THEFT OF EMPLOYEE SERVICES UNDER THE UNITED STATES PENAL CODE

In 1948 Congress enacted 18 U.S.C. § 641 — a penal code section designed to punish theft of money, property, and records of the United States Government. In 1952 the Supreme Court construed this section as a recodification of the various crimes against federal property that had previously existed in the Code. In 1959 the Ninth Circuit refused to recognize theft of employee services as an offense within the scope of section 641. Twenty-five years later the Seventh Circuit disagreed, and construed the statute to protect federal interests in employee services. This Comment illustrates how general theft statutes, such as section 641, are traditionally tied to legal concepts of property. The Comment notes that the federal government possesses no property interest in the labor of its employees. Therefore, this Comment recommends that courts strictly construe section 641 and defer establishment of a federal "theft of employee services" crime to Congress.

INTRODUCTION

Theft of property owned by the United States has been punishable under federal law in various forms since 1790.[1] Prior to 1948, the United States Penal Code (Code)[2] sections dealing with larceny, embezzlement and related crimes were scattered in a confused manner throughout the Code. The language used in this piecemeal legislation lacked consistency. Consequently, the lines of demarcation between these crimes against property were uncertain.[3] In reality, the passage of time had eroded the effective protection of property rights that the

1. *See, e.g.*, 1 Stat. 116 (1790) (larceny on high seas); 2 Stat. 601 (1810) (larceny of newspapers from the mails); 9 Stat. 63 (1846) (embezzlement of public moneys; failure to deposit); 14 Stat. 557 (1867) (larceny of property of United States).

2. The United States Penal Code is codified at 18 U.S.C.

3. *See infra* notes 44-49 and accompanying text.

criminal law traditionally provided.[4] Pleading difficulties and unjust decisions were the symptoms of a Code desperately in need of revision.[5]

In 1948 Congress enacted section 641[6]—a major revision to the Code which consolidated the scattered sections relating to larceny, embezzlement, and false pretenses, within a single, general "theft" section.[7] Although this revision was a major step toward improving the Code, it failed to define "thing of value,"[8] a phrase intended to identify the subject matter of these crimes. Additionally, by inserting the phrase, "converts to his use," the legislature introduced the tort concept of conversion into the federal system of criminal law for the first time.[9] Although the legislature intended only to consolidate crimes against property, the addition of conversion to the Code brought with it enormous potential for expansion as well.[10]

In 1952 the Supreme Court delivered its only opinion construing section 641 in *Morissette v. United States.*[11] In a comprehensive analysis of the legislative history, the Court concluded that the conversion language did not create new crimes against property, but rather, filled in gaps between the existing crimes. The Court concluded that the legislature was concerned with bringing to justice those who "obtain wrongful advantages from another's property," yet who may not have technically committed larceny or embezzlement.[12] Despite its insight into the purposes underlying section 641, the *Morissette* Court left many questions unanswered, specifically, the exact subject matter of the newly revised "theft" crime.[13]

In 1959 the Ninth Circuit answered one such question in *Chappell*

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4. *See infra* notes 23-39 and accompanying text.
5. *See* Comment, *Theft of Labor and Services*, 12 STAN. L. REV. 663 n.4 (1960).
6. Section 641 states

> Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another . . . any record, voucher, money, or thing of value of . . ., or any property made or being made under contract for the United States or any department or agency thereof — Shall be fined not more than $10,000 or imprisoned not more than ten years, or both. . . .

18 U.S.C. § 641 (1982).
7. *See infra* notes 50-56 and accompanying text.
8. *See infra* note 53 and accompanying text.
9. *See infra* note 55 and accompanying text.
10. *See, e.g.*, Morissette v. United States, 342 U.S. 246, 272 (1952).
11. 342 U.S. 246 (1952).
12. *Id.* at 271.
13. *Morissette* involved

> a civilian deer hunter [who] was prosecuted under section 641 for knowingly converting, to his own use, discarded simulated bombs he found while hunting on United States Air Force property. The issue before the Supreme Court was whether the government was required to prove the defendant's intent to convert such property to his own use.

United States v. Croft, 750 F.2d 1354, 1360 (7th Cir. 1984) (the issue of what may be converted under section 641 did not arise in the case).

v. United States:[14] Does section 641 extend to protect the government's interest in the services of its employees? The *Chappell* court held that employee services are not a "thing of value" and, therefore, cannot be stolen or converted.[15] The *Chappell* court, in dicta, confined application of section 641 to physical property. This decision has been repeatedly criticized since 1959;[16] however, the holding excluding employee services from section 641 remained unchallenged until 1984.

In *United States v. Croft*,[17] the Seventh Circuit rejected the twenty-five year old *Chappell* holding. The *Croft* court, without reservation, held that employee services were properly the subject of theft and conversion as things of value.[18] Employee services were compared to many other forms of intangible property in which the government has a financial interest.[19] Under *Croft*, arguably any intangible interest of the government is protected by section 641.

In its present form, section 641 is susceptible to broad construction. Nevertheless, courts must balance the need to provide criminal protection against policy considerations that demand strict construction of criminal statutes.[20] Employee service, especially since the abolition of slavery, is a concept significantly different from that of personal property.[21] Theft and conversion are, on the other hand, historically tied to the law of property.[22] This Comment traces these axioms through section 641 case law, from *Chappell* to the present, taking issue with *Croft* and its overzealous disregard of these axioms. Radical changes in statutory construction should be avoided by the courts. If section 641 is to apply to the services of government employees, the decision, as a matter of judicial deference, belongs to Congress.

ORIGINS AND INTENT OF SECTION 641

History of Theft

The modern law of theft is the product of centuries of case law and legislation defining and redefining the nature of crimes against

14. 270 F.2d 274 (9th Cir. 1959).
15. *See infra* notes 66-78 and accompanying text.
16. *See infra* notes 99-124 and accompanying text.
17. 750 F.2d 1354 (7th Cir. 1984).
18. *Id.* at 1362.
19. *See infra* notes 80-89 and accompanying text.
20. *See infra* notes 91-98 and accompanying text.
21. *See infra* notes 126-42 and accompanying text.
22. *See infra* notes 23-43 and accompanying text.

property. It represents the consolidation of common law larceny and its statutory offspring. Developments in the criminal law of theft have closely mirrored evolving concepts of property in civil law.[23]

Larceny is generally defined as the intentional taking and carrying away of another's personal property without consent.[24] The common law elements of this crime developed to protect a feudal society from offenses against its most valuable possessions.[25] Certain offenses, however, became exempt from punishment under the law of larceny. Generally, larceny applied only to movable property which could be carried away. Interference with possession of land, or things firmly attached to the land, was covered under the civil law of trespass.[26] Moreover, larceny did not apply when, at the time of the interference with the owner's interest, the offender was in legal possession of the property. Finally, a fraudulent taking of another's property was exempt, based upon the notion that the owner had voluntarily parted with the property.[27]

