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ROBBERY IN ILLINOIS: A PROPOSAL TO REINSTATE THE ELEMENT OF SPECIFIC INTENT

EXPLORING THE SCOPE OF THE OFFENSE OF ROBBERY: *PEOPLE V. SMITH*¹

On September 25, 1993, Abe and Gloria Smith withdrew approximately \$5,000 from Granite Savings & Loan. The next morning, the Smiths hid their money in the family cookie jar and drove to a nearby army base where their son Troy, was stationed. When the Smiths returned from their visit, they discovered that their money had disappeared. The only other person who knew of the Smith's withdrawal was their nephew, Nick Jones, who had cashed a paycheck at Granite while the Smiths were making their withdrawal.

On September 26, 1993, the Smiths filed a police report with Officer Hardy. After a brief investigation and a discussion with Granite officials, Officer Hardy informed the Smiths that, luckily, their stolen money had originated from a batch of marked bills. Officer Hardy gave the Smiths a sample of a marked bill. He stated that the distinct markings would aid in the apprehension of the thief or thieves.

On October 1, 1993, Troy obtained a weekend pass and decided to head home to visit his family. After visiting with his parents and viewing the sample marked bill, Troy met up with a few friends at a local diner. At the diner, Troy spotted his cousin Nick in another section of the restaurant. Troy excused himself from the table and headed toward Nick's table to say hello. As Troy approached Nick's table, he watched Nick remove a wad of money from his coat pocket.

Troy examined the money on the table as he and Nick talked; he noticed that the bills contained the Granite marking. Troy snatched the bills from the table and questioned Nick about the markings and the wad of money. Nick claimed that the money was part of his paycheck and put the wad of money back into his pocket. Instead of returning the bills to the table, Troy forcefully grabbed the wad of money out of Nick's coat pocket.

Troy resisted Nick's subsequent physical attempts to reclaim what Troy mistakenly believed to be his parents' money. Troy then told Nick that he was going to take the money to the bank to verify

1. *People v. Smith* is a fictitious case created to illustrate the possible effects of classifying robbery as a general intent crime.

the markings. Troy ran out of the restaurant and jumped into his car as Nick screamed, "Stop him, he took my money!" Hearing Nick's cry, the restaurant owner called the police. Troy was stopped by Officer Hardy, handcuffed, and taken to jail. Troy was subsequently charged with the offense of robbery.

In the vast majority of states, trial courts would find that Troy was not guilty of robbery.² These courts would assert that Troy's mistaken, but good faith belief, that Nick's money was his parents', precludes a robbery conviction.³ However, Illinois courts would ignore Troy's good faith defense and convict him of robbery.⁴ Thus, Troy could spend up to seven years⁵ in an Illinois state penitentiary.⁶

INTRODUCTION

Robbery is generally defined as a specific intent crime and as an aggravated and violent form of theft.⁷ In almost all states, robbery and theft are closely related offenses. Indeed, the theft element of a specific intent "to steal or deprive" is an indispensable element of robbery.⁸ A mistaken view as to the ownership of property coupled with the taking of that property does not satisfy the specific intent requirement of either theft or robbery.⁹ Instead, a taking by mistake represents an intent to recover property and not

2. See *infra* notes 203-77 and accompanying text for a discussion of how other states define robbery and the intent element associated with robbery. See generally ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW ch. 4, § 2, at 344-46 (3d ed. 1982) (discussing defenses to the intent element of robbery).

3. See *infra* notes 7-10 and accompanying text for a discussion of how a defendant's good faith belief negates the intent element of robbery.

4. See, e.g., *People v. Falkner*, 61 Ill. App. 3d 84, 88-90, 377 N.E.2d 824, 828-29 (2d Dist. 1978) (ruling before Illinois categorized robbery as a general intent crime that a defendant's mistaken belief as to the ownership of stolen property vitiated the specific intent required for robbery).

5. 720 ILCS 5/18-1 (1993) (defining robbery as a Class 2 felony); 730 ILCS 5/5-8-1 (1993) (setting sentencing requirements of three to seven years for a Class 2 felony).

6. See *infra* notes 12-17 and accompanying text for a discussion of how Illinois defines the mental state associated with robbery in a manner which merely requires knowledge and thus precludes a good faith defense.

7. PERKINS & BOYCE, *supra* note 2, at 343 (defining robbery and stating the elements of robbery in terms of theft); see also 67 AM. JUR. 2D *Robbery* § 19 (1964) (stating that robbery is customarily viewed as an aggravated form of theft).

8. PERKINS & BOYCE, *supra* note 2, at 343 (defining the mental state associated with robbery as an intent to steal, an intent to deprive, or a felonious intent).

9. A person is not guilty of robbery if he believes he is entitled to the property that he is forcibly taking from another. 67 AM. JUR. 2D *Robbery* § 19 (1964). Additionally, a good faith belief of entitlement vitiates the intent to steal required for robbery. *Id.*; see also PERKINS & BOYCE, *supra* note 2, at 344 (stating that robbery defendants are afforded a good faith belief defense); 77 C.J.S. *Robbery* § 22 (1967) (highlighting mental state defenses and the requirement of intent to deprive for one's own use).

an intent to steal another's property.¹⁰ Thus, most state courts would dismiss a robbery charge founded on a mistaken taking, like the one in the hypothetical *Smith* case, because the defendant did not have the specific intent to steal or deprive.¹¹

However, contrary to the holdings of most jurisdictions, the Illinois Supreme Court recently concluded that robbery is a general intent crime.¹² A general intent offense does not require a particular mental state, such as the intent to steal, but instead can be satisfied by any one of three mental states: intent, knowledge, or recklessness.¹³ Since theft is a specific intent crime, defining robbery as a general intent crime alters the close relationship between the two offenses.¹⁴ One result of this alteration is that defenses which traditionally apply to both theft and robbery, such as the good faith defense, may no longer apply to robbery.¹⁵ An Illinois defendant is now judged by the lesser mental state standards of knowledge or recklessness.¹⁶ Thus, an innocent defendant, like Troy Smith, can be convicted of robbery.¹⁷

Another result of severing the link between theft and robbery is that theft is not always a lesser included offense of robbery.¹⁸ A lesser included offense is a crime which contains some of the elements of the greater offense, and only elements in the greater of-

10. PERKINS & BOYCE, *supra* note 2, at 344 (stating that a good faith taking shows a defendant's intent to collect and not an intent to steal); 67 AM. JUR. 2D *Robbery* § 19 (1964) (declaring that good faith contradicts robbery's mental state).

11. See *infra* notes 203-57 and accompanying text for a discussion of how other states include specific intent in their robbery statutes and thus allow defenses based on the mental state associated with theft.

12. In *People v. Jones*, 149 Ill. 2d 288, 595 N.E.2d 1071 (Ill. 1992), the Illinois Supreme Court concluded that robbery was a general intent crime. *Id.* at 295, 595 N.E.2d at 1075. The *Jones* court highlighted the absence of specific mental state language in the robbery statute, and thus held that intent, knowledge, and recklessness could satisfy the mental state requirement for robbery. *Id.*; see also 720 ILCS 5/4-3(b) (1993) (stating that either intent, knowledge, or recklessness must be applied to each element of an offense if that offense does not list a specific intent requirement).

13. *Jones*, 149 Ill. 2d at 295, 595 N.E.2d at 1075.

14. See *infra* notes 123-87 and accompanying text for a discussion of how a lesser included offense problem arose after robbery was deemed a specific intent crime.

15. After the Illinois Supreme Court interpreted the robbery statute in terms of general intent, the *Jones* court concluded that the defendant knowingly took the stolen property. *Jones*, 149 Ill. 2d at 295, 595 N.E.2d at 1075. Thus, a defense that is based on a specific intent no longer applies to the general intent crime of robbery. *Id.*

16. *Id.*

17. *Id.* The fictitious *Smith* defendant, like the defendant in *Jones*, could be convicted of robbery using the mental state of knowledge as defined in 720 ILCS 5/4-1 (1993).

18. See *infra* notes 123-56 and accompanying text for examples of Illinois appellate court decisions holding that theft is and is not a lesser included offense of robbery.

fense.¹⁹ Theft is generally a lesser included offense of robbery because theft contains all the elements of robbery and no additional elements.²⁰ However, now that Illinois defines robbery as a general intent crime, the offense of theft contains an element of specific intent not present in the offense of robbery.²¹ Thus, according to Illinois statutory definitions, theft is no longer a lesser included offense of robbery.²²

Illinois courts encounter problems and rule inconsistently in circumstances where a defendant charged with robbery deserves a lesser included theft conviction. Illinois courts must either: (1) allow a defendant to escape a warranted theft conviction by ruling that the element of specific intent is not properly charged in the robbery indictment;²³ or (2) ignore the statutory definition of an included offense and attempt to deduce the element of theft's specific intent from the language of the robbery indictment.²⁴ Consequently, Illinois prosecutors and defendants are uncertain whether a robbery charge also charges the offense of theft.²⁵

This Note analyzes how the Illinois general intent definition of robbery results in lesser included offense problems in Illinois courts. This Note proposes to solve these problems by suggesting that the Illinois legislature reinstate the specific intent requirement into the Illinois robbery statute. Part I of this Note shows

19. The Illinois definition of an included offense provides as follows:

"Included offense" means an offense which (a) Is established by proof of the same or less than all of the facts or a less culpable mental state (or both), than that which is required to establish the commission of the offense charged, or (b) Consists of an attempt to commit the offense charged or an offense included therein.

720 ILCS 5/2-9 (1993); see also *People v. Jones*, 149 Ill. 2d 288, 293, 595 N.E.2d 1071, 1073 (Ill. 1992) (holding that an included offense is an offense that contains all of the elements of the greater offense without any additional elements).

20. 67 AM. JUR. 2D *Robbery* § 9 (1964) (declaring that theft is commonly a lesser included offense of robbery).

21. *Jones*, 149 Ill. 2d at 295, 595 N.E.2d at 1075.

22. 720 ILCS 5/2-9 (1993).

23. See *infra* notes 123-54 and accompanying text for a discussion of the inconsistent rulings of Illinois appellate courts in instances where a defendant is charged only with robbery and subsequently charged with, and convicted of, theft.

24. *Jones*, 149 Ill. 2d at 295, 595 N.E.2d at 1075. The *Jones* court recognized that theft and robbery do not share the relationship envisioned by the Illinois included offense statute. *Id.* at 293, 595 N.E.2d at 1073. However, the *Jones* court found that the language of the indictment or inferences drawn from the facts in the case could supplement the robbery charge and, thus, allow a lesser included theft conviction. *Id.* at 292-96, 595 N.E.2d at 1073-75. See *supra* notes 156-86 and accompanying text for a discussion of problems that occur when a court looks outside the express language of the robbery charge to find the element of specific intent.

25. See generally Patrick A. Tuite, *Ruling Should Spur Counsel to Check for Lesser Included Offense*, CHI. DAILY L. BULL., Aug. 19, 1992, at 5, for a detailed review of the *Jones* decision and a warning to defense counsel.

how misinterpretation of case law resulted in a general intent robbery statute. Part II analyzes how the definition of robbery as a general intent crime modified the close relationship between theft and robbery, and thus, created lesser included offense problems. Part III searches for a model Illinois robbery statute by exploring the treatment of robbery and theft in the Model Penal Code and in other jurisdictions. Finally, this Note proposes a model robbery statute designed to solve questions and concerns over robbery's intent element.

I. CONFUSION OVER THE INTENT ELEMENT OF ROBBERY

This section identifies and analyzes a series of contradictory Illinois cases and statutes which have defined the mental state associated with robbery. Initially, this section focuses on early Illinois Supreme Court rulings which properly held that the offenses of theft and robbery shared the common element of specific intent. This section then analyzes *People v. Hildebrand*²⁶ to show that the Illinois Supreme Court unintentionally modified robbery's specific intent requirement. This section also discusses how subsequent Illinois Supreme Court decisions have mistakenly applied the *Hildebrand* holding. Finally, this section analyzes how the absence of intent language in the current robbery statute results from misinterpretation of case law and questionable statutory construction.

A. Early Robbery Definitions Properly Included the Element of Specific Intent

At early common law, the elements of theft coincided with the elements of robbery.²⁷ The specific intent to steal or deprive was an indispensable element of both the offense of theft, previously termed larceny, and the crime of robbery.²⁸ Early Illinois theft and robbery statutes conformed to the common law definitions of the two offenses.²⁹ Theft or larceny was defined as "[a] felonious . . . taking . . . [of] goods . . . [from] another,"³⁰ and robbery was codified

26. 307 ILL. 544, 139 N.E. 107 (ILL. 1923).

27. PERKINS & BOYCE, *supra* note 2, at 343 (defining robbery and stating the elements of robbery in terms of theft); see also 67 AM. JUR. 2D *Robbery* § 19 (1964) (stating that robbery is customarily viewed as an aggravated form of theft).

28. PERKINS & BOYCE, *supra* note 2, at 343 (defining robbery's mental state as an intent to steal or a felonious intent).

29. See *infra* notes 29-30 and accompanying text for a discussion and presentation of early Illinois theft and robbery statutes.

