The Void Left in Illinois Homicide Law after People v. Lopez: The Elimination of Attempted Second Degree Murder

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INTRODUCTION

Illinois courts have long grappled with the crime of attempted second degree murder (voluntary manslaughter). The issue has remained relatively dynamic due to a slowly developing homicide statute. Recently, in People v. Lopez, the Supreme Court of Illinois considered the issue within the context of the latest statutory amendments and eradicated that crime from the current law of Illinois. In her dissenting opinion, Justice McMorrow borrowed the words of Professor Timothy P. O'Neill, a renowned criminal law scholar, to illustrate the deplorable result of the supreme court's opinion. Although the illustration originated fourteen years ago in a distinct homicide law environment, Professor O'Neill's hypothetical serves as an accurate example of the new void in Illinois homicide law. Accordingly, this Note begins with that illustration.

Professor O'Neill based his illustration on an argument between two friends, Kane and Abel, which becomes physical. After a drawn out altercation, Kane strangles Abel, breaking his neck. The police arrive shortly thereafter and arrest Kane. An hour later, Kane's lawyer arrives at the station.

'I'm afraid I have some bad news.'
'You mean Abel died?'
'No, the bad news is that Abel did not die.'
'I don't understand.'
'If he had died, there is no question that you would have been charged with [second degree murder]. He's alive, however, and there is no such crime as attempt [second degree murder] in Illinois. You admitted you tried to kill Abel and that is attempt [first degree]

4. Id. at 869 (McMorrow, J., dissenting) (quoting Timothy P. O'Neill, "With Malice Toward None": A Solution to an Illinois Homicide Quandary, 32 DePaul L. Rev. 107, 107-08 (1982) [hereinafter O'Neill, "With Malice Toward None"]).
6. Id.
murder, a Class X felony punishable by up to thirty years in the penitentiary. Moreover, because it is a Class X crime, there is no possibility of probation. Frankly, you made a terrible mistake by not making sure that you actually killed Abel. 7

The Supreme Court of Illinois recently injected new lifeblood into absurd scenarios such as this with its opinion in *People v. Lopez.* 8 *Lopez* held that there is no offense of attempted second degree murder in Illinois. 9

This Note will examine the foundation upon which the *Lopez* decision was built and attempt to illuminate its errors so that future judicial opinions and legislation can remedy the problems it perpetuates. To that end, Part I of this Note begins with a discussion of the nature and origin of criminal attempt and second degree murder (voluntary manslaughter). 10 Part I continues with the specific development of the offense of second degree murder (voluntary manslaughter) in Illinois. 11

Part I also includes a discussion of the cases which exemplify the recent split in Illinois District Court opinions, with respect to the latest statutory amendments in 1987, which led to the supreme court’s opinion in *Lopez.* 12 Part I concludes with the first Illinois supreme court interpretation of the 1987 revised Criminal Code in *People v. Jeffries.* 13 Part II discusses the only other supreme court interpretation of the current Illinois Criminal Code, the subject opinion of this Note, *People v. Lopez.* 14

The analysis presented in Part III challenges the judicial interpretations of the Illinois homicide statute which have been commonplace since the 1961 amendments. 15 The author argues that those erroneous interpretations scarred the homicide jurisprudence of Illinois and

7. Id.
9. See infra notes 141-83 and accompanying text (discussing the *Lopez* opinion).
10. See infra notes 21-43 and accompanying text (discussing the crimes of attempt and second degree murder/voluntary manslaughter).
11. See infra notes 44-94 and accompanying text (exploring the development of second degree murder in Illinois).
12. See infra notes 97-123 and accompanying text (examining the case law split which preceded the Illinois supreme court’s decision in *People v. Lopez*).
13. 646 N.E.2d 587 (III. 1995). In *Jeffries,* the court determined that the latest statutory revisions are constitutional and declared an end to some of the ambiguities that had been addressed in previous lower court opinions. See infra notes 124-40 and accompanying text (presenting a thorough discussion of *Jeffries*).
14. 655 N.E.2d 864 (III. 1995); see infra notes 141-83 and accompanying text (discussing the *Lopez* decision).
15. See infra notes 202-22 and accompanying text (challenging the Illinois judicial interpretations of the homicide statute).
served as the foundation for the *Lopez* decision.\textsuperscript{16} The analysis then focuses on some of those errors as they are specifically repeated in the *Lopez* decision.\textsuperscript{17}

Part IV of this Note explores the impact of the *Lopez* opinion, giving special attention to the absence of satisfactory alternatives to the crime of attempted second degree murder.\textsuperscript{18} This Note concludes that the *Lopez* decision constitutes the inevitable culmination of the erroneous judicial interpretations preceding it.\textsuperscript{19} However, the author suggests that the problems perpetuated by the *Lopez* decision can be easily remedied through judicial or legislative action.\textsuperscript{20}

\textbf{I. Background}

This section discusses the origin of attempt crimes and second degree murder (voluntary manslaughter) in general as well as their specific application in Illinois law. Although the law of attempt in Illinois has remained quite constant, there has been considerable statutory change in Illinois homicide law. This section highlights those changes and discusses the effects that they have had on Illinois jurisprudence. In particular, this section focuses on the Illinois courts' treatment of the most recent amendments to the homicide statute.

\textbf{A. The Law of Attempt}

1. \textit{History and Origin}

The crime of attempt is a fairly new development of the common law.\textsuperscript{21} In medieval times, courts, on rare occasions, convicted those who were unsuccessful in their attempt to perform a heinous felony.\textsuperscript{22} They did so based upon the doctrine of "\textit{voluntas reputabitur pro facto}-the intention is to be taken for the deed."\textsuperscript{23} Notwithstanding these rare occurrences, the modern theory of criminal attempt was

\begin{itemize}
  \item \textsuperscript{16} See infra notes 202-22 and accompanying text (arguing that the *Lopez* decision was built upon the prior erroneous interpretations of the Illinois homicide statute).
  \item \textsuperscript{17} See infra part III (analyzing the *Lopez* court's interpretation of the "specific offense" language in the attempt statute, its reliance on \textit{Reagan's} finding that the intent to kill is insufficient to establish criminal attempt, and its finding that the absence of attempted second degree murder is not fundamentally unfair).
  \item \textsuperscript{18} See infra notes 247-52 and accompanying text (discussing offenses alternative to attempted second degree murder).
  \item \textsuperscript{19} See infra part V (presenting the author's conclusions).
  \item \textsuperscript{20} See infra part V (presenting the author's suggested remedies).
  \item \textsuperscript{21} \textsc{Wayne R. LaFave & Austin W. Scott, Jr.}, Criminal Law 495 (1986).
  \item \textsuperscript{22} \textit{Id.} at 495-96.
  \item \textsuperscript{23} \textit{Id.}
probably derived from the Court of Star Chamber,\textsuperscript{24} which had occasion to deal with many offenses tantamount to modern-day attempt crimes.\textsuperscript{25} However, the doctrine of criminal attempt was not clearly established until many years after the abolition of the Star Chamber,\textsuperscript{26} when in 1801, in the case of \textit{Rex v. Higgins}, the court noted: “All offenses of a public nature, that is, all such acts or attempts as tend to the prejudice of the community, are indictable.”\textsuperscript{27}

One reason for punishing criminal attempts is to allow law enforcement officials to prevent a crime before it is completed.\textsuperscript{28} However, such a rationale does not adequately further criminal law objectives.\textsuperscript{29} That is, as observed in one esteemed treatise, “[t]he primary purpose in punishing attempts is not to deter the commission of completed crimes, but rather to subject to corrective action those individuals who have sufficiently manifested their dangerousness.”\textsuperscript{30}

2. \textit{Attempt in Illinois}

The Illinois attempt statute has long provided: “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.”\textsuperscript{31} Thus, criminal attempt requires “the intent to do certain proscribed acts or to bring about a certain proscribed result, rather

\begin{itemize}
\item \textsuperscript{24} The Star Chamber was a court originally created to correct “the manifest defects and shortcomings of the common law courts.” \textit{Id.}
\item \textsuperscript{25} \textit{Id.} (citing \textsc{Jerome Hall}, \textit{General Principles of Criminal Law} 567 (2d ed. 1960)).
\item \textsuperscript{26} \textsc{LaFave & Scott}, \textit{supra} note 21, at 496. “Most likely the development of the crime of attempt was retarded by the fact that other means often existed for dealing with unsuccessful or incomplete criminal schemes. Of particular significance is the accelerated growth of the aggravated assault type of crime during this period.” \textit{Id.} (citations omitted). Many Criminal Codes today still include crimes that are arguably attempt-type crimes. For example, possession crimes are probably codified since possession is perceived to be a likely “step toward the doing of harm.” \textit{Id.} at 497.
\item \textsuperscript{27} \textit{Id.} (quoting \textit{Rex v. Higgins}, 2 East 5 (1801)).
\item \textsuperscript{28} \textit{Id.} at 498-99.
\item \textsuperscript{29} \textit{Id.} For instance, the “stop and frisk” doctrine can already be said to accomplish that goal to a certain degree. \textit{Id.}
\item \textsuperscript{30} \textit{Id.} at 495; \textit{see State v. Robinson}, 643 A.2d 591, 594-95 (N.J. 1994) (acknowledging that the New Jersey attempt statute was enacted in order to punish those who are disposed to commit a crime as well as those who failed to complete a crime solely due to their misfortune in carrying it out).
\item \textsuperscript{31} 720 ILCS 5/8-4(a) (West 1996). Although this definition is “less expansive than . . . the contents of Model Penal Code’s § 5.01, which defines attempt, under which other jurisdictions have recognized the crime of attempt second degree murder,” it does contain the critical elements: “the existence of the requisite \textit{mens rea} to commit a specific offense plus the occurrence of a substantial step toward the commission of the specific offense.” \textsc{Timothy P. O’Neill & James N. Perlman} (On behalf of the Illinois Attorneys for Criminal Justice), \textit{Brief and Argument for Amicus Curiae on Behalf of the Petition for Rehearing of People v. Lopez} 18-19 (1995); \textit{see Model Penal Code} § 5.01 (1962) (“A person is guilty of an attempt to commit a crime if,
than an intent to engage in criminality." Therefore, even if a person intentionally sought to engage in what he perceived to be unlawful conduct, he is not guilty of an attempt if that conduct is not an "offense" proscribed by law. On the other hand, a person is not excused if he is unaware that the intended conduct would constitute a criminal offense; ignorance of the law is no excuse.

Furthermore, Illinois courts are unwavering in their requirement that a specific intent to commit an offense be proven in order to establish an attempt crime. "[S]pecific intent is most generally understood to mean 'some intent in addition to the intent to do the physical act which the crime requires.'" In other words, a specific intent is the desire to effectuate a particular result. This specific intent, however, may be proven by either direct or circumstantial evidence.