Eighteenth century industrialization gave rise to new forms of property and expanded needs in the protection of ownership interests. Faced with judicial hesitancy to expand larceny beyond its traditional boundaries, legislatures enacted statutes that effectively plugged the holes in common law larceny.[28] Embezzlement statutes were enacted to deal with offenses against an owner's property by another in lawful possession of the property.[29] The element of fraud gave rise to other crimes. If possession, but not title, was obtained by fraud, subsequent conversion was punishable under the crime of larceny by trick.[30] If title itself was obtained by fraud, the crime of obtaining property by false pretenses was committed.[31]

It is noteworthy that the crimes of embezzlement and larceny by trick include the element of conversion, although ordinary larceny

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23. *See generally* J. HALL, THEFT, LAW AND SOCIETY (2d ed. 1952).

24. *See* W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 622 (1972).

25. These possessions were generally limited to cattle, farming implements, and harvested crops. "The local lord had a few chattels of relatively rare value, perhaps some silver plate, several gold ornaments, his weapons, horses and dogs." Cattle, however, as a mode of transportation and a medium of exchange, "were by far the most important of the possessions." J. HALL, *supra* note 23, at 81-82.

26. *See id.* at 83-84.

27. *See* W. LAFAVE & A. SCOTT, *supra* note 24, at 622-23.

28. A comprehensive discussion of the limitations in the common law of larceny and the 18th century legislative responses can be found in J. HALL, *supra* note 23, at 34-79.

29. A common example of embezzlement is when a bailee absconds with the bailed property rather than return it to the bailor as agreed. Although the bailee had legal possession of the property, failure to return it constitutes a material interference with the bailor's ownership interest—a conversion. *See* W. LAFAVE & A. SCOTT, *supra* note 24, at 644-54.

30. *See id.* at 627.

31. *See id.* at 655-72.

and false pretenses do not.[32] Conversion, an intentional civil law tort, includes "those major interferences with the chattel, or with the plaintiff's rights in it, which are so serious, and so important, as to justify the forced judicial sale to the defendant . . . ."[33] Conversion may involve removing, transferring possession of, withholding possession of, destroying, altering, or misusing the chattel.[34] "Conversion for embezzlement purposes is not different from conversion for tort purposes."[35]

Industrialized society gave rise to the concept of intangible property. Choses in action were the primary intangible property rights created in the course of business transactions.[36] As a general rule, however, courts did not recognize criminal offenses against such intangible rights.[37] Larceny, and related crimes, generally applied to movable goods only. The chose was considered to merge into the rights that it represented; because the right was not a movable good, the chose in action could not be stolen.[38]

In addition to the problems involving intangibles, prosecutions involving offenses against property became increasingly confusing. This led to unjust results. Larceny, embezzlement, and false pretenses did not overlap; they were very distinct crimes which became cumbersome when applied to complex fact patterns. Prosecutors might prove a crime that was not pleaded, or perhaps, might plead all of the property-related crimes yet fail to prove any one of them completely. Many offenders escaped conviction or had convictions reversed.[39]

Many American states revised and consolidated their penal codes during the twentieth century. The new crime of "theft" emerged, utilizing the elements of larceny, larceny by trick, embezzlement, and false pretenses.[40] These theft statutes were intended to eliminate

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32. *See id.* at 645.

33. W.P. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON THE LAW OF TORTS 90 (5th ed. 1984) [hereinafter cited as PROSSER & KEETON].

34. *See id.* at 95-102.

35. W. LAFAVE & A. SCOTT, *supra* note 24, at 645.

36. A chose is defined as "[a] thing; an article of personal property. A chose . . . is either in action or in possession." A chose in action is defined as "[a] right to personal things of which the owner has not the possession, but merely a right of action for their possession . . . . A right to receive or recover a debt, demand, or damages [in contract or tort causes of action]." BLACK'S LAW DICTIONARY 125 (5th ed. 1983).

37. *See* J. HALL, *supra* note 23, at 85-88.

38. *See* W. LAFAVE & A. SCOTT, *supra* note 24, at 633.

39. *See, e.g.*, Commonwealth v. O'Malley, 97 Mass. 584 (1867); Nichols v. People, 17 N.Y. 114 (1858); *see also* W. LAFAVE & A. SCOTT, *supra* note 24, at 673-76.

40. Some statutes retain the traditional terminology, but consolidate the various

many pleading problems and convict offenders who were otherwise avoiding conviction under the previous inadequate criminal statutes.[41] The language within these theft statutes broadly defines those property interests protected. However, legislatures tended to specifically enumerate those unconventional forms of protected personal property. Choses in action were usually protected in this manner.[42]

As society grows more complex, new forms of intangible property are continually identified. Issues arise concerning theft or conversion of ideas, information, images, computer time, and even clientele. Prosser & Keeton found no reason why conversion (and, therefore, embezzlement and larceny by trick) should not expand to include "any species of personal property which is the subject of private ownership."[43]

1948—Revision of the Code

Prior to 1948, Congress had codified crimes against United States property without regard to the interrelationships among the various Code sections it enacted. As in many states, this situation was the result of defensive legislation intended to resolve many shortcomings which arose in the law of larceny.[44] These overlapping sections led to confusion in pleadings and inconsistency in results.[45] In response, the various sections were consolidated by Congress in 1948 to form section 641.[46]

The former Code sections failed to protect the government from a wide range of offenses committed against its property. Larceny and embezzlement were well covered in the pre-1948 Code,[47] yet serious

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crimes against property under one code section. *E.g.*, MASS. GEN. LAWS ANN. ch. 266, § 30 (West 1970) ("Whoever steals, or . . . obtains by a false pretense, or . . . with intent to steal or embezzle, converts . . . the property of another . . . shall be guilty of larceny . . . ."). Other statutes avoid the traditional terminology in favor of the more general "theft." *E.g.*, MINN. STAT. ANN. § 609.52 (West 1964) ("whoever does any of the following commits theft . . .").

41. *See* W. LAFAVE & A. SCOTT, *supra* note 24, at 677.

42. *E.g.*, MASS. GEN. LAWS ANN. ch. 266, § 30 (West 1970) ("the term 'property,' as used in this section, shall include money, personal chattels, a bank note, bond, promissory note, . . . a deed or writing containing a conveyance of land, any valuable contract in force . . .").

43. PROSSER & KEETON, *supra* note 33, at 92 (citing Vaughn v. Wright, 139 Ga. 736, 78 S.E. 123 (1913)).

44. *See supra* notes 28-31 and accompanying text.