30. The initial Illinois theft statute was titled larceny. This early Illinois larceny statute provided as follows:

Larceny is the *felonious stealing, taking* and carrying, or leading, riding, or driving away the personal goods of another. Larceny shall embrace every theft which deprives another of his money, or other personal property, or those means or muniments, by which the right and title to property, real or

as a "felonious and violent taking of . . . goods . . . from the person of another, by force or intimidation."³¹ The word "felonious" represented the intent to steal or deprive and was commonly used in early theft and robbery statutes.³² Thus, theft and robbery shared the same specific "felonious" intent.

Early Illinois cases also shared the prevalent common law view that robbery was an aggravated form of theft, and that both offenses shared an element of specific intent.³³ In the 1893 Illinois Supreme Court case *Burke v. People*,³⁴ two defendants appealed a robbery conviction after they forcefully took a billfold from a saloon-keeper and sped off in their horse-drawn buggy.³⁵ The defendants argued that their robbery conviction should be overturned because the indictment under which they were charged, failed to describe the value of the money in the saloon-keeper's pocketbook.³⁶ The defendants argument was based on a requirement which mandated a description of the value of the property value description stolen property in the lesser included offense of theft.³⁷

The Illinois Supreme Court ruled that the property value description requirement was only for the purpose of determining the

personal, may be ascertained. Private stealing from the person of another, and from a house in the day time, shall be deemed larceny: Larceny may be also committed by *feloniously taking* and carrying away any bond, bill, note, receipt, or any instrument of writing of value to the owner. Every person convicted of larceny, shall be fined in a sum not less than half the value of the thing stolen, shall be whipped not more than one hundred lashes, and imprisoned for a term not exceeding two years.

R.L. 1827, p. 134, § 62 (current version at 720 ILCS 5/16-1 (1993)) (emphasis added).

31. The original Illinois robbery statute stated as follows:

Robbery is the *felonious and violent taking* of money, goods or other valuable thing, from the person of another, by force or intimidation. Every person guilty of robbery, shall be fined in a sum not exceeding one thousand dollars, publicly whipped, not less than fifty, nor more than one hundred lashes, on his bare back, and imprisoned, for a term not exceeding three years.

R.L. 1827, p. 134, § 61 (current version at 720 ILCS 5/18-1 (1993)) (emphasis added).

32. See *People v. Ware*, 23 Ill. 2d 59, 61, 177 N.E.2d 362, 364 (Ill. 1961) (stating that the term "felonious" was synonymous with intent to steal or intent to deprive).

33. See *People v. Campbell*, 234 Ill. 391, 392, 84 N.E. 1035, 1036 (Ill. 1908) (classifying robbery and theft according to force used); *Steward v. People*, 224 Ill. 434, 443, 79 N.E. 636, 639 (Ill. 1906) (defining robbery as taking by force); *Hall v. People*, 171 Ill. 540, 542, 49 N.E. 495, 496 (Ill. 1898) (deeming the only difference between theft and robbery to be force or threat of force); *Burke v. People*, 148 Ill. 70, 72, 35 N.E. 376, 377 (Ill. 1893) (ruling that theft and robbery are distinguished by the degree of force or coercion used in robbery).

34. *Burke*, 148 Ill. at 70, 35 N.E.2d at 376.

35. *Id.*

36. *Id.* at 72, 35 N.E. at 377.

37. *Id.*

degree of theft, grand or petit.³⁸ The court held that a charge alleging robbery also alleged the lesser crime of theft and all its elements.³⁹ The court explained that robbery and theft were distinguished only by the force or coercion present in robbery.⁴⁰ Thus, the specific intent to steal or deprive existed in both theft and robbery.⁴¹

In another pre-1900 case, *Hall v. People*,⁴² the Illinois Supreme Court followed the *Burke* reasoning in concluding that theft and robbery differed only by the presence of force or coercion.⁴³ The *Hall* defendant argued that his lower court robbery conviction was erroneous because his victim was intoxicated and unaware of the defendant's pick-pocketing activity.⁴⁴ The defendant asserted that the victim's intoxicated state coupled with the secretive taking obviated the need for force or intimidation.⁴⁵ Thus, the defendant contended that his conviction for the forceful crime of robbery was unwarranted.⁴⁶

The Illinois Supreme Court agreed and held that a charge of theft, and not robbery, was warranted when an object was unknowingly taken.⁴⁷ The *Hall* court ruled that the defendant's possession of a stolen billfold supported the finding of felonious intent required for either theft or robbery.⁴⁸ However, the court also held that the absence of fear or coercion warranted a charge of the lesser included offense of theft in *Hall's* case.⁴⁹ The court reasoned that the presence of force or intimidation was the sole factor distinguishing

38. *Id.* at 70, 35 N.E. at 376. The *Burke* court held that the value of the property is immaterial to a charge of robbery. *Id.* at 72, 35 N.E. at 377. (Ill. 1893)

39. *Burke*, 148 Ill. at 72, 35 N.E. at 377.

40. *Id.* The *Burke* court ruled that the "gist of the offense" of robbery is the use of force or intimidation. *Id.*; see also *Steward v. People*, 224 Ill. 434, 443, 79 N.E. 636, 639 (Ill. 1906) (holding robbery, unlike theft, requires violence and intimidation which results in a fearful victim).

41. *Burke*, 148 Ill. at 72, 35 N.E. at 377. Also note that the theft statute in place at the time of the *Burke* decision required a "felonious . . . taking," see R.S. 1874, p. 348, div. 1, § 167 (current version at 720 ILCS 5/16-1 (1993)), and that the robbery statute included an identical "felonious taking." R.S. 1874, p. 390, div. 1, § 246 (current version at 720 ILCS 5/18-1 (1993)).

42. 171 Ill. 540, 49 N.E. 495 (Ill. 1898).

43. *Id.* at 542, 49 N.E. at 496; see also *People v. Campbell*, 234 Ill. 391, 392, 84 N.E. 1035, 1036 (Ill. 1908) (ruling consistently with the *Burke* and *Hall* decisions by classifying robbery according to intimidation or fear); *Steward*, 224 Ill. at 443, 79 N.E. at 639 (quoting the holding and reasoning of *Burke* and *Hall*).

44. *Hall*, 171 Ill. at 540, 49 N.E. at 495.

45. *Id.* at 540-42, 49 N.E. at 495-96.

46. *Id.*

47. *Id.* at 542, 49 N.E. at 496. The court reasoned that no force was used to steal the drunken victim's wallet because the only physical activity by the defendant was the actual taking of the pocketbook. *Id.* Thus, the lack of force or violence precluded a robbery conviction. *Id.*

48. *Hall*, 171 Ill. at 540, 49 N.E. at 495.

49. *Id.*

robbery from theft.⁵⁰ Thus, the *Hall* court also concluded that robbery was a specific intent crime.⁵¹

The Illinois Supreme Court in *Burke* and *Hall*, as in other early Illinois decisions, properly differentiated theft from robbery by the use of force.⁵² These decisions correctly focused on the violence or intimidation used in robbery and absent in theft.⁵³ Although subsequent Illinois cases altered robbery's intent requirement, early Illinois Supreme Court decisions clearly held that theft and robbery shared the common element of specific intent.⁵⁴ Consequently, placing a specific intent provision in the current Illinois robbery statute would be consistent with early Illinois common law decisions.⁵⁵

B. Hildebrand's Unintentional Alteration of Robbery's Specific Intent Requirement

A later Illinois Supreme Court decision unintentionally altered the long-standing specific intent perception of robbery.⁵⁶ In the case of *People v. Hildebrand*,⁵⁷ four defendants claimed that they were wrongfully sentenced to a minimum term of ten years after they were convicted for robbing a bank at gunpoint.⁵⁸ The defendants based their claim on an earlier Illinois Supreme Court decision, *People v. McKevitt*,⁵⁹ which interpreted the sentencing provisions of the Illinois robbery statute of 1874.⁶⁰ That statute

50. *Id.*

51. See *Hall*, 171 Ill. at 540-42, 49 N.E. at 495-96.

52. See *supra* notes 33-51 and accompanying text for a discussion of how the Illinois Supreme Court differentiated theft from robbery according to the amount of force or intimidation used in the commission of the crime alleged.

53. See *People v. Campbell*, 234 Ill. 391, 392, 84 N.E. 1035, 1036 (Ill. 1908) (classifying robbery and theft according to force); *Steward v. People*, 224 Ill. 434, 443, 79 N.E. 636, 639 (Ill. 1906) (defining robbery as taking by force); *Hall v. People*, 171 Ill. 540, 542, 49 N.E. 495, 496 (Ill. 1908) (deeming the only difference between theft and robbery to be force or threat of force used); *Burke v. People*, 148 Ill. 70, 72, 35 N.E. 376, 377 (Ill. 1893) (ruling theft and robbery are distinguished by force or coercion used in robbery).

54. See *infra* notes 109-20 and accompanying text for a discussion of how later courts distinguished robbery and theft by specific and general intent.

55. See *supra* notes 33-53 and accompanying text for a discussion of Illinois cases that differentiate robbery and theft by the force used and not by the defendant's specific intent.

56. See *infra* notes 76-87 and accompanying text for a discussion of how the *Emerling* decision misinterpreted *Hildebrand*, and subsequently deleted the specific intent requirement from a robbery charge. See also *People v. Banks*, 75 Ill. 2d 383, 391, 388 N.E.2d 1244, 1248 (Ill. 1979) (claiming that the *Hildebrand* holding was erroneously extended beyond the limits envisioned by the *Hildebrand* court).

57. 307 Ill. 544, 139 N.E. 107 (Ill. 1923).

58. *Id.* at 547, 139 N.E. at 108.

59. 208 Ill. 460, 70 N.E. 693 (Ill. 1904).

60. *Hildebrand*, at 555, 139 N.E. at 111. The Illinois Criminal Code of 1874 stated:

imposed a prison term of three to fourteen years for ordinary robbery, but allowed a longer ten years-to-life prison term if a person was "armed with a dangerous weapon, *with intent, if resisted, to kill or maim.*"⁶¹

The *McKevitt* court held that a charge of armed robbery must contain specific allegations of an intent to kill or maim in addition to a threshold intent to steal.⁶² The court also ruled that omission of express language alleging an intent to kill or maim prevented the imposition of the longer ten years-to-life prison term.⁶³ The *Hildebrand* defendants, like the defendants in *McKevitt*, asserted that the indictment charging them with robbery failed to charge an intent to kill or maim.⁶⁴ Thus, the *Hildebrand* defendants claimed that they were guilty of only ordinary robbery and deserved a shorter sentence.⁶⁵

Unfortunately for these defendants, however, the robbery statute of 1874 was amended four years prior to their convictions.⁶⁶ The new robbery statute,⁶⁷ contained in the Laws of 1919, removed any reference to the secondary intent to kill or maim.⁶⁸ The new

Robbery is the felonious and violent taking of money, goods or other valuable thing, from the person of another by force or intimidation. Every person guilty of robbery shall be imprisoned in the penitentiary not less than one year nor more than fourteen years; or if he is armed with a dangerous weapon, with *intent, if resisted, to kill, or maim* such person, or being so armed, he wounds or strikes him, or if he has any confederate present so armed, to aid or abet him, he may be imprisoned for any term of years or for life.

R.S. 1874, p. 398, div. 1, § 246 (current version at 720 ILCS 5/18-1 (1993)) (emphasis added).

61. R.S. 1874, p. 390, div. 1, § 246 (current version at 720 ILCS 5/18-1 (1993)) (emphasis added).

62. *McKevitt*, 208 Ill. at 471, 70 N.E. at 697.

63. *Id.* The *McKevitt* court stated that language alleging that the defendant was "animated" while armed with a pistol would be sufficient to support an armed and dangerous robbery conviction. *Id.* In *McKevitt*, the indictment was void of any language alleging similar conduct. *Id.* Thus, the court held that the defendant did not have the intent to kill or maim. *Id.* The court never focused on the threshold intent to steal. *Id.*

64. *People v. Hildebrand*, 307 Ill. 544, 555, 139 N.E. 107, 111 (Ill. 1923).

65. *Id.*

66. *Id.*

67. The Illinois Criminal Code of 1919 defined robbery as follows:

Robbery is the *felonious and violent taking* of money, goods or other valuable thing, from the person of another by force or intimidation. Every person guilty of robbery shall be imprisoned in the penitentiary not less than three years nor more than twenty years; or if he is armed with a dangerous weapon, or being so armed, he wounds or strikes him, or if he has any confederate present so armed, to aid or abet him, he shall be imprisoned for any term of years not less than ten years or for life.

