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# Easing the Tension Between Statutes of Limitations and the Continuing Offense Doctrine

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# Easing the Tension Between Statutes of Limitations and the Continuing Offense Doctrine

Jeffrey R. Boles\*

## ABSTRACT

*This Article is the first to analyze comprehensively the relationship between the continuing offense doctrine and criminal statutes of limitations. The continuing offense doctrine is a powerful tool for prosecutors who face statute of limitations challenges. It functions to delay the running of statutes of limitations for certain crimes by postponing the completion of those crimes. In order to trigger the operation of the doctrine, a court must conclude that a particular crime is a “continuing offense” for statute of limitations purposes. Identifying what crimes are continuing offenses has been a problematic exercise for federal courts, leading to a growing number of conflicting approaches and circuit splits. Moreover, courts are employing the continuing offense doctrine with increasing frequency, subjecting otherwise time-barred conduct to prosecution and boosting the risk of violation of the rights of the defendant, such as prosecution based upon stale evidence. This Article examines the shortcomings of the continuing offense doctrine and its potential for misuse in the statute of limitations context, and provides solutions to reform the doctrine and restore order in what has become a chaotic area of jurisprudence.*

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## INTRODUCTION

Imagine that the local United States Attorney’s Office charges a defendant investor with one count of securities fraud for allegedly executing fraudulent trades as part of a securities fraud scheme. Imagine also that the defendant argues, in a motion to dismiss, that the statute of limitations prohibits prosecution because the defendant’s alleged conduct occurred more than five years prior to the indictment. The government counters that securities fraud is a “continuing offense” for statute of limitations purposes, placing the defendant’s entire course of fraudulent conduct within the statute of limitations and subject to prosecution. Resolving this dispute depends upon whether the court will deem securities fraud to be a continuing offense, which would expand the limitations period in this instance. For this reason, deciding whether a particular offense is continuing for statute of limitations purposes, a seemingly benign issue, is generating robust controversy and conflicting approaches across the federal courts.

Criminal statutes of limitations serve a number of purposes in the public interest. For instance, they restrict a defendant’s exposure to prosecution to a finite period of time, bestowing amnesty from prosecution once the limitations period has ended.<sup>1</sup> They also encourage law enforcement officials to investigate suspected criminal activity promptly.<sup>2</sup>

<sup>1</sup> *Toussie v. United States*, 397 U.S. 112, 113–14 (1970), *overruled by* 50 U.S.C. App. § 463 *on other grounds as stated by*, e.g., *United States v. Martinez*, 890 F.2d 1088, 1091–92 (10th Cir. 1989).

<sup>2</sup> *Id.* at 115.

Legislatures create and modify limitations statutes in order to balance the government's need for adequate time to uncover, investigate, and prosecute crime against the defendant's interest in avoiding the threat of prosecution for stale crimes committed long ago.<sup>3</sup>

As a general rule, limitations periods commence at the moment when each element of a crime has occurred.<sup>4</sup> The Supreme Court created an exception to the general limitations rule by carving out the continuing offense doctrine. The doctrine provides that the statute of limitations for continuing offenses begins to run not when the elements of the offense are first met, but when the offense terminates.<sup>5</sup> Although seemingly straightforward in its operation, the continuing offense doctrine can have a powerful impact on a defendant's conviction because it ushers in conduct that predates the stated limitations period, provided that part of the defendant's alleged course of conduct occurs within the stated limitations period. Not surprisingly, the government frequently tries to categorize offenses as continuing to avoid the running of the statute of limitations.<sup>6</sup>

The Supreme Court has recognized the inherent tension between the continuing offense doctrine and statutes of limitations and has directed that the continuing offense doctrine be applied sparingly.<sup>7</sup> The instruction is in deference to the policy concerns underlying statutes of limitations, which are designed to protect defendants from possible prejudice occasioned by impaired memories, lost evidence, and absent witnesses.<sup>8</sup> To facilitate the process, the Supreme Court issued a test in its seminal decision *United States v. Toussie*<sup>9</sup> for courts to determine whether a criminal offense is continuing for statute of limitations purposes. The Court's test has significantly enhanced the analysis, but major issues remain.

Applying the continuing offense doctrine has proven to be a challenging exercise for the federal courts; they have applied the doctrine unevenly, often struggling with the decision of whether a particular crime is a continuing offense. Most crimes transpire instantaneously and discretely, but continuing offenses span a period of time in their commission and cause recurring harm in the process.<sup>10</sup> Many federal offenses can be categorized as either discrete or continuing without difficulty, presenting virtually no conceptual issues. There is, however, an array of crimes that have posed difficulties to the courts in this regard.

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<sup>3</sup> *United States v. Marion*, 404 U.S. 307, 322 (1971); *United States v. DiSantillo*, 615 F.2d 128, 135 (3d Cir. 1980).

<sup>4</sup> *Toussie*, 397 U.S. at 115; *United States v. Yashar*, 166 F.3d 873, 875 (7th Cir. 1999).

<sup>5</sup> *Toussie*, 397 U.S. at 115. The continuing offense doctrine is occasionally referred to as the continuing crime doctrine. *See, e.g.*, *United States v. Fleetwood*, 489 F. Supp. 129, 131 (D. Or. 1980) (using the term "continuing crime doctrine"). This criminal law doctrine is separate and unrelated to the continuing violations doctrine from the civil law. *See* James R. MacAyeal, *Discovery Rule and the Continuing Violation Doctrine as Exceptions to the Statute of Limitations for Civil Environmental Penalty Claims*, 15 VA. ENVTL. L.J. 589, 622–23 (1996).

<sup>6</sup> *See* *State v. Gainer*, 227 Kan. 670, 672 (1980) ("The continuing offense doctrine is usually advanced by the prosecution to avoid the running of the statute of limitations.").

<sup>7</sup> *Toussie*, 397 U.S. at 115.

<sup>8</sup> *Id.* at 115.

<sup>9</sup> *See id.* at 115.

<sup>10</sup> *See* Note, *Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution*, 102 U. PA. L. REV. 630, 641–42 (1954) [hereinafter *Penetrable Barrier to Prosecution*].

First, Courts have applied the *Toussie* test inconsistently and have issued clashing statutory interpretations and conflicting decisions across a number of jurisdictions. Confusing and muddled case law, including a handful of circuit splits, has emerged as a result. Second, amidst this confusion lies a troubling pattern: a growing number of courts have applied the continuing offense doctrine loosely, in essence ignoring that the doctrine is disfavored by the Supreme Court and should be applied only in rare circumstances. The liberal use of the continuing offense doctrine reflected in these decisions has created further disorder, as it fundamentally circumvents the protections to defendants afforded by the statutes of limitations. The trend can be viewed as part of a larger shift in the criminal law toward retributivism, a theory of criminal justice which espouses the belief that proportionate punishment is a justified response to criminal behavior.<sup>11</sup>

The continuing offense doctrine has been virtually unexplored by legal scholarship.<sup>12</sup> The thorny conceptual issues and problematic applications it generates in the realm of statutes of limitations are ripe for examination and reform. This Article scrutinizes the inherent conflict between statutes of limitations and the continuing offense doctrine, explores the conceptual landscape and the disruptive uses of the continuing offense doctrine, and offers legislative and judicial solutions to rehabilitate the doctrine.<sup>13</sup> Part I of the Article provides an overview of the nature and purposes of criminal statutes of limitations. Part II examines the continuing offense doctrine, its relationship to statutes of limitations, and the process by which courts determine whether an offense is continuing. Part III analyzes the federal courts' treatment of the continuing offense doctrine and inspects the doctrine's overuse and the circuit splits it has generated. Part IV concludes with recommendations for reforming the continuing offense doctrine and restoring order in this problematic area of jurisprudence.

## I. CRIMINAL STATUTES OF LIMITATIONS

### A. *Nature and Effects*

A criminal statute of limitations establishes “a time limit for prosecuting a crime, based on the date when the offense occurred.”<sup>14</sup> It bars the government from prosecuting an offense if the government fails to file an indictment or other formal charge within the limitations period.<sup>15</sup> Without such statutes, the government could initiate a prosecution indefinitely.<sup>16</sup>

Statutes of limitations are entirely “creatures of statute,” existing only to the extent

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<sup>11</sup> See Mark D. White, *RETRIBUTIVISM* xi (2011).

<sup>12</sup> Continuing offenses have been addressed in legal scholarship, but their connection to statutes of limitations has not been substantively examined. See, e.g., J. Richard Broughton, *On Straddle Crimes and the Ex Post Facto Clauses*, 18 *GEO. MASON L. REV.* 719, 724 (2011) (discussing the relationship between continuing offenses and ex post facto prohibitions).

<sup>13</sup> This Article analyzes federal, rather than state, law approaches to criminal statutes of limitations and the continuing offense doctrine due to active developments of the continuing offense doctrine within the federal law. However, it may serve as a foundation for evaluation of various state law approaches to these areas of inquiry.

<sup>14</sup> *BLACK'S LAW DICTIONARY* 1546 (9th ed. 2009).

<sup>15</sup> See, e.g., *Toussie*, 397 U.S. at 113–14.

<sup>16</sup> 21 *AM. JUR. 2D CRIMINAL LAW* § 247 (2008).

that they are created by legislatures,<sup>17</sup> as no criminal limitations period existed at common law.<sup>18</sup> As summarized by the California Supreme Court, “statutes of limitation are an optional form of legislative grace.”<sup>19</sup> Legislatures may enact, modify or repeal them at will.<sup>20</sup>

The federal government,<sup>21</sup> and nearly all state legislatures,<sup>22</sup> have enacted criminal statutes of limitations. In the federal sphere, § 3282(a) of Title 18 of the United States Code establishes a default five-year limitations period that extends to most federal crimes.<sup>23</sup> Moreover, Congress has chosen special limitations periods for a variety of crimes,<sup>24</sup> enacting statutes that generally relate the length of the limitations period to the seriousness of the crime.<sup>25</sup> Indeed, Congress has established that no limitations periods apply to capital and certain other offenses; these offenses may be prosecuted at any time.<sup>26</sup>

### B. Purposes

Courts<sup>27</sup> and commentators<sup>28</sup> have recognized that criminal statutes of limitations are equitable in nature and serve a number of purposes in the public interest. At the

<sup>17</sup> 51 AM. JUR. 2D LIMITATIONS OF ACTIONS § 1 (2000).

