

NEVADA'S COMPREHENSIVE THEFT STATUTE: CONSOLIDATION OR CONFUSION?

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I. INTRODUCTION

Although the theft crimes in Nevada are covered in multiple subsections of the Nevada Revised Statutes (“NRS”), which would make them appear to comprise separate and distinct crimes, theft in Nevada, and in those states that have similarly consolidated the theft crimes, is considered one crime.¹ Consolidation should lead to simplification, which is generally true within those states that have consolidated the common law theft crimes into one theft statute.² However, the opposite result rings true in Nevada: Nevada’s Consolidated Theft Statute has led to needless confusion rather than simplification because the common law, codified theft crimes that it was meant to replace still, surprisingly and mystifyingly, remain.

Nevada’s theft statute, more particularly described as the Comprehensive Theft Statute³ (“CTS” and/or “Theft Statute(s)”), is found in NRS 205.0833.⁴

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¹ *E.g.*, State v. Winter, 706 P.2d 1228, 1231 (Ariz. Ct. App. 1985) (Theft in Arizona, as an effect of the consolidation of the theft offenses, “is presently a single offense even though it has multiple subsections.”); *see also* MODEL PENAL CODE § 223.1 cmt. 2, at 137-38 (Official Draft and Revised Comments 1980) (stating that consolidation of the common law theft crimes is to consolidate them into a single offense, albeit with some constitutional considerations regarding a defendant’s having fair notice of the crime with which he is charged).

² *See infra* note 11 (listing those states that have Comprehensive Theft Statutes).

³ Comprehensive Theft Statutes are also known as either Unified or Consolidated Theft Statutes, depending on the particular state’s preference in terminology; Nevada’s is known as Comprehensive. Assemb. 594, 1989 Leg., 65th Sess. (Nev. 1989) (“Assembly Bill 594 adopts a *comprehensive* theft statute.”) (emphasis added).

⁴ NEV. REV. STAT. § 205.0833 (2007). Please take note that during the 2007 legislative session, the Nevada Legislature added to the codified theft laws one additional section, which adds “organized retail theft rings” to the definition of “theft.” *See April 2, 2007 Minutes: Hearing on Assemb. B. 421 Before the Assemb. Comm. on Judiciary*, 2007 Leg., 74th Sess. 7 (Nev. 2007) (“Assembly Bill 421: [e]stablishes the crime of participating in an organized retail theft ring.”).

It provides in relevant part: "Conduct denominated theft in NRS 205.0821 to 205.0835, inclusive, and section 1 of this act constitutes a single offense embracing the separate offenses commonly known as larceny, receiving or possessing stolen property, embezzlement, obtaining property by false pretenses, issuing a check without sufficient money or credit, and other similar offenses."⁵

These words seem simple enough, or at least they were intended to be that way. Who would have thought that this "simple" language comprising a "simplification" statute with the very purpose of simplifying the law regarding theft crimes would create such needless confusion? This is exactly the result in Nevada—one the Nevada Legislature itself has created and continues to perpetuate.

Unfortunately, Nevada's CTS has led to needless and troubling confusion. Although the main purpose behind enacting a CTS is to simplify the state of the law by eliminating the technical and procedural distinctions between various types of theft and instead to deal with all forms in one simplified statute, the result in Nevada⁶ is increased confusion.⁷ Thus, the Nevada Legislature's purpose for enacting the statute is not being fully realized because prosecutors are continuing to charge defendants under either the CTS or the various common law theft statutes, depending on the facts and circumstances of a particular case.⁸ Given the resulting confusion, it is an enigma why the Nevada Legislature chose to enact a CTS, yet decided not to repeal the very crimes that led to the drafting and enactment of the statute in the first place.

⁵ NEV. REV. STAT. § 205.0833(1); see also *Winter*, 706 P.2d at 1231 ("[T]he multiple prior theft offenses of embezzlement, conversion, larceny, finding and keeping stolen property, theft by false pretenses, and other similar 'verbal distinctions' [have been consolidated] to produce a single unified offense.").

⁶ It should be noted that California has also arguably kept the codified common law crimes despite its enactment of a CTS. CAL. PENAL CODE §§ 484, 490(a) (West 2007); see CAL. PENAL CODE §§ 484-502.9, 503-515, 528-539 (codifying larceny, embezzlement, and false pretenses, respectively). The term "arguably" is due to CAL. PENAL CODE § 490(a), which provides: "Wherever any law or statute of this state refers to or mentions larceny, embezzlement, or stealing, said law or statute shall hereafter be read and interpreted as if the word 'theft' were substituted therefor." Although this specifically states that these common law theft crimes are now known as "theft," California's theft laws are also confusing because, technically, the common law theft crimes are still codified, considering that the words "larceny" and "embezzlement" have not been deleted from the language in the other chapters of the theft statutes (again, "larceny" and "embezzlement" appear in chapters other than California's Theft Statute).

Thankfully, however, California's theft laws are easier to understand than Nevada's in light of section 490(a), whereas Nevada's theft laws are more confusing because Nevada has no such section stating that the common law theft crimes of "larceny" and "embezzlement" appearing in other sections of the statutes are replaced by the term "theft."

However, because this Note specifically addresses Nevada's CTS, there will be no further discussion regarding California's Theft Statute.

⁷ See *April 25, 1989 Minutes: Hearing on Assemb. B. 594 Before the Assemb. Comm. on Judiciary*, 1989 Leg., 65th Sess. 4 (Nev. 1989) [hereinafter *Assemb. Comm. Hearing*] (testimony of Carolyn Ellsworth, Chief Deputy District Attorney for Clark County). See generally *State v. Tramble*, 695 P.2d 737 (Ariz. 1985); MODEL PENAL CODE § 223.1 cmt. 2(b), at 133 (Official Draft and Revised Comments 1980).

⁸ See E-mail Interview with Dave Barker, Dist. Attorney, Clark County, Nev., in Las Vegas, Nev. (Nov. 7, 2006) (on file with author).

In Part II of this Note, the history of NRS 205.0833, Nevada's CTS, and the rationales behind Theft Statutes will be addressed. Then, this Part will specifically address Arizona's CTS⁹ because the language of Nevada's CTS was derived from that in Arizona.¹⁰ In Part III, this Note will attempt to ascertain the true reason behind the Nevada Legislature's failure to repeal the common law theft crimes in light of the enactment of the CTS because the apparent reasons behind the CTS fail to address the repeal issue. The author of this Note interviewed Clark County, Nevada, District Attorneys Dave Barker, Christopher Laurent, Ben Graham, and former Clark County, Nevada, District Attorney Carolyn Ellsworth to get their perspectives on the state of Nevada's theft laws.

Further, in Part III, the doctrine of implied repeal will be addressed, which is a doctrine that may serve to repeal the common law theft crimes in the absence of the Nevada Legislature's direct repeal of the common law theft crimes. Finally in Part III, this Note will provide some plausible solutions to the problem of the muddled mess that has resulted from the Nevada Legislature's failure to take this unnecessary, and easily preventable, confusion of the theft-related crimes seriously.

II. HISTORICAL BACKGROUND OF COMMON LAW THEFT CRIMES

Practically every state has consolidated all of the common law theft crimes into one unified crime known simply as "theft."¹¹ These states essentially fol-

⁹ ARIZ. REV. STAT. ANN. § 13-1802 (2007).

¹⁰ *June 13, 1989 Minutes: Hearing on Assemb. B. 594 Before the S. Comm. on Judiciary*, 1989 Leg., 65th Sess. 3 (Nev. 1989) [hereinafter *S. Comm. Hearing*] (testimony of Dave Barker, District Attorney for Clark County). Thus, this Note will not dovetail into a full-length discussion of the Comprehensive Theft Statutes of all of the states that have them because it is unnecessary to do so in order to determine the reasons as to why the Nevada Legislature has refused to address the issue of repealing the theft-related common law crimes.

¹¹ See ALA. CODE §§ 13A-8-1 to -23 (2007); ALASKA STAT. §§ 11.46.100 to .295 (2007); ARIZ. REV. STAT. ANN. §§ 13-1801 to -1818; ARK. CODE ANN. §§ 5-36-101 to -405 (2007); CAL. PENAL CODE §§ 484, 490(a); COLO. REV. STAT. §§ 18-4-401 to -416 (2007); CONN. GEN. STAT. §§ 53a-118 to -125b (2007); DEL. CODE ANN. tit. 11, §§ 840-859 (2007); FLA. STAT. §§ 812.005 to .176 (2007); GA. CODE ANN. §§ 16-8-1 to -86 (2007); HAW. REV. STAT. §§ 708-830 to -858 (2007); 720 ILL. COMP. STAT. §§ 5/16-1 to 5/16A-10 (2007); IND. CODE §§ 35-43-4-1 to -6 (2007); IOWA CODE §§ 714.1 to .25 (2007); KAN. STAT. ANN. §§ 21-3701 to -3704 (2007); KY. REV. STAT. ANN. §§ 514.010 to .150 (West 2007); LA. REV. STAT. ANN. § 14:67 (2007); ME. REV. STAT. ANN. tit. 17-A, §§ 351-361 (2007); MD. CODE ANN., CRIM. LAW §§ 7-102 to -110 (West 2007); MINN. STAT. §§ 609.52 to .551 (2007); MO. REV. STAT. §§ 570.010 to .220 (2007); MONT. CODE ANN. §§ 45-6-301 to -319 (2007); NEB. REV. STAT. §§ 28-510 to -518 (2007); NEV. REV. STAT. §§ 205.0821 to .0835 (2007); N.H. REV. STAT. ANN. §§ 637:1 to :11 (2007); N.J. STAT. ANN. §§ 2C:20-1 to -37 (West 2007); N.Y. PENAL LAW §§ 155.00 to .45 (McKinney 2007); N.D. CENT. CODE §§ 12.1-23-01 to -14 (2007); OHIO REV. CODE ANN. §§ 2913.01 to .82 (West 2007); OR. REV. STAT. §§ 164.005 to .140 (2007); 18 PA. CONS. STAT. §§ 3901-3934 (2007); S.D. CODIFIED LAWS §§ 22-30A-1 to -44 (2007); TEX. PENAL CODE ANN. §§ 31.01 to .16 (Vernon 2007); UTAH CODE ANN. §§ 76-6-401 to -412 (2007); WASH. REV. CODE §§ 9A.56.010 to .360 (2007); WIS. STAT. §§ 943.20 to .74 (2007); WYO. STAT. ANN. §§ 6-3-401 to -410 (2007).