Laws 1919, p. 246, § 431 (current version at 720 ILCS 5/18-1 (Smith-Hurd 1993)) (emphasis added). Note that the felonious intent language was retained in the 1919 robbery statute. *Id.* However, the prior statute's language requiring an intent to kill or maim is absent from the 1919 robbery statute. *Id.*

68. *Hildebrand*, 307 Ill. at 555, 139 N.E. at 111.

robbery statute required the imposition of a ten years-to-life prison term in instances where a defendant was armed with a dangerous weapon, regardless of intent.⁶⁹ Thus, the *Hildebrand* court ruled that no question of intent existed and that the mere act of committing an armed robbery warranted a longer prison term.⁷⁰ Therefore, the court affirmed the defendants' convictions and sentences.⁷¹

Although the *Hildebrand* court addressed the intent to kill or maim, subsequent Illinois Supreme Court decisions have mistakenly applied the limited *Hildebrand* holding to robbery's threshold intent to steal.⁷² The *Hildebrand* court never attempted to modify or strike the specific intent requirement present in the Laws of 1919.⁷³ The "felonious . . . taking" language present in the Laws of 1919 also supported the contention that robbery was still a specific intent crime.⁷⁴ Thus, the *Hildebrand* court unintentionally altered robbery's threshold specific intent requirement by stating that "no question of intent [to kill or maim] is involved."⁷⁵

C. *Erroneous Application of Hildebrand*

In the later decision of *People v. Emerling*,⁷⁶ the Illinois Supreme Court incorrectly ruled that robbery was no longer a specific intent crime.⁷⁷ In *Emerling*, the defendant asserted that a prejudicial jury instruction resulted in his armed robbery conviction.⁷⁸ The defendant claimed that he was wrongly convicted of robbing a convenience store after the trial judge erroneously instructed the jury to infer an intent to steal from the facts of the alleged rob-

69. *Id.*

70. *Id.*

71. *Id.*

72. *See, e.g.*, *People v. Cassidy*, 394 Ill. 245, 245, 68 N.E.2d 302, 302 (Ill. 1946) (holding intent was not an element of robbery); *People v. Johnson*, 343 Ill. 273, 276, 175 N.E. 394, 395 (Ill. 1931) (holding intent was no longer an element of robbery charge, and thus a defendant's mental state was irrelevant); *People v. Bartz*, 342 Ill. 56, 66, 173 N.E. 779, 783 (Ill. 1930) (ruling that a defendant's drunken state did not affect his robbery conviction because the intoxication defense applied only to offenses requiring a finding of intent); *People v. Emerling*, 341 Ill. 424, 428, 173 N.E. 474, 476 (Ill. 1930) (relying on *Hildebrand* decision to conclude intent was not an element of robbery).

73. *Hildebrand*, 307 Ill. at 555, 139 N.E. at 111; *see also* *People v. Banks*, 75 Ill. 2d 383, 391, 388 N.E.2d 1244, 1248 (Ill. 1979) (stating that later Illinois Supreme Court decisions misapplied the holding and reasoning contained in the *Hildebrand* decision).

74. Laws 1919, p. 431, § 246 (current version at 720 ILCS 5/18-1 (1993)).

75. *Hildebrand*, 307 Ill. at 555, 139 N.E. at 111. *See infra* notes 76-84 and accompanying text for a discussion of how the *Hildebrand* holding modified the intent element associated with robbery.

76. 341 Ill. 424, 173 N.E. 474 (Ill. 1930).

77. *Id.* at 428, 173 N.E. at 476.

78. *Id.*

bery.⁷⁹ The *Emerling* court incorrectly relied on the *Hildebrand* decision in ruling that the trial court instruction on intent was irrelevant because intent did not have to be "charged or prove[n]."⁸⁰ Thus, the court affirmed Emerling's robbery conviction.⁸¹

The *Emerling* decision contradicted, or purposefully ignored, a substantial number of prior Illinois decisions that required theft's specific intent in robbery convictions.⁸² Additionally, the *Emerling* court failed to recognize that the *Hildebrand* decision applied only to the secondary intent, to kill or maim, and not to the threshold intent to steal.⁸³ Remarkably, the Illinois Supreme Court undertook such a complete departure from established Illinois law in two sentences, without any further discussion.⁸⁴ Although unprecedented and contrary to prior Illinois case law, lower Illinois courts faithfully followed the *Emerling* decision.⁸⁵ In this manner the faulty *Emerling* decision substantially altered Illinois' robbery statute.⁸⁶

D. Questionable Legislative and Judicial Reliance on Emerling

The *Emerling* decision caused further repercussions when the Illinois legislature enacted the Criminal Code of 1961.⁸⁷ In an attempt to consolidate the mental states associated with criminal offenses, the Illinois legislature removed many terms of intent from the statutory definitions of particular offenses.⁸⁸ After consolidat-

79. *Id.*

80. *Id.* The *Emerling* court stated that an instruction to infer intent is not appropriate when a defendant is charged with a specific intent offense. *Id.* Thus, an accurate reading of *Hildebrand* would have prevented the prejudicial instruction Emerling's case. See *People v. McLaughlin*, 337 Ill. 259, 264-66, 169 N.E. 206, 209-10 (Ill. 1929) (requiring direct evidence of a defendant's intent).

81. *People v. Emerling*, 341 Ill. 424, 428, 173 N.E. 474, 476 (Ill. 1930).

82. See *supra* note 33 and accompanying text for a discussion of early Illinois court rulings that required an intent to steal.

83. See *infra* notes 93-108 and accompanying text for a discussion of *People v. White*, 67 Ill. 2d 107, 365 N.E.2d 337 (Ill. 1977), and for an in depth look at the confusion surrounding the *Emerling* decision. See also *People v. Banks*, 75 Ill. 2d 383, 391, 388 N.E.2d 1244, 1248 (Ill. 1979) (stating that *Emerling* decision and other Illinois Supreme Court decisions misapplied the holding and reasoning contained in *Hildebrand*).

84. *Emerling*, 341 Ill. at 428, 173 N.E. at 476. The *Emerling* court stated that "[i]n the present case no question of intent is involved . . . [i]t was not required to be charged or proved." *Id.*

85. See, e.g., *People v. Cassidy*, 394 Ill. 245, 245, 68 N.E.2d 302, 302 (Ill. 1946) (following *Emerling* holding); *People v. Johnson*, 343 Ill. 273, 276, 175 N.E. 394, 395 (Ill. 1931) (declaring, like *Emerling*, that intent does not have to be proven).

86. See *supra* notes 76-84 and accompanying text for a discussion on how the *Emerling* decision altered the element of intent in the 1961 Illinois robbery statute.

87. 720 ILCS 5/4-3 (1993) (Committee comments at 213) (citing *Emerling* and stating that robbery does not require a specific intent).

88. Section 5/4-3 of the Illinois Criminal Code, 720 ILCS 5/4-3 (1993), defines mental states. The Committee comments associated with section 5/4-3

ing mental states, the code defined robbery as "tak[ing] property from the person or presence of another by the use of force or by threatening the imminent use of force."⁸⁹ The language requiring a "felonious intent" was noticeably absent from the new robbery definition.⁹⁰ The Committee comments to the robbery statute cited the *Emerling* decision and stated that no intent was required for a robbery conviction.⁹¹ Apparently, the Illinois legislature concluded that the term "felonious" was unnecessary after the *Emerling* decision. Thus, theft could not be a lesser included offense of robbery because the theft statute,⁹² unlike the robbery statute, still mandated the presence of an intent to deprive a person of property.

However, in *People v. White*,⁹³ the Illinois Supreme Court recognized the faulty reasoning employed in *Emerling* and attempted to re-establish the relationship between theft and robbery.⁹⁴ *White* claimed that his drunken state prevented him from formulating the intent to steal necessary for a robbery conviction.⁹⁵ The court agreed and held that the *Emerling* decision resulted from a misinterpretation of *Hildebrand*.⁹⁶ The *White* court also held that *Hildebrand* applied only to the intent to kill or maim present in the 1874

discuss the arduous process and the difficulty encountered in attempting to consolidate the mental states of various offenses. 720 ILCS 5/4-3 (1993) (Committee comments at 144-53). Interestingly, the Illinois legislature relied on the Model Penal Code in defining general mental states, but ignored the Code's inclusion of an element of intent in the model robbery statute. *Id.*

89. ILL. REV. STAT. ch. 38, para. 501 (1961) (current version at 720 ILCS 5/18-1 (1993)).

90. *Id.* The current Illinois robbery statute provides as follows: "A person commits robbery when he takes property from the person or presence of another by the use of force or by threatening the imminent use of force." 720 ILCS 5/18-1 (1993).

91. 720 ILCS 5/4-3 (1993) (Committee comments at 213).

92. The 1961 Illinois larceny statute provides, in part, as follows: "Larceny is the *felonious stealing, taking* and carrying, leading, riding, or driving away the personal goods of another. Larceny shall embrace every theft which deprives another of his money or other personal property . . ." ILL. REV. STAT. ch. 38, para. 167 (1961) (current version at 720 ILCS 5/16-1 (1993)) (emphasis added).

93. 67 Ill. 2d 107, 365 N.E.2d 337 (Ill. 1977), *overruled by* *People v. Banks*, 75 Ill. 2d 383, 388 N.E.2d 1244 (Ill. 1979).

94. *Id.* at 112-16, 365 N.E.2d at 340-42. The *White* court reinstated the common law view that the specific intent necessary for theft also exists in the offense of robbery. *Id.*; see generally Edward J. Murphy, *Illinois Robbery Statute Construed: The Introduction Of A Specific Intent Element - People v. White*, 27 DEPAUL L. REV. 837 (1978) (discussing *White* and analyzing the impact of incorporating a specific intent element into the offense of robbery).

95. *White*, 67 Ill. 2d at 108-09, 365 N.E.2d at 338.

96. *Id.* at 114, 365 N.E. 2d at 341; see *People v. Banks*, 75 Ill. 2d 383, 390-92, 388 N.E.2d 1244, 1248 (Ill. 1979) (stating that the *Emerling* decision and other Illinois Supreme Court decisions misapplied the holding and reasoning contained in *Hildebrand*). See also *supra* notes 75-85 and accompanying text for a more complete discussion of the *Emerling* decision and its misreading of *Hildebrand*.

robbery statute.⁹⁷ The *White* court reasoned that *Emerling* had misapplied and mistakenly extended the ruling of *Hildebrand* to the threshold intent to steal.⁹⁸ Consequently, the *White* court overruled *Emerling*.⁹⁹

Additionally, the *White* court explored the legislative purpose in enacting the 1961 robbery statute.¹⁰⁰ The court concluded that changes to the 1961 criminal code were for purposes of consolidation and simplicity, not for the purpose of modifying long established substantive law.¹⁰¹ The court relied on a series of cases that distinguished robbery and theft solely by the presence of force and on language in the robbery statute's Committee comments that stated that "[t]his section codifies the law in Illinois on robbery No change is intended."¹⁰² The court contended that the legislature intended the "no change" language to refer to the common law specific intent definition of robbery.¹⁰³ Thus, the *White* court overruled *Emerling* and reinstated the robbery element of specific intent.¹⁰⁴

Although persuasive, the reasoning and holding of the *White* decision were short-lived. Within two years, in *People v. Banks*,¹⁰⁵ the Illinois Supreme Court again redefined the intent required for a robbery conviction.¹⁰⁶ In *Banks*, the defendant eluded a robbery conviction because the indictment charging robbery failed to allege a specific intent to deprive the victim.¹⁰⁷ On appeal, the state argued that the imposition of a specific intent requirement was contrary to the more lenient general intent requirements imposed by the legislature in sections 4-4 through 4-6¹⁰⁸ of the Illinois Crimi-

97. *White*, 67 Ill. 2d at 112-14, 365 N.E.2d at 340-41.

98. *Id.* at 114, 365 N.E.2d at 341; see also Murphy, *supra* note 94, at 838-41 (analyzing the reasoning and holding of the *White* court).

99. *White*, 67 Ill. 2d at 116, 365 N.E.2d at 342.

100. *Id.* at 112-16, 365 N.E.2d at 340-42.

101. *Id.* at 114-16, 365 N.E.2d at 341-42; see also 720 ILCS 5/4-3 (1993) (Committee comments at 145) (explaining that consolidation of mental states was for the purpose of simplifying descriptions of Illinois offenses, and was consistent with the Model Penal Code and trends in other jurisdictions).

102. *White*, 67 Ill. 2d at 117, 365 N.E.2d at 342; see also 720 ILCS 5/18-1 (1993) (Committee comments at 407) (declaring that the robbery statute codifies previous Illinois robbery law).

103. *White*, 67 Ill. 2d at 117, 365 N.E.2d at 342.

104. *Id.*; see also Murphy, *supra* note 94, at 844-50 (discussing the impact of the *White* holding on the mental states associated with theft and robbery).

105. 75 Ill. 2d 383, 388 N.E.2d 1244 (Ill. 1979).

106. *Id.* at 391-92, 388 N.E.2d at 1248.

107. *Id.* at 386, 388 N.E.2d at 1245.

108. The Illinois legislature declared that a person is not guilty of an offense unless that person possesses one of the mental states described in sections 4-4 through 4-7 of the Illinois Criminal Code. 720 ILCS 5/4-3 (1993). The descriptions of Illinois general mental states provide as follows: "Intent. A person intends, or acts intentionally or with intent, to accomplish a result or engage in conduct described by the statute defining the offense, when his conscious objective or purpose is to accomplish that result or engage in that conduct." 720

nal Code.¹⁰⁹ The state contended that the general intent provisions of the code applied to robbery, and therefore, supported the defendant's conviction.¹¹⁰

Although conceding that the *Hildebrand* decision had been misread by the *Emerling* court, the *Banks* court agreed with the state's contention that robbery is a general intent crime.¹¹¹ Unbelievably, the *Banks* court reasoned that, even if the *Emerling* decision was erroneous, strict statutory construction and the language of the Committee comments stating that "no change is intended"

ILCS 5/4-4 (1993) (emphasis added). Generally, robbery is defined in terms of an intentional taking similar to the language quoted above. See PERKINS & BOYCE, *supra* note 2, at 343 (defining the mental state associated with robbery as an intent to steal or a felonious intent).