45. *See infra* note 48 and accompanying text.

46. 18 U.S.C. § 641 (1982). *See supra* note 6.

47. Larceny was included in four sections of the pre-1948 Code. 18 U.S.C. § 82 (1940) read, "[w]hoever shall take and carry away or take for his use . . . with intent to steal or purloin . . . ." 18 U.S.C. § 87 (1940) read, "[w]hoever shall steal . . . or knowingly apply to his own use, or unlawfully sell, convey, or dispose of . . . ." 18 U.S.C. § 99 (1940) read, "[w]hoever shall . . . feloniously take and carry away . . . ." Finally, 18 U.S.C. § 100 (1940) read, "[w]hoever shall . . . steal, or purloin . . . ." Embezzlement was included in 18 U.S.C. § 82 (1940) ("embezzling arms and stores"), and in 18 U.S.C.

interference with government property could still pass unpunished.[48] Offenses such as alteration, obstruction, or misuse usually do not involve an intent to permanently deprive owners of property rights. This was an essential element of larceny and embezzlement.[49] Only a strained construction of the former Code sections could possibly encompass these offenses.

By consolidating five former sections,[50] Congress eliminated redundancy.[51] Congress sifted through the former Code, extracting a cross-section of language. The word "property," present in each of the former sections, now appears in the title of section 641—"Public money, property, or records." The body of section 641 reads in part, "any record, voucher, money, or thing of value . . . ."[52] This method of enumeration highlights records, vouchers, and money as property sufficiently unique to require independent treatment. "Thing of value,"[53] on the other hand, seems to correspond to the word "property" in the title of section 641, constituting a catch-all category for the government's less unique possessions.[54]

The only new section 641 language is: "knowingly converts to his own use."[55] By introducing this tort concept of conversion into the new Code section, the scope of the new section was expanded significantly.[56] The extent of this expansion was identified by Justice Jackson in the Supreme Court's scrutiny of section 641 in *Morissette*.[57]

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§ 100 (1940) ("embezzling public moneys or other property").

48. *See infra* note 57.

49. *See* Comment, *supra* note 5, at 666.

50. The revisers' note to section 641 states that section 641 is a consolidation of U.S.C. §§ 82, 87, 100, and 101 (1940). There is no mention of section 99 being part of that consolidation. The Supreme Court in *Morissette*, however, concluded that section 99 must also have been incorporated into section 641. *See Morissette*, 342 U.S. at 266-69 n.28.

51. "We find no other purpose in the 1948 re-enactment than to collect from scattered sources crimes so kindred as to belong in one category." *See Morissette*, 342 U.S. at 266-67.

52. 18 U.S.C. § 641 (1982). *See supra* note 6.

53. Although the phrase "any thing of value" did not actually appear in the predecessors of section 641, the phrase, "valuable thing whatever," did appear in predecessor section 18 U.S.C. § 100 (1940).

54. *See* W. LAFAVE & A. SCOTT, *supra* note 24, at 77.

55. 18 U.S.C. § 641 (1982). *See supra* note 6.

56. The prior Code sections did contain language similar to "converts to his use." *See* 18 U.S.C. § 82 (1940) ("take for his own use"); 18 U.S.C. § 87 (1940) ("apply to his own use").

57. The history of § 641 demonstrates that it was [intended] to apply to acts which constituted larceny or embezzlement at common law and also acts which shade into those crimes but which, most strictly considered, might not be found to fit their fixed definitions . . . . The 1948 Revision was not intended to create

Morissette emphasizes three fundamental themes. First, the crime of theft under section 641 is synonymous with obtaining "wrongful advantage from another's property."[58] Second, the revision of section 641 did not create new crimes, but merely clarified and refined those already in existence; the language included by Congress maintained its traditional meaning.[59] Third, the Court's continuous use of the word "property" indicates that Congress was concerned with protecting only property interests in the tradition of larceny, embezzlement and related crimes.[60] Protecting a nonproperty interest under section 641 would create a new crime, thus directly conflicting with *Morissette.*

In 1959 the government attempted to expand section 641 to protect its financial interest in the services of one of its employees. In *Chappell v. United States,*[61] however, the Ninth Circuit rejected the government's claim and refused to expand section 641 to include services. This issue was not directly addressed again for twenty-five years.[62] Finally, in 1984, the Seventh Circuit flatly rejected *Chappell*

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new crimes but to recodify those then in existence . . . .

342 U.S. at 269 n.28.

> It is not surprising if there is considerable overlapping in the embezzlement, stealing, purloining and knowing conversion grouped in this statute. What has concerned codifiers of the larceny-type offense is that gaps or crevices have separated particular crimes of this general class and guilty men have escaped through the breaches. The books contain a surfeit of cases drawing fine distinctions between slightly different circumstances under which one may obtain wrongful advantages from another's property. The codifiers wanted to reach all such instances. Probably every stealing is a conversion, but certainly not every knowing conversion is a stealing . . . .

Id. at 271.

> Conversion may include misuse or abuse of property. It may reach use in an unauthorized manner or to an unauthorized extent of property placed in one's custody for limited use . . . . It is not difficult to think of intentional and knowing abuses and unauthorized uses of government property that might be knowing conversions but which could not be reached as embezzlement, stealing or purloining. Knowing conversion adds significantly to the range of protection of government property . . . .

Id. at 272.

58. *See supra* note 57.

59. "And where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken . . . ." *Morissette,* 342 U.S. at 263.

60. Throughout the *Morissette* opinion, the Court uses the word "property" each time it refers to the subject matter of theft or conversion. *E.g.,* 342 U.S. at 270-71 ("But knowing conversion requires more than knowledge that defendant was taking the property into his possession."); *id.* at 272 ("[K]nowing conversion adds significantly to the range of protection of government property."). *See supra* note 57.

61. 270 F.2d 274 (9th Cir. 1959).

62. The dicta in *Chappell* that refuses to expand section 641 to include any intangible, has been frequently rejected by courts since 1959. *See* notes 99-118 and accompanying text.

in *United States v. Croft*,[63] holding that government employee services were protected interests under section 641.[64] The *Croft* decision created a conflict at the circuit court level. Further, it contradicted the Supreme Court's comprehensive analysis in *Morissette*.[65]

CASES IN CONFLICT

1959—The Chappell *Decision*

The defendant in *Chappell v. United States*[66] was a Master Sergeant in the Air Force who allegedly converted the services of an Airman under his supervision. The Sergeant was convicted of knowingly converting to his own use and benefit the services of the Airman, "such services . . . being a thing of value belonging to the United States . . . ."[67] On appeal, the Ninth Circuit reversed, holding that the indictment failed to state a violation of section 641.[68]

Three themes emerge from the *Chappell* decision. First, services are intangibles, and as such fall outside the ordinary scope of theft. Secondly, in redrafting the Code in 1948, Congress did not intend to expand the scope of crimes against property. Finally, as a criminal statute, section 641 should be narrowly construed.