<sup>18</sup> See, e.g., *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 169 (1987) (Scalia, J., concurring); *Gilliam v. Admiral Corp.*, 268 A.2d 338, 340 (N.J. Super. Ct. Law Div. 1970) (noting that “[u]nder the common law no time was fixed for the bringing of an action”).

<sup>19</sup> *People v. Frazer*, 982 P.2d 180 (Cal. 1999), *rev’d on other grounds*, *Stogner v. California*, 539 U.S. 607, 633 (2003).

<sup>20</sup> See, e.g., *Commonwealth v. Duffy*, 96 Pa. 506 (1881); 51 AM. JUR. 2D LIMITATIONS OF ACTIONS § 35 (1970). In *Duffy*, the Pennsylvania Supreme Court noted that “an act of limitation is an act of grace purely on the part of the legislature. . . . Such enactments are measures of public policy only[,] . . . entirely subject to the mere will of the legislative power and may be changed or repealed altogether, as that power may see fit to declare.” *Duffy*, 96 Pa. at 511.

<sup>21</sup> Congress has enacted a general statute of limitations, 18 U.S.C. § 3282(a), that establishes a five-year limitations period for most federal crimes. For a discussion of the history and predecessors of 18 U.S.C. § 3282, see Alan L. Adlestein, *Conflict of the Criminal Statute of Limitations with Lesser Offenses at Trial*, 37 WM. & MARY L. REV. 199, 249 n.222 (1995).

<sup>22</sup> Nearly every state, with the exceptions of South Carolina and Wyoming, has a criminal statute of limitations. See *id.* at 250 n.223 (highlighting states’ limitations periods).

<sup>23</sup> 18 U.S.C. § 3282(a) (2006) provides, “Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.”

<sup>24</sup> See, e.g., 18 U.S.C. § 3294 (2006) (providing a twenty-year limitations period for the theft of art work); 18 U.S.C. § 3291 (2006) (providing a ten-year limitations period for certain nationality, citizenship, passport, and visa offenses).

<sup>25</sup> *Doggett v. United States*, 505 U.S. 647, 668 (1992) (Thomas, J., dissenting) (“In general, the graver the offense, the longer the limitations period; indeed, many serious offenses, such as murder, typically carry no limitations period at all.”).

<sup>26</sup> See, e.g., 18 U.S.C. § 3281 (2006) (“An indictment for any offense punishable by death may be found at any time without limitation.”); 18 U.S.C. § 3299 (2006) (no limitations periods apply to federal child abduction and sex offenses).

<sup>27</sup> See, e.g., *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (“We should regard the plea of limitations as a meritorious defense, in itself serving a public interest.”).

<sup>28</sup> See, e.g., *Penetrable Barrier to Prosecution*, *supra* note 10, at 632 (“Criminal statutes of limitations ostensibly serve several purposes, all of which relate to the efficacy of criminal law administration.”).

epicenter is a balancing process that underlies the creation and maintenance of criminal statutes of limitations, which “represent legislative assessments of relative interests of the State and the defendant in administering justice.”<sup>29</sup> Most legal scholars contend that the statutes are designed to balance the competing interests of the government to discover, investigate, and prosecute crime against two primary countervailing factors: protecting the defendant and enhancing efficiency.<sup>30</sup> The Supreme Court has referenced these factors in perhaps the most heavily cited summary of the purposes of criminal statutes of limitations:

The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity.<sup>31</sup>

### 1. Safeguarding the Defendant’s Rights

Perhaps the most important policy effectuated by criminal statutes of limitations is the protection of defendants. Courts have emphasized that criminal statutes of limitations “exist[] primarily to protect the rights of the defendant.”<sup>32</sup> The statutes grant amnesty from prosecution, after the limitations period has expired, by providing an irrebuttable presumption that a defendant’s right to a fair trial would be prejudiced.<sup>33</sup> Underlying the statutes’ policy to safeguard defendants are the overarching rationales of repose and protection from prejudice stemming from stale claims.

#### i. Providing Repose

Courts strongly endorse the value of repose, an instrumental policy expressed in

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<sup>29</sup> *United States v. Marion*, 404 U.S. 307, 322 (1971).

<sup>30</sup> *See, e.g.*, *United States v. Marshall*, 856 F.2d 896, 899–900 (7th Cir. 1988); Yair Listokin, *Efficient Time Bars? A New Rationale for the Existence of Statutes of Limitations in Criminal Law*, 31 J. LEGAL STUD. 99 (2002); Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO. WASH. L. REV. 68, 75 (2005); Lindsay Powell, *Unraveling Criminal Statutes of Limitations*, 45 AM. CRIM. L. REV. 115, 128–29 (2008).

<sup>31</sup> *Toussie v. United States*, 397 U.S. 112, 114–15 (1970).

<sup>32</sup> *United States v. Podde*, 105 F.3d 813, 819 (2d Cir. 1997); *see also* *United States v. Levine*, 658 F.2d 113, 119 (3d Cir. 1981) (“Fairness to defendants would appear to be the primary consideration of statutes of limitations.”). Criminal statutes of limitations do not fully define a defendant’s rights with respect to the events occurring prior to indictment. *Marion*, 404 U.S. at 324. Pre-indictment delay may violate the Due Process Clause of the Fifth Amendment, but only when the delay “caused substantial prejudice to the defendant’s rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.” *Id.*

<sup>33</sup> *Stogner v. California*, 539 U.S. 607, 611 (2003); *Marion*, 404 U.S. at 322.

criminal statutes of limitations.<sup>34</sup> “[C]riminal statutes of limitation are to be liberally interpreted in favor of repose.”<sup>35</sup> Scholars have noted that while oft-cited in relevant legal opinions, the term “repose” is rarely explored.<sup>36</sup> In the context of limitations statutes, repose includes the interrelated concepts of affording peace of mind, avoiding the disruption of settled expectations, and reducing uncertainty about the future in the lives of defendants.<sup>37</sup>

Repose plays a central policy role within limitations statutes because its converse tenet, subjecting a person indefinitely to the threat of potential criminal punishment, can offend one’s sense of justice.<sup>38</sup> When operating through statutes of limitations, repose functions as a salve to someone’s anxiety and fear of potential prosecution for offenses from the distant past.<sup>39</sup>

By bringing repose, statutes of limitations function as an insurance-mechanism, providing notice that one cannot be prosecuted once the pertinent time period has passed. Grounded in concepts of due process, notice is critical for one’s defense, as it brings knowledge of an accusation and the impetus to discover facts for defense, preserve evidence, and prepare for trial.<sup>40</sup>

## ii. Barring Stale Claims

Evidence deteriorates over time, and criminal statutes of limitations aim to prevent the unfair use of stale evidence to convict a defendant. The statutes “are the primary guarantee a citizen possesses against stale or long-delayed charges being made against him.”<sup>41</sup> “Stale claims” may encompass the possibilities that: (a) evidence has deteriorated; (b) dominant legal and cultural norms have shifted since the underlying events transpired; (c) the accused has changed their stance and would be prejudiced by defending the prosecution; and (d) an excessively long duration of time has transpired between the underlying events and the filing of the indictment.<sup>42</sup> As the Supreme Court has elaborated, the statutes “protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of

<sup>34</sup> *Levine*, 658 F.2d at 125 (“[S]tatutes of limitations embody historically important rights of repose and fairness for defendants which are fundamental to our system of criminal law. . . .”); *Bridges v. United States*, 346 U.S. 209, 215–16 (1953) (the “long-standing congressional ‘policy of repose’ . . . is fundamental to our society and our criminal law”); *United States v. Prospero*, 573 F. Supp. 2d 436, 444 n.15 (D. Mass. 2008) (“Statutes of limitations are favored by the law and courts are to interpret them in favor of a finding of repose because of the salutary effect on the just enforcement of the criminal laws.”).

<sup>35</sup> *United States v. Marion*, 404 U.S. 307, 322 (1971).

<sup>36</sup> See Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453, 460 (1997).

<sup>37</sup> *Id.*

<sup>38</sup> *United States v. Frequency Elecs.*, 862 F. Supp. 834, 843 (E.D.N.Y. 1994) (“Vital to our sense of justice is the notion that we may not subject someone indefinitely to the threat of potential criminal punishment.”).

<sup>39</sup> *United States v. DiSantillo*, 615 F.2d 128, 135 (3d Cir. 1980).

<sup>40</sup> *Cole v. Arkansas*, 333 U.S. 196, 201 (1948); *United States v. Sears, Roebuck & Co.*, 677 F. Supp. 1042, 1045 (C.D. Cal. 1998), *rev'd on other grounds*, 877 F.2d 734 (9th Cir. 1989).

<sup>41</sup> *United States v. Birney*, 686 F.2d 102, 105 (2d Cir. 1982).