Illinois defines knowledge as follows:

A person knows, or acts knowingly or with knowledge if: (a) The nature or attendant circumstances of his conduct, described by the statute defining the offense, when he is consciously aware that his conduct is of such nature or that such circumstances exist. Knowledge of a material fact includes awareness of the substantial probability that such fact exists. (b) The result of his conduct, described by the statute defining the offense, when he is consciously aware that such result is practically certain to be caused by his conduct. Conduct performed knowingly or with knowledge is performed willfully, within the meaning of a statute using the latter term, unless the statute clearly requires another meaning.

720 ILCS 5/4-5 (1993). Illinois courts currently allow robbery convictions when a defendant knowingly takes property. *People v. Jones*, 149 Ill. 2d 288, 296-98, 595 N.E.2d 1071, 1076 (Ill. 1992). This taking does not have to be with a specific intent to steal. *Id.*

Illinois defines recklessness as follows:

A person is reckless or acts recklessly, when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, described by the statute defining the offense; and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation. An act performed recklessly is performed wantonly, within the meaning of a statute using the latter term, unless the statute clearly requires another meaning.

720 ILCS 5/4-6 (1993). Illinois courts also allow robbery convictions in instances where a defendant recklessly takes property from another. *Jones*, 149 Ill. 2d at 298, 595 N.E.2d at 1076.

109. *People v. Banks*, 75 Ill. 2d 383, 387, 388 N.E.2d 1244, 1245-46 (Ill. 1979).

110. *Id.*

111. *Id.* at 391-92, 388 N.E.2d at 1248; *see also* *People v. Whelan*, 132 Ill. App. 2d 2, 267 N.E.2d 364 (2d Dist. 1971) (interpreting robbery as a general intent crime); *People v. Marshall*, 96 Ill. App. 2d 124, 238 N.E.2d 182 (1st Dist. 1968) (concluding that robbery is a general intent offense). *But see* *People v. Campbell*, 234 Ill. 391, 393, 84 N.E. 1035, 1036 (Ill. 1908) (holding that robbery and theft share a common specific intent); *Steward v. People*, 224 Ill. 434, 443, 79 N.E. 636, 639 (Ill. 1906) (deciding that force is the only element that differentiates robbery from theft); *Hall v. People*, 171 Ill. 540, 542-43, 49 N.E. 495, 496 (Ill. 1898) (deeming only difference between theft and robbery to be force or threat of force used); *Burke v. People*, 148 Ill. 70, 74, 35 N.E. 376, 377 (Ill. 1893) (ruling that theft and robbery are distinguished by force or coercion used in robbery, not by a specific mental state).

required a general intent interpretation of the robbery statute.¹¹² The *Banks* court ignored the decisions prior to the *Emerling* case and focused solely on Illinois court rulings handed down within the time span between *Emerling* and the enactment of the Criminal Code of 1961.¹¹³ Thus, the *Banks* court came to the questionable conclusion that the Illinois legislature had ignored a long series of common law cases requiring intent and had based the Illinois robbery statute on decisions which were patterned after *Emerling's* faulty reasoning.¹¹⁴

The *Banks* court also relied on another portion of the robbery statute's Committee comments to conclude robbery was a general intent crime.¹¹⁵ The Committee comments cited by the court state that "the taking by force or threat of force is the gist of the offense and no intent need be charged."¹¹⁶ The *Banks* court asserted that this language "unquestionably" demonstrates that a specific intent is not required for robbery.¹¹⁷ The first portion of language that, "the taking by force or threat of force is the gist of the offense," originated from the 1893 Illinois Supreme Court case of *Burke v. People*.¹¹⁸

However, the *Burke* court, unlike the *Banks* court, ruled that theft and robbery were distinguished solely by the use of force or intimidation.¹¹⁹ Thus, the *Banks* court relied on questionable language derived from a case holding robbery to be a specific intent crime in order to prove that merely general intent is required for a robbery conviction.¹²⁰ Consequently, the *Banks* holding is founded

112. *Banks*, 75 Ill. 2d at 386-87, 388 N.E.2d at 1246. *But see* *People v. Nunn*, 77 Ill. 2d 243, 248-49, 396 N.E.2d 27, 29 (Ill. 1979) (holding that modification of a statute does not necessarily demonstrate a legislative desire to alter common law principles or the meaning of earlier statutes); *O'Donnell v. People*, 224 Ill. 218, 224-26, 79 N.E. 639, 641-42 (Ill. 1906) (ruling that statutes will be construed in accordance with their common law meanings and definitions); *Proud v. W.S. Bills & Sons, Inc.*, 119 Ill. App. 2d 33, 42-43, 255 N.E.2d 64, 68 (3d Dist. 1970) (ruling that a statute will be interpreted in light of common law precedents absent statutory language that clearly and conclusively shows an intention to modify common law principles).

113. *Banks*, 75 Ill. 2d at 386-89, 388 N.E.2d at 1246-47. See *supra* notes 33-55 and accompanying text for a discussion of cases prior to the *Emerling* decision and for an analysis of cases that define robbery in accordance with the common law principle that robbery is a specific intent crime.

114. *People v. Banks*, 75 Ill. 2d 383, 387, 388 N.E.2d 1244, 1246 (Ill. 1979).

115. *Id.*

116. *Id.* at 392, 388 N.E.2d at 1248; see also 720 ILCS 5/18-1 (1993) (Committee comments at 407) (containing language that no intent need be charged).

117. *Banks*, 75 Ill. 2d at 392, 388 N.E.2d at 1248.

118. *Burke v. People*, 148 Ill. 70, 74, 35 N.E. 376, 377 (Ill. 1893). See *supra* notes 33-55 and accompanying text for a discussion of the *Burke* case and other related decisions.

119. *Burke*, 148 Ill. 74, 35 N.E. at 377.

120. *Banks*, 75 Ill. 2d at 386-87, 388 N.E.2d at 1246 (using language of the *Burke* court to focus solely on violence in order to support its conclusion that robbery is a general intent crime).

solely on the questionable reasoning of *Emerling* and the curious application of the *Burke* case.¹²¹ Unfortunately, *Banks* and the previous decisions that defined robbery as a general intent crime created a confusing distinction between theft and robbery.¹²²

II. THE LESSER INCLUDED OFFENSE PROBLEM

The *Banks* classification of robbery as a general intent crime created a lesser included offense problem in Illinois courts. The problem results when the state charges a defendant with the offense of robbery after property is forcibly stolen. Subsequently, when lower courts conclude that the state's proof of force fails to sustain a robbery conviction, the lower court must choose between two unsatisfying alternatives. A lower court's first alternative is to adhere to the *Banks* reasoning and allow a defendant charged with robbery to escape a lesser included and deserving theft conviction. This section explores how a defendant may circumvent a proper theft conviction by arguing that the offense of theft is not properly charged in the robbery indictment.

A trial court's second alternative is to ignore the absence of express specific intent language in a robbery charge and to deduce the element of intent requisite for a theft conviction from language in the charging instrument. This section analyzes how trial courts broadly construe the charging instrument to implicitly find a shred of intent. Finally, this section analyzes the most recent Illinois Supreme Court decision which unsuccessfully tried to reconcile the division among lower appellate courts by questionably expanding the definition of a lesser included offense.

A. The Strict Interpretation

The strict interpretation of the robbery statute by some Illinois courts allows some robbery defendants to escape a lesser included and deserving theft conviction.¹²³ *People v. Kimble*¹²⁴ is representative of many decisions that have chosen to conform to the strict statutory interpretation outlined in *Banks*.¹²⁵ In *Kimble*, the de-

121. *Id.* See *supra* notes 76-86 and accompanying text for a discussion of the *Emerling* court's faulty logic and misinterpretation of previous Illinois Supreme Court cases.

122. See *infra* notes 123-57 and accompanying text for a discussion of how Illinois appellate courts have ruled inconsistently on whether theft is a lesser included offense of robbery.

123. *People v. Kimble*, 90 Ill. App. 3d 999, 414 N.E.2d 135 (1st Dist. 1980).

124. *Id.*

125. See, e.g., *People v. Thomas*, 119 Ill. App. 3d 464, 466-67, 456 N.E.2d 684, 685 (2d Dist. 1983) (ruling theft is not a lesser included offense of robbery); *People v. Baker*, 72 Ill. App. 3d 682, 687-88, 391 N.E.2d 91, 94 (1st Dist. 1979) (robbery charge does not allow lesser included offense conviction for theft); *People v. Yanders*, 32 Ill. App. 3d 601, 602, 335 N.E.2d 801, 804 (4th Dist. 1975)

defendant was charged with robbery but was convicted only of the lesser included offense of theft.¹²⁶ The defendant claimed that the indictment which charged him with robbery could not be used to convict him of theft.¹²⁷ The defendant argued that since theft required a mental state not present in robbery, theft was not a lesser included offense of robbery.¹²⁸ Thus, the defendant asserted that his theft conviction should be overturned.¹²⁹

On appeal, the appellate court of the First District agreed with the defendant and ruled that theft is not a lesser included offense of robbery.¹³⁰ The court reasoned that the language of Illinois' robbery statute, unlike the language of Illinois' theft statute, does not contain a provision for a specific mental state.¹³¹ Since the Illinois theft statute requires a specific intent to deprive, theft contains an element not present in the robbery statute.¹³² Thus, the *Kimble* court claimed that strict statutory construction prevents a lesser included offense conviction.¹³³ Consequently, the court reversed *Kimble's* conviction.¹³⁴

The *Kimble* decision is one of many cases where a defendant circumvented a deserving theft conviction.¹³⁵ Prosecutors unsuccessfully attempted to prevent dismissals and reversals by including language in the robbery indictment that charged an intent to deprive.¹³⁶ However, courts treated this language as "surplusage"

(holding that mental state of theft is not presumed in robbery charge). See *infra* notes 138-54 and accompanying text for a discussion of cases that declined to follow the reasoning of the *Kimble* court.

126. *Kimble*, 90 Ill. App. 3d at 999-1000, 414 N.E.2d at 135.

127. *Id.*; see also 720 ILCS 5/16-1 (1993) (requiring specific intent to deprive the owner of property).

128. *People v. Kimble*, 90 Ill. App. 3d 999, 999-1000, 414 N.E.2d 135, 135 (1st Dist. 1980); see also 720 ILCS 5/2-9 (1993) (defining an included offense as an offense which has all the elements of a greater offense yet has no elements which are not contained in the greater offense).

129. *Kimble*, 90 Ill. App. 3d at 999-1000, 414 N.E.2d at 135.

130. *Id.* at 1000-01, 414 N.E.2d at 136.

131. *Id.*; see also 720 ILCS 5/18-1 (1993) (failing to include the language of a felonious intent or an intent to deprive). See *supra* notes 76-92 and accompanying text for a discussion of how case law misinterpretation resulted in the omission of specific intent language in Illinois' robbery statute.

132. *Kimble*, 90 Ill. App. 3d at 1000-01, 414 N.E.2d at 136.

133. *Id.*

134. *Id.* The *Kimble* court also held that if a defendant was convicted of a crime he was not charged with, the defendant's due process rights of adequate notice would be violated. *Id.* Thus, the court ruled that a person cannot be convicted of a crime with which he is not charged. *Id.*; see also *People v. Lewis*, 83 Ill. 2d 296, 300, 415 N.E.2d 319, 320 (Ill. 1980) (holding that a defendant cannot be convicted of an offense that he has not been charged with).

135. See *supra* note 125 and accompanying text for a list of Illinois appellate courts that allow defendants to escape deserving theft convictions by adhering to the strict wording of the statutory definitions of theft and robbery.

136. *Kimble*, 90 Ill. App. 3d at 1000-01, 414 N.E.2d at 136 (declaring that specific intent language in a robbery indictment is extraneous and irrelevant

and refused to allow concurrent robbery and theft charges.¹³⁷ Although some Illinois courts view the absence of specific intent in the robbery statute as a conclusive distinction between the offenses of theft and robbery, other courts hold that a robbery charge can sustain a lesser included theft conviction.¹³⁸ Consequently, the absence of a specific intent provision in the Illinois robbery statute creates situations where defendants escape deserving convictions and results in unacceptable and inconsistent rulings.¹³⁹

B. The Broad Interpretation

Some Illinois courts use wide discretion and questionably construct a theft charge from the language of a robbery indictment.¹⁴⁰ This questionable construction results in convicting of defendants for crimes with which they were not actually charged. *People v. Rivers*¹⁴¹ is representative of those courts which have chosen to allow theft convictions based solely on an indictment charging robbery.¹⁴² In *Rivers*, the defendant was charged with robbery after he struggled with a victim to obtain a wallet containing eight dollars.¹⁴³ The trial court found the defendant guilty of theft, but not guilty of the more violent crime of robbery.¹⁴⁴

On appeal, the defendant argued that his conviction for theft, based on a robbery indictment, required a reversal.¹⁴⁵ The defendant asserted that theft required a different mental state than rob-

where a prosecutor attempts to charge both the offense of theft and the crime of robbery).