lowed the Model Penal Code model for consolidating all of the theft crimes.¹² To understand why Theft Statutes came into fruition, it is vital to discuss the separate common law theft crimes that led to their creation and widespread adoption.¹³ Most Theft Statutes define “theft” to comprise the three common law crimes of larceny, embezzlement, and obtaining property by false pretenses.¹⁴

A. Common Law Theft Crimes and Their Distinctions

“Larceny” is defined as “the wrongful or fraudulent taking and carrying away of another’s property without his or her permission or consent, with the intent to deprive the owner of that property permanently.”¹⁵ For larceny to exist, there must be an actual or constructive taking of goods or property, a carrying away of the goods or property (asportation), a felonious intent, the goods or property must belong to another, and the taking of the goods or property must be without the owner’s consent.¹⁶

The generic term “larceny” comprises many different types of larceny, including grand larceny,¹⁷ petit larceny,¹⁸ larceny from the person,¹⁹ larceny of

¹² 2 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* § 8.8(d), at 415 (1986) (“The Model Penal Code provides for an ambitious plan of consolidation of smaller separate crimes into one larger crime called ‘theft.’ Theft in the Code covers not only larceny, embezzlement and false pretenses, but also receiving stolen property and blackmail or extortion. . . . Many states follow essentially this approach.”).

¹³ Note that the history behind the common law theft crimes is more extensive than the brief summary provided in this Note. Those articles that have more thoroughly discussed the common law theft crimes did so because the authors of those articles were arguing for the adoption of a Comprehensive Theft Statute in their respective states. In other words, they were discussing the merits behind the adoption of a Comprehensive Theft Statute by pointing out the innumerable flaws with the common law theft crimes. Considering that Nevada already has a Comprehensive Theft Statute, the author deems it unnecessary to engage in any further historical discussion beyond what is already provided herein.

For a more extensive history on the common law theft crimes, see generally John Wesley Bartram, Note, *Pleading for Theft Consolidation in Virginia: Larceny, Embezzlement, False Pretenses and § 19.2-284*, 56 WASH. & LEE L. REV. 249, 250 (1999); John G. Douglass, *Rethinking Theft Crimes in Virginia*, 38 U. RICH. L. REV. 13, 16 (2003); Rudy J. Gerber & John F. Foreman, Commentary, *Arizona’s Criminal Law: The Critical Need for Comprehensive Revision*, 18 ARIZ. L. REV. 63, 98 (1976); Lee Hargrave, *Theft in the Louisiana Criminal Code of 1942*, 52 LA. L. REV. 1109 (1992); Donald L. Paillette, *The Oregon Theft Laws: Consolidation v. Conglomeration*, 51 OR. L. REV. 525, 535 (1972); Hugh Peterson, Jr., *Georgia Law of Theft*, 12 MERCER L. REV. 308, 308 (1961); Austin W. Scott, Jr., *Larceny, Embezzlement and False Pretenses in Colorado—A Need For Consolidation*, 23 ROCKY MTN. L. REV. 446 (1951).

¹⁴ Paillette, *supra* note 13, at 525 (“Traditionally, the intentional misappropriation of property has been punishable as either larceny, embezzlement, or obtaining by false pretenses.”); Scott, *supra* note 13, at 447 (“The fact that today the wrongful appropriation of property is covered by three related crimes—larceny, embezzlement and false pretenses—is the product of the legal history of England.”).

¹⁵ 52B C.J.S. *Larceny* § 1 (2003).

¹⁶ *Id.*

¹⁷ Grand larceny is codified at NEV. REV. STAT. § 205.220 (2007).

¹⁸ Petit larceny is codified at NEV. REV. STAT. § 205.240.

¹⁹ According to District Attorney Christopher Laurent, in Nevada, larceny from the person is not included in the Comprehensive Theft Statute as part of common law larceny because it is considered a more serious offense. Telephone Interview with Christopher Laurent, Dist.

an automobile,²⁰ and larceny of a horse.²¹ The element that determines the type of larceny of which a defendant is guilty is the punishment inflicted.²² Larceny is further broken down into “simple” or “aggravated” larceny.²³ “Simple” larceny simply involves the taking of property, whereas “aggravated” larceny additionally involves an invasion of the right of personal security, such as stealing from the person or stealing from the home.²⁴ Additionally, some states have broadened larceny to encompass the crimes of embezzlement and false pretenses, all three of which have been consolidated in most states under Comprehensive Theft Statutes as constituting simply the crime of “theft.”²⁵

The distinction between the crimes of embezzlement²⁶ and larceny is a small, but important one. With embezzlement, the offender comes into lawful possession of the property and later misappropriates that property, whereas with larceny, the offender takes the property unlawfully in the first instance.²⁷ Further, the crime of embezzlement takes place in the context of the offender having come into possession of the property by virtue of some employment, trust, or agency, with the owner’s consent.²⁸ Thus, the offender holds the property in trust for the owner’s benefit but converts the property for his own use.²⁹ Embezzlement is an “expansion of common-law larceny, made to prevent a failure of justice that would occur under the technical rules that the law has applied to larceny.”³⁰ In other words, embezzlement was created to patch up the loopholes that resulted from larceny’s failure to cover the situation of a defendant forming the intent to convert the property after he had already come into lawful possession of it because larceny requires a defendant to have formed the intent at the time of the property’s conversion.³¹

The crime of “false pretenses”³² involves the offender making a material misrepresentation to the owner or possessor of the property with the intent to

Attorney, Clark County, Nev., in Las Vegas, Nev. (Feb. 6, 2007). Mr. Laurent’s interview is discussed *infra* Part III.C. See also Louisiana’s “purse snatching” statute, LA. REV. STAT. ANN § 14:65.1 (2007), which includes larceny “from the person” and codifies it separately from the common law theft crimes.

²⁰ Grand larceny of a motor vehicle is codified at NEV. REV. STAT. § 205.228.

²¹ 52B C.J.S. *Larceny*, *supra* note 15.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ 50 AM. JUR. 2D *Larceny* § 2 (2006).

²⁶ Embezzlement is codified at NEV. REV. STAT. § 205.300 (2007).

²⁷ Gerber & Foreman, *supra* note 13, at 97 (Under the common law, “the legal recipient of property could not commit larceny because he had not taken and carried away property in the possession of another.”); see also C.T. Foster, Annotation, *Distinction Between Larceny and Embezzlement*, 146 A.L.R. 532 (1943) (discussing the distinction between larceny and embezzlement).

²⁸ Foster, *supra* note 27, at 543 (citing *United States v. Harper*, 33 F. 471 (C.C.S.D. Ohio 1887)).

²⁹ *Id.*

³⁰ *Id.* at 548 (citing *State v. Collins*, 61 N.W. 467 (N.D. 1895)).

³¹ See Gerber & Foreman, *supra* note 13, at 97 (“A new statutory offense of embezzlement therefore was created in 1799 to punish this and the similar offenses labeled fraudulent conversion, larceny by bailee, and larceny after trust.”).

³² False pretenses, known as fraud and fraudulent conveyances in Nevada, is codified at NEV. REV. STAT. § 205.330 (2007).

cheat the offender out of his property,³³ leading the owner or possessor to voluntarily part with the property.³⁴ The crime of false pretenses is distinguishable from larceny because the intent of the owner of the property, the victim, governs.³⁵ If the victim intends to keep title to the property but relinquish only possession, the crime is larceny.³⁶ However, if the victim intends to part with both the title and possession, the crime is false pretenses.³⁷ Additionally, the crime of fraud is different from false pretenses because for a crime to constitute fraud, the false pretense must actually cause the victim to rely upon the offender's false pretense to his detriment.³⁸ Thus, under some fraud statutes, and most notably Arizona's,³⁹ a false pretense is a key element of the crime of fraud.⁴⁰

Therefore, the only differences between the common law crimes of larceny, embezzlement, and false pretenses are at what time the offender formed the intent to deprive the owner of the property permanently and, in the case of false pretenses, what the victim had intended.⁴¹ Thus, new and innumerable statutory crimes came into fruition as a means of covering those situations that were not covered strictly by common law larceny—a means of plugging up the loopholes found in larceny.⁴² These new statutory enactments, unfortunately, created thin, technical distinctions among the common law crimes, making the theft laws a confusing mess.⁴³ Thus, seeing as how subtle and strikingly thin these differences actually are, it is not surprising how easily crafty defense attorneys finagle these differences to their clients' advantage.

If the prosecutor charges the offender with larceny, for example, the defense attorney can simply argue, "My client did not have the intent to steal the property at the time he took the property; however he did form the intent a little while later after having come into possession of the property." And, unfortunately, the attorney's argument would have succeeded under the com-

³³ 35 C.J.S. *False Pretenses* § 3 (1999).

³⁴ Gerber & Foreman, *supra* note 13, at 97 ("The offense of obtaining property by false pretenses also became a separate statutory crime following strict judicial enforcement of the technical larceny requirement that property be obtained against the possessor's will.").

³⁵ 35 C.J.S. *False Pretenses*, *supra* note 33.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ Arizona is notable because, again, its Comprehensive Theft Statute served as a model for Nevada's Comprehensive Theft Statute.

⁴⁰ 35 C.J.S. *False Pretenses*, *supra* note 33 (citing *State v. Johnson*, 880 P.2d 132 (Ariz. 1994)).