After quoting Blackstone, who defines larceny as extending only to personal goods,[69] the court concluded that intangibles of any sort have no place in the ordinary construction of theft: "At common law, personal property in order to be [the subject of] larceny must be corporeal or tangible."[70] The court failed to explore why theft could

63. 750 F.2d 1354 (7th Cir. 1984).
64. *Id.* at 1362.
65. *See infra* notes 123-26 and accompanying text.
66. 270 F.2d 274 (9th Cir. 1959).
67. The Sergeant owned several apartments in Mountain View, Alaska. Both the Sergeant and the Airman were assigned to Elmendorf Air Force Base in Alaska. During a three-week period in 1956, the Sergeant put the Airman on sick call so that the Airman would receive his pay while remaining absent from his normal duties. The Airman was not sick; rather, he spent his normal duty hours painting the interiors of the Sergeant's apartments. It was uncertain whether the Airman was an accomplice of the Sergeant, but nonetheless, the Sergeant was in a position of authority. *See id.* at 275-76.
68. The court held that such failure "constitutes plain error within the meaning of Rule 52(b), 18 U.S.C.," and the court never addressed the assignments of error raised in the appeal. *Chappell*, 270 F.2d at 276.
69. "Larceny is the felonious taking and carrying away of the personal goods of another." *Chappell*, 270 F.2d at 277. The court also quoted BLACK'S LAW DICTIONARY 1070 (3d ed. 1933) to define conversion as "an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's rights." *Id.* at 277.
70. *Id.* at 277, (quoting 2 W. BURDICK, THE LAW OF CRIME § 503 (1946)). Additionally, "[a]ny tangible chattel may be the subject of conversion . . . . Intangible prop-

not extend to any form of property, tangible or intangible. It simply viewed the common-law definition of theft as an unyielding rule of law. From that perspective, the intangible right to employee services could never fall within the scope of ordinary theft statutes.

The government's case required that section 641 be characterized as an appropriate expansion of the law of theft. Relying primarily on *Morissette*, the court was not convinced that such expansion had occurred.[71] In *Morissette* the court had ruled that section 641 consolidated and strengthened the existing crimes against property but did not create new crimes.[72] The purpose of theft and conversion law, therefore, was no different after 1948 than it was previously—the protection of tangible personal property rights from interference.[73]

The court considered the expansion of section 641 to include intangibles a "revolutionary concept." It then iterated the rule of strict construction which applies to all criminal statutes: "[Criminal statutes] must be strictly construed. [They] cannot be enlarged by analogy or expanded beyond the plain meaning of the words used."[74] The indictment for theft of services under section 641 was, therefore, defective and the Sergeant's conviction was reversed.

Only four years before *Chappell*, the Sixth Circuit, in *Burnett v. United States*,[75] affirmed a theft of services conviction. That case had a strikingly similar fact pattern.[76] The issue of whether section 641 applied to services, however, was never raised, and never addressed by the court.[77] The Ninth Circuit expressly disagreed with the *Burnett* holding and anything it may have implied.[78]

Thus, *Chappell* prevailed as the leading decision expressly defining the subject matter of theft and conversion under section 641. Over the next twenty-five years many courts, construing section 641, reached conflicting and often uncertain results.[79] However, not until

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erty relations may not be converted except in [certain limited situations]." *Id.* at 277 n.6, (quoting 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 2.13 (1956)).

71. "We cannot believe that in importing the new words 'knowingly converts' Congress meant that the subject of the conversion should be of any different type than the subject of larceny or that it could be other than personal goods." *Chappell*, 270 F.2d at 277.

72. *See supra* note 57.

73. *See supra* notes 69 & 70 and accompanying text.

74. *Chappell*, 270 F.2d at 278.

75. 222 F.2d 426 (6th Cir. 1955)(per curiam).

76. *Burnett* involved a Lieutenant Colonel in the Army, convicted of "knowingly convert[ing] to his own use the services and labor of two employees of the United States in constructing a chest of drawers for his personal use and benefit, without reimbursing the United States for the value of such services and labor." *Id.* at 427.

77. The defendant's appeal, alleged error regarding the sufficiency of the evidence and the admissibility of certain evidence. The defendant did not allege that the indictment under section 641, for the conversion of services, failed to state an offense. *Id.*

78. *Chappell*, 270 F.2d at 278.

79. *See infra* notes 99-124.

the Seventh Circuit's 1984 decision in *Croft* did a direct conflict with the *Chappell* holding arise.

1984—The Croft *Decision*

In *United States v. Croft*,[80] the defendant was a university professor convicted of converting the services of a research assistant paid with government funds.[81] The Seventh Circuit affirmed the District Court conviction, rejecting the Professor's claim that the services of the Assistant were not a "thing of value" under section 641.[82] The court never questioned that employee services are a thing of value to an employer.[83] The only issue addressed was whether *intangible* things of value, such as services, fall within the scope of section 641.

The court discussed the expansion of crimes against property under section 641. In *Chappell*, expansion was confined to *conduct*; Congress' addition of conversion to the Code expanded upon the court's power to punish criminal conduct peculiar to the law of conversion.[84] The *Croft* court's expansion, however, focused upon new forms of *subject matter*, namely intangible property. Under the court's construction of the phrase "thing of value" in section 641, theft and conversion shed the historical limitations which required tangibility. Misuse of intangible property was now considered one of

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80. 750 F.2d 1354 (7th Cir. 1984).

81. The defendant was an Assistant Professor of Veterinary Sciences at the University of Wisconsin-Madison. The Environmental Protection Agency (EPA) agreed to sponsor an asbestos research study coordinated by the Professor. The EPA designated the University as custodian of approximately $130,000 earmarked for expenses of the EPA project. Shortly thereafter, the Professor became involved in an unrelated and personal asbestos research project with the Town of Weston, Wisconsin. He was paid approximately $40,000 to conduct the project, and in 1981 the Professor employed one particular student to assist him. Having devoted no research time to the EPA project, this Assistant was nevertheless paid with EPA funds. Although the Professor did not have custody of the EPA funds, he was in a position to control disbursements. *See id.* at 1355-59, 1361.