137. *Id.*

138. *People v. Rivers*, 194 Ill. App. 3d 193, 194-99, 550 N.E.2d 1179, 1180-83 (1st Dist. 1990) (upholding a theft conviction on a robbery charge because a robbery indictment implicitly charges the intent required for theft). See also *infra* note 142 and accompanying text for a list of other Illinois appellate courts that have convicted defendants for theft on indictments that charged only robbery.

139. *People v. Kimble*, 90 Ill. App. 3d 999, 1000-01, 414 N.E.2d 135, 136 (1st Dist. 1980) (reversing theft conviction on robbery charge); *cf. Rivers*, 194 Ill. App. 3d at 199, 550 N.E.2d at 1183 (affirming a theft conviction on robbery charge).

140. *Rivers*, 194 Ill. App. 3d at 199, 550 N.E.2d at 1183.

141. 194 Ill. App. 3d 193, 550 N.E.2d 1179 (1st Dist. 1990).

142. See, e.g., *People v. Romo*, 85 Ill. App. 3d 886, 892, 407 N.E.2d 661, 666 (1st Dist. 1980) (allowing reduction of a robbery conviction to theft under lesser included offense reasoning); *People v. King*, 67 Ill. App. 3d 754, 758, 384 N.E.2d 1013, 1016 (4th Dist. 1979) (holding exceptions exist to allow a theft conviction on a robbery charge); *People v. Williams*, 42 Ill. App. 3d 134, 138, 355 N.E.2d 597, 600-01 (1st Dist. 1976) (ruling that a robbery charge can lead to a theft conviction); *People v. Tolentino*, 68 Ill. App. 2d 480, 484-85, 216 N.E.2d 191, 194 (1st Dist. 1966) (declaring that the absence of specific intent language in a robbery charge does not negate a subsequent theft conviction).

143. *People v. Rivers*, 194 Ill. App. 3d 193, 194, 550 N.E.2d 1179, 1180 (1st Dist. 1990).

144. *Id.*

145. *Id.*

bery, and thus, theft was not a lesser included offense of robbery.¹⁴⁶ The First District appellate court dismissed the defendant's contentions and held that the robbery indictment "outlined" the intent element of theft.¹⁴⁷ The court further held that failure to expressly charge theft's intent element does not bar a conviction for theft.¹⁴⁸ The court reasoned that a defendant's right of notice is not violated as long as the defendant can deduce possible offenses from the charging instrument.¹⁴⁹ Therefore, the court upheld the defendant's theft conviction.¹⁵⁰

The *Rivers* court, as well as other Illinois courts, implicitly link theft and robbery through the language of a robbery indictment.¹⁵¹ These courts have exercised their broad discretion and have used questionable logic to prevent defendants from escaping deserving theft convictions.¹⁵² Some courts criticize the logic employed in *Rivers* and claim that a defendant should not be convicted of a crime with which he is not charged.¹⁵³ Critics further argue that a defendant's due process right to adequate notice is violated.¹⁵⁴ The 1991 Illinois Supreme Court case of *People v. Jones*¹⁵⁵ attempted to resolve the inconsistency in lower court holdings, but instead high-

146. *Id.*; see also 720 ILCS 5/16-1 (1993) (requiring a specific intent to deprive the owner of property); cf. 720 ILCS 5/18-1 (1993) (failing to include language regarding a felonious intent or an intent to deprive).

147. *Rivers*, 194 Ill. App. 3d at 196-97, 550 N.E.2d at 1181-82; see also *People v. Bryant*, 113 Ill. 2d 497, 505-07, 499 N.E.2d 413, 417-18 (Ill. 1986) (ruling that a rational link between the language of the charge and another offense allows a lesser included offense conviction).

148. *Rivers*, 194 Ill. App. 3d at 196, 550 N.E.2d at 1181.

149. *Id.* The court noted the difficulty trial courts face in attempting to link two offenses that share common elements but are distinct due to a different mental state. *Id.* The court also stated that "[i]f the trial court [acts compassionately and] finds the defendant guilty of theft, on appeal defendant will argue there was no separate charge of theft, and thus he is not guilty of any crime." *Id.* at 197, 550 N.E.2d at 1182.

150. *Id.*

151. *Id.* at 196, 550 N.E.2d at 1181.

152. See, e.g., *People v. Romo*, 85 Ill. App. 3d 886, 894, 407 N.E.2d 661, 668 (1st Dist. 1990) (ruling that the intent element of theft is "logically presumed" in a robbery indictment); *People v. Williams*, 42 Ill. App. 3d 134, 138, 355 N.E.2d 597, 600-01 (1st Dist. 1976) (ruling that robbery and theft differ only by force, and thus, intent is implicitly included in robbery charge); *People v. Tolentino*, 68 Ill. App. 2d 480, 484-85, 216 N.E.2d 191, 194 (1st Dist. 1966) (allowing absence of indispensable element of specific intent in theft conviction on robbery charge).

153. See, e.g., *People v. Kimble*, 90 Ill. App. 3d 999, 1000-01, 414 N.E.2d 135, 136 (1st Dist. 1980) (ruling theft is not a lesser included offense of robbery, and thus, a defendant cannot be convicted of theft when robbery is charged); *People v. Yanders*, 32 Ill. App. 3d 599, 602, 335 N.E.2d 801, 804 (4th Dist. 1975) (arguing that lack of specific intent language in robbery charge precludes a theft conviction).

154. *Kimble*, 90 Ill. App. 3d at 1000-01, 414 N.E.2d at 136 (claiming that a theft conviction on a robbery charge would "contravene the constitution" of Illinois and would violate a defendant's due process rights).

155. 149 Ill.2d 288, 595 N.E.2d 1071 (Ill. 1992).

lighted the continuing difficulty Illinois courts face in attempting to ascertain the relationship between theft and a general intent robbery statute.¹⁵⁶

C. *The Most Recent Illinois Supreme Court Decision Deducing Theft's Specific Intent from a Robbery Indictment*

The latest Illinois Supreme Court decision, *People v. Jones*,¹⁵⁷ adopted the *Rivers* reasoning and allowed language in a robbery indictment to prove theft's intent to steal. In *Jones*, the defendant was charged with armed robbery after allegedly taking a purse and car at gunpoint.¹⁵⁸ The trial court held that insufficient evidence existed to prove the presence of a weapon or the threat of force.¹⁵⁹ Thus, *Jones* was convicted of theft and not armed robbery.¹⁶⁰

On appeal, *Jones*, like the defendants in *Kimble* and *Rivers*, argued that the indictment contained only an armed robbery charge and failed to expressly charge him of theft.¹⁶¹ *Jones* claimed that his guilty verdict should therefore be overturned.¹⁶² Although the

156. *Id.*; see also Thomas A. Long, *Criminal Law/Theft/Lesser Included Offenses*, 81 ILL. B.J. 108 (1993) (analyzing the *Jones* decision as well as other Illinois Supreme Court decisions, and concluding that the recent *Jones* court broadened the Illinois lesser included offense doctrine to link the offenses of theft and robbery); Tuite, *supra* note 25, at 5 (reviewing the *Jones* decision and declaring that lower courts can now broadly and questionably construe language in the charge and evidence presented at trial to link offenses like robbery with lesser included offenses like theft).

157. 149 Ill.2d 288, 296-98, 595 N.E.2d 1071, 1075-76 (Ill. 1992).

158. *Id.* at 290-91, 595 N.E.2d at 1072.

159. *Id.*

160. *Id.*

161. *Id.* See *supra* notes 123-54 and accompanying text for a discussion of the *Kimble* and *Rivers* decisions.

162. *Jones*, 149 Ill. 2d at 298, 595 N.E.2d at 1076. The *Jones* defendant relied on a previous Illinois Supreme Court case to argue that theft was not a lesser included offense of robbery. *Id.* The defendant's argument was based on the decision of *People v. McCarty*, 94 Ill. 2d 28, 445 N.E.2d 298 (Ill. 1983). *Id.* In *McCarty*, the prosecutor claimed that the defendant's recent robbery conviction could promote the defendant's previous misdemeanor theft conviction to a felony. *Id.* at 32, 445 N.E.2d at 300. The prosecutor relied on language in the Illinois theft statute that allowed any theft conviction to enhance a prior theft conviction to a felony. *Id.* at 32, 445 N.E.2d at 300-01. Although the court recognized that theft and robbery were related offenses, the court ruled that robbery was not a form of theft that could promote a previous misdemeanor theft conviction to a felony. *Id.* at 32-34, 445 N.E.2d at 301-02. The court reasoned that theft required an intent element not present in robbery. *Id.* at 32-33, 445 N.E.2d at 301. Thus, theft is not a lesser included offense of robbery, and robbery is not an aggravated form of theft. *Id.* Therefore, the court concluded that robbery was not an aggravated form of theft that could enhance the defendant's previous theft conviction to a felony. *Id.*

The *Jones* defendant attempted to use the previous *McCarty* ruling to support his argument that theft is not a lesser included offense of robbery. *Jones*, 149 Ill.2d at 300-01, 595 N.E.2d at 1077. The *Jones* court countered the defendant's argument by claiming that the *McCarty* ruling on the relationship between theft and robbery was "merely dicta." *Id.* The *Jones* court reasoned that the *McCarty* ruling applied only to theft's enhancement provision. *Id.* Appar-

Illinois Supreme Court conceded that the defendant had not been expressly charged with theft, the court upheld the defendant's conviction.¹⁶³ The Illinois Supreme Court adopted the *Rivers* line of reasoning and ruled that theft and the requisite mental state can be inferred from the language in an indictment charging robbery.¹⁶⁴ The court reasoned that "common sense" requires the presence of an intent to permanently deprive in virtually all instances of robbery.¹⁶⁵ Consequently, the court affirmed Jones' theft conviction.¹⁶⁶

At first glance, the *Jones* decision appears to address the confusion over the relationship between theft and robbery.¹⁶⁷ The *Jones* court resolved the appellate courts' split and held theft to be a lesser included offense of robbery.¹⁶⁸ The *Jones* court also demonstrated a desire to relink the offenses of theft and robbery by allowing a lower court to find a defendant guilty of theft when only robbery is charged.¹⁶⁹ However, the *Jones* court failed to definitively connect theft and robbery.¹⁷⁰ The *Jones* decision allows lower courts to use discretion in determining whether the language of a particular robbery charge can also sustain a theft conviction.¹⁷¹ Thus, a lower court can decline to follow the *Jones* reasoning by not finding language in the robbery charge that supports an element of

ently, the *Jones* court chose to ignore portions of the *McCarty* decision that held theft and robbery were currently unrelated offenses because of the separate mental states required for each crime. *Id.*; see *McCarty*, 94 Ill.2d at 32-33, 445 N.E.2d at 301 (ruling that since theft and robbery required proof of different mental states, theft was not a lesser included offense of robbery). Thus, the conviction of the *Jones* defendant was upheld. *Jones*, 149 Ill.2d at 300-01, 595 N.E.2d at 1077.

163. *Jones*, 149 Ill. 2d at 300-01, 595 N.E.2d at 1077.

164. *Id.* at 296-97, 595 N.E.2d at 1075; see also *People v. Rivers*, 194 Ill. App. 3d 193, 195-96, 550 N.E.2d 1179, 1181 (ruling that general outline of intent in robbery indictment was sufficient to sustain a theft conviction).

165. *Jones*, 149 Ill. 2d at 300-01, 595 N.E.2d at 1077.

166. *Id.*

167. *Id.* at 292-97, 595 N.E.2d at 1073-75. The *Jones* court discussed the split among Illinois appellate courts and sided with those courts allowing robbery convictions to sustain theft charges. *Id.*

168. *Id.*

169. *Id.* The Illinois Supreme Court concluded that "[c]ommon sense dictates that . . . permanent deprivation is intended" in most robberies. *Id.* at 298, 595 N.E.2d at 1076; see also *People v. Romo*, 85 Ill. App. 3d 886, 894, 407 N.E.2d 661, 668 (1st Dist. 1980) (ruling that theft's intent to deprive is logically presumed from a robbery charge); *People v. Beck*, 42 Ill. App. 3d 923, 924, 356 N.E.2d 848, 850 (holding that it is contrary to good sense and experience to conclude that a robbery indictment does not charge the offense of theft).

170. Long, *supra* note 156, at 109-10 (arguing that the *Jones* court could not connect theft and robbery under the lesser included offense doctrine because theft requires an element of specific intent which is absent in robbery).

171. *People v. Jones*, 149 Ill. 2d 288, 298, 595 N.E.2d 1071, 1076; see also *Tuite*, *supra* note 25, at 5 (stating that the *Jones* decision affords trial courts broad discretion in searching for lesser included offense charges).

specific intent.¹⁷² Consequently, the decision failed to conclusively end the inconsistent holdings that existed among appellate courts prior to the *Jones* ruling.¹⁷³

The *Jones* interpretation of a lesser included offense creates an additional problem.¹⁷⁴ The *Jones* court ruled that defendants must be prepared to defend against any offense expressly or implicitly set out in an indictment.¹⁷⁵ Thus, a defendant is forced to look beyond the express language of the indictment for any other possible crimes the state may seek to prove.¹⁷⁶ This begs the question of whether a defendant is adequately informed of all charges against him.