⁴¹ *Id.*

⁴² See Gerber & Foreman, *supra* note 13, at 98 n.249 (listing the Arizona statutes that the legislature enacted in an "attempt to plug all the imaginable loopholes in the present theft laws"); Paillette, *supra* note 13, at 530-31 ("The former Oregon false pretenses statute is similar to those enacted in most other jurisdictions to plug the gap in common law larceny.") (footnote omitted).

⁴³ Gerber & Foreman, *supra* note 13, at 98 (stating that these technical distinctions are nothing but "cumbersome"); Peterson, *supra* note 13, at 308 (noting that the proliferation of the codified common law theft crimes is "puzzling, and the complexities it engenders can be bewildering"); Scott, *supra* note 13, at 447 (observing that if England had extended larceny to new situations, rather than enacting the newer crimes of embezzlement and false pretenses, the theft laws would have been much simpler to comprehend).

mon law, and, thus, the client would escape punishment, despite his being undoubtedly guilty of one type of theft-related crime. An actual real-life example of this travesty will best drive this consequential point home.

A classic example of such an egregious result can be seen in a Colorado Supreme Court case, *Sparr v. People*.⁴⁴ In *Sparr*, the defendant was charged with both embezzlement and obtaining property by false pretenses⁴⁵ after he had represented to a prospective buyer that he owned pinto beans that had actually belonged to his employer.⁴⁶ The defendant sold a certificate that would entitle the holder of the certificate to 100-pound sacks of pinto beans that were in the warehouse of the defendant's employer.⁴⁷ After the admission of all evidence, the prosecutor dismissed the count of false pretenses because he decided the evidence better supported the count of embezzlement.⁴⁸ The jury ultimately convicted the defendant of embezzlement, and the defendant appealed.⁴⁹ The Colorado Supreme Court reversed the defendant's conviction because, in its view, the evidence presented did not support the theory of embezzlement but rather false pretenses.⁵⁰

One of the important elements of embezzlement, "conversion,"⁵¹ was missing in *Sparr* because the defendant did not own the beans he was selling via a certificate, and such certificate had no legal effect as to the ownership or possession of any beans that his employer owned.⁵² The defendant did not represent that he had such authority to sell in the scope of his employment because he falsely represented that he was the one who owned the beans.⁵³ Consequently, because the element of "conversion" was missing, the defendant escaped conviction and punishment despite the fact that the evidence did ultimately support the charge of false pretenses⁵⁴: a most unfortunate result, to say the least.

Nevertheless, society does not, nor should it, tolerate such unfortunate results, and it is this very intolerance by society that helped pave the way towards the creation of Theft Statutes.

⁴⁴ *Sparr v. People*, 219 P.2d. 317 (Colo. 1950); *see also* Scott, *supra* note 13, at 446 (citing *Sparr*, 219 P.2d. 317).

⁴⁵ *Sparr*, 219 P.2d at 318.

⁴⁶ *Id.* at 319.

⁴⁷ *Id.*

⁴⁸ *Id.* at 318.

⁴⁹ *Id.*

⁵⁰ *Id.* at 321.

⁵¹ In order to convict for a criminal conversion, there must be established as an essential element of the crime of embezzlement that there was an unauthorized assumption and exercise of the right of ownership of goods and chattels belonging to another, to the alteration of their condition or the exclusion of the owner's right.

Id.

⁵² *Id.* at 320.

⁵³ *Id.*

⁵⁴ *Id.* at 321 ("Although defendant's conduct, considered from the standpoint of the prosecution, would warrant conviction upon the second count of the information filed against him, the offense of embezzlement is not supported by the evidence . . .").

B. Rationales Behind the Creation of Theft Statutes

Upon first glance, it would appear that Theft Statutes do not really accomplish much because all they do is basically state that all of those crimes that are known as theft-related crimes under the common law and/or have been codified are defined under one statute. Although it could be argued that Theft Statutes are not a major revolution to the redefinition of the common law theft crimes, they indeed are very important.⁵⁵ Most importantly, these Theft Statutes are extremely necessary if our goal is to ensure that criminals do not get away with their crimes based on mere technicalities.⁵⁶

Essentially four rationales exist behind the enactment of a CTS. First, Theft Statutes seek to simplify charging procedures for prosecutors by avoiding the technical, procedural distinctions among the various common law theft crimes, such as larceny, fraud, embezzlement, obtaining money by false pretenses, and other similar offenses.⁵⁷ These Theft Statutes accomplish this task by dealing with all forms of common law theft in one simplified, comprehensive statute,⁵⁸ hence the name “comprehensive.”⁵⁹ Therefore, rather than theft crimes being classified regarding the means as to how the particular crime is committed, the focus is shifted to the value of the property or services the defendant has wrongfully obtained.⁶⁰

Second, Theft Statutes prevent the egregious consequence of having defendants escape punishment if a prosecutor has charged them with a particular theft-related crime that is later found unsupported by the evidence.⁶¹ In other words, if the defendant is initially charged with larceny but the evidence

⁵⁵ Rafael Guzman, *1976 Criminal Code—General Principles*, 30 ARK. L. REV. 111, 111 n.1 (1976) (Guzman notes the significance of the revision of the theft crimes: “Perhaps the most noteworthy revision lies in the area of theft offenses where such traditional offenses as Larceny, Embezzlement, False Pretenses, etc. have been consolidated into a single offense of Theft.”).

⁵⁶ 2 LAFAYE & SCOTT, *supra* note 12, § 8.8(a)(2), at 412 (“It is thus apparent that to retain these technical distinctions between the three crimes serves mainly to present a guilty defendant with an opportunity to postpone and perhaps altogether to escape his proper punishment.”).

⁵⁷ *Assemb. Comm. Hearing, supra* note 7, at 4 (testimony of Carolyn Ellsworth, Chief Deputy District Attorney for Clark County); *see* Hargrave, *supra* note 13, at 1109 (observing that Louisiana’s Theft Statute eliminated the technical distinctions among the common law theft crimes); *see also* Gerber & Foreman, *supra* note 13, at 98 (“The technical distinctions among shoplifting, embezzlement, receiving stolen property, finding and keeping lost property, defrauding an innkeeper, and other common law theft crimes should merge into an overriding concept of unlawfully controlling the property or services of another.”).

⁵⁸ Hargrave, *supra* note 13, at 1109 (“One of the major reforms of the Louisiana Criminal Code was to consolidate the existing stealing offenses into one combined theft provision.”).

⁵⁹ *Assemb. 594, 1989 Leg., 65th Sess. (Nev. 1989)* (“[a]dopts *comprehensive* theft statute”) (emphasis added); *see* JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* § 32.11, at 614-15 (4th ed. 2006).

⁶⁰ *State v. Tramble*, 695 P.2d 737, 740-41 (Ariz. 1985) (noting that the penalty for theft depends on the value of the property or services obtained).

⁶¹ DRESSLER, *supra* note 59, at 615 (Thieves often escape punishment in the absence of a Comprehensive Theft Statute “because the prosecutor is unable to prove beyond a reasonable [doubt] whether the wrongdoer had a felonious intent at the time he took possession of property (larceny) or later (embezzlement), or whether the wrongdoer’s admitted fraud resulted in transfer of title (false pretenses) or only possession (larceny).”).

is later found to support another theft-related crime, such as embezzlement or obtaining money under false pretenses, then the defendant will go unpunished.⁶²

Third, these statutes ease the confusion surrounding the blurring of the technical distinctions among the various, and originally separate and distinct, common law theft crimes.⁶³ The courts and state legislatures were the ones responsible for the creation of these confounding, technical distinctions among the various theft-related crimes because they, respectively, crafted the common law crimes and then later codified them.⁶⁴

The fourth rationale behind Theft Statutes is that they serve to “minimize or eliminate extensive and costly state litigation”;⁶⁵ however, this Note will not delve further into this rationale for two reasons. First, this rationale is beyond the scope of this Note, and second, the legislative history of Nevada’s CTS barely discusses it, only mentioning it without elaborating as to why. Costly and extensive state litigation can, and most likely will, be avoided by the enactment of a CTS because “[t]his procedural simplification will contribute to speedier justice, less crowded dockets, and fewer appeals.”⁶⁶

Despite these consequential rationales, most notably the “simplification” rationale, Nevada’s CTS fails to satisfy them because the CTS has added to, as opposed to eliminated, the confusion of Nevada’s theft laws.

III. ANALYSIS OF NEVADA’S COMPREHENSIVE THEFT STATUTE

To comprehend the confusion surrounding Nevada’s CTS, it is imperative to, first, examine the text of the CTS itself; second, consult Arizona’s CTS; and finally, interview the people who testified in support of the enactment of Nevada’s CTS, as well as the very people who actively utilize the theft laws every day: district attorneys for Clark County, Nevada.

A. *Text of Nevada’s Comprehensive Theft Statute*

Nevada’s CTS is codified as NRS 205.0833. It provides in full:

1. Conduct denominated theft in NRS 205.0821 to 205.0835, inclusive, and section 1 of this act constitutes a single offense embracing the separate offenses commonly known as larceny, receiving or possessing stolen property, embezzlement, obtaining property by false pretenses, issuing a check without sufficient money or credit, and other similar offenses.

⁶² 2 LAFAYE & SCOTT, *supra* note 12, § 8.8(a)(2), at 412; Michael B. Kennedy, *Idaho’s Generic Theft Law*, 18 IDAHO L. REV. 43, 44 (1982) (noting that a travesty of justice occurs “when a thief [is] permitted to escape justice because the chosen [common law] theory turn[s] out to be incorrect”).

⁶³ Bartram, *supra* note 13, at 250 (“[O]ver the past 130 years, court decisions and statutory amendments have blurred the distinction among the theft offenses.”); Douglass, *supra* note 13, at 15-16 (noting that consolidating the common law theft crimes will “eliminate historical distinctions which serve only to confound prosecutors and complicate criminal litigation”).

⁶⁴ Bartram, *supra* note 13, at 250.

⁶⁵ *Assemb. Comm. Hearing*, *supra* note 7, at 4 (testimony of Carolyn Ellsworth, Chief Deputy District Attorney for Clark County).

⁶⁶ Paillette, *supra* note 13, at 535.