82. Because the Professor stood in such a position of control over the disbursement of the EPA funds, it would seem that he should have been convicted of converting the funds, rather than the services. The Seventh Circuit addressed the issue as follows:

> According to the conditions set forth in the EPA agreement and the regulations enumerated in 40 C.F.R. § 30.100 *et seq*, the EPA . . . maintains substantial supervision and control over the funds in that account. Thus, for purposes of our analysis, the EPA paid for [the Assistant's] services.

Croft, 750 F.2d at 1361 n.4.

83. In a matter of fact manner, the court stated: "[i]n the present case, Croft improperly converted to his own use a 'thing of value,' specifically the services of [the Assistant]." *Id.* at 1361. *See infra* note 124.

84. *See supra* notes 71-73 and accompanying text.

those acts that, under *Morissette*, would "shade into" conversion.[85] The *Croft* court found support in a number of earlier federal court decisions interpreting section 641 to include various forms of intangible property.[86] These decisions uniformly characterize the "tangibility" requirement in *Chappell* as a "narrow and unrealistic interpretation"[87] of section 641. The *Croft* court exploited the momentum created by these earlier cases.

The *Croft* court rebutted the warning found in *Chappell* regarding strict construction. Quoting Justice Holmes, the Seventh Circuit countered, "[w]e agree to all the generalities about not supplying criminal laws with what they omit, but there is no canon against using common sense in construing laws as saying what they obviously mean."[88] Although the language of section 641 does not include the word "intangible," the *Croft* court held that it was included within the obvious meaning of the Code section taken as a whole. The merging of "conversion" with the phrase "thing of value," was seen as an ample substitution for this omission.[89] Based upon this line of reasoning, *Chappell* was discarded as precedent. While neither *Croft*, nor *Chappell*, is the definitive statement on intangible "things of value," the *Chappell* holding is preferred.[90]

Defining the Limits of Section 641

Strict Construction of Criminal Statutes

The *Chappell* and *Croft* courts focused on the proper construction of section 641. In each case, the court reviewed the legislative history and the *Morissette* analysis of that history. The courts dissected the language of the Code section attempting to determine the ordinary meaning of the operative words, mindful of the policy requiring strict construction of criminal statutes.[91] The conflicting results can be attributed to the discretion involved in applying that policy.

Strict construction serves primarily as a protective device. Severe penalties often accompany criminal statutes. Accordingly, ambigu-

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85. *Croft*, 750 F.2d at 1361.

86. The court discusses the following cases: United States v. May, 625 F.2d 186 (8th Cir. 1980); United States v. Girard, 601 F.2d 69 (2d Cir. 1979); United States v. DiGilio, 538 F.2d 972 (3d Cir. 1976). *See Croft*, 750 F.2d at 1360-61. *See infra* notes 102-117 and accompanying text for a more detailed discussion of these and other important section 641 cases.

87. *Croft*, 750 F.2d at 1362.

88. *Id.* at 1362 (citing Roschen v. Ward, 279 U.S. 337, 339 (1929)).

89. The *Croft* court stated that "the statutory words 'thing of value,' broaden the scope of section 641 beyond the subject matter of the common law torts which are its foundation." *Croft*, 750 F.2d at 1360.

90. Both opinions ignore the property/services distinction. *See infra* notes 127-44 and accompanying text.

91. *See Chappell*, 270 F.2d at 278; *see also Croft*, 750 F.2d at 1362.

ous or unclear language should be construed in favor of the defendant. A person should not be executed, imprisoned, or heavily fined for violating a statute that does not clearly embrace the committed offense.[92]

Criminal statues should not be expansively interpreted simply to reach offensive behavior that would otherwise go unpunished. To do so ignores the notice function of criminal statutes. When the legislature enacts a statute, it does so prospectively. Once the statute becomes law, it is assumed to be made known to everyone in that jurisdiction. "Criminals should be given fair warning, before they engage in a course of cónduct, as to what conduct is punishable and how severe the punishment is."[93] Although individuals may never have actual knowledge of a statute, they are deemed to have constructive knowledge.

When a court applies a statute, it does so retrospectively. Because the defendant has already acted, nothing that the court says at trial will provide notice or guidance for that particular defendant. An extraordinary reading of the statute after the fact can be devastating. Just as legislatures are prohibited from enacting *ex post facto* laws,[94] courts should refrain from giving valid laws a similarly expansive effect.

If the statute does not clearly and reasonably include certain conduct, courts should not fill the void.[95] Judicial restraint may admittedly yield undesirable results, especially in the federal system which does not recognize common-law crimes.[96] Certain defendants may be familiar with the text of criminal statutes, and may conduct themselves to avoid any potential violation. Justice may dictate that such clever use of the statutes should be punished. However, due process is constitutionally required, often overriding the court's desire to do "justice."

The policy considerations that support judicial conservatism should not, however, completely stifle the court's discretion. "[T]hough penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legisla-

92. *See* W. LAFAVE & A. SCOTT *supra* note 24, at 72.
93. *Id.*
94. *See* U.S. CONST. art. I, §§ 9, cl. 3, 10, cl. 1.
95. "The spirit of the doctrine which denies to the federal judiciary power to create new crimes forthrightly admonishes that we should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute." *Morissette*, 342 U.S. at 263.
96. *See* W. LAFAVE & A. SCOTT, *supra* note 24, at 60.

ture."[97] Such legislative intent may be identified in the statutory language and the legislative history. Legislative history, however, should not in itself be determinative. The legislative history should be used only to cast a brighter light on the actual text of the statute.[98]

Giving statutory language its obvious meaning must be the primary concern of any court applying criminal statutes to unique situations. Courts should not blindly follow an expansionary trend without fully analyzing the grounds for such expansion. Similarly, courts should not allow their sense of justice to intrude upon the overriding policies which may weigh against expansive statutory interpretation. Rather, courts should strive to extract from the statute the true scope of its applicability.

Expansion Into Intangibles

The *Chappell* court's refusal to expand section 641 to intangible property was extremely conservative. Historically, crimes against property did not apply to intangible property, however, there is no clear reason why they should not. The operative concept is *property* rather than its *tangibility*. So long as an exclusive property right clearly exists, it would not be extraordinary to expand the protection of a general theft section (such as section 641) to intangible property.[99]

Conversion of intangible property may arise in two distinct situations. In the first case, interference is with some tangible object that embodies the more valuable intangible property interest.[100] In the second case, interference does not involve a tangible object, but directly involves an intangible property interest.[101] Historically, as the interference becomes more removed from tangibility, courts have

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97. *Id.* at 72 (quoting Marshall, C.J. in United States v. Wiltberger, 18 U.S. 76 (1820)).

> No doubt some criminal statutes deserve a stricter construction than others. Other things being equal, felony statutes should be construed more strictly than misdemeanor statutes; those with severe punishments more than those with lighter penalties; those involving morally bad conduct more than those involving conduct not so bad; those involving conduct with drastic public consequences more than those whose consequences to the public are less terrible; those carelessly drafted more than those done carefully.