Additionally, the *Jones* court's lesser included offense definition is broader than Illinois' statutory definition.¹⁷⁷ The *Jones* definition allows a lesser included offense conviction when the lesser and greater crimes require different mental states.¹⁷⁸ The Illinois included offense statute does not.¹⁷⁹ The statutory definition does not allow a lesser included offense conviction if the lesser crime requires an element that the greater crime does not require.¹⁸⁰ Thus,

172. See *People v. Russell*, 234 Ill. App. 3d 684, 685-88, 600 N.E.2d 1202, 1203-05 (2d Dist. 1992) (declining to apply *Jones*' lesser included offense holding in an aggravated sexual criminal assault setting).

173. *Id.* at 685-88, 600 N.E.2d at 1203-05 (declining to extend *Jones* reasoning); cf. *People v. Brocksmith*, 237 Ill. App. 3d 818, 823-24, 604 N.E.2d 1059, 1063 (3d Dist. 1992) (applying *Jones*' reasoning, and concluding that a lower court may look outside the statutory wording of a lesser included offense to the charging instrument and trial evidence in instances where a theft charge is reduced to deceptive practices).

174. The *Jones* court held that a lesser included offense can be found through either the express language of the indictment or through wording that generally outlines an offense with a different mental state. *Id.* at 296-97, 595 N.E.2d at 1074-75. In *Jones*, the mental state of intent was inferred from an indictment charging the mental state of knowledge. *Id.* Thus, the *Jones* court expanded on the statutory lesser included offense definition. See also Long, *supra* note 156, at 109-10 (contending that *Jones* reasoning is faulty and impermissibly expands the Illinois statutory definition of an included offense); Tuite, *supra* note 25, at 5 (stating that the wording and language of the indictment coupled with any "implicit allegations" determine if a lesser included offense is charged); cf. 720 ILCS 5/2-9 (1993) (defining an included offense as a an offense that must have a less culpable mental state).

175. *People v. Jones*, 149 Ill. 2d 288, 296-98, 595 N.E.2d 1071, 1075-76 (Ill. 1992).

176. Long, *supra* note 156, at 109-10 (asserting that defendants must now comb through indictments looking for charges not expressly alleged); Tuite, *supra* note 25, at 5 (stating that defense counsel "will need to be on guard . . . for possible lesser included offenses" and declaring that defense counsel must also be aware that judges can sua sponte find a defendant guilty of a lesser included offense that was not formally charged in the indictment).

177. *Jones*, 149 Ill. 2d at 296-98, 595 N.E.2d at 1075-76; cf. 720 ILCS 5/2-9 (1993) (requiring that an included offense must have all the elements of the greater offense, and no additional elements).

178. *Jones*, 149 Ill. 2d at 298, 595 N.E.2d at 1076.

179. 720 ILCS 5/2-9 (1993).

180. *Id.*

in an attempt to link theft and robbery without modifying the express provisions of those statutes, the court modified the more encompassing Illinois lesser included offense statute.¹⁸¹

Instead of judicially modifying the Illinois lesser included offense definition, the *Jones* court should have merely read a specific intent element into the offense of robbery.¹⁸² The *Jones* court could have easily found support for such a measure by: (1) looking at early Illinois statutes and cases that define robbery as a specific intent crime;¹⁸³ (2) recognizing the faulty reasoning and holdings employed in the *Emerling* and *Banks* decision;¹⁸⁴ or (3) following earlier Illinois Supreme Court decisions that hold statutes should be interpreted in light of their common law origins.¹⁸⁵ However, *Jones* is another decision that attempted to connect theft and robbery in a patchwork fashion but failed to conclusively establish a lasting link.¹⁸⁶ Thus, the Illinois legislature should amend the cur-

181. *Jones*, 149 Ill. 2d at 298, 595 N.E.2d at 1076; see 720 ILCS 5/2-9 (defining included offense more narrowly than *Jones*, and precluding convictions for lesser crimes that have a greater mental state than the offense charged); *People v. Brocksmith*, 237 Ill. App. 3d 818, 823-24, 604 N.E.2d 1059, 1063 (3d Dist. 1992) (applying the *Jones* holding that a lower court may look outside the statutory wording of a lesser included offense to indictments and trial evidence); see also *Tuite*, *supra* note 25, at 5 (declaring that the *Jones* decision is not limited to robbery and theft, and stating that other offenses will be impacted by the *Jones* definition of a lesser included offense).

182. See *infra* notes 202-77 and accompanying text for a discussion of how most states judicially interpret robbery as a specific intent crime in instances where the robbery statute fails to list any mental state.

183. See *supra* notes 26-54 and accompanying text for a discussion of early Illinois Supreme Court cases that concluded that robbery was a specific intent crime.

184. See *supra* notes 76-122 and accompanying text for a discussion of the *Emerling* and *Banks* decisions, as well as an analysis of subsequent misinterpretation of the Illinois robbery statute.

185. *O'Donnell v. People*, 224 Ill. 218, 226, 79 N.E. 639, 642 (Ill. 1906). In *O'Donnell*, the Illinois Supreme Court held that language in a statute will be interpreted according to the long-standing and well known common law definition. *Id.* The court reasoned that the "best rule of construction is to construe [terms in] a statute" to be consistent with the common law definition of those terms. *Id.* The court reasoned that inclusion of common law terms shows that the legislature did not intend to modify the common law. *Id.* Thus, only clear legislative intent will modify common law interpretations. *Id.* Interestingly, the *O'Donnell* court was attempting to clarify a provision in a previous version of the Illinois robbery statute. *Id.*; see also *People v. Nunn*, 77 Ill. 2d 243, 248-49, 396 N.E.2d 27, 29 (Ill. 1979) (holding that modification of a statute does not necessarily demonstrate a legislative desire to alter common law principles or earlier statutes); *Proud v. W.S. Bills & Sons, Inc.*, 119 Ill. App. 2d 33, 42-43, 255 N.E.2d 64, 68 (3d Dist. 1970) (ruling that a statute will be interpreted in light of common law precedents absent statutory language that clearly and conclusively shows an intention to modify common law). See *supra* notes 26-54 and accompanying text for a discussion of early Illinois common law cases that concluded that force was the sole factor that differentiated robbery from theft.

186. *Jones*, 149 Ill. 2d at 296-98, 595 N.E.2d at 1075-76. See *supra* notes 139-54 and accompanying text for other Illinois Supreme Court decisions that attempt to link robbery and theft, but fail to hold that specific intent is an essential element of robbery.

rent robbery statute and reincorporate a specific intent element into the offense of robbery.¹⁸⁷

III. WHY THE ILLINOIS LEGISLATURE SHOULD DRAFT A SPECIFIC INTENT PROVISION INTO THE ILLINOIS ROBBERY STATUTE

In proposing a solution that will conclusively link theft and robbery, this Note next explores how criminal law experts as well as other jurisdictions treat the relationship between the two offenses. Initially, this section analyzes the Model Penal Code's robbery statute. This section then explores the criminal codes of other jurisdictions to uncover a model robbery statute.

A. The Model Penal Code's Express Incorporation of Theft into Robbery

The Model Penal Code defines robbery as a forceful or threatening act that occurs in "the course of committing a theft."¹⁸⁸ The Code, like early Illinois decisions, differentiates robbery from theft solely by the presence of force or intimidation.¹⁸⁹ The Code distinguishes the two offenses according to the danger present in a robbery and absent in a theft. However, the Code does not differentiate the crimes by a mental state.¹⁹⁰ Thus, the Code's robbery statute implies that a convicted defendant acted with the intent present in the theft statute.

The Code categorizes theft according to the early common law crimes of larceny, extortion, and deceptive practices.¹⁹¹ The particular Code offense of "theft by unlawful taking or disposition" is analogous to Illinois' general theft statute.¹⁹² The Code, like Illi-

187. See *infra* Appendix.

188. MODEL PENAL CODE § 222.1 (Official Draft and Revised Comments 1962). The Model Penal Code definition of robbery provides:

(1) *Robbery Defined.* A person is guilty of robbery if, *in the course of committing a theft*, he: (a) inflicts serious bodily injury upon another; or (b) threatens another with or purposely puts him in fear of immediate serious bodily injury; or (c) commits or threatens immediately to commit any felony of the first or second degree. An act shall be deemed "in the course of committing a theft" if it occurs in an attempt to commit theft or in flight after the attempt or commission.

Id. (emphasis added).

189. MODEL PENAL CODE § 223.1 (commentary at 98). See *supra* notes 26-54 and accompanying text for an overview of early Illinois decisions that held robbery and theft were distinguished by threat of force.

190. *Id.* commentary at 95-121 (omitting discussion of intent throughout the commentary of robbery and focusing solely on the underlying offense of theft).

191. *Id.* §§ 223.2-223.4.

192. *Id.* The Model Penal Code defines theft by unlawful taking or disposition in part as follows: "(1) *Movable Property.* A person is guilty of theft if he unlawfully takes, or exercises unlawful control over, movable property of another with *purpose to deprive* him thereof." *Id.* § 223.2 (emphasis added); cf. 720 ILCS 5/16-1 (Smith-Hurd 1993) (defining theft by intent to permanently deprive).

nois, defines theft in terms of an intent to deprive.¹⁹³ The Code highlights the need for a specific intent and states that a good faith claim of right, like Troy's good faith belief in the hypothetical case of *People v. Smith*,¹⁹⁴ destroys the intent element present in both theft and robbery.¹⁹⁵

Additionally, the commentators to the Model Penal Code argued against the imposition of a negligent or broader general intent definition of theft or robbery.¹⁹⁶ The Code commentators reason that theft should be defined and perceived as a crime directed against the "purposeful appropriation" of property.¹⁹⁷ This position is consistent with the Illinois theft statute¹⁹⁸ and early Illinois Supreme Court robbery decisions.¹⁹⁹ However, as mentioned in the analysis of the *Jones* case, later Illinois Supreme Court decisions allow convictions for reckless robbery or robbery with knowledge.²⁰⁰ Adoption of theft language in the Illinois robbery statute would preclude troublesome general intent robbery convictions. Additionally, the Illinois robbery statute would mirror that of the Model Penal Code, as well as the robbery statutes of almost all other jurisdictions.²⁰¹

B. Robbery as a Specific Intent Crime in Other Jurisdictions

The vast majority of states, like the Model Penal Code, define robbery as a specific intent crime. This section will explore the statutory definitions of theft and robbery in other jurisdictions to identify a potential model robbery statute. This section will also analyze how the majority of states properly link theft and robbery through an element of specific intent. Finally, this section will ex-

193. MODEL PENAL CODE § 223.2 (Official Draft and Revised Comments 1962).

194. See *supra* note 1 and subsequent text for this hypothetical case.

195. MODEL PENAL CODE § 223.1 (commentary at 151-57) (stating that a theft conviction is precluded by defendant's good faith belief that he is entitled to the property he took); *Id.* § 222.1 (commentary at 113) (declaring that robbery inherits theft's culpability and mental states).

196. *Id.* § 223.1 (commentary at 152).

197. *Id.*

198. 720 ILCS 5/16-1 (1993) (requiring a specific intent to deprive); see also *People v. Jones*, 149 Ill. 2d 288, 296-97, 595 N.E.2d 1071, 1075 (Ill. 1992) (deeming that the Illinois theft statute requires a specific intent to permanently deprive another of property).

199. See *supra* notes 26-54 and accompanying text for a discussion of early Illinois cases that distinguished robbery and theft according to the defendant's use of force and not by the defendant's intent.

200. See *Jones*, 149 Ill. 2d at 298-300, 595 N.E.2d at 1076 (ruling that the defendant in the instant case was guilty of taking the property with knowledge). See also *supra* notes 157-87 and accompanying text for a more complete discussion of the impact of defining robbery as a general intent crime.

201. See *infra* note 203 and accompanying text for a list of jurisdictions that have adopted the Model Penal Code requirement for a specific intent robbery definition.

plore why a handful of other jurisdictions, such as Illinois, separate the offenses of robbery and theft along lines of general and specific intent.

1. *Most states follow the Model Penal Code by explicitly incorporating "theft" into their robbery statutes.*

Twenty-five states clearly define robbery as a specific intent crime.²⁰² The majority of these states, like the Model Penal Code, explicitly list theft or larceny as an element of robbery.²⁰³ The New York robbery statute exemplifies a statute that expressly lists theft or larceny as an element of robbery.²⁰⁴ This statute states that a

202. See *infra* notes 203, 211 and accompanying text for a discussion of state robbery statutes that either adhere to the Model Penal Code language "in the course of committing a theft," or explicitly reference theft or larceny in their robbery statutes.