B. Voluntary Manslaughter/Second Degree Murder

1. History and Origin

The crime of voluntary manslaughter dates back to the common law of England. "[V]oluntary manslaughter appears to be essentially a legal compromise between murder and exoneration, recognizing but not excusing a human weakness consisting of an intense (or irresistible) passion caused by serious provocation, resulting in homicide." In fact, the crime of manslaughter was created out of necessity; it enabled the arm of the law to reach those wrongful killings that fell outside of the definition of murder. Specifically, "provocation man-

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32. LAFAVE & SCOTT, supra note 21, at 500.
33. Id. "Offense" in Illinois is defined as "a violation of any penal statute of this state." 720 ILCS 5/2-12 (West 1993). "Offense" also includes "conduct which if performed in another state would be criminal by the laws of that State and which conduct if performed in this State would be an offense under the laws of this State." 720 ILCS 5/8-6 (West 1993).
34. See LAFAVE & SCOTT, supra note 21, at 500 (stating that "it would make no difference that the defendant engaged in an attempt without knowledge that his intended result would be a crime").
37. See DECKER, supra note 35, at 161-62 (discussing Illinois case law which demonstrates the use of direct or circumstantial evidence).
40. DECKER, supra note 35, at 192. It has been stated that "[p]assion/provocation manslaughter is an intentional homicide committed under extenuating circumstances that mitigate the murder." State v. Robinson, 643 A.2d 591, 594 (N.J. 1994). Of course, voluntary manslaughter is
slaughter” was created under the common law of England in order to avoid the death penalty, which was mandatory in all cases of murder. Of course, today, mandatory death penalties have been abolished. Provocation manslaughter, however, is still a distinct facet of homicide law as “a concession to the frailty of man, a recognition that the average person can understandably react violently to a sufficient wrong and hence some lesser punishment is appropriate.” The development of the Illinois statutory law of voluntary manslaughter is discussed below.

2. Voluntary Manslaughter/Second Degree Murder and Criminal Attempt in Illinois


Prior to 1961, voluntary manslaughter in Illinois was essentially “murder minus malice aforethought.” In other words, voluntary manslaughter and murder were mutually exclusive crimes. Murder was defined as “the unlawful killing of a human being... with malice aforethought, either express or implied.” In contrast, manslaughter readily distinguishable from involuntary manslaughter. Generally, the distinction lies in the difference between an intentional act causing death and an intentional killing; the latter cannot result in involuntary manslaughter. 


It is not the purpose of the law to unbridle human passions. On the contrary, one very important aim of the criminal law is to induce persons to keep their passions under proper control. At the same time the law does not ignore the weaknesses of human nature. Hence as a matter of common law an unlawful killing may even be intentional and yet of a lower grade than murder.

PERKINS & BOYCE, supra note 40, at 84. This analysis applies with as great a force to imperfect self-defense manslaughter because in that case one subjectively believes that the need for self-defense is necessary pursuant to a perceived attack by another on his person. Thus, that attack is akin to provocation. See infra note 57 (defining imperfect self-defense voluntary manslaughter).


O’Neill, “With Malice Toward None”, supra note 4, at 109-110 (quoting ILL. REV. STAT. ch. 38, para. 358 (1959) (emphasis added)). Express malice was defined as “the deliberate intention unlawfully to take away the life of a fellow creature.” Id. at 110 (quoting ILL. REV. STAT. ch. 38, para. 358 (1959)). Implied malice existed “when no provocation appeared or when the killing showed an abandoned or malignant heart.” Id. (quoting ILL. REV. STAT. ch. 38, para. 358 (1959)).

Although the statute, as enacted, adequately reflected society’s view of murder as a premeditated act, the common law of Illinois gradually began to recognize an expanded definition of murder. Id. at 110. Indeed, malice aforethought eventually shifted from a prerequisite to murder to a rubber-stamp categorization ascribed to any act later found to fit within the newly broadened concept of murder. Id.
was "the unlawful killing of a human being without malice, express or implied, and without any mixture of deliberation whatever." It was based upon this pre-1961 definition of manslaughter that the Supreme Court of Illinois, in Moore v. People, held that assault with intent to commit manslaughter did not exist because one could not intend to commit a crime that is itself devoid of deliberation.


With the enactment of the Illinois Criminal Code of 1961, the phrase malice aforethought was completely eliminated from the Code. Consequently, as the Supreme Court of Illinois recently observed, "voluntary manslaughter was transformed from murder minus malice to murder plus mitigation." That is, voluntary manslaughter and murder were no longer mutually exclusive. To illustrate, under the 1961 murder statute, a person merely had to (1) intend to kill or to cause substantial bodily injury or (2) know that his conduct would cause or probably cause the same.

Thus, at common law, malice aforethought covered several categories of mental state: (1) an intent to kill or injure another; (2) knowledge that one's acts will kill or injure another; (3) knowledge that one's acts will probably kill or injure another; (4) an unintentional killing of an officer while resisting him; (5) felony-murder. The three latter categories became known as implied malice.
Similarly, the new voluntary manslaughter statute required that the perpetrator have the intent or knowledge that his acts would result in death.\textsuperscript{54} The statute also provided that those acts must be accompanied by one of two mitigating factors.\textsuperscript{55} Thus, there were now two prongs of voluntary manslaughter. The first, provocation voluntary manslaughter, occurred when one acted in the heat of passion.\textsuperscript{56} The second, imperfect self-defense voluntary manslaughter, occurred when one harbored the unreasonable belief that he acted in self-defense.\textsuperscript{57} Just as under the previous statute, the State had to prove all of the elements of the crime beyond a reasonable doubt, including the mitigating factors.\textsuperscript{58}

Long after the enactment of the Criminal Code of 1961, there continued to be a lack of clear understanding as to its import and effect.\textsuperscript{59}

(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.

\textit{ILL. REV. STAT.} ch. 38, para. 9-1(a) (Smith-Hurd 1985).

\textsuperscript{54} \textit{ILL. REV. STAT.} ch. 38, para. 9-2 (Smith-Hurd 1985); see \textit{supra} note 208 (demonstrating that even though paragraph 9-2(a) of the Code, provocation voluntary manslaughter, does not mention a specific mental state, the mental state required can be no less than intent or knowledge).

\textsuperscript{55} \textit{ILL. REV. STAT.} ch. 38, para. 9-2 (Smith-Hurd 1985).

\textsuperscript{56} \textit{ILL. REV. STAT.} ch. 38 para. 9-2(a) (Smith-Hurd 1985). Provocation voluntary manslaughter occurred when "[a] person who kills an individual without lawful justification . . . at the time of the killing . . . is acting under a sudden and intense passion." \textit{ILL. REV. STAT.} ch. 38 para. 9-2(a); see \textit{infra} note 208 (demonstrating that although this portion of the voluntary manslaughter statute recites no mental state, the mental state required can be no less than intent or knowledge).

\textsuperscript{57} \textit{ILL. REV. STAT.} ch. 38, para. 9-2(b) (Smith-Hurd 1985). Imperfect self-defense voluntary manslaughter involves "[a] person who intentionally or knowingly kills an individual . . . [who] at the time of the killing . . . believes the circumstances to be such that, if they existed, would justify or exonerate the killing . . . but his belief is unreasonable." \textit{ILL. REV. STAT.} ch. 38 para. 9-2(b). In contrast, the Illinois codification of the affirmative defense of self-defense provides:

A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force. However, he is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another, or the commission of a forcible felony.

\textit{720 ILCS 5/7-1} (West 1993).

\textsuperscript{58} People \textit{v.} Jeffries, 646 N.E.2d 587, 591 (Ill. 1995); see Judge Robert J. Steigmann, \textit{First and Second Degree Murder in Illinois}, 75 \textit{ILL. B. J.} 494, 494 (1987) (stating that the 1961 Homicide Code placed the burden of proving the elements of murder, as well as the mitigating factors of voluntary manslaughter, on the State).

In particular, legal scholars disagreed with the courts' interpretations of the new Code.60 One commentator, Professor Timothy P. O'Neill, contended that "Illinois courts took little notice of the major new Criminal Code revisions in the area of homicide."61 Professor O'Neill noted that in 1982, at least one district in Illinois still recognized "malice" as an element of murder.62 He further observed that in 1982, Illinois appellate courts could not explain why a jury may consider the crime of voluntary manslaughter even after the defendant was found guilty of murder.63 Moreover, in 1984, the Second District of Illinois failed to recognize that a prosecution for voluntary manslaughter after an acquittal on murder would illegally place a defendant in double jeopardy.64 Finally, in 1985, the Supreme Court of Illinois still considered voluntary manslaughter a lesser included offense of murder.65

that the 1961 Code transformed voluntary manslaughter so that it was no longer a lesser included offense of murder since voluntary manslaughter required more elements than murder, not less; that the state of mind for heat of passion voluntary manslaughter had been clarified as not being something less than intentional; and that the new statute failed to define the burden of proof with regard to the mitigating circumstances of voluntary manslaughter). O'Neill found the 1961 Code unclear as to who would bear the burden of proof and what standard of proof was required. Id. But see People v. Reddick, 526 N.E. 2d 141, 145 (Ill. 1988) (referring to the mitigating factors of second degree murder as "mental states . . . of lesser culpability"); People v. Hoffer, 478 N.E.2d 335, 339-40 (Ill. 1985) (referring to voluntary manslaughter as a "lesser included offense" of murder).


61. O'Neill, Second Degree Murder, supra note 59, at 216. "[I]t is apparent that the elimination of malice aforethought by the Illinois legislature has had little effect on the day-to-day workings of the judiciary." O'Neill, "With Malice Toward None", supra note 4, at 114.


64. O'Neill, Second Degree Murder, supra note 59, at 217 (citing People v. Krogul, 450 N.E.2d 20 (Ill. App. Ct. 1983), cert. denied, 465 U.S. 1007 (1984)). Clearly, since the two crimes were now the same, they could not be prosecuted separately for the same set of facts since such would result in double jeopardy. See Decker, supra note 35, at 728 (discussing the doctrine of double jeopardy).

65. Id. at 217 (citing People v. Hoffer, 478 N.E.2d 335, 339 (Ill. 1985)); see Jeffries, 646 N.E.2d at 595 (stating that "second degree murder [and voluntary manslaughter before it] is not a lesser included offense of murder" since such is established when a crime includes a less culpable mental state); People v. Howard, 397 N.E.2d 877, 881 (Ill. App. Ct. 1979) ("Section 2-9 of the
The first case to address the issue of whether attempted voluntary manslaughter would be recognized in Illinois was *People v. Weeks*.66 The *Weeks* court held that there was no offense of attempted provocation voluntary manslaughter.67 In so doing, it relied on the reasoning in *Moore v. People*68 and a New York case, *People v. Brown*.69 Of course, *Moore* was based on the previous Illinois homicide statute,70 while *Brown* was based on a New York statute defining manslaughter as homicide "without a design to effect death."71 The *Weeks* court noted the *Brown* court's ruling that there could not be an attempt to commit manslaughter as that crime involved no intent.72

The *Weeks* court reasoned that attempt crimes require a specific intent. It stated, "[t]he act that constitutes the attempt must result from some calculation on the part of the accused."73 The court noted, however, that provocation voluntary manslaughter obviates any calculation because it occurs pursuant to a sudden and intense passion.74 That is, "[t]he passion engendered by the provocation must be sufficiently intense to vitiate the normal, self-imposed controls against the criminal act."75 Therefore, the court ruled that it was impossible to intend to act with such passion. Even though the *Weeks* ruling has

Criminal Code of 1961, which defines 'included offense,' has been interpreted to mean that an offense is a lesser included offense only if the greater offense charged contains all of the elements of the lesser included offense plus some additional elements." (citation omitted)). Of course, first and second degree murder have identical mental states. Jeffries, 646 N.E.2d at 595.


67. Id. at 14; see supra notes 56-57 and accompanying text (discussing the two forms of voluntary manslaughter in Illinois—provocation and imperfect self-defense).

68. 35 N.E. 166 (Ill. 1893); see supra notes 48-49 and accompanying text (discussing the *Moore* decision, which was based on the pre-1961 Illinois Criminal Code provisions).