Id. at 73. Section 641 is a felony statute that carries with it a potential sentence of ten years imprisonment. *See supra* note 6.

98. *See* W. LA FAVE & A. SCOTT, *supra* note 24, at 72.

99. *See supra* text accompanying note 43.

100. For example, if a theft involves a bond that entitles the bearer to receive a stated amount, the thief has stolen the intangible right to receive payment by stealing the tangible bond certificate.

101. For example, a "theft" could involve use of a counterfeit bond certificate. The thief has stolen the intangible right to receive payment by presenting a counterfeit bearer bond certificate to the issuer. The thief has not interfered with the victim's possession of the genuine certificate, however, the value of that certificate has been materially affected.

been less willing to expand section 641.[102]

The most controversial section 641 cases have involved confidential information contained in government agency files. The unauthorized taking and carrying away of original documents from agency files clearly violates section 641;[103] the government is completely deprived of its ownership interest in the information contained in the documents. This information is often of great value.[104]

When the document is photocopied and replaced, rather than permanently removed, the "tangibility" connection becomes more strained. In *United States v. DiGilio*,[105] the Third Circuit concluded that duplicate copies are still records of the United States, and unauthorized removal of copied FBI files violates section 641. In *DiGilio*, the photocopying was performed on government equipment using government supplies.[106] This was ultimately an important factor in the case. Three years later, in 1979, the *DiGilio* rationale was followed in *United States v. Hubbard*,[107] a case with similar facts. In the same year, the Second Circuit upheld the expansion of section 641 in *United States v. Girard*,[108] a case involving the unauthorized removal of information from a computer file at the Drug Enforcement Administration (DEA). In *Girard*, the information was printed by the DEA computer system and removed from the office by an employee.[109] Most courts apply section 641 when confidential information is reproduced on tangible government property.[110]

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102. *See, e.g.*, United States v. DiGilio, 538 F.2d 972 (3d Cir. 1976); United States v. Hubbard, 474 F. Supp. 64 (D.D.C. 1979).

103. Theft of a record of the United States is specifically provided for in section 641. *See supra* note 6.

104. Once the prosecution has proved its case of theft of the tangible document, valuation would be the only remaining issue. For an example of a valuation problem in a section 641 case unrelated to theft of information, see United States v. May, 625 F.2d 186 (8th Cir. 1980).

105. 538 F.2d 972 (3d Cir. 1976).

106. An FBI clerk-typist copied the original documents related to an investigation of the defendant, "during her working hours and with government papers and copying equipment. The original records were returned . . . to the proper files." The clerk-typist then removed the copies from the office. The defendant eventually received the copies through a series of middlemen. These activities were conducted frequently over approximately a six-month period. *Id.* at 976.

107. 474 F. Supp. 64 (D.D.C. 1979). "[T]he defendants removed originals of government documents and made photocopies of them through the use of government equipment and government supplies, and then returned the original to the agency." *Id.* at 79. The court held that "copies made from government resources are owned by the government." *Id.* at 80.

108. 601 F.2d 69 (2d Cir. 1979).

109. *See id.* at 70.

110. Unlike *DiGilio* and *Hubbard*, the *Girard* court did not expressly rest its deci-

When a defendant "borrows" a document from an agency's files and reproduces it by private means, the defendant has stolen neither the document nor any other government property in the process.[111] There has been a misuse, yet its significance must be established; only a serious misuse constitutes conversion.[112] A similar situation arose under section 641 in the "Pentagon Papers Trial."[113]

Perhaps the most tenuous expansion of section 641 in "theft of information" cases involves absolutely no tangible interference. A defendant may memorize information while in legal possession of a government document. A defendant may use an idea obtained from a government source.[114] Such cases raise the ultimate question: Can information itself be stolen or converted? To date, no court has expanded section 641 that far.[115]

It is questionable whether information and ideas may be subject to exclusive property rights. Constitutional protections of free speech and press weigh heavily against such a concept.[116] In *United States v. Hubbard*, the Court stated, "[i]f section 641 reaches the theft of

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sion on the narrow, tangible aspects of the offense. The court considered the information itself capable of section 641 protection. However, due to the factual similarity of *Girard* to the more narrow holdings, it is doubtful that the opinion will carry much precedential weight. *See, e.g.*, United States v. Truoung Dinh Hung, 629 F.2d 908 (4th Cir. 1980). The courts have preferred the narrower holding. In fact, the *DiGilio* court held that "[a] duplicate copy is a record for purposes of [section 641]. . . ." 538 F.2d at 977. Theft of a government record is specifically provided for in 18 U.S.C. § 641. *See supra* note 6.

111. One of the fundamental elements of larceny is "an intent to deprive the owner of the possession of his property permanently or for an unreasonable length of time, or to use the property in such a way that the owners will probably be deprived of it." W. LAFAVE & A. SCOTT, *supra* note 24, at 637.

112. *See* PROSSER & KEETON, *supra* note 33, at 90; *see also Hubbard*, 474 F. Supp. at 79 (citing Pearson v. Dodd, 410 F.2d 701, 708 (D.C. Cir. 1969)). "[T]he court of appeals for this circuit ruled that the temporary removal of documents for copying purposes does not result in a tortious conversion." Additionally, the court states, "there is clear precedent that the copying of any document does not constitute conversion." *Hubbard*, 474 F. Supp. at 80.

113. *See* United States v. Russo, No. 9373-(WMB)-CD (filed Dec. 29, 1971), dismissed (C.D. Cal. May 11, 1973) (the case against Daniel Ellsberg, not to be confused with the case against the New York Times (New York Times Co. v. United States, 403 U.S. 713 (1971)). In *Russo*, Ellsberg was in rightful possession of the "Pentagon Papers." He had them copied at a private copy shop. These copies later came into the possession of the New York Times and Washington Post. Ellsberg and Russo were charged *inter alia* with violating section 641. This celebrated case was dismissed on other grounds, however, and the section 641 issue was never decided. For an excellent analysis of the proceedings see Nimmer, *National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg Case*, 26 STAN. L. REV. 311 (1974).

114. *See generally* Moskoff, *The Theft of Thoughts: The Realities of 1984*, 27 CRIM. LAW Q. 226 (1984-85).

115. Although in *Girard*, the court held that the information itself may be converted, that case involved many tangible considerations. *See supra* notes 108-10 and accompanying text. There have been no such holdings in cases involving ideas, memorization of information, or photocopying with nongovernmental resources. *See* United States v. Jeter, 775 F.2d 670 (6th Cir. 1985).