203. The twenty-five states that explicitly define robbery as a specific intent crime use either the exact language of the Model Penal Code or similar language to link robbery and theft. See, e.g., ALA. CODE § 13A-8-43 (1982) (defining robbery as an offense that involves theft); ARK. CODE ANN. § 5-12-102 (Michie 1987) (declaring that robbery must occur in course of committing a theft); CONN. GEN. STAT. § 53a-133 (1985) (stating that robbery must occur in course of committing a larceny); DEL. CODE ANN. tit. 11, § 831 (1987 & Supp. 1992) (defining robbery as an offense that occurs in the course of committing a theft); GA. CODE ANN. § 16-8-40 (Harrison 1990) (listing intent to commit theft as statutory requirement for robbery conviction); HAW. REV. STAT. § 708-840 (1985) (containing in the course of committing theft language); IOWA CODE ANN. § 711.1 (West 1993) (requiring an intent to commit a theft); KY. REV. STAT. ANN. § 515.030 (Michie/Bobbs-Merrill 1990) (linking theft and robbery by course of committing theft language); ME. REV. STAT. ANN. tit. 17-A, § 651 (West 1983) (associating robbery with theft by stating that a robbery must occur if a theft is committed or attempted); MONT. CODE ANN. § 45-5-401 (1993) (using Model Penal Code course of committing theft language); N.H. REV. STAT. ANN. § 636:1 (Supp. 1993) (same); N.J. STAT. ANN. § 2C:15-1 (West 1982) (same); N.M. STAT. ANN. § 30-16-2 (1984) (stating that robbery consists of theft by force or threats of force); N.Y. PENAL LAW § 160.00 (McKinney 1988) (declaring that robbery must occur in course of committing a larceny); N.D. CENT. CODE § 12.1-22-01 (1985) (including Model Penal Code in the course of committing theft language); OHIO REV. CODE ANN. § 2911.02 (Anderson 1993) (listing theft section and Model Penal Code language); OR. REV. STAT. § 164.395 (1990) (following the Model Penal Code interpretation of robbery); PA. STAT. ANN. tit. 18, § 3701 (1972) (same); TENN. CODE ANN. § 39-13-401 (1991) (defining robbery as the intentional or knowing theft of property); TEX. PENAL CODE ANN. § 29.02 (West 1989) (declaring robbery as an offense that occurs in the course of committing a theft); WYO. STAT. § 6-2-401 (1988) (listing theft section and Model Penal Code language).

204. The New York robbery statute uses the Model Penal Code language, "in the course of committing a theft," and provides:

Robbery is forcible stealing. A person forcibly steals property and commits robbery when, *in the course of committing a larceny*, he uses or threatens the immediate use of physical force upon another person for the purpose of:

1. Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or
2. Compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny.

N.Y. PENAL LAW § 160.00 (McKinney 1989) (emphasis added).

person "commits robbery when, in the course of committing a larceny, he uses or threatens . . . physical force."²⁰⁵

Although the New York statute does not contain a specific intent requirement, a robbery charge incorporates the specific intent requirement of the lesser included offense of theft.²⁰⁶ For a defendant to be convicted of robbery, most jurisdictions require the specific intent to steal or deprive present in most theft statutes.²⁰⁷ Thus, the New York robbery statute, like the statutes in many other jurisdictions, differentiates robbery from theft by violent or threatening circumstances.²⁰⁸ Theft and robbery statutes in these states, unlike Illinois, do not differentiate robbery and theft by a mental state requirement.²⁰⁹ Consequently, theft and robbery share a common intent element.

A handful of states explicitly list theft or larceny without using the Model Penal Code language of "in the course of committing a theft."²¹⁰ These states incorporate theft into their robbery statutes by using the language of the theft statute in the robbery statute, and by expressly referencing to theft or larceny.²¹¹ For example, the Michigan robbery statute contains explicit references to the offense of theft.²¹² This statute states that robbery is a "steal[ing of] . . . property . . . which may be the subject of larceny."²¹³ The corre-

205. *Id.*

206. *People v. Chessman*, 429 N.Y.S.2d 224, 228 (N.Y. App. Div. 1980), *appeal dismissed*, 430 N.E.2d 1301 (N.Y. 1981). In *Chessman*, the New York appellate court ruled that robbery does not require a specific intent. *Id.* However, the court held that a prosecutor must meet the intent requirement associated with the included crime of larceny. *Id.*

207. *Id.*

208. See *supra* note 204 and accompanying text for a discussion of the New York robbery statute; see also *Chessman*, 429 N.Y.S.2d at 228 (declaring that force coupled with larceny equals robbery); cf. N.Y. PENAL LAW § 155.05 (McKinney 1988) (defining larceny as a stealing and not requiring a forceful or violent taking).

209. See *supra* note 203 and accompanying text for a list of states that do not differentiate theft and robbery by a mental state requirement, and link the two offenses by the Model Penal Code language "in the course of committing a theft."

210. See *infra* note 211 and accompanying text for a list of those states which do not use a variation of the Model Penal Code's "in the course of committing a theft" language, but instead reference theft by the taking involved.

211. See, e.g., MICH. COMP. LAWS ANN. § 750.529 (West 1990) (stating robbery requires an intent to steal property which may be subject of larceny); MASS. GEN. L. ch. 265, § 19 (1992) (same); MO. REV. STAT. § 569.030 (1979) (listing act of forcibly stealing as element of robbery); VT. STAT. ANN. tit. 13, § 608 (1974) (declaring that robbery requires an intent to steal property which may be the subject of larceny).

212. See *infra* notes 213-14 and accompanying text for a full definition of the Michigan robbery statute and for a comparison between the Michigan robbery and theft statutes.

213. The Michigan robbery statute provides:

Any person who shall assault another, and shall *feloniously rob, steal and take* from his person, or in his presence, any money or other property, which may be the subject of larceny, such robber being armed with a dan-

sponding Michigan theft statute defines larceny as a "stealing of . . . property."²¹⁴ Thus, the Michigan robbery statute, like other states' statutes, links theft and robbery by explicitly referencing to theft or larceny.²¹⁵

Michigan and other states which reference the language of the theft statute, like those states following the Model Penal Code, conclude that the specific intent requirement of theft flows to the offense of robbery.²¹⁶ A robbery conviction cannot stand without proof of theft's specific intent to steal or deprive.²¹⁷ Thus, the Michigan robbery statute and other state robbery statutes do not distinguish robbery and theft by a requirement of specific or general intent.²¹⁸ These states, unlike Illinois, properly transfer the specific intent requirement of theft to robbery.²¹⁹

2. *Many states define robbery by requiring theft's specific intent to steal or felonious intent.*

Thirteen states define robbery using specific intent language.²²⁰ Although the language of these statutes varies, robbery is generally defined in terms of an intent to steal, a felonious intent or taking, or an intentional taking.²²¹ For example, the Wisconsin

gerous weapon or any article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon, shall be guilty of a felony, punishable by imprisonment in the state prison for life or for any term of years.

MICH. COMP. LAWS ANN. § 750.529 (West 1990) (emphasis added).

214. MICH. COMP. LAWS ANN. § 750.356 (1990) (defining theft as a stealing of another's property); *see also* *People v. Karasek*, 234 N.W.2d 761, 764 (Mich. Ct. App. 1975) (ruling that larceny contains a specific intent to steal).

215. Michigan courts hold that the robbery element of an intent to steal is derived from the inclusion of larceny wording in the robbery statute. *See Karasek*, 234 N.W.2d at 764 (discussing the mental state for larceny and imputing it to robbery).

216. Michigan courts rule that larceny's specific intent is an "integral" part of a robbery conviction. *Id.* Thus, robbery inherits larceny's specific intent to steal. *Id.*

217. *Id.*

218. *See supra* notes 203-08 and accompanying text for a discussion of how most states follow the Model Penal Code and declare that theft or theft's mental state is an essential element of robbery.

219. *See supra* notes 56-86 and accompanying text for a discussion of how the Illinois Supreme Court erroneously concludes that robbery and theft should not share a common element of specific intent to deprive.

220. *See infra* note 221 and accompanying text for a list of state robbery statutes that define robbery using various forms of specific intent language.

221. *See, e.g.*, CAL. PENAL CODE § 211 (West 1988) (defining robbery as a felonious taking); IDAHO CODE § 18-6501 (1987) (same); MISS. CODE ANN. § 97-3-73 (1993) (defining robbery as a felonious taking); NEB. REV. STAT. § 28-324 (1989) (stating that robbery requires an intent to steal); NEV. REV. STAT. § 200.380 (1991) (requiring an unlawful taking of property); S.D. CODIFIED LAWS ANN. § 22-30-1 (1988) (requiring an intentional taking of property); UTAH CODE ANN. § 76-6-301 (1990) (declaring that robbery requires an unlawful and intentional taking); W. VA. CODE § 61-2-12 (1992) (defining robbery by a felonious taking); WIS. STAT. ANN. § 943.32 (West 1982) (requiring an intent to steal prior to a

robbery statute contains specific intent language.²²² The Wisconsin robbery statute states that a robbery is a forceful or threatening taking coupled "with [an] intent to steal."²²³

The Wisconsin Supreme Court, in *Moore v. State*,²²⁴ interpreted the relationship between theft and robbery. In *Moore*, a sixty-three year old woman was confronted by the defendant as she walked to her local church.²²⁵ The defendant instructed the victim not to scream and took her coin purse containing one dollar and sixteen cents.²²⁶ Although the defendant was arrested and charged with robbery, the trial court convicted the defendant of the lesser crime of theft.²²⁷ The lower court ruled that the defendant's taking was not violent or intimidating enough to satisfy the robbery statute's forcefulness requirement.²²⁸

On appeal, the defendant asserted, as Illinois defendants often do, that theft was not a lesser included offense of robbery.²²⁹ The defendant complained that he was wrongfully convicted of a crime with which he was not charged.²³⁰ The Wisconsin Supreme Court rejected the defendant's contention and ruled that the stealing language in the robbery statute incorporates the elements of theft into the robbery statute.²³¹ The Wisconsin Supreme Court held that robbery is a violent form of theft, and thus, theft is a lesser included offense of robbery.²³² Like the Illinois Supreme Court decision of

robbery conviction). See also *State v. LeFebvre*, 609 A.2d 957, 959 (R.I. 1992) (continuing common law definition of robbery and ruling that an intent to steal is an essential element of robbery); *Johnson v. Commonwealth*, 211 S.E.2d 71, 72 (Va. 1975) (ruling that common law crime of robbery requires an intent to steal); *State v. Gover*, 298 A.2d 378, 380 (Md. 1973) (ruling that the common law crime of robbery requires a larcenous intent to steal); *State v. Haynie*, 68 S.E.2d 628 (S.C. 1952) (ruling that the crime of robbery includes the intent of larceny).

222. The Wisconsin robbery statute provides in pertinent part as follows:

(1) Whoever, with *intent to steal*, *takes property* from the person or presence of the owner by either of the following means is guilty of a Class C felony: (a) By using force against the person of the owner with intent thereby to overcome his physical resistance or physical power of resistance to the taking or carrying away of property; or (b) By threatening the imminent use of force against the person of the owner or of another who is present with intent thereby to compel the owner to acquiesce in the taking or carrying away of property.

WIS. STAT. ANN. § 943.32 (West 1982) (emphasis added).

223. *Id.*

224. 197 N.W.2d 820 (Wis. 1972).

225. *Id.* at 821.

226. *Id.*

227. *Id.*

228. *Id.*

229. *Moore v. State*, 197 N.W.2d 820, 822 (1972). See also *supra* note 162 and accompanying text for a discussion of how Illinois defendants assert that theft is not a lesser included offense of robbery.

230. *Moore*, 197 N.W.2d at 822.

231. *Id.* at 822-23.

232. *Id.*

People v. Jones,²³³ the Wisconsin Supreme Court prevented a defendant from escaping a deserved theft conviction.²³⁴

However, unlike the Illinois Supreme Court, the Wisconsin Supreme Court declined to broaden the lesser included offense doctrine and instead, properly chose to link the offense of robbery with the underlying crime of theft.²³⁵ Wisconsin, like other states with similar robbery statute language, chose to define robbery in terms of theft's specific intent to steal or deprive.²³⁶ Thirty-eight states definitively conclude that robbery and theft share the same specific intent.²³⁷ These thirty-eight states either explicitly list theft as an element of robbery²³⁸ or expressly word the robbery statute using specific intent language identical to the language contained in the theft statute.²³⁹

3. *A Minority of States Do Not Include Theft as an Element of Robbery.*

The remaining twelve states do not list theft as an element of robbery nor do they link theft and robbery by identical specific intent language. The robbery statutes of these states do not require any specific mental state. A few of these states, including Illinois, conclude that robbery is a general intent crime. Other states, decline to conclude that robbery is a general intent crime and judicially construe a specific intent element into the state's robbery statute.

a. Judicial incorporation of specific intent

The absence of a specific intent provision in a robbery statute has led seven state supreme courts to interpret robbery as a specific

233. 149 Ill. 2d 288, 595 N.E.2d 1071 (Ill. 1992); see *supra* notes 10-25 and accompanying text for a discussion of *Jones*' effect on Illinois law.