<sup>42</sup> Ochoa & Wistrich, *supra* note 36, at 458.



documents, or otherwise.”<sup>43</sup>

## 2. Promoting Efficiency

Society benefits from the limitations statutes’ focus on recently committed crimes.<sup>44</sup> The statutes “provide an incentive for action on behalf of the government in criminal cases that is swift, sure, and certain.”<sup>45</sup> They prod law enforcement to investigate suspected criminal activity and prosecutors to charge offenders promptly.<sup>46</sup> Prosecutors face a greater possibility of successful convictions with increased ability to prove their cases, offenders are brought to justice more quickly, and courts are relieved of the burden of adjudicating long-abandoned or tenuous crimes.<sup>47</sup> Moreover, the limitations statutes’ focus on fresh evidence helps protect society from convicting its citizens erroneously based upon unreliable evidence, thus garnering the public’s respect in the judiciary.<sup>48</sup>

Limitations law also promotes judicial efficiency. It reduces transaction costs associated with gathering evidence to reconstruct the distant past, reduces the number of indictments filed, and simplifies judicial decisions by drawing a predictable bright-line rule.<sup>49</sup> One scholar has likened limitations statutes to gatekeepers in that they allow timely claims and bar untimely ones, creating clarity and saving time and resources in the process.<sup>50</sup>

### C. Policies Opposing Criminal Statutes of Limitations

The legal community has recognized that criminal statutes of limitations also bring considerable costs along with the benefits they bestow. The mechanical operation of statute of limitations does not take into consideration whether newly available evidence overwhelmingly establishes a defendant’s guilt. Rather, these statutes block the prosecution of offenses which may be in society’s best interest to punish, essentially providing amnesty to offenders after the limitations period has expired. With their all-or-nothing approach, the statutes “paint with a broad brush of an inflexible general rule” and allow no room for judicial evaluation of the particular offense or offender.<sup>51</sup> The Supreme Court acknowledged this reality by noting that “every statute of limitations . . . may permit a rogue to escape.”<sup>52</sup>

In addition, critical commentators have highlighted the arbitrary features of

<sup>43</sup> United States v. Kubrick, 444 U.S. 111, 117 (1979).

<sup>44</sup> United States v. Levine, 658 F.2d 113, 119 n.4 (3d Cir. 1981).

<sup>45</sup> State v. Ricci, No. 01C01-9403, 1995 Tenn. Crim. App. LEXIS 34, at \*14 (Tenn. Crim. App. Jan. 12, 1995).

<sup>46</sup> Toussie v. United States, 397 U.S. 112, 115 (1970); United States v. Otto, 742 F.2d 104, 107 (3d Cir. 1984).

<sup>47</sup> *Otto*, 742 F.2d at 107; *see also* United States v. Eliopoulos, 45 F. Supp. 777, 781 (D.N.J. 1942) (“Statutes of limitation are founded upon the liberal theory that prosecutions should not be allowed to ferment endlessly in the files of the government to explode only after witnesses and proofs necessary to the protection of the accused have by sheer lapse of time passed beyond availability.”).

<sup>48</sup> *See* Ochoa & Wistrich, *supra* note 36, at 481–82.

<sup>49</sup> Malveaux, *supra* note 30, at 78–80.

<sup>50</sup> *Id.* at 81.

<sup>51</sup> Adlestein, *supra* note 21, at 266.

<sup>52</sup> *Toussie*, 397 U.S. at 123–24 (internal quotation marks and citation omitted).

limitations statutes.<sup>53</sup> One may find the selection of the duration of limitations periods particularly difficult to justify. Originally enacted in 1790, the federal default criminal limitations period has shifted over time from two, to three, to five years, with scant legislative history justifying these changes.<sup>54</sup> It is unclear whether the five-year limitations period is optimal or whether a single limitations period is even appropriate for most federal crimes.<sup>55</sup> Given these criticisms, some have called for the abolishment of the current limitations laws and replacement with a standard-based approach that evaluates any time-based prejudice to defendants on a case-by-case basis.<sup>56</sup>

#### D. Construction by the Courts

Despite criticisms from the legal community, the judiciary and legislatures remain strongly committed to upholding the protections afforded by criminal statutes of limitations. Congress has proclaimed a policy that the statute of limitations should not be extended “(e)xcept as otherwise expressly provided by law.”<sup>57</sup> The Supreme Court supplemented the congressional mandate by instructing that criminal statutes of limitations are to be strictly construed in favor of the accused.<sup>58</sup> Many scholars agree with this construction and maintain that criminal statutes of limitations are, at their core, protective statutes that serve the public interest, despite their shortcomings.<sup>59</sup> Because “the statutes are fixed by the legislature and not decreed by courts on an ad hoc basis,” their existence provides predictability to defendants and society; as a result, members of society may rely on the statutes to their benefit.<sup>60</sup>

## II. CONTINUING OFFENSES

### A. Defining a Continuing Offense

Within the criminal law, crimes may be classified according to their nature<sup>61</sup> as instantaneous or continuing. As its name implies, an instantaneous offense is a “discrete act”<sup>62</sup> that occurs at a single, immediate period of time. The harm which it causes occurs

<sup>53</sup> See Powell, *supra* note 30, at 117 (examining the fundamental arbitrariness of limitations periods).

<sup>54</sup> Act of Apr. 30, 1790, ch.9, 1 Stat. 112, 119 *repealed by* The Diplomatic Relations Act of 1978, §§ 1–6, 22 U.S.C. §§ 254a–254e; Act of Apr. 13, 1876, ch. 56, 19 Stat. 32, 32–33; Act of Sept. 1, 1954, ch. 1214, § 10(a), 68 Stat. 1142, 1145, *amended by* Act of Sept. 26, 1961, Pub. L. No. 87-299, 75 Stat. 640, 648.

<sup>55</sup> See Powell, *supra* note 30, at 117.

<sup>56</sup> See *id.* at 154.

<sup>57</sup> 18 U.S.C. § 3282(a); see also *Toussie*, 397 U.S. at 115.

<sup>58</sup> See, e.g., *United States v. Marion*, 404 U.S. 307, 322 n.14 (1971); *United States v. Morgan*, 922 F.2d 1495, 1500 (10th Cir. 1991).

<sup>59</sup> See, e.g., Listokin, *supra* note 30, at 114; Ochoa & Wistrich, *supra* note 36, at 512–13.

<sup>60</sup> *Doggett v. United States*, 505 U.S. 647, 665–66 (1992).

<sup>61</sup> Courts often use the term “nature” when analyzing crimes in the continuing offense context. See, e.g., *infra* note 66 and accompanying text. It generally refers to a crime’s elements. For a discussion of the inherent vagueness in the term “nature” in the continuing offense context, see *supra* subpart III.B For a proposed definition of a crime’s “nature” involving its statutorily defined legal elements, see *supra* subpart IV.A

<sup>62</sup> *United States v. Bucheit*, 134 F. App’x 842, 853 (6th Cir. 2005).

in that moment and does not continue beyond it. An example is battery.<sup>63</sup> A battery transpires, for instance, at the moment when a perpetrator's closed fist makes contact with a victim's body. The crime and its attendant harm cease when the perpetrator removes his fist from the victim's body.

On the other hand, the term "continuing offense" is a term of art which embodies a special legal meaning. It is a course of conduct spanning an extended period of time,<sup>64</sup> and the harm it generates continues uninterrupted until the course of conduct ceases. As Judge O'Scannlain has summarized, the continuing offense generally "involves (1) an ongoing course of conduct that causes (2) a harm<sup>[65]</sup> that lasts as long as that course of conduct persists."<sup>66</sup> The continuing offense is "one which by its nature or by its terms is a single, ongoing crime."<sup>67</sup> A defendant participating in all or any part of a continuing offense may be charged with only one crime.<sup>68</sup>

There is a legal distinction between conduct that the legislature and judiciary declare as a "continuing offense" and conduct that constitutes an ongoing course of criminal activity but is not deemed a "continuing offense."<sup>69</sup> Courts have recognized that a "continuing offense" is a term of art that "does not merely mean an offense that continues in a factual sense, as where a defendant engages in a course of conduct comprised of repeated criminal violations, such as recurring sales of narcotics or a string of separate robberies."<sup>70</sup> The Supreme Court has described the term as a continuous,

<sup>63</sup> See, e.g., FLA. STAT. § 784.03(1)(a)(1) (2001) (defining the offense of battery as "occur[ring] when a person actually and intentionally touches or strikes another person against the will of the other").

<sup>64</sup> *Buchheit*, 134 F. App'x at 853; *United States v. McGoff*, 831 F.3d 1071, 1078 (D.C. Cir. 1987) ("A continuous offense . . . is an unlawful course of conduct that does endure."); *Penetrable Barrier to Prosecution*, *supra* note 10, at 641; see also BLACK'S LAW DICTIONARY 1186 (9th ed. 2009) ("A crime (such as a conspiracy) that is committed over a period of time . . ."). Hence, discrete criminal acts are considered to be categorically separate from continuing offenses. See *United States v. De La Mata*, 266 F.3d 1275, 1288 (11th Cir. 2001) ("A continuing offense is one which is not complete upon the first act, but instead continues to be perpetrated over time."). Continuing offenses are also known as continuous crimes. See, e.g., *United States v. Mardirosian*, 602 F.3d 1, 9 (1st Cir. 2010) ("The possession and concealment of stolen property is a continuous crime.").

<sup>65</sup> Courts have used the term "harm" in the continuing offense doctrine context to describe "the substantive evil [to society that] Congress sought to prevent" in making certain actions or omissions federal crimes. *Toussie*, 397 U.S. at 122 ("It is in the nature of a conspiracy that each day's acts bring a renewed threat of the substantive evil Congress sought to prevent."); see also *United States v. Morales*, 11 F.3d 915, 922 (9th Cir. 1993) ("The harm done [by bribery] is intangible, but real enough: the undermining of public confidence, the loss of respect for and pride in our institutions. Congress simply has chosen to address this last kind of 'substantive evil' in section 201(b)(2)."); *United States v. Cunningham*, 891 F. Supp. 460, 464 (N.D. Ill. 1995) ("A prime example [of a continuing offense] is kidnapping, where the offender continues to violate the law and harm the victim every day that the victim is not released.").

<sup>66</sup> *Morales*, 11 F.3d at 921 (O'Scannlain, J., dissenting). Judge O'Scannlain elaborates that "the commission of [continuing offenses] takes place not in a moment, but over a span of time . . . [and the] harm done to society through [the] commission necessarily continues on for as long as the crime is ongoing." *Id.*

<sup>67</sup> *United States v. Castellano*, 610 F. Supp. 1359, 1408 (S.D.N.Y. 1985).

<sup>68</sup> *Castellano*, 610 F. Supp. at 1408.