70. See infra notes 46-49 and accompanying text (discussing the pre-1961 homicide statute and the *Moore* decision's interpretation thereof).


72. Id. (citing People v. Brown, 249 N.Y.S.2d 922 (1964)).

73. Id.

74. Id.; see supra note 56 (explaining provocation voluntary manslaughter in Illinois).

75. Id. But see People v. Jeffries, 646 N.E.2d 587, 594-95 (Ill. 1995) (noting that the mental states required for the crimes of murder and voluntary manslaughter have been the same since 1961).
been criticized by legal scholars\textsuperscript{76} and rejected by other states,\textsuperscript{77} it is still followed in Illinois.\textsuperscript{78}

In 1983, the Supreme Court of Illinois, in \textit{People v. Reagan},\textsuperscript{79} sounded the final death knell for attempted voluntary manslaughter in Illinois when it ruled that there is no crime of attempted voluntary manslaughter based on an imperfect self-defense.\textsuperscript{80} The court reasoned that the intent to kill, in and of itself, is not a crime.\textsuperscript{81} Hence, the attempt statute must be read to mandate that one intend to kill \textit{without lawful justification}, since the statute only prohibits one to act with the intent to commit an \textit{offense}.\textsuperscript{82} Of course, a person who committed imperfect self-defense voluntary manslaughter actually believed his actions were justified. Thus, according to the court, he does not intend to kill without lawful justification because to act in self-defense is not a crime.\textsuperscript{83} The court also noted that "it is impossible to intend an unreasonable belief" such as that required to sustain an imperfect self-defense.\textsuperscript{84} Finally, the court focused on the specific intent required of attempt crimes.\textsuperscript{85} It concluded that voluntary manslaughter—

\begin{footnotes}
\item[76] See, e.g., \textsc{LaFave \& Scott}, \textit{supra} note 21, at 502 (arguing that \textit{Weeks} was incorrectly decided); O'Neill, "\textit{With Malice Toward None}", \textit{supra} note 4, at 115-18 (criticizing the \textit{Weeks} court for not fully recognizing that malice aforethought had been eliminated from the Code, thus making murder and voluntary manslaughter essentially the same crime); Sachs, \textit{supra} note 60, at 167-70 (arguing that \textit{Weeks} was incorrectly decided).

\item[77] See Sachs, \textit{supra} note 60, at 167-69 (citing cases from California, Florida, Indiana, Louisiana, Massachusetts, Michigan, and Utah, which have declined to follow \textit{Weeks}).

\item[78] O'Neill, "\textit{With Malice Toward None}", \textit{supra} note 4, at 118; see, e.g., \textit{People v. Stevenson}, 555 N.E.2d 1074, 1078-79 (Ill. App. Ct. 1990) (citing \textit{Weeks} for the proposition that there can be no attempted second degree murder based on a sudden and intense passion).

\item[79] 457 N.E.2d 1260 (Ill. 1983).

\item[80] \textit{Id.} at 1261; see \textit{supra} note 57 (explaining imperfect self-defense voluntary manslaughter in Illinois).

\item[81] Reagan, 457 N.E.2d at 1261 (relying on \textit{People v. Barker}, 415 N.E.2d 404 (Ill. 1980), for the proposition that attempted voluntary manslaughter involves more than an intent to kill, which by itself is not unlawful).

\item[82] \textit{Id.} "There is no such criminal offense as an attempt to achieve an unintended result." \textit{Id.} (quoting \textit{People v. Viser}, 343 N.E.2d 903, 910 (Ill. 1975)). The Illinois supreme court in \textit{Reagan} quoted, with approval, language from the appellate court opinion: "If a defendant intended to kill with the knowledge that such action was unwarranted, he has intended to kill without lawful justification and could be prosecuted for attempted murder." \textit{Id.} at 1262 (citing \textit{People v. Reagan}, 444 N.E.2d 742 (Ill. App. Ct. 1983)).

\item[83] \textit{Id.} at 1261-62.

\item[84] \textit{Id.} at 1262 (citing \textit{People v. Reagan}, 444 N.E.2d 742 (Ill. App. Ct. 1983)). In \textit{Reagan}, the State had argued "the more logical interpretation [of the attempt statute] is that a defendant must intend to kill but that his intent must be accompanied by the subjective (yet unreasonable) belief that the killing is justified." \textit{Id.} at 1261.

\item[85] \textit{Id.} at 1261-62. The court was compelled to address this issue upon facing the State's appeal to logic. The State argued that since one can receive a conviction for voluntary manslaughter when his victim dies, it logically follows that when the same victim lives, the defendant should be convicted of attempted voluntary manslaughter. \textit{Id.}
\end{footnotes}
ter cannot be attempted since that crime has long been recognized as not involving a specific intent.86


Four years later, in 1987, the Illinois legislature once again revised the provisions for murder87 and voluntary manslaughter88 in the Criminal Code. "Murder" became "First Degree Murder," but retained its previous elements.89 It was changed in order "to distinguish it from and to show the relationship to the new offense of second degree murder."90 "Voluntary Manslaughter" became "Second Degree Murder"91 and now reads:

(a) A person commits the offense of second degree murder when he commits the offense of first degree murder as defined in paragraphs (1) or (2) of subsection (a) of Section 9-1 of this Code and either of the following mitigating factors are present:

(1) At the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by the individual killed or another whom the offender endeavors to kill, but he negligently or accidentally causes the death of the individual killed; or

(2) At the time of the killing he believes the circumstances to be such that, if they existed, would justify or exonerate the killing under the principles stated in Article 7 of this Code, but his belief is unreasonable.

86. Id. at 1262. About whether manslaughter can be the object of an attempt crime, Professor John F. Decker commented:

With respect to involuntary manslaughter, there is clear logic for this position: since intent to kill is not an element of involuntary manslaughter, and since involuntary manslaughter by its very nature could not arise where there is an intent to kill—because intent to kill brings into play murder or voluntary manslaughter—there could be no attempted involuntary manslaughter. The specific intent required of the criminal attempt—the intent to take life—clashes with the involuntary nature of this category of manslaughter. On the other hand, it would appear logical to have a crime of attempted voluntary manslaughter... 

Decker, supra note 35, at 167 (citations omitted). For a brief discussion of "specific intent" see supra notes 36-37 and accompanying text.


90. Steigmann, supra note 58, at 494.

91. Compare 720 ILCS 5/9-2 (West 1993) with ILL. REV. STAT. ch. 38, para. 9-2 (Smith-Hurd 1987); see Steigmann, supra note 58, at 494 (explaining the changes in going from voluntary manslaughter to second degree murder).
(b) Serious provocation is conduct sufficient to excite an intense passion in a reasonable person.\textsuperscript{92}

Second degree murder also requires that once the State has met its burden of proving the elements of first degree murder beyond a reasonable doubt, the defendant bears the burden of proving one of the mitigating factors.\textsuperscript{93} The defendant must establish and prove the existence of the applicable mitigating circumstance by a preponderance of the evidence.\textsuperscript{94}

Some legal scholars anticipated that the 1987 homicide statute would allow for attempted second degree murder (voluntary manslaughter) in Illinois.\textsuperscript{95} In particular, they argued that the change of names would emphasize the 1961 amendments, which also accommodated such an offense.\textsuperscript{96} Indeed, several Illinois appellate courts have recently recognized attempted second degree murder.

\textbf{C. Illinois Appellate Courts Recognizing Attempted Second Degree Murder}

Subsequent to the enactment of the Criminal Code of 1987, some Illinois appellate courts recognized the existence of attempted second degree murder.

\textsuperscript{92} 720 ILCS 5/9-2 (West 1993). "The only circumstances which constitute 'serious provocation' under Illinois law are substantial physical injury or assault, mutual quarrel or combat, illegal arrest, and adultery with the defendant's spouse." People v. Lopez, 655 N.E.2d 864, 872 (Ill. 1995) (McMorrow, J., dissenting). Senate Bill 522, which was enacted into the new second degree murder statute, was drafted by Judge Robert J. Steigmann and it was based on Professor Timothy P. O'Neill's article, "Murder Least Foul": A Proposal to Abolish Voluntary Manslaughter in Illinois, 72 ILL. B. J. 306 (1984) [hereinafter O'Neill, "Murder Least Foul"]. Steigmann, supra note 58, at 494.

\textsuperscript{93} Section 5/9-2 of the Illinois Criminal Code provides:

\begin{quote}
When a defendant is on trial for first degree murder and evidence of either of the mitigating factors defined in subsection (a) of this Section has been presented, the burden of proof is on the defendant to prove either mitigating factor by a preponderance of the evidence before defendant can be found guilty of second degree murder. However, the burden of proof remains on the State to prove beyond a reasonable doubt each of the elements of first degree murder and, when appropriately raised, the absence of circumstances at the time of the killing that would justify or exonerate the killing under the principles stated in Article 7 of this Code. In a jury trial for first degree murder in which evidence of either of the mitigating factors defined in subsection (a) of this Section has been presented and the defendant has requested that the jury be given the option of finding the defendant guilty of second degree murder, the jury must be instructed that it may not consider whether the defendant has met his burden of proof with regard to second degree murder until and unless it has first determined that the State has proven beyond a reasonable doubt each of the elements of first degree murder.
\end{quote}


\textsuperscript{94} 720 ILCS 5/9-2 (West 1993).

\textsuperscript{95} See infra notes 191-96 and accompanying text (discussing the views of Professor O'Neill and Judge Steigmann).

\textsuperscript{96} Id.
degree murder. For example, in *People v. Moore*, the Third Judicial District held that there is a crime of attempted second degree murder based on a sudden and intense passion. The court noted that contrary to the procedures required by the 1961 statute, the prosecutor must now prove the elements of first degree murder before the mitigating circumstances—here, sudden and intense passion—are considered. Therefore, attempted second degree murder is proven when the evidence shows that there was a specific intent to kill, but that the killing was the result of provocation. The specific intent required of attempt crimes is not related to the mitigating factors. The court thus explicitly rejected the applicability of *People v. Weeks* to the revised statute.

Similarly, in *People v. Austin*, the Second Judicial District held that attempted second degree murder based on an imperfect self-defense is a cognizable crime in Illinois. After reviewing the relevant current and former homicide statutes, the court addressed the Illinois supreme court's opinion in *People v. Reagan*. *Reagan* held that a crime of attempted imperfect self-defense voluntary manslaughter would illogically require that one specifically intend an unreasonable belief in the need for self-defense. Relying on the Third District's reasoning in *People v. Moore*—that the intent element is now separate from the mitigating factors—the court rejected the concurrence's contention that *Reagan* was still controlling.

According to the concurrence in *Austin*, the previous statute also demanded that the State “first prove each of the elements of murder,” yet voluntary manslaughter was not considered a specific intent crime. The majority responded that the concurrence's statutory in-
interpretation ignored "the fact that the statute was in fact completely rewritten as well as renamed." The court stated, in illustration, that to obtain an attempted second degree murder conviction, the jury is initially required to find that the intentional killing was without lawful justification. That is, the defendant's self-defense argument must first be rejected. At that point, the jury then considers the issue of mitigation. Thus, contrary to the prior practice of addressing the mitigating factors together with the issue of intent, the new statute requires a two-step process.

Finally, although the Fourth District has not evaluated the propriety of recognizing the existence of attempted second degree murder in Illinois, a Fourth District court assumed its existence in People v. Flaugher. In Flaugher, the court held that the trial court's attempted second degree murder instructions to the jury were not in error, even though the defendant argued that they confused the jury and led to an attempted first degree murder conviction.