234. The *Moore* court stated that, since theft is a lesser included offense of robbery, the defendant's theft conviction will stand. *Id.* Interestingly, the *Moore* court resolved a split among appellate courts as to whether theft was an included offense of a robbery by holding that robbery contains all the elements present in a theft conviction. *Id.* This conflict parallels the conflict of recent Illinois Supreme Court decisions. See *supra* notes 123-56 and accompanying text for a discussion of the inconsistent Illinois appellate court rulings.

235. *Moore*, 197 N.W.2d at 823.

236. *Id.* at 822; see also *State v. Plumley*, 368 S.E.2d 726, 728 (W. Va. 1988) (ruling that a theft's felonious taking or an intent to steal is an indispensable element of robbery).

237. See *supra* notes 203-35 and accompanying text for a discussion of how the majority of jurisdictions conclude that robbery is a specific intent crime.

238. See *supra* notes 203-08 and accompanying text for a discussion of how twenty-five states incorporate the Model Penal Code language, or the words theft or larceny in their robbery statutes.

239. See *supra* notes 221-34 and accompanying text for a discussion of how thirteen states incorporate theft's specific intent language into their robbery statutes.

intent crime.²⁴⁰ The Indiana Supreme Court decision, *Gregory v. State*,²⁴¹ is representative of other state court decisions that conclude robbery is a specific intent crime.²⁴² In *Gregory*, the defendant asked an acquaintance for a ride and then stole approximately one hundred dollars from the victim.²⁴³ Although the defendant used a gun, the trial court concluded that there was insufficient force to sustain a robbery conviction.²⁴⁴ Consequently, the trial court found the defendant guilty of the lesser included offense of theft.²⁴⁵

On appeal, the defendant argued that the intent to deprive is an element of theft but is not an element of robbery.²⁴⁶ The defendant asserted that the absence of intent precluded a lesser included offense conviction.²⁴⁷ The *Gregory* court conceded that the statute did not contain a specific intent requirement.²⁴⁸ However, the court ruled that the robbery statute contained the intent to deprive by an "irrebuttable inference."²⁴⁹ The court reasoned that theft and robbery share a common law relationship founded on an identical intent.²⁵⁰

The *Gregory* court also reasoned that the robbery statute and other statutes adopt common law definitions.²⁵¹ The court ruled that the Indiana common law definition of robbery, similar to Illi-

240. See, e.g., *State v. Celaya*, 660 P.2d 849, 853 (Ariz. 1983) (inserting the element of specific intent into the Arizona robbery statute); *Daniels v. State*, 587 So. 2d 460, 462 (Fla. 1991) (ruling that the legislative modifications to the intent element of the theft statute also apply to the robbery statute); *Gregory v. State*, 291 N.E.2d 67, 69 (Ind. 1973) (holding that its robbery statute adopts the common law requirement of specific intent); *State v. Johnson*, 368 So. 2d 719, 722 (La. 1979) (deeming that robbery's taking requirement incorporates theft's specific intent); *State v. Coleman*, 373 N.W.2d 777, 781 (Minn. 1985) (stating that robbery and assault would be identical offenses if courts did not construe the specific intent to deprive into the robbery statute); *State v. Mundy*, 144 S.E.2d 572, 574 (N.C. 1965) (declaring, contrary to the plain language of North Carolina's robbery statute, that robbery is a specific intent crime); *State v. Sly*, 794 P.2d 1316, 1319 (Wash. Ct. App. 1990) (holding that the modern robbery statute inherits the common law element of specific intent, even though the robbery statute contains no express language requiring a specific mental state).

241. 291 N.E.2d 67 (Ind. 1973).

242. See *supra* note 240 and accompanying text for a listing of seven state supreme and appellate court decisions that define robbery as a specific intent crime.

243. *Gregory*, 291 N.E.2d at 67.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Gregory*, 291 N.E.2d at 67. The court stated that the absence of an express mental state in the language of the robbery statute is only one factor to consider in determining if robbery contains an element of specific intent. *Id.*

249. *Id.* The court claimed that this "irrebuttable inference" stemmed from the long-standing common law definitions of theft and robbery. *Id.*

250. *Id.* at 69.

251. *Id.* The court again stated that the express provisions of the robbery statute are not conclusive and controlling on Indiana courts. *Id.*

nois' common law definition, requires a specific intent to steal or deprive.²⁵² The Indiana Supreme Court supplemented the language of the current robbery statute by holding that the offense of robbery requires an implicit intent to deprive.²⁵³ Therefore, the defendant's conviction on a lesser included theft offense was upheld.²⁵⁴

Indiana and other states avoid lesser included offense problems by judicially construing a specific intent element into a robbery statute when that statute lacks a mental state requirement.²⁵⁵ These states hold that all the elements of theft exist in the crime of robbery.²⁵⁶ Thus, every robbery charge necessarily contains a theft charge.²⁵⁷ Consequently, these states, unlike Illinois, do not questionably broaden their respective lesser included offense doctrines to link robbery and theft.²⁵⁸

b. The questionable view of robbery as a general intent crime.

Four states share Illinois' minority view that robbery is a general intent crime.²⁵⁹ These states choose to ignore common law precedent and cling to the express language of their robbery statutes.²⁶⁰ These states must also expand their definitions of a lesser

252. *Id.*

253. *Gregory*, 291 N.E.2d at 69. The court also held that robbery's specific intent is inferred from the indictment, the force used, the taking, and the robbery statute. *Id.* Thus, the court states that "[t]he intent requisite to the crime of theft then, is also requisite to the crime of robbery." *Id.*

254. *Id.* at 70.

255. See *supra* note 239-53 and accompanying text for a discussion of how Indiana and other state courts interpret a specific intent requirement into robbery statutes.

256. See *supra* note 203 and accompanying text for a list of states that conclude theft is a lesser included offense of robbery because theft contains no element that is not present in robbery.

257. See, e.g., *State v. Celaya*, 660 P.2d 849, 852-53 (Ariz. 1983) (concluding that "[i]t is well established" that theft is a lesser included offense of robbery); *Daniels v. State*, 587 So. 2d 460, 461-62 (Fla. 1991) (ruling that a theft charge is a component of a robbery charge); *Gregory v. State*, 291 N.E.2d 67, 69 (Ind. 1973) (holding that theft is always an included offense in a robbery charge); *State v. Johnson*, 368 So. 2d 719, 722 (La. 1979) (holding that proof of theft is "essential" for a robbery conviction); *State v. Coleman*, 373 N.W.2d 777, 781 (Minn. 1985) (ruling that theft must be an element of robbery).

258. See *supra* notes 155-81 and accompanying text for a discussion of how Illinois broadens the lesser included offense doctrine by failing to conclusively link theft and robbery through an element of specific intent.

259. See, e.g., *State v. Minano*, 710 P.2d 1013, 1016 (Alaska 1985) (holding that an intent to deprive is not an indispensable element of robbery); *People v. Meeks*, 542 P.2d 397, 398 (Colo. Ct. App. 1975) (declaring that robbery is a general and not a specific intent crime); *State v. Thompson*, 558 P.2d 1079, 1086 (Kan. 1976) (holding that intent to permanently deprive is not an element of robbery and that general intent will suffice for a robbery conviction); *Traxler v. State*, 251 P.2d 815, 836 (Okla. 1953) (ruling that an intent to steal or deprive is not an element of robbery).

260. See, e.g., *Traxler*, 251 P.2d at 836 (concluding that common law precedent is vitiated by plain language of robbery statute).

included offense in order to link theft and robbery on a case by case basis.²⁶¹ The Oklahoma Supreme Court case *Traxler v. State*²⁶² contains several arguments commonly used to support the general intent definition of robbery.²⁶³

In *Traxler*, an escaped prisoner stole a car at gunpoint in an attempt to elude pursuing officers.²⁶⁴ The defendant was apprehended, charged with robbery, and subsequently convicted for robbery.²⁶⁵ On appeal, the defendant claimed that he did not intend to permanently deprive the owner of his vehicle and only intended to use the car for a short period of time.²⁶⁶ The defendant argued that the robbery requirement of intentional deprivation was not satisfied.²⁶⁷ Thus, the defendant asserted that he was wrongfully convicted of robbery.²⁶⁸

The *Traxler* court upheld the defendant's conviction,²⁶⁹ and ruled that a robbery conviction does not require proof of an intent to deprive.²⁷⁰ The court noted the absence of specific intent language in the Oklahoma robbery statute.²⁷¹ Thus, the court reasoned that the statutory definition broadened the crime of robbery and obviated the need for proof of intent to deprive.²⁷²

The *Traxler* court stubbornly refused to read in long-standing common law principles which mandate a specific intent definition of robbery.²⁷³ The Oklahoma Supreme Court decision, like Illinois

261. See, e.g., *Minano*, 710 P.2d at 1016 (stating that theft is not "technically" a lesser included offense of robbery, but allowing a lesser included offense instruction in this instance); *State v. Long*, 675 P.2d 832, 841-42 (Kan. 1984) (declaring that theft is a lesser included offense of robbery in some cases).

262. 251 P.2d 815 (Okla. 1953).

263. See *infra* notes 266-77 and accompanying text for a discussion of the reasoning and logic employed by the Oklahoma Supreme Court.

264. *Traxler*, 251 P.2d at 819.

265. *Id.* at 819-20.

266. *Id.* at 836; see also PERKINS & BOYCE, *supra* note 2, at 343-44 (stating that an intent to steal is an indispensable element of an intent to deprive).

267. *Traxler*, 251 P.2d at 829-30.

268. *Id.*

269. *Id.* at 838.

270. *Id.* at 836.

271. *Id.* at 829. The *Traxler* court ruled that no specific intent language existed in the Oklahoma robbery statute. *Id.* However, the court wrestled with the inclusion of the word "wrongful" in the Oklahoma robbery statute. *Id.* at 836. The court concluded that "wrongful" was not synonymous with common law felonious intent or with an intent to deprive. *Id.*

272. *Traxler*, 251 P.2d at 836-37. The court stated that the requirement of an intent to deprive would "weaken and destroy law . . . and make all citizens liable to death, humiliation, or at least a loss in value of their property, at the whim of the . . . dangerous." *Id.* at 837. *But cf.* PERKINS & BOYCE, *supra* note 2, at 344 (stating that an intent to deprive is necessary to avoid faulty robbery convictions in instances where a defendant takes property based on a mistaken but good faith belief over ownership).

273. *Traxler*, 251 P.2d at 836; see also *Berry v. State*, 279 P. 982, 985 (Okla. 1929) (ruling that larcenous taking required in instances of robbery); *Johnson*

Supreme Court decisions, created problems for lower courts.²⁷⁴ The *Traxler* decision prevents defendants from using a good faith defense, like the defense raised in the hypothetical *Smith* case.²⁷⁵ Additionally, the court's decision muddied the previously clear lesser included offense doctrine.²⁷⁶ Subsequent Oklahoma courts, like Illinois courts, ruled inconsistently on whether theft is a lesser included offense of robbery.²⁷⁷ Consequently, a specific intent provision should be reinstated in the Oklahoma and Illinois robbery statutes.

CONCLUSION

The model statute below is designed to end Illinois' century long confusion over robbery's element of intent. The model statute will ensure that the Illinois robbery statute conforms to the long line of early Illinois common law decisions that treat robbery as a specific intent crime. Additionally, the wording of the model robbery statute will mirror language incorporated into the Model Penal Code robbery statute. This language would prevent Illinois courts from applying the current overly-broad, general intent definition of robbery.

The model robbery statute provided below will also bring the Illinois definition of robbery in line with the robbery statutes of almost all other state courts. By conforming to the widely accepted definition of robbery, Illinois will avoid questionably expanding its lesser included offense doctrine. Thus, defendants will not be convicted of an offense that they were not charged with. Finally, the language of the statute provided below will extend defenses that apply in theft settings to robbery. Consequently, innocent defendants, like the defendant in the hypothetical *People v. Smith* case, will not be wrongfully sentenced to lengthy prison terms for a mistaken, but good faith belief concerning the ownership of property.

v. State, 218 P. 179, 181 (Okla. 1923) (deeming that a larcenous intent is an indispensable ingredient in every robbery conviction).

274. See *supra* notes 156-87 and accompanying text for a discussion of the lesser included offense problems, and the good faith defense problems created by Illinois courts.

275. See *Johnson*, 218 P. at 181. The *Johnson* court reasoned that robbery's specific intent element is not satisfied when a defendant takes property under a good faith claim of right. *Id.* Thus, a robbery conviction is precluded by the absence of a larcenous intent. *Id.*

276. See *supra* note 19 and accompanying text for a discussion of the lesser included offense doctrine.

277. See *Luckey v. State*, 529 P.2d 994, 996 (Okla. 1974) (holding that larceny may or may not be a necessary included offense of robbery).

APPENDIX

Proposed Model Robbery Statute 720 ILCS 5/18-1:

§ 18-1. Robbery. (a) A person commits robbery when, *in the course of committing a theft*, he takes property from the person or presence of another by the use of force or by threatening the imminent use of force.²⁷⁸

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278. The proposed model robbery statute inserts the Model Penal Code language into Illinois' current robbery statute. See *supra* note 90 and accompanying text for the exact wording of the current Illinois robbery statute, 720 ILCS 5/18-1 (Smith-Hurd 1993); see also *supra* note 188 and accompanying text for the exact wording of the Model Penal Code robbery statute.