2. A criminal charge of theft may be supported by evidence that an act was committed in any manner that constitutes theft pursuant to NRS 205.0821 to 205.0835, inclusive, and section 1 of this act notwithstanding the specification of a different manner in the indictment or information, subject to the power of the court to ensure a fair trial by granting a continuance or other appropriate relief if it determines that, in a specific case, strict application of the provisions of this subsection would result in prejudice to the defense by lack of fair notice or by surprise.⁶⁷

Those specific actions that constitute “theft”—known in the common law as larceny, receiving or possessing stolen property, and embezzlement, the crimes that were originally codified in NRS 205.0821 to 205.0835⁶⁸—are defined in the first part of NRS 205.0832.⁶⁹

The second part of the CTS means that prosecutors may prosecute for “theft” for any action that is deemed to be one of the codified common law theft crimes—larceny, receiving or possessing stolen property, etc. This means that a prosecutor need not charge under the common law theft crimes but can, and as will be argued extensively herein should, charge strictly under this one simplified statute.

Although the body of the CTS provides that the crime of “theft” shall encompass the common law theft crimes (larceny, receiving or possessing stolen property, embezzlement, obtaining property by false pretenses, issuing a check without sufficient money or credit, and other similar offenses),⁷⁰ these common law theft crimes are still codified in Nevada’s statutes.⁷¹ Therefore, the law of theft in Nevada is more muddled and, consequently, even more confusing than it was prior to the adoption of the CTS. The confusion can be summed up with the following question: if the sole purpose of a CTS is to clarify the law that has become muddled over the years by replacing the common law theft crimes, why should the State refuse to repeal the very crimes that the Comprehensive Theft Statute was meant to replace?

Because every state with a Comprehensive, Unified, or Consolidated Theft Statute has repealed the common law theft crimes,⁷² it is especially enigmatic

⁶⁷ NEV. REV. STAT. § 205.0833 (2007).

⁶⁸ *Id.*

⁶⁹ *Id.* § 205.0832(1)(a) (providing in relevant part that “a person commits theft if, without lawful authority, he knowingly . . . [c]ontrols any property of another person with the intent to deprive that person of the property”).

⁷⁰ *Id.* § 205.0833(1).

⁷¹ Larceny is codified at NEV. REV. STAT. §§ 205.2175 to .2707, embezzlement is codified at NEV. REV. STAT. §§ 205.300 to .312, and fraudulent conveyances and fraud are codified at NEV. REV. STAT. §§ 205.330 to .460.

⁷² *E.g.*, State v. Dunn, 767 So. 2d 405, 407 (Ala. Crim. App. 2000) (Alabama abolished the common law crime of larceny and “created the new offense of theft of property” to take its place. “The purpose of the new theft statutes was ‘to create a unified theft offense which eradicate[d] the common law distinctions between the crimes of larceny, embezzlement, and false pretense.’” (alteration in original) (citation omitted)); State v. Lahurd, 632 So. 2d 1101, 1103 (Fla. Dist. Ct. App. 1994) (“The statute repealed the specific common law crimes of larceny, embezzlement and obtaining money under false pretenses and substituted an expanded and simplified crime of theft graded by degree according to the amount involved.”); see also *The Theft Act 1968*, 33 J. CRIM. L. 63, 63 (1969) (“The Larceny Acts of 1861 and 1916 are among the enactments *repealed*. The Act *abolishes* the old offenses of larceny, embezzlement and fraudulent conversion and replaces them with a new offense of theft.” (emphasis added)).

why the Nevada Legislature has chosen not to follow suit. In an attempt to ascertain why the Nevada Legislature has failed to repeal the common law theft crimes at the time of the adoption of the CTS, or even afterwards, it is instructive and necessary to consult the history of Arizona's CTS.

It is instructive, or more accurately crucial, to consult the history of Arizona's CTS because the Nevada Legislature utilized it as a model for the enactment of Nevada's CTS. Arizona's CTS, besides being the model for Nevada's CTS, is important to consult because the legislative history of Nevada's CTS provides no insight whatsoever as to why the common law theft crimes were not repealed.

B. *Arizona's CTS*

Arizona no longer has the common law theft crimes codified into its statutes because the Arizona State Legislature repealed them at the time it enacted its CTS.⁷³ The reason for this, most likely, is because the common law theft crimes codified in the statutes were no longer needed. The very purpose behind a CTS is to lump all of these crimes into one statute. This makes a prosecutor's job much more efficient by enabling her to charge defendants under one simplified statute and, thus, avoiding the requirement that she choose at the outset of a case under which common law theft crime to charge the defendant. Further, the one statute eliminates the "confusing distinctions between the various forms of larceny [then] contained in Arizona statutes and case law."⁷⁴ Thus, the Nevada Legislature's desire to keep the common law theft crimes on the books does not make any sense in light of the purpose behind the statute.

Additionally, the Nevada Legislature's refusal to address this issue is perplexing because the legislative history of Nevada's CTS unequivocally states that Arizona's CTS was consulted in the drafting of Nevada's version of the statute.⁷⁵ Thus, Arizona's CTS, including its language and the rationale behind its enactment, was the main, and most likely the only, model consulted.⁷⁶ And yet, Nevada has failed to follow Arizona's lead in repealing the common law theft crimes, which Arizona did upon its enactment of its CTS.

An important distinction is that Arizona's CTS, unlike Nevada's, does not refer to the names of the common law crimes that it is replacing.⁷⁷ Arizona's CTS has practically identical wording to NRS 205.0832, which defines the specific acts that constitute "theft," even though NRS 205.0832 is not Nevada's CTS. Nevada's CTS is NRS 205.0833, and it is this statute that refers to those

⁷³ ARIZ. REV. STAT. ANN. § 13-1802 (2007). Sections 13-661 through 13-777 were repealed. Those sections related to, e.g., degrees of theft, property subject to theft, theft of money, and punishment.

⁷⁴ *Summary Analysis of New Criminal Code: Hearing Before the H. Comm. on Judiciary*, 1977 Leg., 33d Sess. 6 (Ariz. 1977). Not surprisingly, this rationale is identical to the rationale stated in the legislative history of Nevada's Comprehensive Theft Statute.

⁷⁵ *S. Comm. Hearing*, *supra* note 10, at 3 ("Mr. Barker said the legislation was developed from laws passed in the State of Arizona.").

⁷⁶ There is nothing in the legislative history to explain why Arizona's Comprehensive Theft Statute was consulted and not the Theft Statutes of other states.

⁷⁷ ARIZ. REV. STAT. ANN. § 13-1802 (providing in relevant part that "[a] person commits theft if, without lawful authority, the person knowingly . . . [c]ontrols property of another with the intent to deprive the other person of such property").

other sections of the Nevada statutes that constitute the conduct that is now defined as “theft” in the CTS, namely the codified common law theft crimes.⁷⁸

To put it another way, Nevada essentially borrowed the language from Arizona’s CTS and inserted it into a statute that is not the actual Theft Statute. Furthermore, Nevada’s Theft Statute, unlike Arizona’s, does not list the penalties for committing “theft” in the CTS itself.⁷⁹ Instead, the penalties, which are classified by the value of the property that a defendant misappropriated, are provided in another, separate statute, namely NRS 205.0835.⁸⁰ These seemingly minor deviations from Arizona’s CTS are confusing, and they represent further, and arguably conclusive, evidence that those who drafted Nevada’s CTS did an inadequate, if not a downright poor, job. It is such inadequate drafting that further lends to the confusion surrounding Nevada’s theft laws. Because Nevada’s CTS refers to the other statutory sections that define the common law theft crimes,⁸¹ the Nevada Legislature perhaps did not intend to repeal the common law crimes.

⁷⁸ NEV. REV. STAT. § 205.0833 (2007) (“Conduct denominated theft in NRS 205.0821 to 205.0835, inclusive, and section 1 of this act constitutes a single offense embracing the separate offenses commonly known as *larceny, receiving or possessing stolen property, embezzlement, obtaining property by false pretenses, issuing a check without sufficient money or credit, and other similar offenses.*”) (emphasis added).

⁷⁹ ARIZ. REV. STAT. ANN. § 13-1802(E) reads in relevant part:

Theft of property or services with a value of twenty-five thousand dollars or more is a class 2 felony. Theft of property or services with a value of four thousand dollars or more but less than twenty-five thousand dollars is a class 3 felony. Theft of property or services with a value of three thousand dollars or more but less than four thousand dollars is a class 4 felony, except that theft of any vehicle engine or transmission is a class 4 felony regardless of value. Theft of property or services with a value of two thousand dollars or more but less than three thousand dollars is a class 5 felony. Theft of property or services with a value of one thousand dollars or more but less than two thousand dollars is a class 6 felony. Theft of any property or services valued at less than one thousand dollars is a class 1 misdemeanor, unless the property is taken from the person of another, is a firearm or is a dog taken for the purpose of dog fighting in violation of § 13-2910.01, in which case the theft is a class 6 felony.

⁸⁰ NEV. REV. STAT. § 205.0835 provides in full:

1. Unless a greater penalty is imposed by a specific statute and unless the provisions of section 1 of this act apply under the circumstances, a person who commits theft in violation of any provision of NRS 205.0821 to 205.0835, inclusive, and section 1 of this act shall be punished pursuant to the provisions of this section.
2. If the value of the property or services involved in the theft is less than \$250, the person who committed the theft is guilty of a misdemeanor.
3. If the value of the property or services involved in the theft is \$250 or more but less than \$2,500, the person who committed the theft is guilty of a category C felony and shall be punished as provided in NRS 193.130.
4. If the value of the property or services involved in the theft is \$2,500 or more, the person who committed the theft is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 10 years, and by a fine of not more than \$10,000.
5. In addition to any other penalty, the court shall order the person who committed the theft to pay restitution.