D. Illinois Appellate Courts Refusing to Recognize Attempted Second Degree Murder

In contrast, two Illinois Appellate Districts have refused to recognize the existence of attempted second degree murder. In People v. Williams, the First District decided that the crime of attempted second degree murder based on an imperfect self-defense does not exist in Illinois. The court reiterated the reasoning of People v. Reagan and stated that the new statute did not affect its applicability. The future neither changed the essential nonspecific nature of the offense of second degree murder nor diminished the applicability of Reagan . . . . " Id.; see People v. Aliwoli, 606 N.E.2d 347 (Ill. App. Ct. 1992) (supporting Justice Nickels' statutory interpretation). The court in Aliwoli cited the legislative history of the new section to support its position: "We're going to be eliminating the term 'voluntary manslaughter.' We're going to have murder 1 and murder 2. And what we're doing, however, is not to change the elements of the offense of voluntary manslaughter, but we're basically changing the burden of proof to the defendant." Id. at 360 n.4 (quoting 84th Ill. Gen. Assem., House Proceedings, June 23, 1986, at 72 (statements of Rep. Cullerton)).

109. Austin, 574 N.E.2d at 1303.

110. Id. (further noting that a jury, after rejecting the self-defense claim, could convict based on the defendant's mistaken belief that he was acting in self-defense).

111. Id.

112. Id. at 1304.


114. Id. The court did note the possibility of jury confusion but did not find such a possibility to be prejudicial to the defendant. Id.


116. Id. at 116.

117. Id. The court noted that the only real change in the revised statute was that the defendant now carries the burden of proving the existence of the mitigating factors. Id.
court distinguished the Third District's opinion in *People v. Moore* since the offense before it was based on a sudden and intense passion.\(^{118}\)

In *People v. Fletcher*,\(^{119}\) the Fifth District also refused to recognize attempted second degree murder based on the unreasonable belief in the need to use self-defense.\(^{120}\) The court stated that the only change in the statute of 1987 was the name and the shifted burden of proof.\(^{121}\) Moreover, the court reasoned that the legislature passed the act with the intention of retaining all of the substantive law related to the offense of voluntary manslaughter.\(^{122}\) The court applied the reasoning of *People v. Reagan* to the new offense of second degree murder to reach its conclusion that an unreasonable belief in self-defense did not constitute attempted second degree murder.\(^{123}\)

### E. The Illinois Supreme Court’s Treatment of the New Homicide Statute: *People v. Jeffries*\(^{124}\)

Recently, the Supreme Court of Illinois addressed the new homicide statute for the first time, albeit in a different context. In *People v. Jeffries*, the court held that the new second degree murder statute is constitutional.\(^{125}\) The defendants in *Jeffries* challenged the new Illinois homicide scheme on federal and state due process grounds.\(^{126}\) The court began with the United States Supreme Court’s rule advanced in *In re Winship*,\(^{127}\) and cases which followed,\(^{128}\) that “[a] del-
fendant’s due process rights are violated when the burden shifts to the defendant to disprove an element of the [charged] offense.” However, the court reasoned that the Fourteenth Amendment does not preclude a requirement that the defendant prove a mitigating factor in order to “reduce the severity of a homicide charge.” Thus, the Illinois statutory scheme was found constitutional because the State retains the burden of proof with respect to all of the elements of first degree murder. Even though the defendant must prove an affirmative defense—one of the mitigating factors of second degree murder—he does so only after the State has successfully made its case for first degree murder.

Furthermore, the Jeffries court ruled that first and second degree murder have identical mental states. It also found that second degree murder cannot be considered a lesser included offense of murder, since it does not entail a “less culpable mental state.” Rather, sec-

128. See Mullaney v. Wilbur, 421 U.S. 684 (1975) (holding that the right to due process is violated when the defendant is made to bear the burden of disproving an element of an offense); Patterson v. New York, 432 U.S. 197 (1977) (same).

129. Jeffries, 646 N.E.2d at 592 (citing Mullaney v. Wilbur, 421 U.S. 684 (1975)). Mullaney held that Maine’s homicide statute was unconstitutional because it required the defendant to disprove malice, an element of murder, in order to receive a conviction for the lesser offense of manslaughter. Mullaney, 421 U.S. at 703-04.

130. Jeffries, 646 N.E.2d at 592-93. The Jeffries court referred to Patterson v. New York, 432 U.S. 197 (1977), in its discussion of constitutional issues. Id. The Patterson court held that New York’s statutory scheme was constitutional where it required the defendant to prove the affirmative defense of emotional disturbance in order to receive a conviction for the reduced offense of manslaughter. A jury could only convict a defendant of second degree murder if it found that all of the elements of second degree murder existed and that the defendant had not proved his affirmative defense. Patterson, 432 U.S. at 210. The Jeffries court similarly found that the Illinois Constitution did not preclude a requirement that the defendant bear the burden of proving a mitigating factor. Jeffries, 646 N.E.2d at 596.


132. Id. Thus, the Illinois homicide scheme is clearly distinguishable from that prohibited by the United States Supreme Court in Mullaney v. Wilbur, 421 U.S. 684 (1975), since the latter provided that the malice required for a murder conviction could only be rebutted if the defendant proved that he acted in the heat of passion. Id.

133. Id. at 594-95. In ruling that the mental state required for first degree murder is identical to that required for second degree murder, the court reaffirmed its earlier ruling in People v. Wright, 488 N.E.2d 973 (Ill. 1986). Id. at 594. The Jeffries court held that Wright had implicitly overruled its prior decision in People v. Hoffer, 478 N.E.2d 335 (Ill. 1985). Id. The Hoffer court had “held that the mental states for murder and voluntary manslaughter were ‘mutually inconsistent.’” Id. at 595 (quoting Hoffer, 478 N.E.2d at 340). The Jeffries court also explicitly rejected its previous decisions insofar as they described “serious provocation” or “unreasonable belief in justification” as being less culpable mental states. Id. (citing People v. Reddick, 526 N.E.2d 141, 145 (Ill. 1988)).

134. Id.
ond degree murder is "a lesser mitigated offense of first degree murder."\textsuperscript{135}

The Supreme Court of Illinois also rejected the defendant’s claim that the Illinois statutory scheme unfairly required the defendant to prove an unreasonable belief in the need to defend himself, after having had the burden to prove a reasonable belief for purposes of a self-defense claim.\textsuperscript{136} Rather, the court reasoned, the defendant presents evidence to establish a claim of self-defense, i.e., that the defendant subjectively believed self-defense was necessary and that the belief was reasonable.\textsuperscript{137} The fact finder then determines whether the State has proven the elements of first degree murder and has disproved the affirmative defense.\textsuperscript{138} If the State has proven both, the jury then re-examines that same evidence to decide whether a conviction of second degree murder is in order.\textsuperscript{139} Thus, the court concluded that "a defendant is not forced to argue that his ‘belief was unreasonable’" and the statute does not interfere with a defendant’s due process protection.\textsuperscript{140} According to Jeffries, then, the 1987 revisions to the Homicide Code, which modified the crimes of murder and voluntary manslaughter and called them “First and Second Degree Murder” respectively, are constitutional as well as legally enforceable.

\textbf{II. Subject Opinion: \textit{People v. Lopez}\textsuperscript{141}}

Shortly after its opinion in Jeffries, the Supreme Court of Illinois decided the case of \textit{People v. Lopez}. It did so in order to resolve the split among the lower courts with respect to the existence of the crime of attempted second degree murder in Illinois, which developed after the enactment of the 1987 amendments to the Homicide Code.\textsuperscript{142} In Lopez, the court determined that attempted second degree murder does not exist in Illinois.

\begin{itemize}
  \item \textsuperscript{135} \textit{Id.} (emphasis added) (citing \textit{People v. Newbern}, 579 N.E.2d 583 (Ill. App. Ct. 1991), as holding: “second degree murder is a lesser offense because its penalties upon conviction are lesser, and it is a mitigated offense because it is first degree murder plus defendant’s proof by a preponderance of the evidence that a mitigating factor is present”).
  \item \textsuperscript{136} \textit{Id.} at 596-97.
  \item \textsuperscript{137} \textit{Id.} at 597.
  \item \textsuperscript{138} \textit{Id.} at 598.
  \item \textsuperscript{139} \textit{Id.} at 597.
  \item \textsuperscript{140} \textit{Id.}
  \item \textsuperscript{141} 655 N.E.2d 864 (Ill. 1995).
  \item \textsuperscript{142} \textit{Id.} at 864-65; see also supra notes 97-123 and accompanying text (discussing the split among the lower courts and the reasoning adopted by each district).
\end{itemize}
In People v. Lopez, the Supreme Court of Illinois consolidated the appeals of Denis Lopez and Juan Cruz. Both criminal defendants claimed that the trial court had erred in refusing to recognize and instruct the jury on the crime of attempted second degree murder.\textsuperscript{143} After the First Judicial District of Illinois upheld the trial courts' decisions to deny the proffered instructions and to convict both defendants of attempted first degree murder, the Supreme Court of Illinois also affirmed.\textsuperscript{144}

Both defendants claimed, essentially, that had their victims died, they would be guilty merely of second degree murder, since Lopez asserted that he acted in the heat of passion\textsuperscript{145} and Cruz contended that he had a claim of imperfect self-defense.\textsuperscript{146} Of course, all of the victims lived. Consequently, the defendants asserted that it would be unfair to punish them for attempted first degree murder because that crime carried with it a higher minimum penalty as well as a higher possible maximum penalty than would a second degree murder conviction.\textsuperscript{147}

The court began by citing its previous opinion, People v. Reagan,\textsuperscript{148} which ruled "that the crime of attempted voluntary manslaughter based upon an imperfect self-defense does not exist in Illinois."\textsuperscript{149}

\begin{itemize}
  \item \textsuperscript{143} Lopez, 655 N.E.2d at 864.
  \item \textsuperscript{144} Id. at 864, 868.
  \item \textsuperscript{145} Id. at 864-65. In December 1989, after two or three years of marital trouble, Lopez's wife of ten years informed him that she was having an affair and that her lover was the father of their son. Id. at 865. In March 1990, Mrs. Lopez informed Lopez that she was filing for divorce and later that month she and their children moved in with her mother. Id. On March 22, 1990, Lopez shot his wife, but she survived the attack. Id.
  \item \textsuperscript{146} Id. Cruz shot two plain-clothed policemen when they attempted to apprehend him because he was in the midst of distributing drugs at a housing project. Id. Cruz contended that he was unaware that the two men were police officers. Id.
  \item \textsuperscript{147} Id. at 868; see infra notes 225-31 and accompanying text (discussing the penalty structure in Illinois). Defendant Cruz received thirty years in prison for the attempted first degree murder conviction. People v. Cruz, 618 N.E.2d 591, 593 (Ill. App. Ct. 1993). Defendant Lopez received a sentence of twenty-five years in prison for his attempted first degree murder conviction after that verdict was merged with his conviction for armed violence. People v. Lopez, 614 N.E.2d 329, 334 (Ill. App. Ct. 1993).
  \item \textsuperscript{148} See supra notes 79-86 and accompanying text (discussing People v. Reagan, 457 N.E.2d 1260 (Ill. 1983)).
  \item \textsuperscript{149} People v. Lopez, 655 N.E.2d 864, 866 (Ill. 1995) (emphasis added). There is no similar Illinois Supreme Court ruling for the crime of attempted voluntary manslaughter based on provocation, although People v. Weeks, 230 N.E.2d 12, 14 (Ill. App. Ct. 1967), which held that there is no attempted voluntary manslaughter based on a sudden and intense passion, has been followed by other district courts. See supra notes 66-78 and accompanying text (discussing the Weeks opinion and noting those courts which have rejected that opinion as well as those that have embraced its reasoning).
\end{itemize}
The court relied on Reagan's finding that the intent to kill, standing alone, is not a "specific offense" for purposes of criminal attempt. Instead, a person must intend to kill without lawful justification. The Reagan court had held that in the case of an imperfect self-defense, a person intends to kill another with the subjective, though unreasonable, belief that self-defense is necessary; thus, such a defendant believes his acts were justified, contrary to the requirement that he intend to kill without lawful justification.