116. *See, e.g., Pearson*, 410 F.2d at 707-08; *Hubbard*, 474 F. Supp. at 80; Nimmer, *supra* note 113, at 319-20.

government information, . . . serious first amendment questions would be raised, and there is ample legal authority to avoid these constitutional questions by interpreting the statute to not include information as a thing of value."[117]

The 1959 *Chappell* decision illustrated that section 641 is not a cure-all for every offense against valuable government interests. Certain interests were considered so foreign to theft law that broad statutory language would not include them. Often, more specific language is necessary to adequately notify the public.[118] The *Chappell* court treated employee services, and all intangibles, in this manner, drawing the line at tangibility.[119]

Subsequent courts, however, disagree with the *Chappell* tangibility distinction. Certain intangible interests seem less alien to theft than others.[120] In those cases, courts extended the limits of section 641, gradually drawing a new line that excluded situations involving tenuous or nonexistent ownership interests. Constitutional or practical problems may also have influenced these new limits of section 641.[121]

The *Croft* court, in contrast, concluded that section 641 was so broadly worded that no limit should be put on its expansion. The court produced a revolutionary construction of theft, and of section 641, discarding the concept of property completely.[122] Theft of em-

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117. *Hubbard*, 474 F. Supp. at 79.

118. More specific theft statutes exist at the state level. *See, e.g.*, CAL. PENAL CODE § 484 (West 1970); ILL. REV. STAT. ch. 38, § 16 (West 1977). These statutes have been worded to specifically include certain types of behavior and subject matter. However, section 641 is still capable of a reasonably broad construction. *See Truong Dinh Hung*, 629 F. 2d at 924.

119. *Chappell*, 270 F.2d at 277-78.

120. *See supra* note 110 and accompanying text.

121. Section 641 could interfere with, or even defeat, the purpose for existing federal sanctions for the disclosure of classified information:

> Congress has legislated frequently and with precision with regard to the unauthorized disclosure of classified information, and it has chosen to punish only certain categories of disclosures and defendants . . . . If § 641 were extended to penalize the unauthorized disclosure of classified information, it would greatly alter this meticulously woven fabric of criminal sanctions.

Truong Dinh Hung, 629 F.2d at 926.

A similar situation could arise with regard to federal copyright legislation. "The right to prevent or control the making of copies of material contained in a document is known as copyright." Nimmer, *supra* note 113, at 319. "[T]he Congress has explicitly provided that there is no copyright on government documents. 17 U.S.C. § 105." *Hubbard*, 474 F. Supp. at 80. Additionally, if all government documents can be protected under section 641, the statute may well be found overbroad and, therefore, unconstitutional. *See Truong Dinh Hung*, 629 F.2d at 924-25; Nimmer, *supra* note 113, at 322.

122. The court did not believe it had judicially extended theft beyond property

ployee services—interference with an intangible in which no property right is recognized—is a fundamentally new concept.[123] Thus, the *Croft* court created a new crime, in direct conflict with the Supreme Court's interpretation of the legislative intent.[124] Section 641 is an ordinary theft statute; the property requirement must, therefore, be maintained.[125] Property can be owned; employee services cannot. This distinction is controlling.

The Property/Services Distinction

Judge Dumbauld's concurring opinion in *Croft* raises an interesting point. He stated: "services are not property, at least since the 13th amendment abolished slavery . . . . [C]onversion of services may constitute misconduct, wrongful activity, or breach of obligation, but [a service is] not property. You cannot make it property 'by calling it a thing.' "[126] This sharp distinction between property and services should not be discarded in the construction of theft statutes unless expressly intended by the legislature.

The thirteenth amendment constitutionalized the belief that one person could not own the services of another.[127] The one-time slave owner became an employer, the slave an employee, and the property interest an interest in an employment contract. So long as theft remains tied to property principles, it cannot include employee ser-

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principles. The court considered such extension to have been performed by Congress in 1948. The phrase "thing of value" was seen as including more than just property interests. As a result, the court seems to have been puzzled by the charge in the concurring opinion that the court was considering services as property. The court countered, "our narrow holding is that the services [of the Assistant] do constitute a 'thing of value' under 18 U.S.C. § 641." *Croft*, 750 F.2d at 1362 n.5.

123. "[Theft of Services] represented a substantially new concept in New York law when it was incorporated into the revised penal Law in 1967. Because of its basic novelty as a separate defined crime, no attempt was then made to further subclassify it; . . . the Legislature would impose reasonable subclassifications." N.Y. PENAL LAW § 165.15 (McKinney 1975) (practice commentary).

124. *See* Morissette v. United States, 342 U.S. 246 (1952). *See supra* note 57.

125. "[T]he existence of rare cases which cannot be fitted into any accepted classification is the inevitable limitation of any law . . . ." J. HALL, *supra* note 23, at 108-09. The accepted classification when discussing theft or conversion is property. For Hall, the problem in extending theft to intangible rights is fitting them into the definition of property in the private law. He refers to International News Serv. v. Associated Press, 248 U.S. 239 (1918), in which the Supreme Court struggled with this problem. J. HALL, *supra* note 23, at 107-08.

126. *Croft*, 750 F.2d at 1367-68. Judge Dumbauld did not dissent from the majority opinion. Although he found that opinion fundamentally flawed, he was unwilling to differ with what he considered strong precedent. He was referring to United States v. Bailey, 734 F.2d 296 (7th Cir. 1984). *Bailey*, however, is not strong precedent. First, the case involves the embezzlement of public funds, not services. Second, the court, similar to the Supreme Court in *Morissette*, constantly uses the word property in its analysis of section 641. In reality, Judge Dumbauld struck on the key note of the *Chappell* and *Croft* cases and should have pursued it more vigorously.

127. *See* U.S. CONST. amend. XIII.

vices. However, the thirteenth amendment restriction is overcome simply by redefining theft, or in a sense, by creating a new crime. Once theft is stripped of its property ties and redefined to specifically include services, convictions in cases such as *Chappell* and *Croft* would be acceptable.[128] However, such an overhaul of a criminal statute is exclusively within the province of Congress.[129]

Several states have recognized the inadequacy of traditional theft law for protecting employment relationships.[130] Feeling a need to design criminal sanctions for those who intentionally misappropriate employee services, states began to revise their theft codes.[131] Effective revision was accomplished in one of two ways. Some states, like California, merely added the words, "labor," and "services," into their existing theft sections.[132] Other states, including New York and Illinois, created entire sections concerned solely with the intricacies of employee service theft.[133]

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128. *Croft* was not a decision that violated the thirteenth amendment. Judge Dumbauld referred to the thirteenth amendment to illustrate the fundamental differences between property ownership and employment relationships.

129. *See supra* notes 91-98 and accompanying text.