⁸¹ MODEL PENAL CODE § 223.1 cmt. 1, at 136 (Official Draft and Revised Comments 1980), provides:

Or, in the alternative, it is possible that the Nevada Legislature referred to these other sections simply to define what is meant by “theft” and not because it wanted prosecutors to continue to charge under those statutes after the enactment of the CTS. In sum, it is possible that this was strictly an oversight. Unfortunately, the answer to this question can only be answered by the Nevada Legislature, a question that is not very likely to be answered any time soon because the Nevada Legislature seems to be comfortable with Nevada’s theft laws.⁸² Perhaps the answer lies with the current prosecutors in Nevada and those who testified in support of the enactment of Nevada’s CTS.

C. Interviews with Former Nevada District Attorney Carolyn Ellsworth and Nevada District Attorneys Dave Barker, Christopher Laurent, and Ben Graham

Because the legislative history of Nevada’s CTS is not instructive as to why the common law theft crimes still exist in conjunction with the Theft Statute, the author of this Note interviewed those people who may offer some insight as to why this is the case. These interviewed individuals are/were prosecutors, two of whom testified before the Nevada Legislature, and one of whom, Clark County, Nevada, District Attorney Dave Barker, was responsible for drafting the Theft Statute.

All of these individuals were asked the following questions in their respective interviews with the author of this Note: (1) whether they feel the Nevada Legislature has refused to address the issue of repealing the common law theft crimes; and (2) whether prosecutors charge under either the common law theft crimes or the Comprehensive Theft Statutes (in other words, whether they pick and choose under which statutes to charge, depending on the particular facts of the case).

1. Interview with Former Nevada District Attorney Carolyn Ellsworth

Carolyn Ellsworth, who testified before the Nevada Legislature⁸³ as it considered the adoption of a CTS, noted that she believes the Nevada Legislature failed to repeal the common law theft crimes upon enactment of the CTS for three reasons.⁸⁴ First, the Nevada Legislature, as well as Ms. Ellsworth, wanted to make certain that the CTS was in place and “working ok” first.⁸⁵ Second, she opined that it sounded better to call the accused, and have it pre-

It was specifically stated in the text of Subsection (1) as published in the Proposed Official Draft of the Model Code, that the consolidated offense was designed to embrace the offenses that were “heretofore known as larceny, embezzlement, false pretense, extortion, blackmail, fraudulent conversion, receiving stolen property, and the like.” *This language has been omitted so as not to suggest that the common-law content of these offenses is meant to be carried forward.* (emphasis added).

⁸² Telephone Interview with Ben Graham, Dist. Attorney, Clark County, Nev., in Las Vegas, Nev. (Feb. 13, 2007).

⁸³ *Assemb. Comm. Hearing, supra* note 7, at 4 (testimony of Carolyn Ellsworth, Chief Deputy District Attorney for Clark County).

⁸⁴ Telephone Interview with Carolyn Ellsworth, former Chief Deputy Dist. Attorney, Clark County, Nev., in Las Vegas, Nev. (Nov. 1, 2006).

⁸⁵ *Id.*

served in his record as, an “embezzler”⁸⁶ as opposed to a “thief.” Third, she noted that everyone knows what the crime of embezzlement is as opposed to the general crime of “theft.”⁸⁷

However, most of her assessments do not seem to be particularly convincing, at least, not anymore. First, regarding her concern about the statute “working ok,”⁸⁸ this rationale may have made sense upon enactment. If a statute is newly enacted, it is important to ensure that it is serving the purpose for which it was created; in this context, the main purpose was to make charging easier for prosecutors.⁸⁹ However, Nevada’s CTS was enacted in 1989, which was well over nineteen years ago.⁹⁰ There is no reason why the common law theft crimes should still be on the books just in case the CTS does not work. If the prosecutors are unable to charge under the newer statute by now, why is that statute still on the books? Therefore, this reason does not really make sense in light of the long passage of time since the CTS’s enactment.

Second, regarding her claim about labeling someone an “embezzler,” it is doubtful that members of a jury care about the particular label with which the defendant is identified. It is the nature of the crime (the nature in this case being theft of property) that ultimately matters. Someone who is just a thief is just as bad as someone who is an “embezzler.”⁹¹

Third, Ms. Ellsworth’s statement about everyone knowing what embezzlement is⁹² constitutes a questionable answer. The acts that constitute the crime of embezzlement are muddled and, thus, difficult to comprehend. This confusion is one of the main rationales behind enacting a CTS in the first place.⁹³ The distinctions among the common law theft crimes, which include embezzlement, are slim and technical,⁹⁴ and it is these technicalities that give rise to the need for a CTS. These statutes clarify the theft laws by lumping the common law theft crimes together in one easy statute and calling it “theft,” which constitutes a single offense.

2. Interview with Nevada District Attorney Dave Barker

Yet another person who testified before the Nevada Legislature, arguing for the adoption of the Comprehensive Theft Statute, was District Attorney for Clark County, Nevada, Dave Barker.⁹⁵ Mr. Barker’s opinion regarding the

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ See *supra* Part II.B.

⁹⁰ Assemb. 594, 1989 Leg., 65th Sess. (Nev. 1989) (“[a]dopts comprehensive theft statute”).

⁹¹ Scott, *supra* note 13, at 449 (“There is no difference in moral quality between the activities of a thief, an embezzler or a swindler.”); see also MODEL PENAL CODE § 223.1 cmt. 2(b), at 132 (Official Draft and Revised Comments 1980) (“Prevailing moral standards do not differentiate sharply between the swindler and other ‘thieves.’ To that extent, at least, consolidation conforms to the common understanding of what is substantially the same kind of undesirable conduct.”).

⁹² Telephone Interview with Carolyn Ellsworth, *supra* note 84.

⁹³ See *supra* Part II.B.

⁹⁴ *Assemb. Comm. Hearing, supra* note 7, at 4 (testimony of Carolyn Ellsworth, Chief Deputy District Attorney for Clark County); see also Gerber & Foreman, *supra* note 13, at 98.

⁹⁵ *S. Comm. Hearing, supra* note 10, at 3 (testimony of Dave Barker, District Attorney for Clark County).

state of the law of theft in Nevada is particularly crucial because he was one of the people who participated in the drafting of Nevada's CTS, in addition to being one of the people who testified before the Nevada Legislature.

He answered in regard to the Nevada Legislature's failing to address the repeal issue by stating that he "would not characterize this situation as a 'refusal.' My impression is the time is so short with the 120-day rule and under current rules BDRs⁹⁶ are limited . . . so no one has asked."⁹⁷ Regarding the question as to whether prosecutors charge under either the common law crimes or the CTS depending on the facts of the particular case, he provided: "We don't charge both . . . we use either,"⁹⁸ "although the charging decision is based more on an analysis of the facts and statutory elements than the name of the crime."⁹⁹

It should be further noted that Mr. Barker did not respond to whether he feels that the Nevada Legislature has failed to repeal the common law theft crimes because of the doctrine of implied repeal.¹⁰⁰ He said that he feels the Nevada Legislature has failed to repeal the common law crimes because they "did not have the political will to do so."¹⁰¹

On this subject, he continued: "On routine criminal cases where the facts are clear, the old common law theories are OK."¹⁰² Therefore, prosecutors continue to charge under the common law theft crimes if there appears to be no doubt what crime the accused has committed.¹⁰³ From his answers, one may reasonably infer that Mr. Barker feels that it is unnecessary to charge under the CTS if there is virtually no doubt which common law theft crime the defendant has committed.

His rationale seems to make sense upon initial inspection. However, this very same rationale is the exact opposite of what Mr. Barker argued in support of the enactment of the CTS. He testified before the Nevada Legislature that one of the biggest problems with the then current theft laws in Nevada was that

⁹⁶ The Nevada Legislature's website explains that the Legislative Counsel Bureau is a service agency that allows legislators to rely on the Bureau for assistance in the researching and drafting of bills on their behalf instead of relying on biased people, such as lobbyists or the governor to do so. So, essentially, a BDR is a proposal for a new statute that is submitted to the Legislative Counsel Bureau for drafting on behalf of the legislator. See Nevada Legislature, Legislative Counsel Bureau, <http://www.leg.state.nv.us/lcb/morelcb.cfm> (last visited Mar. 3, 2007).

For more information on the procedures of submitting BDR's, see Instructions for Submission of Bill Draft Requests by Executive Branch Agencies, available at http://budget.state.nv.us/allagency/memos/memos2006/AAM2006_03_instructions.pdf (last visited Dec. 19, 2007).

⁹⁷ E-mail Interview with Dave Barker, *supra* note 8 (ellipses in original). Mr. Barker explained that the 120 day rule means that the Legislature has 120 days to pass or otherwise address a particular piece of legislation. If the Legislature fails to do so within this time period, the bill is rejected and will have to be re-submitted for later consideration.

⁹⁸ *Id.* (ellipses in original).

⁹⁹ *Id.*

¹⁰⁰ See generally *infra* Part III.D.

¹⁰¹ Telephone Interview with Dave Barker, Dist. Attorney, Clark County, Nev., in Las Vegas, Nev. (Nov. 6, 2006).

¹⁰² *Id.*

¹⁰³ *Id.*

prosecutors had to “‘pigeonhole’ or pick a particular charge, based upon facts.”¹⁰⁴ He continued:

The facts are extremely important . . . if there is a subtle distinction or change in those facts, the crime can change . . . with this law, the prosecution need only charge grand theft . . . then allege the facts behind the theft itself . . . it would not change the burden of proof . . . but it would allow us to forego the need to make subtle distinctions in the law.¹⁰⁵

To recap, Mr. Barker stated in his email interview that “[o]n routine criminal cases where the facts are clear . . . the old common law theories are OK.”¹⁰⁶ If this is what prosecutors are continuing to do—charging defendants under the common law theories when it seems abundantly clear what crime they had committed—then they are doing the exact thing that Mr. Barker argued was wrong with the common law theories in his testimony before the Legislature. Namely, they are picking particular theories based on the facts.¹⁰⁷

This picking and choosing is troubling because although it may seem clear the defendant has committed larceny, for example, at the charging stage, the evidence may end up supporting another, uncharged common law theft crime, like embezzlement.¹⁰⁸ This means that if the evidence fits embezzlement as opposed to the charged crime of larceny, the defendant will completely avoid paying for his criminal behavior,¹⁰⁹ despite his clearly being a thief.