The court also assessed the pertinent Illinois statutes. According to the court, the attempt statute provides that "for a defendant to commit an attempted offense, he must intend to commit a specific offense." The court reasoned that since the offense of second degree murder is dependent upon the presence of certain mitigating circumstances, an offense of attempted second degree murder is an impossibility since one cannot intend that such mitigating factors exist.

The court recognized the defendant's suggestion that just as second degree murder is first degree murder plus mitigating factors, so should attempted second degree murder be attempted first degree murder plus mitigating factors. However, the court concluded that the attempt statute specifically requires that a person have the intent to commit a specific offense, as opposed to having merely the intent to kill. Therefore, according to the court, the statute must be applied differently to the two separate offenses of first and second degree murder. In so ruling, the court recognized its strictly noninterpretivist stance and suggested that opinions to the contrary be addressed to the legislature.

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150. Lopez, 655 N.E.2d at 866 (quoting Reagan, 457 N.E.2d at 1262).
151. Id. (quoting Reagan, 457 N.E.2d at 1261-62).
152. Id. at 865-66.
153. Id. at 865-67.
154. Id. at 866-67 (citing People v. Jeffries, 646 N.E.2d 587, 595 (Ill. 1995)).
155. As noted in Jeffries, first and second degree murder are similar in that they have the same mental states. What distinguishes the two offenses is the presence of the mitigating circumstance, which reduces first degree murder to second degree murder. However, the mitigating circumstances are not elements of the crime. In fact, first and second degree murder have the same elements. Second degree murder is simply a lesser mitigated offense, a concept new to Illinois.
156. Id. at 867 (emphasis added).
157. Id. at 866-68.
158. But cf. Model Penal Code § 5.01(1) (1962) (providing that an attempt is committed when, "acting with the kind of culpability otherwise required for commission of the crime," a person takes substantial steps toward the commission thereof).
159. Lopez, 655 N.E.2d at 867-68.
160. Id. at 868.
Finally, the court addressed the defendants' fairness argument. Lopez had argued that without attempted second degree murder they could be sentenced, unfairly, to a longer prison term. The Supreme Court of Illinois determined that the disparate sentencing guidelines were not significantly cruel and disproportionate. Therefore, the court refused to overrule the legislature's chosen penalties based upon the "Illinois Constitution's requirement that 'all penalties.. be determined . . . according to the seriousness of the offense.'"

B. The Dissent

In concluding that the crime of attempted second degree murder does exist in Illinois, the dissent emphasized the disparate treatment that would result from the majority's ruling, especially the lower sentence available if the defendant's victim fortuitously died as a result of his actions. Justice McMorrow argued that the existence of attempted second degree murder is both a logical result of the new homicide scheme and "consistent with recent case law interpreting the statute."

161. Id.; see infra notes 225-31 and accompanying text (discussing the penalty structure in Illinois).

162. Lopez, 655 N.E.2d at 868 (quoting ILL. CONST., Art. 1, § 11). The court relied on its opinion in People v. Steppan, 473 N.E.2d 1300 (Ill. 1985), which held:

This court has traditionally been reluctant to override the judgment of the General Assembly with respect to criminal penalties. It indicated at an early date that the constitutional command that "penalties shall be proportioned to the nature of the offense" would justify interference with the legislative judgment only if the punishment was "cruel," "degrading" or "so wholly disproportionate to the offense committed as to shock the moral sense of the community."

Id. at 868 (quoting Steppan, 473 N.E.2d at 1305). Although similar, this is not a "cruel and unusual punishment" argument based on the Eighth Amendment of the United States Constitution. Such an analysis is rarely undertaken in relation to the States' chosen penalty structures. See, e.g., Harmelin v. Michigan, 501 U.S. 957, 997 (1991) (upholding a mandatory life sentence for a first-time drug conviction based on a narrow proportionality review, while noting that only egregious cases of grossly disproportionate sentences will be reviewed).

163. The dissent (and partial concurrence) was written by Justice McMorrow and joined by Chief Justice Bilandic. Lopez, 655 N.E.2d at 868. Chief Justice Bilandic was the author of the court's opinion in People v. Jeffries, 646 N.E.2d 587 (III. 1995).

164. Lopez, 655 N.E.2d at 868-71 (McMorrow, J., dissenting) (noting that not only is there a lesser sentence imposed if the victim dies, 4 to 20 years versus 6 to 30 years, but a person convicted of second degree murder may be eligible for probation whereas probation is not available for an attempted first degree murder conviction); see infra notes 225-31 and accompanying text (discussing the Illinois penalty structure). The dissent addressed the majority's argument that the court should not interfere with the legislature's penalty structure "unless the disparity in sentencing is 'cruel,' 'degrading' or 'so wholly disproportionate to the offense committed as to shock the moral sense of the community.'" Lopez, 655 N.E.2d at 869 (McMorrow, J., dissenting) (citations omitted).

Justice McMorrow cited various articles, written by proponents of the 1987 revised homicide statute, that supported her view that the revisions were aimed at eliminating the previous disparity caused by the court's ruling in *Reagan*. Although Justice McMorrow noted that the *Reagan* decision itself might have been decided wrongly (because voluntary manslaughter should have also been viewed as "murder plus mitigation"), she emphasized that the 1987 revisions specifically separated the mitigating circumstances from the elements of second degree murder. In fact, according to the decision in *Jeffries*, the factors in mitigation are no longer elements of second degree murder at all. Moreover, "the recently promulgated jury instructions addressing the new homicide statute," which "logically guide a jury through deliberation on attempted second degree murder," require that a jury first find that the elements of attempted first degree murder exist, before it examines the mitigating circumstances. Thus, "the crime of attempted second degree murder is simply attempted first degree murder plus mitigating circumstances."

The dissent noted that such a formulation does not compromise the fact that attempt is a specific intent crime. Rather, the State still bears the burden to prove that the defendant specifically intended to kill; however, that intent requirement is unrelated to the factors advanced in mitigation.

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166. *Id.* at 872 (citing Steigmann, *supra* note 58; O'Neill, *Second Degree Murder, supra* note 59).
167. *Id.* at 871 n.1 (McMorrow, J., dissenting). Justice McMorrow stated, however, that "the commingling of the elements of voluntary manslaughter with the mitigating circumstances in the statute led courts to interpret the attempt statute as requiring the defendant to have intended both the elements of the crime and the mitigating circumstances." *Id.*
168. *Id.*
169. 646 N.E.2d 587 (Ill. 1995); *see supra* notes 124-40 and accompanying text (discussing *Jeffries*).
171. *Id.* at 872 (referring to *ILLINOIS PATTERN JURY INSTRUCTIONS, CRIMINAL*, Nos. 6.07Y (provocation), 6.07Z (belief in justification) (3d ed. 1992)).
172. *Id.* at 872 (McMorrow, J., dissenting).
173. *Id.* at 870-71.
174. *Id.* at 871.
175. *Id.* (citing People v. Moore, 562 N.E.2d 215, 217 (Ill. App. Ct. 1990)). *See generally,* People v. Williams, 649 N.E.2d 397, 403-04 (Ill. 1995) (indicating that the intent element of attempt to commit murder can be shown by the surrounding circumstances); People v. Leger, 597 N.E.2d 586, 606-08 (Ill. 1992) (discussing previous case law finding jury instructions erroneous where they allowed the jury to find attempted murder based upon definitions of murder other than that requiring a specific intent to kill—for example, felony murder, knowledge that acts would result in the death of another—but finding that a conviction for attempted first degree murder is appropriate in the instant case since the jury "specifically found that defendant intended to kill [his victim]").
Furthermore, the dissent argued, "[i]t is not logical to conclude that the legislature intended the mitigating circumstances to reduce the degree of murder, but not attempted murder." Justice McMorrow concluded that since the legislature clearly intended that the existence of the statutory mitigating factors would decrease the defendant's culpability for murder, the legislature logically intended the same for attempted murder. Further, it would be irrational for the legislature to intend that the mitigating factors result in the elimination of a lesser offense. Thus, under the rules of statutory interpretation, "that no statute should be construed in a manner which will lead to consequences which are absurd, inconvenient, or unjust," the dissent found the majority's conclusion to be faulty.

In sum, the dissent argued that a crime of attempted second degree murder should be recognized in Illinois since the barriers to doing so, which may have existed in the Criminal Code of 1961, were eliminated. That is, the mitigating factors required for a second degree murder conviction are no longer considered elements of the offense. Thus, where before the language of the attempt statute—requiring an intent to commit a specific offense—may have required that the defendant intend, illogically, that the mitigating factors be present, such is no longer the case. Of course, the intent to kill would continue to be necessary for an attempted second degree murder conviction. Finally, the dissent concluded that the majority's statutory interpretation leads to absurd and fundamentally unfair results, in contravention of the Illinois Constitution.

176. Lopez, 655 N.E.2d at 872 (McMorrow, J., dissenting).
177. Id. at 871. In this regard, Justice McMorrow stated:
   The result of the majority's interpretation of the attempt and homicide statutes is that the very circumstance that should mitigate the defendant's conduct, the belief in the need for self-defense and a lack of intent to commit a specific offense, actually precludes a conviction of the lesser offense. We are bound to presume that the legislature did not intend such an absurd result.
   Id.
178. Id. (quoting People v. Partee, 530 N.E.2d 460, 463 (Ill. 1988)).
179. Id. at 871-72. The dissent concluded that the Cruz court should have instructed the jury on attempted second degree murder since there existed an issue of fact as to whether "the defendant believed that deadly force was necessary to defend himself." Id. at 873 (referring to People v. Cruz, 618 N.E.2d 591 (Ill. App. Ct. 1993)). On the other hand, the dissent found that the Lopez majority had properly denied the defendant's proffered attempted second degree murder instruction since the act of his wife informing him that she was having an affair did not amount to "serious provocation" under Illinois law. Id. at 872-73 (referring to People v. Lopez, 614 N.E.2d 329 (Ill. App. Ct. 1993)).
180. Id. at 870.
181. Id.
182. Id. at 871.
183. Id.
III. ANALYSIS

The case of People v. Lopez was decided wrongly and should be judicially or legislatively overturned. The Supreme Court of Illinois based its opinion upon inapplicable and unsound precedent as well as an unduly strict interpretation of statutory law. Most importantly, and beyond any argument which endeavors to construe the precise language of the law of criminal attempt and second degree murder in Illinois, Lopez represents a travesty of fairness and logic.

A. The Lopez Court’s Reliance on Precedent Was Misplaced

The erroneous use of precedent has long accompanied the Illinois Criminal Code enactments and might be considered part and parcel thereof. Indeed, it is the lax interpretive history of the homicide statutes that has scarred Illinois judicial reasoning to the extent that the decision in Lopez is not as shocking as it should be.