130. *See* J. HALL, *supra* note 23, at 104-07, discussing the application of the old NEW YORK PENAL CODE § 1290 in People v. Ashworth, 220 A.D. 498, 222 N.Y.S. 24 (1927):

> In *People v. Ashworth*, an important New York case, one defendant was the mill superintendent and general manager of the A.O. Worsted Co. Inc. His brother, also a defendant, was the owner of a company which had a contract to comb twenty thousand pounds of raw wool and to spin this wool at twenty cents a pound. Having no facilities for spinning the wool, he arranged with the mill superintendent to have the spinning done at the Worsted Co. Without the knowledge of this company, its machinery, facilities and laborers were used. When the facts were discovered the brothers and three other persons were indicted for conspiracy and grand larceny. They were convicted, but on appeal the judgment was reversed by a unanimous court.

131. The state code revisions that created the theft of services crime were generally separate from, and subsequent to, the state code revisions that consolidated the theft crimes into the single crime of theft. *See supra* notes 28-31 and accompanying text.

132. *See* CAL. PENAL CODE § 484 (West 1970). This statute was revised in 1927 to include labor for the first time, seemingly in reaction to the *Ashworth* decision in New York. *See supra* note 130; *see also* FLA. STAT. ANN. § 812-012 (West Supp. 1986); ARIZ. REV. STAT. ANN. § 13-1802-02 (1978).

133. *See* N.Y. PENAL LAW § 165.15 (McKinney 1975). Section 165.15 was amended in 1975 to include subsection (7):

> *Section 165.15 Theft of Services*
> A person is guilty of theft of services when:
> . . .
> 7. Obtaining or having control over labor in the employ of another person, . . . knowing that he is not entitled to the use thereof, and with intent to derive a commercial or other substantial benefit for himself or a third person, he uses or diverts to the use of himself or a third person such labor . . . .

The practice commentary to subsection 7 states that the amendment was directed at the

According to the commentary following the New York code section, theft of services was not an ordinary expansion of theft. "Since 'services' are not 'property,' 'theft' of a service does not constitute larceny; and, if any such conduct is to be proscribed, it must be by special statute."[134] This statement is historically accurate. A property right cannot be claimed in employee services, except perhaps by the employee who provides them.[135] Absent a property interest, there can be no theft without altering the essence of that crime. The same is true of conversion. Prosser & Keeton, who recognized the virtually limitless potential for expansion, drew the line at private ownership.[136]

Perhaps an argument in favor of expansion without statutory revision can be borrowed from civil law. The tort of interference with contractual relations recognizes that an employer may have a valuable interest in an employment contract. This interest embodies the employer's right to the exclusive benefit of the employee's services.[137] If the employer does indeed have a property interest in this right, it could conceivably be interfered with in such a manner as to constitute a conversion.

An argument of this sort is unacceptable, however, since "[s]ervices are thought to be the property of the one rendering them, . . . and it is clear that no property interest in the services is conveyed by a contract with the party to whom they are rendered."[138] The lack of a perfected property interest in employment relationships discourages courts from granting specific performance remedies in employment contract disputes.[139] Courts are also concerned about imposing a personal servitude on an employee. Such tenuous, revolutionary arguments should not be relied upon to broaden the scope of any criminal statute.[140]

The distinction between property and services is fundamental to an ordinary construction of a broad theft statute such as section 641. Only by specific statutory language has theft been construed to in-

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Ashworth holding. *See supra* note 130; *see also* ILL. REV. STAT. ch. 38, § 16-3 (West 1977) (enacted in 1961).

134. N.Y. PENAL LAW § 165.15(7) (McKinney 1975) (practice commentary by A. Hechtman).

135. This raises an interesting situation. Under *Croft*, or in a "theft of services" state, services are capable of being stolen or converted. Could, therefore, employees steal or convert their own services? This is a difficult question. Perhaps a thirteenth amendment issue would be raised in that instance. *See* Comment, *supra* note 5, at 668.

136. PROSSER & KEETON, supra note 33, at 92. *See supra* text accompanying note 43.

137. *See generally* PROSSER & KEETON, *supra* note 33, at 978-1004.

138. Comment, *supra* note 5, at 665 n.20.

139. *Id.*

140. *See supra* notes 91-98 and accompanying text.

clude services and labor.[141] The Seventh Circuit, in *Croft*, ignored the centuries of tradition that define the nature of theft and conversion. Broad language may breed endless expansion of *related* subject matter. It should not, however, incorporate *unrelated* subject matter. If the criminal statute is to maintain its status as a mechanism of public notice, reasonableness cannot be set aside. A union of concepts as foreign as theft (or conversion) and services requires specificity.[142]

CONCLUSION

Theft of employee services is a crime unto itself. It exists by specific statutory enactment in a majority of the states. It is a unique theft crime because it is not concerned with property interests. Only services of employees, in which there exists no exclusive property right, comprise its subject matter. The federal government has no such "theft of services" criminal statute. Section 641 of the United States Penal Code is merely a broad recodification of the ordinary crimes against property.[143] These crimes cannot exist apart from the principles of property law.[144] The government's employment interest are nonetheless valuable, and may well require additional legal protection. Perhaps it is time for the federal government to follow the states and specifically amend its Penal Code. However, until a "theft

141. *See* W. LAFAVE & A. SCOTT, *supra* note 24, at 633-34. At present, 33 states plus the District of Columbia have revised their penal codes to specifically create a theft of services crime. The following states have not done so: Colorado, Indiana, Louisiana, Massachusetts, Michigan, Mississippi, Missouri, Nevada, New Mexico, North Carolina, Oklahoma, Rhode Island, South Carolina, Tennessee, Virginia, West Virginia, and Wisconsin.

142. Just as the term "property," or "thing of value," may be broad enough to embrace all property rights, the term "services" is itself a consolidation of related interests:

> 'Service' is defined broadly . . . to include almost anything that is ordinarily provided for compensation but that was traditionally excluded from theft because it is not classified as 'property.' Thus, in addition to the services previously protected, such as the provision of food, lodging, entertainment, or transportation, communications, and public utilities, the definition includes the provision of labor and professional services and the rental of property.

TEX. PENAL CODE ANN. § 31.04 (Vernon 1974) (practice commentary by S. Searcy III and J. Patterson) (discussing the effects of recodifying Texas theft code sections concerning services). *See also* W. LAFAVE & A. SCOTT, *supra* note 24, at 78.

143. *See supra* notes 51 & 57 and accompanying text.

144. *See supra* notes 23-43 and accompanying text.

of services" statute is enacted, the federal courts should reject the *Croft* decision and limit section 641 to the ordinary scope of common-law theft.

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