<sup>69</sup> *United States v. Rivlin*, No. 07-Cr-524, 2007 U.S. Dist. LEXIS 89323, at \*6-7 (S.D.N.Y. Dec. 5, 2007).

<sup>70</sup> *Id.* (internal quotation marks and citation omitted); see also *United States v. Yashar*, 166 F.3d 873, 875 (7th Cir. 1999); *United States v. Reitmeyer*, 356 F.3d 1313, 1321 (10th Cir. 2004) ("The term 'continuing offense' is a term of art that does not depend on everyday notions or ordinary meaning.").

unlawful act or series of acts “set on foot by a single impulse and operated by an unintermittent force, however long a time it may occupy.”<sup>71</sup> Conceptually, as the perpetrator engages in the continuing offense, a crime continues to be committed each moment. “The hallmark of the continuing offense is that it perdures beyond the initial illegal act, and that ‘each day brings a renewed threat of the evil Congress sought to prevent even after the elements necessary to establish the crime have occurred.’”<sup>72</sup> These offenses continue until the proscribed course of conduct ceases, as “continuing offenses do not, in general, continue indefinitely.”<sup>73</sup>

A prototypical example of a continuing offense is the possession of contraband.<sup>74</sup> The offense begins when the perpetrator acquires the contraband item and continues every day, until the perpetrator parts with the item. The crime qualifies as a continuing offense because the ongoing course of conduct, possession of the item, causes harm every moment that the perpetrator possesses the item.<sup>75</sup>

### *B. Applying the Statute of Limitations to Continuing Offenses: An Overview*

Whether a crime is continuous or not affects the operation of the statute of limitations. Ordinarily, the limitations period commences when a crime is committed and “complete,”<sup>76</sup> regardless of whether the government has discovered the existence of the crime.<sup>77</sup> As a general rule, a crime is “complete” as soon as every element of the crime has occurred.<sup>78</sup>

An exception from the general rule is the continuing offense, which is not deemed complete until the perpetrator’s entire course of conduct ceases.<sup>79</sup> For continuing offenses, the last act of the offense controls when the statute of limitations commences.<sup>80</sup> Accordingly, the statute does not begin to run when all of the elements of the continuing offense are initially present, rather when the entire course of conduct ceases.<sup>81</sup> For all practical purposes, courts look to the last day of the continuing offense to determine when the statute of limitations commenced. For instance, a court will look to the last day on which a perpetrator possessed an illegal firearm to determine when the statute of limitations began to run for a firearms possession offense.<sup>82</sup> In effect, the continuing

<sup>71</sup> United States v. Midstate Horticultural Co., 306 U.S. 161, 166 (1939) (citation omitted).

<sup>72</sup> *Yashar*, 166 F.3d at 875 (quoting *Toussie*, 397 U.S. at 122); see also *State v. Legg*, 9 S.W.3d 111, 116 n.3 (Tenn. 1999) (“[E]very moment an offense is continued, the offense is committed anew.”).

<sup>73</sup> United States v. McGoff, 831 F.3d 1071, 1079 (D.C. Cir. 1987).

<sup>74</sup> See *supra* subpart II.E for a discussion of possessory crimes and additional examples of continuing offenses.

<sup>75</sup> See, e.g., *United States v. Zrallack*, No. 3:10CR68, 2010 U.S. Dist. LEXIS 65988, at \*6 (D. Conn. July 2, 2010) (“Grenades are inherently dangerous weapons for which no peaceful purpose can be seriously suggested, regardless of whether [they] are actually used. As [grenade possession] is a continuing offense, the risk of harm remained present throughout its alleged commission.”).

<sup>76</sup> *Pendergast v. United States*, 317 U.S. 412, 418 (1943).

<sup>77</sup> See, e.g., *United States v. Mubayyid*, 567 F. Supp. 2d 223, 239 (D. Mass. 2008).

<sup>78</sup> *United States v. Smith*, 740 F.2d 734, 736 (9th Cir. 1984); accord *Yashar*, 166 F.3d at 875; *United States v. Payne*, 978 F.2d 1177, 1179 (10th Cir. 1992).

<sup>79</sup> *United States v. Motz*, 652 F. Supp. 2d 284, 293 (E.D.N.Y. 2009).

<sup>80</sup> BLACK’S LAW DICTIONARY 1186 (9th ed. 2009).

<sup>81</sup> *Nisenzon v. Morgan Stanley DW, Inc.*, 2007 U.S. Dist. LEXIS 4078, at \*12 (E.D. Pa. Jan. 18, 2007).

<sup>82</sup> See, e.g., *United States v. Krstic*, 558 F.3d 1010, 1017 (9th Cir. 2009) (“[T]he statute of limitations does

offense doctrine extends the statute of limitations beyond its stated term,<sup>83</sup> allowing the government to prosecute conduct that precedes the stated limitations period.

### C. *Brief History of the Continuing Offense Doctrine*

Prior to the Supreme Court's *Toussie* decision issued in 1970, no test existed to identify a continuing offense in a systematized way; courts generally classified crimes as continuing on an unstructured basis with minimal guiding principles.<sup>84</sup> Moreover, an analysis of federal case law prior to 1970 reveals that courts commonly agreed only that conspiracy,<sup>85</sup> concealment of bankruptcy assets,<sup>86</sup> and failure to register for the draft<sup>87</sup> were continuing offenses for statute of limitations purposes. Courts reached these conclusions based upon loose analyses of whether the offenses featured a pattern of antisocial behavior.<sup>88</sup> While the issue has surfaced in federal and state cases for over a century, explorations of this area of the law are virtually absent in the scholarly literature.

### D. *The Supreme Court's Guidance in Toussie v. United States*

Substantive analysis of the relationship between the continuing offense doctrine and the statute of limitations must begin with the Supreme Court's landmark decision in *Toussie v. United States*. *Toussie* remains the seminal case on defining the nature and scope of the continuing offense doctrine.<sup>89</sup> In *Toussie*, the Court crafted the contours of the doctrine and propounded a test to determine when an offense should be considered continuing for statute of limitations purposes.<sup>90</sup>

The defendant in *Toussie* was required to register for the draft within five days of his eighteenth birthday—in accordance with a presidential proclamation issued pursuant to § 3 of the Universal Military Training and Service Act<sup>91</sup>—but he did not register at any time.<sup>92</sup> He was subsequently convicted and he moved to dismiss based on statute of limitations grounds. Upon reviewing the defendant's conviction, the Court had to determine when the statute of limitations began to run for the crime of failure to

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not begin to run until the possessor parts with the item.”)

<sup>83</sup> *Toussie v. United States*, 397 U.S. 112, 115 (1970).

<sup>84</sup> *See, e.g., United States v. Mendoza*, 122 F. Supp. 367, 368 (N.D. Cal. 1954).

<sup>85</sup> *United States v. Kissel*, 218 U.S. 601, 610 (1910); *United States v. Graham*, 102 F.2d 436, 444 (2d Cir. 1939).

<sup>86</sup> *Somberg v. United States*, 71 F.2d 637, 639 (7th Cir. 1934); *United States v. Arge*, 418 F.2d 721, 724 (10th Cir. 1969).

<sup>87</sup> *Fogel v. United States*, 162 F.2d 54, 55 (5th Cir. 1947); *McGregor v. United States*, 206 F.2d 583, 584 (4th Cir. 1953).

<sup>88</sup> *See Penetrable Barrier to Prosecution, supra* note 10, at 641–44.

<sup>89</sup> *United States v. Winnie*, 97 F.3d 975, 976 (7th Cir. 1996); *see also United States v. Bell*, 598 F.3d 366, 369 (7th Cir. 2010) (applying test as set forth in *Toussie*).

<sup>90</sup> *Toussie*, 397 U.S. at 114–15.

<sup>91</sup> Section 3 of the Universal Military Training and Service Act, 50 U.S.C. App. § 453 (2006), provides:

Except as otherwise provided in this title, it shall be the duty of every male citizen . . . who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder.

<sup>92</sup> *Toussie*, 397 U.S. at 113.

register.<sup>93</sup> The defendant argued that the offense was complete when he failed to register in 1959 and that the applicable five-year statute of limitations barred his prosecution upon his indictment in 1967.<sup>94</sup> The government countered that the crime continued to be committed every day that the defendant did not register.<sup>95</sup>

The Court began its analysis by warning that the continuing offense doctrine should only be applied in “limited circumstances” because the doctrine could contradict the purposes of statutes of limitations.<sup>96</sup> Noting that “questions of limitations are fundamentally matters of legislative . . . decision,” the Court highlighted the “tension between the purpose of a statute of limitations and the continuing offense doctrine . . . ; the latter, for all practical purposes, extends the statute beyond its stated term.”<sup>97</sup> It issued a two-part test to determine whether an offense is continuing for statute of limitations purposes, holding that an offense should be deemed continuing only if (a) “the explicit language of the substantive criminal statute compels such a conclusion,” or (b) “the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one.”<sup>98</sup>

Applying the test, the Court held that neither the explicit language of the draft registration statute nor the nature of the crime involved demonstrated any congressional intent for the offense to be treated as continuing for limitations purposes.<sup>99</sup> The Court therefore concluded that the statute of limitations began to run five days after the defendant’s eighteenth birthday in 1959 and reversed his conviction.<sup>100</sup>

### 1. The *Toussie* Test’s First Prong: Explicit Language of the Statute

To qualify as a continuing offense under *Toussie*’s first prong, the explicit language of the statute must plainly state that the offense is a continuing one or indicate that the statute of limitations begins to run when the entire course of conduct ceases.<sup>101</sup> The first prong recognizes that Congress knows how to create a continuing offense and has done so with blunt language in a number of statutes.<sup>102</sup> For instance, 22 U.S.C. § 618(e)

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<sup>93</sup> *Id.* at 114.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 115.

<sup>97</sup> *Toussie*, 397 U.S. at 115 (citation and internal quotation marks omitted). In discussing the application of the continuing offense doctrine, the Court stressed the importance of the policy considerations embodied in statutes of limitations that protect defendants and that are discussed in Part I.