The Lopez decision centers almost exclusively around the court’s previous opinion in People v. Reagan. Reagan held that attempted imperfect self-defense voluntary manslaughter is not a crime in Illinois. Reliance upon Reagan is misplaced, however, since that decision served as an interpretative device for a prior, and arguably quite different, homicide statute. The relevant statute, Illinois Criminal Code of 1961, upon which the Reagan opinion rested, provided: “A person who intentionally or knowingly kills an individual commits voluntary manslaughter if at the time of the killing he believes the circumstances to be such that, if they existed, would justify or exonerate the killing... but his belief is unreasonable.”

184. See, e.g., O’Neill, “With Malice Toward None”, supra note 4, at 116 (arguing that Moore v. People, 35 N.E.2d 166 (Ill. 1893), misinterpreted the import of “malice aforethought” because rather than asking whether one could deliberately intend to commit manslaughter, “the court should have asked whether one could intend to kill under circumstances negating deliberation, which would render the intent non-malicious and reduce the crime from murder to manslaughter.”). O’Neill also argued that People v. Weeks, 230 N.E.2d 12 (Ill. App. Ct. 1967), was incorrectly decided because the court failed to recognize that the Criminal Code of 1961 erased “malice aforethought” from its provisions, which meant that “murder no longer possessed [any] element which provoked manslaughter did not.” Id. at 117; see also Sachs, supra note 60, at 170 (arguing that Weeks was erroneously decided).

185. See supra notes 79-86 and accompanying text (discussing People v. Reagan, 457 N.E.2d 1260 (Ill. 1983)).

186. Reagan, 457 N.E.2d at 1261.

187. But see supra note 108 (presenting arguments that the 1987 Code effected little change in homicide law).

188. ILL. REV. STAT. ch. 38, para. 9-2(b) (Smith-Hurd 1979).
The 1987 Criminal Code transformed voluntary manslaughter into second degree murder.\footnote{189} Now, the mitigating factors are clearly separate from the intent requirement.\footnote{190} Moreover, the burden rests upon the defendant to prove that a mitigating circumstance existed at the time that he committed the requisite acts.

Both Judge Robert J. Steigmann and Professor Timothy P. O'Neill, proponents of the new revisions, believed that the new Illinois homicide statute of 1987, in particular its change of names, would act to establish the crime of attempted second degree murder in Illinois.\footnote{191} In fact, O'Neill argued that it was imperative for the courts to recognize and clarify those changes that were instituted in the Criminal Code of 1961.\footnote{192}

Specifically, O'Neill contended that attempted voluntary manslaughter would be a crime in Illinois except for the supreme court's "perversity" in refusing to recognize the same.\footnote{193} He then proposed that "[t]he new names of the offenses will eliminate this anomaly and clarify the fact that a person can be guilty of either 'attempt first degree murder' or 'attempt second degree murder.'"\footnote{194}

Similarly, Judge Steigmann claimed that one of the reasons he included the change of names in his draft for the new statute was because he believed that Professor O'Neill's reasoning was correct—the new names would emphasize that attempted second degree murder is a crime in Illinois.\footnote{195} He further pointed out that the existence of attempted second degree murder is supported by the fact that the legis-

\begin{footnotes}
\item[189] For a complete discussion of the changes instituted by the 1987 amendment to the Illinois Homicide Code, see supra notes 87-94 and accompanying text.
\item[190] See supra notes 87-94 and accompanying text (discussing the 1987 amendments).
\item[191] O'Neill, Second Degree Murder, supra note 59, at 223; Steigmann, supra note 58, at 498.
\item[192] O'Neill, "Murder Least Foul", supra note 92, at 308. In order to justify his proposal that "voluntary manslaughter" be changed to "second degree murder," Professor O'Neill stated: The murder/manslaughter dichotomy was useful when those crimes were mutually exclusive. Yet what we now call voluntary manslaughter in Illinois is only a statute defining a less serious form of murder. It would help both courts and juries to jettison the entire manslaughter terminology, redolent of arcane common law distinctions, in favor of a more accurate term. "Murder in the second degree" would be a vast improvement. \textit{Id.}; see People v. Lopez, 655 N.E.2d 864, 869-70 (Ill. 1995) (McMorrow, J., dissenting) (stating her belief that the 1987 amendments were aimed at eliminating the disparity caused by the court's failure to recognize attempted second degree manslaughter under the 1961 Code); People v. Jeffries, 646 N.E.2d 587, 590 (Ill. 1995) ("The intent of the legislature in enacting [the new homicide statute] was to remedy the confusion and inconsistency that had developed in regard to the murder and voluntary manslaughter statutes."); see also supra notes 59-65 and accompanying text (discussing the courts' failure to recognize that the 1961 amendments to the Criminal Code had substantially changed the law of homicide).
\item[193] O'Neill, Second Degree Murder, supra note 59, at 223.
\item[194] \textit{Id}.
\item[195] Steigmann, supra note 58, at 498, 511.
\end{footnotes}
lature heard Professor O'Neill’s arguments, as well as those in opposition to the name change, and yet proceeded to adopt the new names.\footnote{196. Id. Some courts have argued that the legislature explicitly intended that the change of names would not effect the case law relating to the offense of voluntary manslaughter. People v. Fletcher, 625 N.E.2d 1185, 1187 (Ill. App. Ct. 1993); People v. Cruz, 618 N.E.2d 591, 595 (Ill. App. Ct. 1993); People v. Timberson, 573 N.E.2d 374, 376-77 (Ill. App. Ct. 1991). However, the fact that the legislature intended that the case law dealing with the offense of voluntary manslaughter remain intact does not directly address the issue of the existence of attempted voluntary manslaughter/second degree murder.}

Therefore, since Professor O'Neill and Judge Steigmann, whose recommendations were enacted into the new Code, both believed that the 1987 revisions would make a difference in the attempted voluntary manslaughter jurisprudence, there is strong support for such a conclusion. Thus, the Supreme Court of Illinois’ continued reliance on the Reagan decision is erroneous. That opinion was rendered in 1983, four years prior to the latest changes in the Illinois Homicide Code.

\section{B. Following Unsound Precedent, the Lopez Court Misinterpreted Statutory Law}

One legal scholar, James B. Haddad, stated that even though he believes the offense of attempted voluntary manslaughter (second degree murder) should exist, the new statute would not affect the supreme court’s reasoning in Reagan.\footnote{197. James B. Haddad, Second Degree Murder Replaces Voluntary Manslaughter in Illinois: Problems Solved, Problems Created, 19 Loy. U. Chi. L.J. 995, 1022-23 (1988).} Haddad concluded that a change in the relevant law would occur only pursuant to an attack on the reasoning of Reagan.\footnote{198. Id.} Accordingly, this Note argues that Reagan itself was incorrectly decided and that the Lopez court erroneously relied upon it. That is, even if Reagan’s precedential value has not been disturbed by the 1987 revisions, it is an unsound opinion and should not have been given any weight by the Lopez court.

The Reagan opinion rested upon two principal conclusions of law. First, the court ruled that attempted voluntary manslaughter based on an imperfect self-defense is an impossibility since it requires that one intend an unreasonable belief.\footnote{199. People v. Reagan, 457 N.E.2d 1260, 1261 (Ill. 1983).} Second, the court reasoned that having an intent to kill, of itself, is not a crime; rather, in order to commit attempted voluntary manslaughter one would have to intend to kill without lawful justification.\footnote{200. Id.} The court noted, however, that an imperfect self-defense means that the defendant intended to “en-
gage in self-defense, which is not a criminal offense.\textsuperscript{201} It is upon these two conclusions that the \textit{Lopez} opinion depends. The error in each is discussed below.

1. \textit{The Crime of Attempted Second Degree Murder Does Not Compromise the “Specific Offense” Language of the Attempt Statute}

Following the reasoning in \textit{Reagan}, the \textit{Lopez} court strictly construed the attempt statute, which provides that one must intend to commit a specific offense.\textsuperscript{202} The court held that one cannot intend to commit the specific offense\textsuperscript{203} of second degree murder since it is illogical to intend that the requisite mitigating factors be present.\textsuperscript{204}

Clearly, the court erred.\textsuperscript{205} The crime of attempted second degree murder logically fits within the supreme court’s myopic definition of specific offense. Alternatively, this Note argues that the attempt statute calls for a looser interpretation of “specific offense” that would better accommodate attempted second degree murder.

The offense of second degree murder provides that the mitigating factors be considered separately from the intent requirement and that the burden to prove one of them be on the defendant.\textsuperscript{206} Thus, as the \textit{Lopez} court itself recognized: “[T]he mitigating circumstances are not elements of the crime. In fact, first and second degree murder have the same elements. Second degree murder is simply a lesser mitigated offense, a concept new to Illinois.”\textsuperscript{207} Such being the case, the specific offense of second degree murder is actually first degree mur-

\textsuperscript{201} \textit{Id.} at 1262.

\textsuperscript{202} People v. Lopez, 655 N.E.2d 864, 867 (Ill. 1995).

\textsuperscript{203} The Illinois Criminal Code defines offense as “a violation of any penal statute of this State.” 720 ILCS 5/2-12 (West 1993). In addition, section 5/8-6 states that “[f]or purposes of this Article, ‘offense’ shall include conduct which if performed in another state would be criminal by the laws of that State and which conduct if performed in this State would be an offense under the laws of this State.” 720 ILCS 5/8-6 (West 1993).

\textsuperscript{204} Lopez, 655 N.E.2d at 867.

\textsuperscript{205} Cf. Cox v. State, 534 A.2d 1333 (Md. 1988) (finding the existence of attempted voluntary manslaughter based upon similar terminology). In Cox, the Maryland Court of Appeals ruled that its common law version of attempt, “intent to commit a particular offense coupled with some overt act,” could be applied to the crime of voluntary manslaughter, “an intentional homicide, done in a sudden heat of passion.” \textit{Id.} at 1335, 1337 (emphasis added).

\textsuperscript{206} For a complete discussion of the most recent homicide statute, see \textit{supra} notes 87-96 and accompanying text.

\textsuperscript{207} Lopez, 655 N.E.2d at 867 (citing People v. Jeffries, 646 N.E.2d 587, 595 (Ill. 1995)). Of course, the elements of (first degree) murder and voluntary manslaughter (second degree murder) became identical in 1961. Jeffries, 646 N.E.2d at 594-95.
Only after the elements of first degree murder are proven beyond a reasonable doubt does the jury determine whether it will decrease the defendant's conviction because certain mitigating circumstances are present.

Therefore, since the mens rea and actus reus required for first and second degree murder are the same, it is logical to conclude that just as one can attempt the former, so can one attempt the latter. The elements of both crimes are now the same. That is, the prosecution must prove beyond a reasonable doubt, for both murder and voluntary manslaughter, that (1) the defendant committed the act which caused the victim's death, (2) he knew that such an act would cause death or great bodily harm or intended the same, and (3) "the defendant was not justified in using the force which he used." Steigmann, supra note 58, at 497-98. It is now the defendant who elects to have second degree murder instructions given to the jury. Moreover, the defendant bears the burden of proving by a preponderance of the evidence that mercy should be given due to the presence of one of the two mitigating circumstances. As such, the State cannot itself request second degree murder instructions; moreover, it would appear that, under Mullaney v. Wilbur, 421 U.S. 684 (1975), the State is also prohibited from charging a defendant with second degree murder. Id. at 496. Therefore, "[t]he crime of second degree murder is first degree murder plus mitigating circumstances." Lopez, 655 N.E.2d at 870-71 (McMorrow, J., dissenting). The Lopez majority did not deny this. Justice Nickels proclaimed: "[w]hile they share the same elements, second degree murder requires the presence of a mitigating circumstance, which, while not an element or mental state, does reduce the culpability and thus the sentencing range." Id. at 867-68 (citing People v. Jeffries, 646 N.E.2d 587, 594-95 (III. 1995)).