Moreover, Mr. Barker’s explanation as to why the common law theories still exist in the Nevada statutes does not make inherent sense. Even if it seems clear that the defendant committed larceny, it does not make sense that the prosecutor refuses simply to charge him under the CTS. This would be the better course of action because if the evidence later points toward another common law theory, then the defendant’s charge under the CTS will take care of this, demonstrating the utility of this statute.

3. *Interview with Nevada District Attorney Christopher Laurent*

Of course, Clark County District Attorney Christopher Laurent may believe, as does Clark County District Attorney Dave Barker, that this picking and choosing is harmless. When the author of this Note asked Mr. Laurent about whether Nevada prosecutors have ever encountered a problem where they charged a defendant under one particular common law theory, like larceny, but the evidence later turned out to support a different theory, he suggested this has never occurred.¹¹⁰ This question was then immediately followed by an inquiry as to whether Nevada prosecutors have ever encountered problems regarding charging defendants under the common law theories

¹⁰⁴ *S. Comm. Hearing, supra* note 10, at 3 (testimony of Dave Barker, District Attorney for Clark County).

¹⁰⁵ *Id.* (omissions in original).

¹⁰⁶ E-mail Interview with Dave Barker, *supra* note 8 (ellipses in original).

¹⁰⁷ *S. Comm. Hearing, supra* note 10, at 3 (testimony of Dave Barker, District Attorney for Clark County).

¹⁰⁸ See discussion regarding *Sparr v. People, supra* notes 44-54 and accompanying text; see also 2 LAFAVE & SCOTT, *supra* note 12, § 8.8(a)(2), at 412.

¹⁰⁹ 2 LAFAVE & SCOTT, *supra* note 12, § 8.8(a)(2), at 412.

¹¹⁰ Telephone Interview with Christopher Laurent, *supra* note 19.

as opposed to charging them strictly under the CTS. He stated that it is a concern on law enforcement's initial screening, and he gave an example of a police officer writing down "larceny" when the appropriate charge was actually "embezzlement."¹¹¹ He then said in that particular situation, he would just write down the charge of "embezzlement" instead of the charge of "larceny."¹¹² Besides this problem upon the initial screening of defendants, he did not state that prosecutors have ever had problems with defendants escaping punishment because the prosecutors charged them with the wrong common law theft theory.

Despite the Nevada Legislature's good intention to simplify charging procedures for prosecutors and to eliminate the technical distinctions among the common law theft crimes, the CTS as currently applied is not being utilized correctly. Although the defendant's crime may seem clear at the outset, the factfinder—whether the factfinder be either a jury or a judge—may interpret the evidence not to fit the particular crime for which the accused is charged.¹¹³ If this is the case, then the defendant will go free if he is charged for embezzlement, for example, but the factfinder feels that the evidence does not fit the embezzlement theory but fits some other common law theft crime.¹¹⁴

Perhaps the Nevada Legislature has not addressed repealing the common law crimes because Nevada's theft laws, in the shocking words of Mr. Laurent, "are not confusing at all."¹¹⁵ Mr. Barker, in contrast with Mr. Laurent, merely implied this same sentiment, probably unintentionally, by opining that the Nevada Legislature likely feels the issue is not important enough to address thoroughly.

One may infer from both Mr. Laurent's and Mr. Barker's statements that the explanation behind the Nevada Legislature's failure to address the repeal issue is due to the Legislature's having come to the conclusion that Nevada's theft laws are clear as written, thus obviating the need for a change. If this is the true reason why the Nevada Legislature has failed to address the issue of repealing the common law theft crimes, then this "explanation" just highlights the Nevada Legislature's ignorance regarding the purpose and rationales behind Comprehensive Theft Statutes. The Comprehensive Theft Statutes serve an extremely crucial function: they eliminate the technical, thin (in other words, confusing) distinctions among the common law theft crimes. These distinctions arose from the courts' attempts to cover the various situations that amounted to theft but would not be considered theft under older theories.

However, in an attempt to prove that the theft laws are *not* confusing, Mr. Laurent tried to explain why this is so by using an example of "larceny from the person" and "larceny of livestock."¹¹⁶ He stated that because "larceny from

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ 2 LAFAYE & SCOTT, *supra* note 12, § 8.8(a)(2), at 412 ("It is thus apparent that to retain these technical distinctions between the three crimes serves mainly to present a guilty defendant with an opportunity to postpone and perhaps altogether escape his proper punishment.").

¹¹⁴ *Id.*

¹¹⁵ Telephone Interview with Christopher Laurent, *supra* note 19.

¹¹⁶ *Id.*

the person” involves an element of threat, it is not included in Nevada’s definition of common law larceny under the CTS.¹¹⁷ Regarding “larceny of livestock,” he said that because it is difficult to put a dollar amount on a stolen cow, it is best to charge under the codified common law statute because unlike the CTS, one does not need to put a dollar amount on the stolen property in order to charge the defendant.¹¹⁸

These examples would provide some reasonable explanation as to why the codified common law crime of larceny still exists except for one reason: common law larceny, a crime that the Theft Statutes are meant to cover and replace, includes both “larceny from the person”¹¹⁹ and “larceny of livestock.”¹²⁰ Furthermore, Arizona repealed all forms of common law larceny upon enactment of its CTS.¹²¹ Because Arizona’s, as well as Nevada’s, CTS provides a defendant’s penalty based upon the value of the misappropriated property,¹²² the prosecutor still must determine the value of any misappropriated property, including the value of livestock. Moreover, as dictated by NRS 205.251, one still must determine the value of all property involved in any larceny offense.¹²³ Thus, Mr. Laurent’s argument regarding the non-necessity of determining the value of livestock when charging under the codified common law crime of larceny does not appear to be valid. Furthermore, in his effort to explain why Nevada’s theft laws are not confusing, he only served to prove that Nevada’s theft laws are indeed perplexing.

4. Interview with Nevada District Attorney Ben Graham

Unlike Ms. Ellsworth, Mr. Barker, and Mr. Laurent, Clark County, Nevada, District Attorney Ben Graham, whom Mr. Laurent referred to as a “legislative guru,”¹²⁴ stated directly that the Nevada Legislature has failed to address the repealing of the common law theft crimes thoroughly because the

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ However, in Louisiana, “larceny from the person” is considered separate from the common law theft crimes because it includes an element of violence. Thus, it is codified as “purse snatching” under LA. REV. STAT. ANN § 14:65.1 (2007):

Purse snatching is the theft of anything of value contained within a purse or wallet at the time of the theft, from the person of another or which is in the immediate control of another, by use of force, intimidation, or by snatching, but not armed with a dangerous weapon.

¹²⁰ 52B C.J.S. *Larceny*, *supra* note 15 (“‘Larceny’ is a generic term within the broad outlines of which there are many different offenses. These include petit larceny, grand larceny, *larceny from the person* . . .” (emphasis added) (footnotes omitted)); *see also supra* note 73 (providing a list of those common law theft crimes that were repealed upon enactment of Arizona’s Comprehensive Theft Statute (this includes larceny of livestock)).

¹²¹ *See supra* Part III.B.

¹²² ARIZ. REV. STAT. ANN. § 13-1802(E) (2007) states in relevant part: “Theft of property or services with a *value* of twenty-five thousand dollars or more is a class 2 felony.” (emphasis added).

¹²³ NEV. REV. STAT. § 205.251(2) (2007) provides in relevant part: “The value of property involved in larceny offenses committed by one or more persons pursuant to a scheme or continuing course of conduct may be aggregated in determining the grade of the larceny offenses.”

¹²⁴ He dubbed Ben Graham “legislative guru” because Mr. Graham is the one in the District Attorney’s office who is considered an expert on the Nevada Legislature’s activities. Telephone Interview with Christopher Laurent, *supra* note 19.

Legislature is perfectly “comfortable with the situation.”¹²⁵ The Legislature is comfortable with the situation because it feels that there are no problems regarding how the common law theft crimes are currently being read and utilized.¹²⁶ Further proof of the Nevada Legislature’s refusal to take the issue of repealing the common law theft crimes seriously can be found in Nevada’s burglary statute, NRS 205.060, and some of its legislative history.¹²⁷ NRS 205.060 provides in relevant part:

A person who, by day or night, enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, vehicle, vehicle trailer, semitrailer or house trailer, airplane, glider, boat or railroad car, with the intent to commit grand or petit larceny, assault or battery on any person or any felony, or to obtain money or property by false pretenses, is guilty of burglary.¹²⁸

As can clearly be seen, nowhere does the word “theft” appear in the statute. Instead, the common law theft crimes of “larceny” and “false pretenses” appear in the text. As if this were not enough proof demonstrating the Nevada Legislature’s failure to see the problem with using the common law theft terms “larceny,” “embezzlement,” etc., the most recent piece of legislative history to Nevada’s burglary statute is.

Sergeant David Della of the Reno Police Department testified before the Nevada Legislature regarding the proposed amendment to the burglary statute in 2005, an amendment that involved adding the “false pretenses” language into the statute alongside the crimes “grand or petit larceny.”¹²⁹ Mr. Della testified, as well as drafted in his Bill Draft Request, that instead of adding “false pretenses,” the words “any theft” should be added¹³⁰ because “theft” is the language used in Nevada’s Comprehensive Theft Statute and many of the surrounding states’ statutes.¹³¹ He argued that “any theft” was enough and that the “any theft” language would be “broader, and it would prevent having to come back to this Committee in the future every time a new type of theft was enacted.”¹³²

Unfortunately, the amendment as proposed was passed in 2005, and the word “theft” was not added to the statutory language.¹³³ Although Sergeant Della did not directly discuss the repeal of the common law theft crimes in light of the CTS, his testimony and Bill Draft Request nonetheless brought the problem of using the common law terminology to the attention of the Nevada Legis-

¹²⁵ Telephone Interview with Ben Graham, *supra* note 82.