<sup>98</sup> *Toussie*, 397 U.S. at 115. The *Toussie* test is essentially a matter of statutory interpretation; courts must ascertain congressional intent when applying it. See *United States v. Richardson*, 512 F.2d 105, 106 (3d Cir. 1975) (“The question is one of ascertaining congressional intent.”).

<sup>99</sup> *Toussie*, 397 U.S. at 120–22. The Court reasoned that, because draft registration are “instantaneous events and not a continuous process, . . . there is nothing inherent in the nature of failing to register that makes it a continuing offense.” *Id.* at 122.

<sup>100</sup> *Id.* at 119.

<sup>101</sup> See *United States v. Banks*, 708 F. Supp. 2d 622, 623 (E.D. Ky. 2010) (“To qualify as a continuing offense based on the explicit language of the statute (the first prong of the *Toussie* test), the statute must state the offense is a ‘continuing offense’ or indicate when the statute of limitations begins to run.”).

<sup>102</sup> As “continuing offense” is a settled term of art, see *United States v. Reitmeyer*, 356 F.3d 1313, 1321 (10th Cir. 2004), courts must presume that Congress has accorded “continuing offense” its traditional legal meaning, rather than an ordinary meaning, when Congress utilizes the term in criminal statutes, unless it

provides that failure to register as a foreign agent within ten days of becoming such an agent is a “continuing offense.”<sup>103</sup> Title 18 U.S.C. § 3284 provides that concealment of a bankruptcy’s assets “shall be deemed to be a continuing offense . . . and the period of limitations shall not begin to run until such final discharge or denial of discharge.”

Most federal criminal offense statutes, however, do not contain explicit language addressing whether the offense is a continuing one. Congressional silence in a criminal statute, the Supreme Court has held, is “strong[ly] in favor of not construing this Act as incorporating a continuing-offense theory.”<sup>104</sup> Not surprisingly, most federal criminal offenses do not satisfy the first prong of the *Toussie* test. If the first prong of the *Toussie* test is not satisfied, courts move to the second prong to complete their analysis.

## 2. The *Toussie* Test’s Second Prong: Nature of the Crime

Under the second *Toussie* prong, courts must examine the nature of the offense alleged and determine whether it is such that Congress “must have assuredly intended” that it be treated as continuing.<sup>105</sup> With a focus on congressional intent, the second prong questions whether there is anything inherent in the offense itself that makes it continuing in nature. One indication that the offense might be continuing is that it “clearly contemplates a prolonged course of conduct.”<sup>106</sup> Courts have considered statutory language, structure and purpose,<sup>107</sup> legislative history,<sup>108</sup> and/or past precedent<sup>109</sup> to make

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has provided contrary instructions. *See Morissette v. United States*, 342 U.S. 246, 263 (1952) (“[W]here 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 and the meaning its use will convey to the judicial mind unless otherwise instructed.”); *United States v. McGoff*, 831 F.3d 1071, 1078 (D.C. Cir. 1987) (according the term “continuing offense” in 22 U.S.C. § 618(e) its traditional legal meaning after finding no contrary instruction from Congress).

<sup>103</sup> 22 U.S.C. § 618(e) (2006) provides, “Failure to file any such registration statement or supplements thereto as is required by either section 2(a) or section 2(b) [22 U.S.C. § 612(a) or (b)] shall be considered a continuing offense for as long as such failure exists, notwithstanding any statute of limitation or other statute to the contrary.”; *see also* 50 U.S.C. § 856 (2006) (“Failure to file a registration statement [indicating that one is trained in foreign espionage systems] as required by this Act is a continuing offense for as long as such failure exists, notwithstanding any statute of limitation or other statute to the contrary.”).

<sup>104</sup> *Toussie*, 397 U.S. at 120. After looking to the plain meaning of the statute’s words, some courts will look to a statute’s legislative history if the statute’s plain meaning does not address whether an offense is continuing. *See United States v. Gray*, 876 F.2d 1411, 1418–19 (9th Cir. 1989) (“The legislative history of the statute also fails to indicate whether failure to appear is a continuing offense.”); *United States v. Cunningham*, 891 F. Supp. 460, 463 (N.D. Ill. 1995) (“[T]here is nothing in the legislative history to either section that indicates Congress’ intent in separating theft of mail from delay of mail had anything to do with the continuing offense doctrine.”), *rev’d on other grounds*, 108 F.3d 120 (7th Cir. 1997). The practice of looking to the legislative history is a controversial step, however, given its due process implications in this context. *See McGoff*, 831 F.2d at 1084 (“We will . . . look to see what the historical materials suggest, but we do so without in any fashion suggesting that which would be extraordinary in a free country ruled by law—that [one] could be convicted of a crime by virtue of extra-statutory expressions of legislative ‘intent’ or, more precisely, ‘meaning’ found in the web of legislative history.”); *see also Garcia v. United States*, 469 U.S. 70, 75 (1984) (“[O]nly the most extraordinary showing of contrary intentions [in the legislative history] would justify a limitation on the ‘plain meaning’ of the statutory language.”).

<sup>105</sup> *Toussie*, 397 U.S. at 115.

<sup>106</sup> *Id.* at 120.

<sup>107</sup> *See United States v. Blizzard*, 812 F. Supp. 79, 81 (E.D. Va. 1993) (“The nature of the crime as

this determination. In addition, some courts have analyzed whether the dangers posed to society by the offense continue in duration,<sup>110</sup> given that a continuing offense features “a harm that lasts as long as that course of conduct persists.”<sup>111</sup>

### *E. Applying the Toussie Test to Prototypical Continuing Offenses*

Courts have consistently deemed conspiracy, kidnapping, and crimes of possession to be continuing offenses. These crimes illustrate a successful application of the second *Toussie* prong such that Congress “must have assuredly intended” that they be treated as continuing.

Conspiracy is widely recognized as the classic example of a continuing offense.<sup>112</sup> While the statutory language of the federal conspiracy offenses would not satisfy the first *Toussie* prong,<sup>113</sup> the offenses nevertheless qualify as continuing under the second prong because the conspirators’ ongoing actions in pursuit of their conspiratorial agreement cause harm that lasts as the course of conduct persists. Indeed, the Supreme Court has held: “[i]t is in the nature of a conspiracy that each day’s acts bring a renewed threat of the substantive evil Congress sought to prevent.”<sup>114</sup> Conspiracy continues as long as the

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determined from the overall statutory scheme also compels the conclusion that the crime alleged in Count II is a continuing offense.”); *cf.* *United States v. Cores*, 356 U.S. 405, 408 (1958) (“Section 252(c) [of the Immigration and Nationality Act, 8 U. S. C. § 1282(c)] punishes ‘any alien crewman who willfully remains in the United States in excess of the number of days allowed.’ The conduct proscribed is the affirmative act of willfully remaining, and the crucial word ‘remains’ permits no connotation other than continuing presence.”).

<sup>108</sup> *See United States v. Del Percio*, 657 F. Supp. 849, 852 (W.D. Mich. 1987) (“With respect to the second [prong], a thorough examination of the legislative history of the Act . . . fails to provide any evidence to suggest that the nature of the crimes alleged in this indictment is such that Congress ‘must have assuredly intended’ that they be treated as continuing.”) (citation omitted), *rev’d in part on other grounds*, 870 F.2d 1090 (6th Cir. 1989).

<sup>109</sup> *See United States v. Bailey*, 444 U.S. 394, 413 (1980) (observing that “every federal court that has considered this issue has held, either explicitly or implicitly, that [18 U.S.C.] § 751(a) defines a continuing offense” and holding that escape under § 751(a) is a continuing offense).

<sup>110</sup> The Supreme Court held in *Bailey* that “the nature of the crime [of escape] is such that Congress must assuredly have intended that it be treated as a continuing one” because of the “continuing threat to society posed by an escaped prisoner.” *Id.* at 413 (citation omitted); *see also United States v. Audinot*, 901 F.2d 1201, 1203 (3d Cir. 1990) (“We conclude that escape is a continuing offense and that every day away from custody serves as a continuing threat to society . . .”) (internal quotation marks and citation omitted); *United States v. Green*, 305 F.3d 422, 433 (6th Cir. 2002) (finding that failure to appear is a continuing offense because “[e]ach day that the defendant fails to appear enhances the threat and the dangers posed by the delay and demonstrates the continuing nature of the offense”).

<sup>111</sup> *United States v. Morales*, 11 F.3d 915, 921 (9th Cir. 1993).

<sup>112</sup> *See United States v. Yashar*, 166 F.3d 873, 875 (7th Cir. 1999) (“[T]he classic example of a continuing offense is a conspiracy.”); *see also United States v. Kissel*, 218 U.S. 601, 610 (1910) (holding that conspiracy is a continuing offense); *United States v. Jake*, 281 F.3d 123, 129 n.6 (3d Cir. 2002).

Conspiracy crimes involve “the agreement . . . to commit one or more unlawful acts.” *Braverman v. United States*, 317 U.S. 49, 53 (1942). Its unit of prosecution is the criminal agreement. *United States v. Felix*, 503 U.S. 378, 391–92 (1992).

<sup>113</sup> *See, e.g.*, 18 U.S.C. § 371 (2006) (“If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.”).