As a result of the 1961 statutory change, "murder and voluntary manslaughter require identical mental states—intent or knowledge—as well as an identical result—the unjustified killing of a human being." O'Neill, "With Malice Toward None", supra note 4, at 113. This was due to the fact that, with the exception of felony murder, the murder statute now required intent or knowledge, while imperfect self-defense voluntary manslaughter also required either intent or knowledge and provocation voluntary manslaughter did not mention a mental state at all. Id. at 112. However, when an offense is silent with respect to the mental state required, Illinois law implies intent, knowledge, or recklessness. Id. at 112-13.

When the Criminal Code of 1961 was drafted, the revision committee responsible for drafting the Code wisely decided to abandon the myriad of mental states that were reflected in the code before its passage by the state's General Assembly.... Accordingly, paragraph 5/4-3(a) of the code provides:

Metal State. (a) A person is not guilty of an offense, other than an offense which involves absolute liability, unless, with respect to each element described by the statute defining the offense, he acts while having one of the mental states described in Sections 4-4 through 4-7 [intent, knowledge, recklessness, negligence].

Decker, supra note 36, at 2-36 (quoting 720 ILCS 5/4-3(a) (West 1993)). "The general mental-state provision contained in paragraph 5/4-3... Subparagraph (b) provides:[...]. If the statute does not prescribe a particular mental state applicable to an offense (other than an offense which involved absolute liability), any mental state defined in Sections 4-4 [intent], 4-5 [knowledge] or 4-6 [recklessness] is applicable." Id. Of course, because recklessness is reserved for the crime of involuntary manslaughter, provocation voluntary manslaughter would require a mental state of either intent or knowledge. O'Neill, "With Malice Toward None", supra note 4, at 112-13. "Consequently, murder and voluntary manslaughter no longer need to be viewed as different crimes. Instead, they should be characterized as different degrees of the same crime—an unjustified killing performed intentionally or knowingly." Id. at 113.

209. See supra note 93 (quoting the relevant portion of the Illinois second degree murder statute).
mitigating factors are not elements of second degree murder; they exist merely to mitigate one's culpability and to lessen the resulting sentence imposed.\footnote{People v. Jeffries, 646 N.E.2d 587, 595 (Ill. 1995).} Thus, the "specific offense" language, as used by the Lopez court, clearly accommodates the crime of second degree murder.

Even if such a crime does not fall within the court's strict construction, a looser interpretation is certainly in order. As two Illinois criminal law experts recently proclaimed:

[I]t is clear that the word 'specific' was placed in the attempt statute merely to make it clear that an intent to commit any crime was not sufficient to establish attempt; rather, one needed an intent to commit the specific acts contained in a particular statutory definition in order to be found guilty of an attempt to commit any particular offense.\footnote{O'Neill & Perlman, supra note 3, at 18.}

Applied to the statute at hand, the defendant simply has to harbor an intent to kill, while committing some act in furtherance of that intent, for an attempt conviction to lie. In other words, the attending mitigating factors are irrelevant to the issue of criminal attempt because the words "specific offense" focus only upon the requisite acts.

In addition, one renowned legal scholar, Professor John F. Decker, has implied that the "specific offense" language is merely aimed at avoiding the imposition of punishment on a person who has "the intent to engage in some wrongdoing that did not amount to a crime."\footnote{DECKER, supra note 36, at 5-3, 5-4. Professor John F. Decker states:}

The Illinois courts are very clear that proof of specific intent is imperative for a conviction of criminal attempt. The intent must be that an offense cannot be merely an open-ended, vague desire to commit criminality generally; the courts make it clear that the intent must be "an intent to commit a specific offense." If a defendant had the intent to engage in some wrongdoing that did not amount to a crime, he or she cannot be convicted of a criminal attempt.

\footnote{Id.}
Of course, a finding that one does not have to intend the existence of the mitigating factors of second degree murder in order to attempt that crime would not compromise the fact that a criminal attempt requires a specific intent. Rather, like attempted first degree murder, attempted second degree murder would require the intent to kill. The existence of the factors in mitigation would merely reduce the defendant's culpability and resulting sentence. Thus, the specific intent required of attempt crimes would exist because, despite his motives, the defendant desired that his acts result in the death of another.\(^{213}\)

Therefore, in holding that attempted second degree murder would illogically require an intent that certain mitigating circumstances be present, the Lopez court rendered an unduly strict interpretation of criminal attempt. That interpretation leaves "the intent to commit a specific offense" language at odds with common sense. However, whether or not such a judicial interpretation is allowed to stand, the crime of second degree murder is a logical reality.

2. The "Intent to Kill" Itself Is Sufficient to Establish an Attempt Crime

Even if the Lopez court were to concede that the defendant does not have to intend that the mitigating factors be present in order to be convicted of attempted second degree murder, its contention is that an intent to kill is insufficient to constitute a crime.\(^{214}\) Rather, the court stated that one would have to show an intent to kill unlawfully.\(^{215}\)

The Lopez court's interpretation of the homicide statute is illogical. Initially, the Lopez court, just as the Reagan court before it, erroneously concluded that the intent to kill is not a crime. On the contrary, Illinois courts routinely hold that "[t]o prove attempted first degree murder, the State must prove that with intent to kill, the defendant committed an act which constitutes a substantial step toward the commission of the murder."\(^{216}\) Thus, the intent to kill, coupled with the requisite actions, should be sufficient to support a conviction for an attempt crime.

\(^{213}\) For a definition of specific intent, see supra notes 36-37 and accompanying text.

\(^{214}\) People v. Lopez, 655 N.E.2d 864, 867 (Ill. 1995).

\(^{215}\) Id. Of course, the argument against attempted second degree murder based on a sudden and intense passion goes no further than the previous discussion. That is, the words "without lawful justification" are not an impediment to recognizing that crime even though there is no belief that one's actions are justified.

\(^{216}\) People v. Burrage, 645 N.E.2d 455, 462 (Ill. App. Ct. 1994) (emphasis added); see People v. Feyrer, 646 N.E.2d 1244, 1250 (Ill. App. Ct. 1994) (noting that the specific intent to kill is necessary to convict of attempted murder and that such an intent can be inferred from the defendant's acts).
The *Lopez* and *Reagan* courts further erred in holding that one would have to intend to kill "without lawful justification" to be convicted of attempted murder. In the case of imperfect self-defense attempted second degree murder, this would be an impossibility, the *Lopez* court found, because even an unreasonable belief in the need to defend oneself would mean that one did not intend to kill *unlawfully*. It stated, "[t]he two different intents, intent to kill unlawfully and intent to kill in self-defense, cannot coexist in the same crime." Here, the court confuses the intent requirement with the jury's task during deliberations. That is, the phrase "without lawful justification" is not an element of the crime of first or second degree murder.

Rather, "this language merely refers to affirmative defenses the defendant could interpose once charged; accordingly, the State is under no obligation to affirmatively prove in each murder prosecution that the killing was without lawful justification unless the accused offers some evidence that his or her killing was justified." Only then does the issue of whether the killing was without lawful justification become a question of fact for the jury to determine. Therefore, the specific intent to commit an offense needed for criminal attempt does not include an intent that one's acts be unlawful.

That the *Lopez* court was wrong to interpret "without lawful justification" as it did is confirmed by a reading of the Illinois Homicide Code. For instance, the first degree murder statute, which is relevant to any second degree murder discussion, provides: "A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death . . . he . . . intends to kill . . . ." Clearly, the statute itself demands that the words "without lawful justification" be interpreted as a conclusion of fact that is distinct from the elements of the crime itself.

Further light is shed on this issue upon considering the involuntary manslaughter provisions. That statute provides: "A person who unintentionally kills an individual without lawful justification commits involuntary manslaughter if his acts . . . are such as are likely to cause death . . . , and he performs them recklessly . . . ." The fact that the

218. *Id.*
219. *Decker*, *supra* note 35, at 201; *see People v. Feyrer*, 646 N.E.2d 1244, 1250 (Ill. App. Ct. 1994) (stating that once the claim of self-defense is raised by the defendant, the State is then required to disprove the use of justifiable force); *People v. Austin*, 574 N.E.2d 1297, 1303 (Ill. App. Ct. 1991) (holding that the attempt to kill without lawful justification is established once the defendant's self-defense argument is rejected).
221. 720 ILCS 5/9-3(a) (West 1996) (emphasis added).
same language is used in this unintentional crime shows that these words denote a conclusion of fact rather than a matter of intent.

Therefore, the *Lopez* court erred when it held that one must intend to kill without lawful justification in order to commit attempted murder. The intent to kill is routinely found sufficient to establish criminal culpability. Furthermore, the words "without lawful justification" do not constitute an element of the specific offense of murder. Instead, the words are a "catchall phrase" to be used in jury instructions in the case of affirmative defenses.222

C. The Disproportionality that Results from *Lopez* Is at Odds with Legislative Intent and the Illinois Constitution

Finally, the decision in *People v. Lopez* is wrong simply because it is fundamentally unfair. The elimination of attempted second degree murder leaves would-be offenders subject to higher criminal penalties than they might otherwise receive. Such injustice was not the intent of the Illinois legislature. In fact, the holding in *Lopez* interferes with the Illinois Criminal Code scheme. Perhaps more importantly, the disparity in sentencing caused by *Lopez* violates the Illinois Constitution.

1. Legislative Intent Militates in Favor of Recognizing Attempted Second Degree Murder

Without the crime of attempted second degree murder, a defendant may receive an increased sentence if his or her victim fortuitously lives. This absurdity stems from the fact that the absence of attempted second degree murder leaves attempted first degree murder as the most significant alternative.223 After all, the actus reus and mens rea for the two crimes are exactly the same.224 Unfortunately, there are substantial sentencing differences between the two.

Generally, the penalty structure in Illinois consists of ten grades within which each offense is categorized.225 For instance, after first

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223. *See infra* notes 247-52 and accompanying text (discussing the unsatisfactory alternatives to attempted second degree murder).
224. *See supra* notes 207-08 and accompanying text (making this argument).
225. 730 ILCS 5/5-5-1, council commentary (revised 1973) (West 1993).

The purpose of classifying offenses into graded categories is twofold: to assist the Legislature in creating an ordered system of offenses by seriousness, and to simplify the sentencing choices which a judge must make in criminal cases. The ultimate purpose of both of these is to eliminate disparity of sentencing and produce more evenhanded justice.

730 ILCS 5/5-5-1.
and second degree murder, which are separate classes, there are Class X, 1, 2, 3 and 4 felonies. Each grade is assigned a range of possible penalties from which a sentencing judge must choose. Specifically, a conviction for second degree murder carries with it a penalty range of four to twenty years. Attempted first degree murder, a Class X felony, carries with it a sentencing range of six to thirty years. Additionally, probation may be imposed for second degree murder, barring certain aggravating factors, whereas it is never an option for attempted first degree murder. Therefore, pursuant to the Supreme Court of Illinois' opinion in Lopez, a defendant's fate may depend entirely upon whether his victim happens to die, rather than on his level of culpability. In fact, in the cases underlying the supreme court's opinion, defendants Lopez and Cruz received sentences of twenty-five and thirty years respectively, more than they could have received had their victims died.