¹²⁶ *Id.*

¹²⁷ NEV. REV. STAT. § 205.060; see *May 11, 2005 Minutes: Hearing on S.B. 449 Before the Assemb. Comm. on Judiciary*, 2005 Leg., 73rd Sess. 28 (Nev. 2005) [hereinafter *May 11, 2005 Minutes*] (testimony of Sergeant David Della, Reno Police Department, Reno, Nev.).

¹²⁸ NEV. REV. STAT. § 205.060.

¹²⁹ *May 11, 2005 Minutes*, *supra* note 127, at 28.

¹³⁰ *Id.*

¹³¹ *Id.* at 27. (“Other states around us that are doing this are Colorado, Connecticut, Oregon, and Washington.”). The “this” referred to here is the practice of these states using the word “theft” as opposed to larceny or obtaining money by false pretenses.

¹³² *Id.* at 28.

¹³³ *Id.* at 29 (The proposed amendment that suggested adding “false pretenses” instead of “theft” was passed (“The Motion Carried”) in response to Chairman Anderson’s asking: “Do we want to broaden it or just take the bill as it’s currently written?”).

lature. It is a shame that the Nevada Legislature once again chose to ignore the problem. It is comforting, however, to see that at least some people, such as Mr. Della and Mr. Graham, recognize the problem and see a need for change to the confusing theft-of-property laws in Nevada.

District Attorney Ben Graham was the only one of the four district attorneys interviewed who at least implied that perhaps the state of the theft laws in Nevada are in need of change.¹³⁴ In fact, he went so far as to suggest that the author of this Note submit an informal proposal to him in the Fall of 2008, outlining changes that should be made to the theft-related crimes in Nevada, a proposal that would be before the Nevada Legislature in 2009.¹³⁵

D. The Doctrine of Implied Repeal: Does It Repeal the Common Law Theft Crimes?

Although the Nevada Legislature has failed to repeal the common law theft crimes directly, they may be repealed by implication. The doctrine of implied repeal can occur in one of two ways. First, if a statute appears to be repugnant to the language of another similar statute and there is no reasonable basis to read the statutes as being in harmony with one another, the older statute is repealed by implication.¹³⁶ Two statutes are out of harmony when the purposes behind the statutes cannot both be realized because they are in direct conflict with each other.¹³⁷ The reason for this rule of statutory construction is seemingly obvious. By drafting and subsequently enacting a new statute that covers the same exact subject matter, the legislature is essentially saying the following: this new statute is now the *only* law on this subject from this point on.

Second, if the statute covers the whole subject matter of an earlier act and it is clearly evident that it was intended as a substitute for it, repeal by implication occurs.¹³⁸ Whether it is evident that the new law was meant to substitute the old law is a question of legislative intent. This means that “one statute will not repeal another by implication unless it appears from the terms and provisions of the later act that it was the intention of the legislature to enact a new law in place of the old.”¹³⁹ This is the relevant prong of the implied repeal doctrine here.

¹³⁴ Telephone Interview with Ben Graham, *supra* note 82.

¹³⁵ *Id.* However, it should be noted that even Christopher Laurent commented that maybe the Theft Statute is in need of an “amendment.” What exactly he meant by “amendment” was unclear. Telephone Interview with Christopher Laurent, *supra* note 19.

¹³⁶ 73 AM. JUR. 2D *Statutes* § 285 (2001).

¹³⁷ *Id.*

If an act is so repugnant to, or so contradictory of, or so irreconcilably in conflict with, a prior act that the two acts cannot be harmonized in order to effect the purpose of their enactment, the later act operates without any repealing clause as a repeal of the first to the extent of the irreconcilable inconsistency.

¹³⁸ *Red Rock v. Henry*, 106 U.S. 596, 602 (1883); *State v. Thompson*, 511 P.2d 1043, 1045 (Nev. 1973) (citing *State v. Economy*, 130 P.2d 264 (Nev. 1942)); *So. Nev. Tel. Co. v. Christoffersen*, 363 P.2d 96 (Nev. 1961); *Cunningham v. Washoe County*, 203 P.2d 611, 613 (Nev. 1949) (noting that the common law may be repealed by construction “in cases where a statute has revised the whole subject”); 73 AM. JUR. 2D *Statutes*, *supra* note 136, § 280.

¹³⁹ 73 AM. JUR. 2D *Statutes*, *supra* note 136, § 280.

In Nevada, the common law theft crimes are codified in two separate sections: the statutes covering the particular common law theft crimes of larceny, embezzlement, fraud, and obtaining money by false pretenses, and the CTS. Because the newer CTS covers, or at least was intended to cover, the same subject matter as the codified common law theft crimes, the codified common law theft crimes may be repealed by implication.

Although it is feasible that the doctrine of implied repeal may serve to repeal the common law theft crimes in light of the enactment of the CTS, there are two reasons why the doctrine may not apply in this context. First, the common law theft crimes and the CTS are not incongruous: the crimes are just defined in two separate places. Second, courts disfavor repealing legislative acts by implication and, thus, rarely do so.

Again, the CTS states in relevant part: “Conduct denominated theft in NRS 205.0821 to 205.0835, inclusive, and section 1 of this act constitutes a single offense embracing the separate offenses commonly known as larceny, receiving or possessing stolen property, embezzlement, obtaining property by false pretenses, issuing a check without sufficient money or credit, and other similar offenses.”¹⁴⁰ Thus, the CTS is simply referring to those sections that define what actions constitute the crime of “theft” under the newer CTS. To clarify, the newer statute is procedural in nature and not substantive: it is procedural because it was enacted primarily to make charging defendants for the crimes of theft easier for prosecutors, as indicated by the legislative history.¹⁴¹

Furthermore, the subject matter of the newer statute may not trump the common law crimes because the CTS is merely a “technical adjustment [and] . . . ‘a comprehensive uniform theft statute,’ that doesn’t change anything.”¹⁴² Again, it is quite reasonable to infer from this testimony that the CTS is not a change or a complete replacement of the law regarding the common law theft crimes. If the law has not changed, then it may not be possible for the newer statute to repeal by implication the older statutes that define the state and nature of the theft crimes.

Additionally, courts disfavor repealing acts of the legislature by implication and will only do so if there is not any reasonable construction of both statutes.¹⁴³ In other words, both statutes are in harmony with one another if

¹⁴⁰ NEV. REV. STAT. § 205.0833 (2007).

¹⁴¹ *S. Comm. Hearing*, *supra* note 10, at 3. (Dave Barker, District Attorney for Clark County, Nev. testified that the purpose behind a Comprehensive Theft Statute is to simplify the charging process.); MODEL PENAL CODE § 223.1 cmt. 2(b), at 133 (Official Draft and Revised Comments 1980) (“The purpose of consolidation . . . is not to avoid the need to confront substantive difficulties in the definition of theft offenses. The appropriate objective is to avoid procedural problems.”).

¹⁴² *June 12, 1989 Minutes: Hearing on Assemb. B. 594 Before the S. Comm. on Judiciary*, 1989 Leg., 65th Sess. 16 (Nev. 1989) (testimony of Dr. James Austin, Director of Research, National Council on Crime and Delinquency).

¹⁴³ *Branch v. Smith*, 538 U.S. 254, 273 (2003) (opinion of Scalia, J.) (“We have repeatedly stated . . . that absent ‘a clearly expressed congressional intention,’ ‘repeals by implication are not favored’” (citation omitted)); *Posadas v. Nat’l City Bank*, 296 U.S. 497, 503 (1936) (“The cardinal rule is that repeals by implication are not favored. Where there are two acts upon the same subject, effect should be given to both if possible.”).

Further, the case of *Red Rock v. Henry*, 106 U.S. at 601-02, states:

they can be read together.¹⁴⁴ If the statutes are reconcilable, repeal by implication does not occur.¹⁴⁵ Again, the CTS could be read in harmony with the older, codified common law crimes. The CTS does not exactly change theft law jurisprudence, but instead it provides that the common law theft crimes constitute the crime of “theft” and those crimes can be charged under that single statute.

Thus, “theft” is just another word—a synonym—used to describe the crimes of larceny, embezzlement, false pretenses, etc. Because this is a reasonable interpretation and courts strive to read two allegedly conflicting statutes as being in harmony with one another,¹⁴⁶ it is probable that the courts, whenever they decide to address this doctrine in relation to Nevada’s CTS and the common law theft crimes, will refuse to repeal the common law theft statutes.

Moreover, courts will typically refuse to opine that an older law was repealed by implication if it does not appear from the newer statute that the legislature specifically intended a repeal of the older law, as the Nevada Supreme Court articulated in *Pyramid Land & Stock Co. v. Pierce*.¹⁴⁷ This rule is rather ironic and surprising. The purpose of the doctrine of repeal by implication is to operate in those cases where the state legislature has either refused or neglected to address the older law in the enactment of the newer law. This is why the doctrine is referred to as an *implied* repeal: repeal is not direct from the legislature, but rather is an inference drawn from looking at the older and newer laws to determine whether the newer law covers the same subject matter as the older law. If it covers the same subject matter, it can be inferred that the legislature would choose to not keep the older law on the books. Otherwise, the legislature would not have passed the newer law.

Obviously, the only way to know definitively and unequivocally that the legislature intended for the newer law to trump the older law is if the legislature has specifically stated so either in the body of the newer statute or in the statute’s legislative history. Thus, if the legislature has stated that the newer law is a complete replacement of the older law in either the statute or the legislative history, then this is a formal, direct repeal of the older law and, consequently, applying the doctrine of implied repeal is moot.

[W]hen an affirmative statute contains no expression of a purpose to repeal a prior law, it does not repeal it unless the two acts are in irreconcilable conflict, or unless the later statute covers the whole ground occupied by the earlier and is clearly intended as a substitute for it, and the intention of the legislature to repeal must be clear and manifest.

See also *Thompson*, 511 P.2d at 1044-45 (citing *Economy*, 130 P.2d at 264).