<sup>114</sup> *Toussie*, 397 U.S. at 122.



conspirators take any action in furtherance of the conspiracy.<sup>115</sup> Hence, given its status as a continuing offense, a conspiracy is not complete, and the statute of limitations does not begin to run until some affirmative event, such as an arrest, puts an end to the defendant's conspiratorial conduct.<sup>116</sup>

Courts similarly classify kidnapping as a continuing offense.<sup>117</sup> The federal kidnapping statute does not explicitly address continuing offenses;<sup>118</sup> but courts have concluded that the crime easily qualifies as a continuing offense under *Toussie's* second prong, stressing the ongoing, involuntary detention of the victim as justification.<sup>119</sup> Every day the victim is not released, the kidnapper continues to violate the law and harm the victim.<sup>120</sup> "[T]his is a crime of continuing force upon the person . . . [which keeps] parents and family . . . in a constant state of anxiety."<sup>121</sup> The statute of limitations begins to run not upon the victim's abduction and transport, but when the victim is no longer held.<sup>122</sup>

Courts have almost unanimously identified crimes of possession as continuing offenses.<sup>123</sup> These offenses "involve the simple and continuous act of possessing a contraband item"<sup>124</sup> and satisfy the *Toussie* test's second prong because the perpetrators violate the law every moment they possess the contraband items. The Seventh Circuit has reasoned, "[a]dopting [the] position that possession is not a continuing offense would enable criminals to keep dangerous and illegal things—guns, drugs, bombs—if they are able to conceal them for the statutory limitations period. This result is an obvious absurdity."<sup>125</sup> Courts have held that the offenses are complete, and the statute of limitations begins to run not when the offender first receives the prohibited item, but

<sup>115</sup> *United States v. Cozzo*, No. 2-CR-400-1, 2003 U.S. Dist. LEXIS 178, at \*3 (N.D. Ill. Jan. 2, 2003).

<sup>116</sup> *United States v. Rastelli*, 870 F.2d 822, 838 (2d Cir. 1989). A conspiracy whose statute requires proof of an overt act is complete when the last overt act ends. *Fiswick v. United States*, 329 U.S. 211, 216 (1946). A conspiracy whose statute does not require an overt act continues until the conspiratorial plan is abandoned or accomplished. *United States v. Coia*, 719 F.2d 1120, 1124 (11th Cir. 1983).

<sup>117</sup> See *United States v. Rodriguez-Moreno*, 526 U.S. 275, 281 (1999); *Yashar*, 166 F.3d at 875; *Morales*, 11 F.3d at 921.

<sup>118</sup> 18 U.S.C. § 1201(a) (2006) provides, in relevant part, "Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person . . . when . . . the person is willfully transported in interstate or foreign commerce . . . shall be punished . . ."

<sup>119</sup> *United States v. Garcia*, 854 F.2d 340, 343 (9th Cir. 1988).

<sup>120</sup> *United States v. Cunningham*, 891 F. Supp. 460, 464 (N.D. Ill. 1995).

<sup>121</sup> *Garcia*, 854 F.2d at 343 (quoting *Parnell v. Superior Court*, 173 Cal. Rptr. 906, 915 (Cal. Ct. App. 1981)).

<sup>122</sup> *Id.* at 344.

<sup>123</sup> See *United States v. Hull*, 456 F.3d 133, 146 (3d Cir. 2006) (collecting cases); see also *United States v. Berndt*, 530 F.3d 553, 555 (7th Cir. 2008) (holding a violation of 26 U.S.C. § 5861(d), which penalizes the possession of an unregistered firearm, is a continuing offense); *United States v. Krstic*, 558 F.3d 1010, 1018 (9th Cir. 2009) (holding a violation of 18 U.S.C. § 1546(a), which penalizes the possession of immigration documents procured by fraud, is a continuing offense); *United States v. Winnie*, 97 F.3d 975, 976 (7th Cir. 1996) (holding a violation of 16 U.S.C. 1538(c)(1), which penalizes the possession of illegally traded wildlife, is a continuing offense); *United States v. Kayfez*, 957 F.2d 677, 678 (9th Cir. 1992) (per curiam) (holding a violation of 18 U.S.C. § 472, which penalizes the possession of counterfeit notes, is a continuing offense).

<sup>124</sup> *United States v. Del Percio*, 870 F.2d 1090, 1097 (6th Cir. 1989).

<sup>125</sup> *Berndt*, 530 F.3d at 555.

rather when the offender parts with the item.<sup>126</sup>

### III. ANALYSIS OF THE CONTINUING OFFENSE DOCTRINE IN FEDERAL CRIMINAL CASES: JUDICIAL CONFUSION AND OVERBROAD APPLICATION

#### A. Overview of the Federal Courts' Application of the Continuing Offense Doctrine

Since the Court decided *Toussie*, the continuing offense doctrine has maintained its function as a judicial tool to elongate the running of the statute of limitations. Contemporary courts have applied the doctrine unevenly, however, because they often have struggled deciding whether a particular crime is a continuing offense. While the Supreme Court's test elucidated in *Toussie* significantly facilitated the analysis of this issue, it by no means resolved it. To be sure, the *Toussie* test does not generate conflict when applied to most crimes. Most federal offenses appear to present minimal conceptual issues regarding their inherent nature, and can be easily categorized as discrete.<sup>127</sup> Moreover, the judiciary has employed the continuing offense doctrine routinely to a core set of crimes, including conspiracy, possession, and certain status offenses, with nearly unanimous agreement among courts.<sup>128</sup> In contrast, there is a set of crimes that have posed considerable difficulties, and in deciding whether these crimes are continuing, a number of federal courts have applied the *Toussie* test inconsistently, generating conflicting case law, circuit splits, and widespread confusion and uncertainty.

The judicial disagreement surrounding the relationship between this problematic set of crimes and the continuing offense doctrine can be largely summarized by two divergent approaches taken by courts. The first approach features a set of courts applying the *Toussie* test in a careful and exacting manner, closely following the Supreme Court's strongly worded guidance on the continuing offense doctrine as set forth in the *Toussie* decision.<sup>129</sup> The second approach consists of another set of courts that apply the *Toussie* test in a broadly interpretive manner, essentially expanding the continuing offense doctrine beyond the principles set forth in *Toussie* and consequently sidestepping the statute of limitations as a bar to prosecution.<sup>130</sup>

The remainder of this Part examines how courts have applied the *Toussie* test, identifies the source of the disagreements surrounding the continuing offense doctrine, scrutinizes the major judicial disagreements regarding the doctrine, and explores the approaches that some contemporary courts have adopted to expand the doctrine.

#### B. An Analysis of the *Toussie* Test: Where Does the Trouble Lie?

Over three hundred federal court decisions have cited the Supreme Court's *Toussie*

<sup>126</sup> See *Krstic*, 558 F.3d at 1017.

<sup>127</sup> See *supra* subpart II.A

<sup>128</sup> See *supra* subpart II.D.2 (discussing conspiracy, kidnapping, and crimes of possession as continuing offenses).

<sup>129</sup> See, e.g., *United States v. Green*, 305 F.3d 422, 432 (6th Cir. 2002). After carefully implementing both prongs of the *Toussie* analysis and providing substantive analysis, the court in *Green* held that failure to appear under 18 U.S.C. § 3146 is a continuing offense. *Id.*

<sup>130</sup> See *infra* subparts III.C & III.D.

opinion,<sup>131</sup> with a significant subset applying the *Toussie* test to determine whether the pertinent criminal statutes called into question are continuing offenses. An analysis of these cases reflects a general pattern of courts implementing the *Toussie* test's first prong with relative ease, but facing difficulty when applying the second, more nebulous, prong.

The *Toussie* test's first prong has been relatively simple for courts to execute because it requires straightforward statutory interpretation.<sup>132</sup> One needs only to look at the face of the criminal statute for the key language to make this determination. Furthermore, the prong's aim, discerning congressional intent by examining statutory language, carries solid intuitive weight as a foundational tenet of statutory interpretation.<sup>133</sup> As the Tenth Circuit has reasoned, "[i]f Congress intended the [offense in question] to be a continuing offense, it could have clearly stated so."<sup>134</sup> Executing the first prong has thus been uncontroversial.

The major issues stemming from judicial interpretation of the *Toussie* test lie with its second prong.<sup>135</sup> Deploying this prong is an intrinsically more complex judicial undertaking, since courts may consider multiple sources, including legislative text, history and purpose, and past precedent, when analyzing the inherent nature of a particular crime.<sup>136</sup> Moreover, the Supreme Court has not elaborated on precisely how one may assess the "nature" of a crime; the notion itself smacks of vagueness. One practitioner has criticized the "nature of a crime" concept as "so vague as almost to defy analysis."<sup>137</sup> For these reasons, courts have undoubtedly more leeway and less guidance in deeming an offense as continuing under the second prong.<sup>138</sup>

For roughly the first two decades after the *Toussie* decision was handed down, most federal courts implementing the second prong expressed little disagreement over the prong's operations. They exercised the caution that *Toussie* calls for, holding the vast majority of federal crimes analyzed were not continuing offenses.<sup>139</sup> The last two

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<sup>131</sup> Shepard's Report: *Toussie*, LEXIS NEXIS (2012).

<sup>132</sup> See *supra* subpart II.D.1

<sup>133</sup> *CSX Transp., Inc. v. Ala. Dep't. of Revenue*, 131 S. Ct. 1101, 1107 (2011) ("We begin, as in any case of statutory interpretation, with the language of the statute.").

<sup>134</sup> *United States v. Reitmeyer*, 356 F.3d 1313, 1322 (10th Cir. 2004) (quotation marks and citation omitted).

<sup>135</sup> See *supra* subpart II.D.2

<sup>136</sup> See *United States v. Bundy*, No. 08-196, 2009 U.S. Dist. LEXIS 56466, at \*23 (D. Me. Mar. 31, 2009) (noting that the *Toussie* test's second prong presents a "more difficult" analysis than its first prong); see also *supra* subpart II.D.2.

<sup>137</sup> Benjamin E. Rosenberg, 'Continuing Crimes' and Statutes of Limitations, WESTLAW J. WHITE-COLLAR CRIME, Dec. 2010, at 4.

<sup>138</sup> The judiciary nevertheless must be mindful of the Supreme Court's mandate that offenses should be deemed continuing only in limited circumstances due to the continuing offense doctrine's power to forestall the running of the limitations period. See *Toussie v. United States*, 397 U.S. 112, 116 (1970); see also *United States v. W.R. Grace*, 429 F. Supp. 2d 1207, 1240 (D. Mont. 2006) ("In light of the purposes of a statute of limitations, which include protection against prosecution for acts done in the distant past and insurance against loss of evidence due the passage of time, the continuing offense doctrine applies only in rare circumstances.").