It is clear that the Illinois legislature did not intend to foster such unjust results. Indeed, the committee comments to the Illinois attempt statute declare that all crimes are subject to the statute unless they are explicitly excluded. Moreover, the true intent of the Illinois legislature can be found in its stated purpose for enacting the criminal code. The Illinois Criminal Code provides:

*General Purposes. The provisions of this Code shall be construed in accordance with the general purposes hereof, to:*

(a) Forbid and prevent the commission of offenses;
(b) Define adequately the act and mental state which constitute each offense, and limit the condemnation of conduct as criminal when it is without fault;
(c) *Prescribe penalties which are proportionate to the seriousness of offenses* and which permit recognition of differences in rehabilitation possibilities among individual offenders;
(d) Prevent arbitrary or oppressive treatment of persons accused or convicted of offenses.

226. 730 ILCS 5/5-5-1(b) (West 1993). In addition, there are three grades of misdemeanor offenses. 730 ILCS 5/5-5-1(c) (West 1993).
227. 730 ILCS 5/5-8-1(a)(1.5) (West 1996). Second degree murder is a Class 1 felony. However, the legislature recently increased the maximum allotted sentence for second degree murder to twenty years, as opposed to the maximum of fifteen years allotted for all other Class 1 felonies. 730 ILCS 5/5-8-1(a)(4) (West 1996).
228. 720 ILCS 5/8-4(c) (West 1994).
229. 730 ILCS 5/5-8-1(a)(3) (West 1996).
230. 730 ILCS 5/5-5-3(c) (West 1996).
231. 730 ILCS 5/5-5-3(c)(2)(B) (West 1996).
233. 720 ILCS 5/1-2 (West 1993) (emphasis added); see also People v. Pardue, 361 N.E.2d 383, 384 (1977) (stating that "the purpose of sentencing is to provide adequate punishment for the
With respect to the specific crime of second degree murder (voluntary manslaughter), it is helpful to recall the origin of that crime. It was enacted as "a concession to the frailty of man, a recognition that the average person can understandably react violently to a sufficient wrong and hence some lesser punishment is appropriate." Although we may empathize with a person who is provoked to such an extent, it must be recognized that that person, when committing the injurious act(s), still harbors an intent to kill. Thus, even in 1961, the people of Illinois, through their legislature, transformed the homicide scheme so that murder and voluntary manslaughter became essentially the same crime. At the same time, the people decided that the events leading up to the formation of an intent to kill may justify a lesser penalty for voluntary manslaughter.

Furthermore, "[t]he sentencing provisions of the criminal attempt prohibition tie the penalty for attempt to that of the principal crime." In fact, the attempt statute provides that the sentencing range for a criminal attempt shall mirror that which corresponds to crimes that are a classification below the one attempted. In other words, an attempt to commit a Class 1 felony receives the sentencing offense, safeguard society from further offenses, and to restore the offender to useful citizenship.

234. See supra notes 38-43 and accompanying text (discussing the history and origin of voluntary manslaughter (second degree murder)).

235. State v. Robinson, 643 A.2d 591, 594 (N.J. 1994) (citations omitted). This "frailty of man" theory applies just as well to imperfect self-defense manslaughter because the defendant with such a claim honestly held the belief that he acted justifiably, but failed to measure up to the average man standard in that his belief was unreasonable.

236. It is clear that an intent to kill or knowledge that one’s actions will result in the death of another is required by the second degree murder statute. See supra note 92 and accompanying text (providing the relevant portions of that statute); see also supra note 133 and accompanying text (discussing the mental state required for second degree murder and emphasizing that it is nothing less than intentional).

237. See supra notes 50-54, 208 and accompanying text (discussing the fact that the 1961 statute essentially transformed the two offenses into the same crime).

238. DECKER, supra note 36, at 5-3 (citing ILL. ANN. STAT. ch. 38, § 8-4, 1961 committee comments 500 (Smith-Hurd 1989) and 720 ILCS 5/8-4(c) (West 1993)).

239. 720 ILCS 5/8-4(c) (West 1994). This statute provides the sentence structure for attempt crimes:

A person convicted of an attempt may be fined or imprisoned or both not to exceed the maximum provided for the offense attempted . . . .

(1) the sentence for attempt to commit first degree murder is the sentence for a Class X felony . . . ;
(2) the sentence for attempt to commit a Class X felony is the sentence for a Class 1 felony;
(3) the sentence for attempt to commit a Class 1 felony is the sentence for a Class 2 felony;
(4) the sentence for attempt to commit a Class 2 felony is the sentence for a Class 3 felony;
range given for a Class 2 felony. Clearly, this scheme militates in favor of imposing similar penalties for both second degree murder and its inchoate counterpart. The result would be consistent with the general purposes of the Criminal Code.

The Lopez court’s interpretation of the attempt and homicide statutes runs afoul of Illinois legislative intent and the public policy upon which it is based. In making penalties for attempt crimes based on those for the completed offense, the Illinois legislature intended to punish equally those with similar culpability. Thus, because the legislature obviously intended to provide for a mitigated murder offense, it must have entertained the same intention for attempted murder. Otherwise, its stated purpose—"to prescribe penalties which are proportionate to the seriousness of offenses"—would be compromised. That is, when a person’s act, if completed, would render him culpable of second degree murder, it is contrary to the Criminal Code to find him guilty of attempted murder, which seeks to punish a higher level of culpability, when the crime is incomplete. It is blatantly unfair to punish a person more severely for an uncompleted, as opposed to a completed, crime.

2. The Lopez Holding Violates the Illinois Constitution

The Lopez opinion also stands in contravention of the Illinois Constitution. The Illinois Constitution requires that “all penalties . . . be determined . . . according to the seriousness of the offense.” However, the Lopez decision ensures that those with lesser culpability may receive the same sentence as more culpable criminals. Therefore, Lopez violates the Illinois Constitution.

Nevertheless, the Lopez court rejected the argument that its decision would violate the Illinois Constitution. Rather, the court declared that it would only “override the judgment of the General Assembly with respect to criminal penalties” when the penalty is “cruel, degrading, or so wholly disproportionate to the offense committed as to shock the moral sense of the community.”

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(5) the sentence for attempt to commit any felony other than those specified in Subsections (1), (2), (3), and (4) hereof is the sentence for a Class A misdemeanor.

720 ILCS 5/8-4(c).

240. 720 ILCS 5/8-4(c).


243. 720 ILCS 5/1-2(c) (West 1994).

244. ILL. CONST., art. I, § 11.

245. Lopez, 655 N.E.2d at 868.

246. Id.
discussion above demonstrates, the absence of attempted second degree murder undoubtedly results in disproportionality. Whether a minimum of two extra years in the penitentiary, a possibility of ten additional years in the penitentiary, or the impossibility of probation is "cruel," "degrading," or "wholly disproportionate" is a matter of opinion. Regardless of the desirability of the court's opinion, however, its argument on this point fails.

The court's argument fails because the decision to recognize attempted second degree murder would not override the legislature's judgment as to criminal penalties. Indeed, although it is unclear whether the Illinois legislature would recognize the offense of attempted second degree murder, it has definitely not expressed any specific judgment with respect to its penalty. At most, the Illinois legislature ambiguously made a judgment as to whether attempted second degree murder should exist. Clearly, the court would not be overriding its judgment by recognizing that crime. Therefore, the Lopez opinion violates the Illinois Constitution because it ensures that all penalties are not in proportion to the seriousness of offenses.

IV. IMPACT

As a result of the Lopez decision, which holds that the crime of attempted second degree murder does not exist, prosecutors and fact finders statewide are left in an untenable position. If either believes a conviction for attempted first degree murder is not in order, without the compromise presented by an attempted second degree murder offense, he or she may be forced to pursue less-than-favorable options. For instance, the most common alternative to the would-be offense of attempted second degree murder seems to be aggravated battery.\textsuperscript{247} That crime, however, is merely a Class 3 felony carrying a penalty of two to five years.\textsuperscript{248} Besides, aggravated battery involves an intent or knowledge that great bodily harm will result from the actor's conduct.\textsuperscript{249} Such a crime cannot fill the void left by the Lopez court because an offense of attempted second degree murder would clearly

\textsuperscript{247} See, e.g., People v. Williams, 581 N.E.2d 113, 118 (Ill. App. Ct. 1991) (affirming the defendant's conviction for armed violence predicated on aggravated battery and reversing his conviction for attempted second degree murder); People v. Reagan, 444 N.E.2d 742, 746 (Ill. App. Ct. 1982) (rejecting the State's argument that the "minor charges of aggravated assault or aggravated battery" are insufficient to serve as an alternative to a would-be attempted second degree murder conviction). Aggravated battery is battery committed with the intent or knowledge that great bodily harm will result or a battery committed with a deadly weapon other than a firearm. 720 ILCS 5/12-4 (West 1996).

\textsuperscript{248} 720 ILCS 5/12-4(14)(e) (West 1996).

\textsuperscript{249} 720 ILCS 5/12-4(a) (West 1996).
punish nothing less than an intent to kill, i.e., a more culpable state of mind.\textsuperscript{250}

Another option is aggravated battery with a firearm. That crime, however, is a Class X felony and carries with it the same penalty carried by the offense of attempted first degree murder.\textsuperscript{251} Moreover, such an offense has very limited applicability, i.e., when a firearm is discharged.\textsuperscript{252} Thus, the Supreme Court of Illinois has created a gap in the conviction and sentencing of those who have an intent to kill another, but have been provoked to that point. Consequently, not only are the alternatives insufficient, but the lack of guidance to prosecutors and judges with respect to offenses that would otherwise be considered attempted second degree murder leaves too much room for unfairness and inconsistency in sentencing.

V. Conclusion

The Lopez decision is in error because it is based upon unsound precedent, a misinterpretation of statutory law and a disregard for fairness and logic. The crime of attempted second degree murder should exist in Illinois.

Unsound precedent has long accompanied the Illinois homicide statute, thwarting the legislature's purpose for enacting a criminal statute at all, as well as destroying its sentencing goals. That precedent and continued misinterpretation have culminated in the opinion of People v. Lopez. Once the erroneous origin of that opinion is recognized and understood, the result in Lopez is exposed for its superfluous unfairness. It is clearly unfair that a defendant be exposed to the risk that he or she will receive a greater penalty if the victim lives rather than dies. That an attempted crime may be punished more severely than its completed offense runs contrary to legislative purpose as well as common sense. The void left by Lopez is untenable.

Of course, a judicial overruling of Lopez would be appropriate. Perhaps the safer route to the resolution of this issue lies, however, in the legislative process. Indeed, it may be time to revise the Illinois Criminal Code yet again. In particular, the attempt statute should be reworded so that it explicitly requires only that an individual specifically intend to commit the acts required for a particular crime, while harboring the intent to achieve the necessary result. This wording

\textsuperscript{250} See supra note 216 and accompanying text (discussing murder and the intent to kill).
\textsuperscript{251} 720 ILCS 5/12-4.2 (West 1996).
\textsuperscript{252} 720 ILCS 5/12-4.2 (West 1996).
would definitely accommodate the crime of attempted second degree murder and fill the void left by *People v. Lopez*.

*Donna Sternicki*