¹⁴⁴ *Thompson*, 511 P.2d at 1044-45 (citing *Economy*, 130 P.2d at 264).

¹⁴⁵ 73 AM. JUR. 2D *Statutes*, *supra* note 136, § 285, states:

Since laws are presumed to be passed with deliberation and with full knowledge of existing ones on the same subject, it is reasonable to conclude that the legislature, in passing a statute, did not intend to interfere with or abrogate any former law relating to the same matter unless the repugnancy between the two is irreconcilable.

(footnote omitted).

¹⁴⁶ *Id.*

¹⁴⁷ *Pyramid Land & Stock Co. v. Pierce*, 95 P. 210, 212 (Nev. 1908) (In reference to a 1903 act that contained no repealing clause and made no reference to the former act, the court opined that “[r]epeals by implication are not favored, and there is nothing to suggest that any repeal was intended.”).

Of course, it is possible, if not probable, that the Nevada Supreme Court in *Pyramid Land* could have meant by its statement “there is nothing to suggest that any repeal was intended”¹⁴⁸ that the Nevada Legislature’s intention regarding a repeal cannot be ascertained by looking at the new statute, in this case the CTS itself. Thus, a direct, unequivocal statement from the legislature that a repeal was intended is not necessary for there to be evidence of a suggestion that the newer law was intended to repeal the older law.

This is most likely the meaning of this rule, but it is not a particularly convincing interpretation. The only way to infer accurately the true intention of the legislature is by either examining the text of the statute itself to ascertain its plain meaning or, in the case of ambiguity in the statutory language, by examining the legislative history.¹⁴⁹ Again, nowhere is it articulated in the legislative history of Nevada’s CTS that the intention of the legislature was for the CTS to repeal the common law crimes. The history merely states that the purpose behind the statute is to “eliminate technical distinctions”¹⁵⁰ that exist among the various common law crimes, simplify charging procedures for prosecutors,¹⁵¹ eliminate the need for costly litigation,¹⁵² and prevent defendants from walking free when it turns out that the crime with which they were initially charged does not fit the evidence.¹⁵³

E. Solutions to Ending the Muddled Mess That Is Nevada’s Theft Laws

The only solution to ending the senseless confusion surrounding the theft-related laws in Nevada is for the Nevada Legislature formally to repeal the common law crimes the CTS was meant to replace. However, this solution alone is not enough to end the confusion. Indeed, Nevada’s Comprehensive Theft Statute is poorly drafted, especially in light of the fact that it was modeled after Arizona’s much clearer CTS. Nevada’s CTS should be amended to include the penalties in the CTS itself as opposed to having them in a sepa-

¹⁴⁸ *Id.*

¹⁴⁹ *City of Las Vegas v. Macchiaverna*, 661 P.2d 879, 880 (Nev. 1983), provides in pertinent part:

The leading rule for the construction of statutes is to ascertain the intention of the legislature in enacting the statute, and the intent, when ascertained, will prevail over the literal sense. The meaning of words used in a statute may be sought by examining the context and by considering the reason or spirit of the law or the causes which induced the legislature to enact it.

(quoting *Welfare Div. v. Washoe Co. Welfare Dep’t*, 503 P.2d 457, 458-59 (Nev. 1972)); see also *Cirac v. Lander County*, 602 P.2d 1012, 1016 (Nev. 1979) (“If the words of a statute are clear, we should not add to or alter them to accomplish a purpose not on the face of the statute or apparent from permissible extrinsic aids such as legislative history or committee reports.”).

¹⁵⁰ *Assemb. Comm. Hearing*, *supra* note 7, at 4 (testimony of Carolyn Ellsworth, Chief Deputy District Attorney for Clark County).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ 2 LAFAYE & SCOTT, *supra* note 12, § 8.8(a)(2), at 412 (“It is thus apparent that to retain these technical distinctions between the three crimes serves mainly to present a guilty defendant with an opportunity to postpone and perhaps altogether to escape his proper punishment.”).

rate section. This is what Arizona has done, and, consequently,¹⁵⁴ Arizona's CTS is much easier to comprehend.

Another worthwhile suggestion is for the Nevada Legislature to amend the CTS to define only those acts that constitute the crime of "theft." It is true that NRS 205.0832 already defines the acts that constitute "theft."¹⁵⁵ However, the CTS, NRS 205.0833, refers specifically to the common law crimes that the CTS is meant to replace.¹⁵⁶ This creates the impression that the acts that constitute "theft" are different and separate from the common law crimes. This interpretation is not difficult to fathom, considering that the acts that constitute "theft" are listed in a separate statute—NRS 205.0832—when in actuality those acts that constitute "theft" include the common law crimes that are specifically named in NRS 205.0833.

Put another way, the Nevada Legislature should list those acts that constitute theft in NRS 205.0833, the CTS, instead of listing those acts in a completely separate statute. This would eliminate any possible confusion regarding which of the "acts that constitute theft" constitute the common law theft crimes of larceny, embezzlement, false pretenses, etc. In the alternative, Nevada, like Arizona, could eliminate from the statutory language of the CTS the common law theft crimes.¹⁵⁷ This elimination would prevent confusion as to whether the codified common law theft crimes still exist. If there is no mention of the common law theft crimes in the statute, then it is conclusively established that the acts that once constituted these common law crimes are now known as simply "theft," thus eliminating any confusion.

Or better yet, a complete redrafting of the CTS would be advisable, with the following proposed definition of "theft": "the misappropriation or taking of anything of value which belongs to another, either without the consent of the other . . . , or by means of fraudulent conduct, practices, or representations."¹⁵⁸ Not only is this language simple, but it allows for the addition of new crimes that are similar to theft, thereby eliminating the need for the Nevada Legislature to keep enacting new statutes whenever a new crime is delineated as "theft."

Lastly, if the Nevada Legislature is not going to address this problem, then perhaps the courts should intervene and declare that the older, common law crimes are repealed by implication. However, this solution is not likely to be realized any time soon, if ever. The courts dislike opining that older statutes are repealed by implication because to do so is overstepping the bounds of what

¹⁵⁴ ARIZ. REV. STAT. ANN. § 13-1802 (2007).

¹⁵⁵ NEV. REV. STAT. § 205.0832 (2007) (title of statute is "[a]ctions which constitute theft").

¹⁵⁶ NEV. REV. STAT. § 205.0833 provides in relevant part: "Conduct denominated theft . . . constitutes a single offense embracing the separate offenses commonly known as larceny, receiving or possessing stolen property, embezzlement, obtaining property by false pretenses, issuing a check without sufficient money or credit, and other similar offenses."

¹⁵⁷ See ARIZ. REV. STAT. ANN. § 13-1802 (The language of Arizona's Comprehensive Theft Statute makes no mention of the common law theft crimes; it simply lists those acts that constitute the crime of "theft.").

¹⁵⁸ Hargrave, *supra* note 13, at 1109 (quoting article 67 of Louisiana's Criminal Code of 1942). "There seems to be absolutely no reason why today the fundamental notion that it is socially wrong to take the property of another, in any fashion whatsoever, cannot be stated as clearly as it has been above." *Id.* (quoting the comment to article 67 of the Louisiana Criminal Code of 1942).

is within the purview of the judiciary and intrudes on the province of the legislature: repealing statutes constitutes lawmaking, and lawmaking is within the purview of the Legislature.¹⁵⁹ Thus, for obvious reasons, courts will strive to interpret seemingly conflicting statutes as being in harmony with one another in order to avoid the appearance of lawmaking.

IV. CONCLUSION

The Nevada Legislature must repeal all of the codified common law theft crimes to eliminate the confusion surrounding the Nevada Legislature's adoption of the CTS, the purpose of which is to extinguish the technical distinctions among the common law crimes. Because all other states that have Theft Statutes, most importantly Arizona, have repealed the common law theft crimes, Nevada would be wise to follow suit.

The author's interviews with District Attorneys Ms. Ellsworth and Messrs. Barker, Laurent, and Graham helped explain why the common law crimes were not repealed upon the CTS's enactment. However, the information gleaned from those interviewed did not explain why prosecutors continue to pick and choose which common law theft theories to charge defendants with, despite this being the main rationale behind the CTS's enactment.

This picking and choosing has proven to be detrimental when the evidence turns out to favor another common law theft crime. Unfortunately, because prosecutors are still charging under either the common law or the CTS, they are still picking and choosing between the common law theories. It is precisely this picking and choosing that illuminates the problem with the common law, which led to the creation and enactment of the CTS in the first place.

The older crimes may still exist because it was inadvertent.¹⁶⁰ This inference would be more plausible if the CTS were new, but it is not: it was enacted in 1989. Moreover, such an inference is unreasonable because prosecutors continue to charge under the common law. However, the common law crimes may nonetheless be repealed by the doctrine of implied repeal because the CTS encompasses the same subject matter as the common law crimes, although this is unlikely because courts are reluctant to repeal statutes by implication.

The Nevada Legislature must formally address the repeal issue if the confusion is to end. The best course of action is for the Nevada Legislature to

¹⁵⁹ U.S. CONST. art. I, § 8, cl.18 (Congress shall "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."); NEV. CONST. art. IV, §§ 23, 35; 1A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 23:10, at 492-93 (6th ed. 2002) ("The underlying theory in modern government is that it is through the legislatures and Congress that the current public demands resulting from changing social, economic and political conditions are enabled to find expression.").

¹⁶⁰ See *Watt v. Alaska*, 451 U.S. 259, 281 n.5 (1981) (Stewart J., dissenting) (observing that although it may be unreasonable to expect Congress to alter fundamental policy by repealing an older statute upon enactment of the newer one without an unambiguous intent to do so, it may be "equally unreasonable to expect Congress to specify, or indeed even to consider, the effect of a new statutory provision on all earlier provisions affecting the same subject that may be swept away by the enactment" (emphasis added)).

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repeal the common law crimes in order to uphold the spirit behind the creation and enactment of the CTS. It should also either redact the statutory language mentioning the common law theft crimes or redraft the CTS altogether.