<sup>139</sup> *United States v. Morales*, 11 F.3d 915, 921 (9th Cir. 1993) (describing *United States v. Garcia*, 854 F.2d 340 (9th Cir. 1988), as "one of the very few cases (if not the only case) that has deemed a federal crime a continuing offense under the second prong of the *Toussie* test."). The *Garcia* case involved the federal crime of kidnapping, discussed in subpart II.D.2.

decades, however, have produced an outgrowth of judicial decisions that have applied *Toussie*'s second prong to hold that a number of crimes are continuing offenses.<sup>140</sup> The trend appears to be increasing, with a number of courts applying the continuing offense doctrine with zeal, particularly to white-collar criminal offenses.<sup>141</sup> Procedurally, some of these decisions reflect jumbled, sloppy, or minimal analysis,<sup>142</sup> while others more carefully proceed with the *Toussie* test's inquiries.<sup>143</sup> Taken as a whole, the decisions demonstrate a movement in the federal common law towards an expansion of the number of crimes treated as continuing offenses.<sup>144</sup>

Given the powerful effects of the continuing offense doctrine's application, expanding the number of continuing offenses brings sizable consequences for defendants and society. For every offense that is deemed continuing, the statute of limitations will not bar prosecution if the alleged criminal conduct extends beyond the statutory limitations period.<sup>145</sup> A central question arises: what is propelling the growth of recognized continuing offenses? An analysis of the case law points to two principal lines of cases that have generated a significant portion of this growth. The "charged conduct" and the "fraudulent scheme" approaches have significantly expanded the continuing offense doctrine beyond the principles enunciated in *Toussie*. The following two subparts examine these approaches and explore whether they are compatible with the Supreme Court's teachings and the principles that support the statutes of limitations.

<sup>140</sup> See, e.g., *United States v. Bell*, 598 F.3d 366, 369 (7th Cir. 2010) (failure to pay child support under 18 U.S.C. § 228 is a continuing offense); *United States v. Merino*, 44 F.3d 749, 753 (9th Cir. 1994) (failure to appear for sentencing under 18 U.S.C. § 3146(a) is a continuing offense); *United States v. Mermelstein*, 487 F. Supp. 2d 242, 256 (E.D.N.Y. 2007) (making false statements under 18 U.S.C. § 1035 may be charged as a continuing offense).

<sup>141</sup> See, e.g., *United States v. Aliperti*, 867 F. Supp. 142, 147 (E.D.N.Y. 1994) (holding extortion under 18 U.S.C.S. § 1951 is a continuing offense); *United States v. Anderson*, 995 F. Supp. 944, 949 (C.D. Ill. 1998) (bank fraud under 18 U.S.C. § 1344 is a continuing offense); *United States v. Gibson*, No. 08-030570, 2008 U.S. Dist. LEXIS 119120, at \*5 (W.D. Mo. Sept. 12, 2008) (embezzlement under 18 U.S.C. § 641 is a continuing offense).

<sup>142</sup> See, e.g., *Morales*, 11 F.3d at 917–18. The court in *Morales* treated a bribery conviction under 18 U.S.C. § 201 as a continuing offense merely because "the charged criminal conduct extends over a period of time." *Id.* at 918. As noted by Judge O'Scannlain in dissent, the *Morales* court failed to recognize or analyze properly the continuing offense doctrine or the Supreme Court's guidance in *Toussie*. *Id.* at 919–20.

<sup>143</sup> Compare *United States v. Dixon*, 551 F.3d 578, 582 (7th Cir. 2008) (concluding that a violation of 18 U.S.C. § 2250 is a continuing offense, without referencing *Toussie* or analyzing the text or purpose of 18 U.S.C. § 2250) with *United States v. Hinckley*, 550 F.3d 926, 936 (10th Cir. 2008) (concluding that a violation of 18 U.S.C. § 2250 is a continuing offense based upon a *Toussie* test second prong analysis and prior judicial findings). See also *United States v. Gomez*, 38 F.3d 1031, 1034–35 (8th Cir. 1994) (finding, in a summary manner without putting forth reasoning or an analysis under *Toussie*, that a violation under 8 U.S.C. § 1326(b)(2) is a continuing offense).

<sup>144</sup> While the Supreme Court recognized in *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), that "[t]here is no federal general common law," a specialized body of federal common law still exists. *Am. Elec. Power Co. v. Conn.*, 131 S. Ct. 2527, 2535 (2011). This "new federal common law addresses subjects within national legislative power where Congress has so directed or where the basic scheme of the Constitution so demands." *Id.* Federal courts' decisions that address whether certain federal crimes are continuing offenses represent part of this body of specialized federal common law.

<sup>145</sup> See *supra* subpart II.B

*C. Courts Adopting the Charged Conduct Approach Have Significantly Distorted the Continuing Offense Doctrine*

Many cases that have arguably misapplied the continuing offense doctrine can be best described as following a “charged conduct” approach. The approach has fundamentally altered the continuing offense doctrine as applied to a number of federal crimes, creating disorder in what had otherwise been a relatively settled area of law. By shifting courts’ attention from discerning congressional intent to analyzing the language of the charging document, the charged conduct approach has muddled the *Toussie* analysis, engendered confusion over *Toussie*’s application, and caused a split among the circuit courts.<sup>146</sup>

This “charged conduct” approach focuses on the defendant’s conduct alleged by the prosecutor in the charging document. The approach’s basic tenet maintains that no criminal conduct described in the charging document, as reflected by a single-count violation committed outside the applicable limitations period, should be barred by the statute of limitations when that conduct is part of a larger pattern of violations some of which occur within the limitations period.<sup>147</sup> The cases adopting the charged conduct approach generally reflect a similar procedural pattern: the government accuses the defendant of a repeated course of conduct spanning a period of time and aggregates the alleged conduct into a single count in the indictment. Part of the conduct falls outside of the applicable limitations period, and the defendant raises a statute of limitations defense. The prosecutor argues, in turn, that the defendant’s conduct should be viewed as one overall pattern or scheme (typically expressed as such via the single-count charge) and that because the limitations period encompasses some of the conduct, the continuing offense doctrine should apply to the offense and insulate the count from a statute of limitations challenge.<sup>148</sup>

The charged conduct approach has divided the judiciary. Some courts have endorsed the approach, treating the charged conduct at issue as continuous in nature under the second prong of *Toussie* and rejecting a limitations defense.<sup>149</sup> Other courts have rebuffed the approach outright, concluding that it is squarely at odds with *Toussie* and other Supreme Court precedent.<sup>150</sup> Conflicting case law has spread into many areas of criminal jurisprudence, as courts have clashed in addressing the charged conduct approach to a number of offenses, including bribery, forgery, and tax evasion.<sup>151</sup> The

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<sup>146</sup> See *United States v. Phan*, 754 F. Supp. 2d 186, 189 (D. Mass. 2010) (noting the circuit split and collecting cases).

<sup>147</sup> See *United States v. Sunia*, 643 F. Supp. 2d 51, 72 (D.D.C. 2009) (describing the charged conduct approach).

<sup>148</sup> For an example of the typical procedural posture of the charged conduct approach, see *United States v. Smith*, 373 F.3d 561, 563–64 (4th Cir. 2004).

<sup>149</sup> See, e.g., *id.* at 564 (holding that the crime at issue be treated as a continuing offense).

<sup>150</sup> See, e.g., *United States v. Yashar*, 166 F.3d 873, 875 (7th Cir. 1999) (rejecting a charged conduct argument and holding that embezzlement under 18 U.S.C. § 666 is not a continuing offense).

<sup>151</sup> Compare *United States v. Morales*, 11 F.3d 915, 917 (9th Cir. 1993) (following the charged conduct approach and upholding a bribery conviction based on bribes charged under a single count that occurred before and after the effective date under the sentencing guidelines) with *Sunia*, 643 F. Supp. 2d at 69–70 (rejecting the charged conduct approach as applied to a bribery charge). See also *United States v. Kirkman*, 755 F. Supp. 304, 306–08 (D. Idaho 1991) (rejecting a charged conduct argument and holding that tax

judicial divide is perhaps best reflected in the federal embezzlement case law, where circuit courts are split over whether certain federal embezzlement crimes are continuing offenses for statute of limitations purposes.<sup>152</sup>

### 1. The Development of the Charged Conduct Approach Through the Lens of Embezzlement

In order to understand the growth of the charged conduct approach and its impact, one can look to the controversy surrounding the federal embezzlement statute of conversion under 18 U.S.C. § 641, where the government has vigorously argued that the crime is a continuing offense under the charged conduct approach.<sup>153</sup> The pertinent language of the statute provides:

Whoever embezzles, steals, purloins, or knowingly converts to his use . . . any record, voucher, money, or thing of value of the United States or of any department or agency thereof . . . [is guilty of a crime].<sup>154</sup>

There are three elements required for a conviction under this section of the statute: (1) a specific intent to (2) make a knowing conversion (3) of governmental property.<sup>155</sup>

The first reported case addressing the issue of whether embezzlement, under § 641, is a continuing offense, *United States v. Beard*, held in the negative.<sup>156</sup> While implementing the *Toussie* test, the *Beard* court held that, for purposes of the second prong, a § 641 offense is complete upon the initial interference with the government's property interest (i.e., at the moment when all of the elements are first met). It then concluded that nothing in the nature of the crime indicated that Congress must have intended for it to be treated as a continuing offense.<sup>157</sup>

Fifteen years after the *Beard* decision, the Fourth Circuit transformed the landscape with its decision in *United States v. Smith*,<sup>158</sup> igniting a movement favoring the "charged conduct approach." In *Smith*, the defendant Alfred Smith's mother received benefit payments from the Social Security Administration that were electronically deposited into

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evasion is not a continuing offense); *United States v. Jaynes*, 75 F.3d 1493, 1506–07 (10th Cir. 1996) (discussing whether forgery is a continuing offense under the charged conduct approach).

<sup>152</sup> See *supra* note 146 and accompanying text (discussing the circuit split).

<sup>153</sup> See *United States v. Gibson*, No. 08-030570, 2008 U.S. Dist. LEXIS 119120, at \*4 (W.D. Mo. Sept. 12, 2008) (adopting the prosecution's charged conduct position and holding that 18 U.S.C. § 641 is a continuing offense).

<sup>154</sup> 18 U.S.C. § 641 (2006); see also *United States v. Beard*, 713 F. Supp. 285, 287 (S.D. Ind. 1989). Section 641 prohibits two separate and distinct forms of conduct, known within the case law as the "first paragraph" and "second paragraph" prohibitions. *Id.* The continuing offense controversy concerns § 641's first paragraph, and as such, references to § 641 within this Article address the first paragraph offense only.

<sup>155</sup> *Id.* at 288–89.

<sup>156</sup> See *id.* at 290–91 (noting that "[n]o reported cases have expressly addressed the question of whether conversion under paragraph one of section 641 is a continuing offense" and holding that the crime is not a continuing offense).

<sup>157</sup> *Id.* at 290. In *Beard*, the government did not raise a charged conduct argument but instead analogized a § 641 violation to the crime of joyriding. *Id.* The court rejected the government's analogy. *Id.* at 291.

<sup>158</sup> *United States v. Smith*, 373 F.3d 561, 561 (4th Cir. 2004).

a bank account jointly held with the defendant.<sup>159</sup> Smith's mother died on February 4, 1994, and Smith did not report the death of his mother to the Social Security Administration.<sup>160</sup> From March 1994 through February 1998, the Social Security Administration continued issuing payments that were electronically deposited into Smith's joint account with his mother.<sup>161</sup> During this time, Smith wrote checks and withdrew funds from the account.<sup>162</sup> In all, he received forty-eight payments, totaling approximately \$26,336, after his mother's death.<sup>163</sup> On January 24, 2003, he was charged, in a single-count indictment, with violating 18 U.S.C. § 641 by operating a scheme to embezzle his mother's payments on a recurring basis.<sup>164</sup>

Smith opposed the aggregation of his acts into a single count, arguing that the single-count indictment impermissibly joined separate acts that occurred at different times. He also argued that the statute of limitations barred prosecution of the earlier acts because those acts fell outside of the applicable five-year limitations period.<sup>165</sup> The Fourth Circuit rejected this argument. Addressing the aggregation, the court held that if a defendant executed "a plan or scheme or [set] up a mechanism which, when put into operation, [would] result in the taking or diversion of sums of money on a recurring basis, the crime may be charged in a single count." The court decided that Smith's failure to report his mother's death evidenced intent to establish a mechanism for the continuous and automatic receipt of funds for an indefinite period.<sup>166</sup> It held that Smith's alleged conduct was properly aggregated into a single count.<sup>167</sup>

Addressing Smith's statute of limitations argument, the Fourth Circuit reasoned that the indictment would be sufficient if embezzlement can be treated as a continuing offense. The court held that "the nature of embezzlement is such that Congress must have intended that, in some circumstances, it be treated in § 641 as a continuing offense."<sup>168</sup> It reasoned:

Embezzlement is the type of crime that, to avoid detection, often occurs over some time and in relatively small, but recurring, amounts. . . . At least in those cases where the defendant created a recurring, automatic scheme of embezzlement under § 641 by conversion of funds voluntarily placed in the defendant's possession by the government, and maintained that

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<sup>159</sup> *Id.* at 563.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *United States v. Smith*, 373 F.3d 561, 563 (4th Cir. 2004). Violations of 18 U.S.C. § 641 are governed by a five-year statute of limitations. *See* 18 U.S.C. § 3282 (2006). The five-year limitations period in *Smith* ran from January 24, 2008 to January 24, 2003, the date of the indictment. *Smith*, 373 F.3d at 570. Some of Smith's conduct occurred within the limitations period, as he received his final payment on February 3, 1998. *Id.* at 568.

<sup>166</sup> *Id.* at 564 (quotation marks and citation omitted). In order to determine whether Smith's series of takings were properly aggregated, the court cited to *United States v. Billingslea*, 603 F.2d 515, 520 (5th Cir. 1979) for the premise that it must examine the intent of the actor at the first taking.

<sup>167</sup> *Smith*, 373 F.3d at 568.

<sup>168</sup> *Id.* at 564.

scheme without need for affirmative acts linked to any particular receipt of funds . . . we think that Congress must have intended that such be considered a continuing offense for purposes of the statute of limitations.<sup>169</sup>

The court's holding reflects a charged conduct approach because it looks to the charged conduct in the indictment and holds that recurring criminal acts that transpire over an extended period (with some acts occurring outside the limitations period) may be treated as a single continuing offense for limitations purposes.

Shortly after *Smith* was decided, the Ninth Circuit also adopted a charged conduct approach in *United States v. Neusom*.<sup>170</sup> The defendant, James Neusom, had appealed his § 641 conviction, arguing that the conviction was barred by the statute of limitations. Neusom allegedly received improper Social Security payments from December 1993 to June 2001, and the prosecution aggregated the improper payment violations into one § 641 count.<sup>171</sup> A five-year statute of limitations governed the indictment, filed on February 28, 2003.<sup>172</sup> Neusom argued that only violations completed after February 28, 1998 could be prosecuted, and that his conviction was barred by the statute of limitations because the charge involved conduct that straddled the limitations date. Mirroring *Smith*, the court held that, given the nature of Neusom's recurring actions as set forth in the indictment, the violation of 18 U.S.C. § 641 at issue constituted a continuing offense. With minimal analysis, the court found no plain error and affirmed Neusom's conviction.<sup>173</sup>

District courts across several jurisdictions have joined the Fourth and Ninth Circuits in holding that a violation of § 641, as described in the language of the charging document, constitutes a continuing offense.<sup>174</sup> All of the rendered decisions feature a charging document with a single-count violation of § 641 alleging unlawful payments spanning a period exceeding five years. These payments straddled the applicable five-year limitations period, thus setting up a conflict with the statute of limitations. The conflict is obvious when one examines the government's alternative charging option. Had the government chosen, in any of these cases, to charge a single indictment count for each individual § 641 violation (i.e., one count for each unlawful payment received), the statute of limitations would plainly bar the counts involving actions occurring prior to the

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<sup>169</sup> *Id.* at 567–68. The court qualified its decision, noting, “This is not to say that all conduct constituting embezzlement may necessarily be treated as a continuing offense as opposed to merely ‘a series of acts that occur over a period of time’; indeed, it may well be that different embezzlement conduct must be differently characterized in this regard.” *Id.* at 568.

<sup>170</sup> 159 F. App'x 796 (9th Cir. 2005).

<sup>171</sup> *Id.* at 798.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 798–99.

<sup>174</sup> See *United States v. Easley*, No. 4:10CR00240-01, 2011 U.S. Dist. LEXIS 61207, at \*7 (E.D. Ark. June 8, 2011); *United States v. Phan*, 754 F. Supp. 2d 186, 189 (D. Mass. 2010); *United States v. Street*, No. 3:07CR181TSL, 2008 U.S. Dist. LEXIS 71331, at \*11 (S.D. Miss. Sept. 19, 2008); *United States v. Gibson*, No. 08-030570, 2008 U.S. Dist. LEXIS 119120, at \*5 (W.D. Mo. Sept. 12, 2008); *United States v. Thompkins*, No. 1:08CR, 2008 U.S. Dist. LEXIS 59255, at \*5–6 (W.D. N.C. Aug. 5, 2008); *United States v. Miller*, 200 F. Supp. 2d 616, 619 (S.D. W.Va. 2002); *United States v. Aubrey*, 53 F. Supp. 2d 1355, 1356 (E.D. Tex. 1999).



five-year limitations period. Because the government elected, in these cases, to aggregate the § 641 violations into a single count, it was able to utilize the charged conduct approach to argue that a continuous course of deliberative conduct occurred in violation of § 641, which in turn created a continuing offense.

Not all courts have elected to follow the charged conduct approach when deciding whether federal embezzlement crimes are continuing offenses. Indeed, other federal appellate courts have flatly rejected it and held that embezzlement is not a continuing offense under the *Toussie* analysis. The Second Circuit, in *United States v. Silkowski*, held that a one-count violation of § 641 is not a continuing offense “regardless of the language contained in the underlying charging document.”<sup>175</sup> In *United States v. Yashar*,<sup>176</sup> the Seventh Circuit similarly rebuffed the charged conduct approach in concluding that 18 U.S.C. § 666, the embezzlement criminal statute at issue and analogous to 18 U.S.C. § 641, did not state a continuing offense under *Toussie*.<sup>177</sup> Numerous district courts have joined the Second and Seventh Circuits with similar holdings.<sup>178</sup> These courts essentially echo the earlier holding in *Beard* that nothing in the nature of embezzlement itself indicates that Congress must have intended for it to be treated as a continuing offense.<sup>179</sup>

When analyzing the charged conduct approach through the lens of embezzlement, several conclusions may be made. *Smith*, *Neusom*, and their progeny are part of a larger set of judicial opinions that firmly establishes the charged conduct approach as a tool for prosecutors. To repel potential statute of limitations barriers, prosecutors, under this line of case law, are able to argue in the charging document that the alleged violations are part of a continuous pattern yielding one continuing crime. The embezzlement case law demonstrates the charged conduct approach’s power as a trigger for the continuing offense doctrine to operate and dispel a statute of limitations argument. Prosecutors have

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<sup>175</sup> *United States v. Silkowski*, 32 F.3d 682, 690 (2d Cir. 1994). The defendant in *Silkowski* pled guilty to an information charging one count of violating § 641 for receiving improperly Social Security benefits issued to his ex-wife and to his daughter for over ten years. *Id.* at 684.

<sup>176</sup> 166 F.3d 873, 879–80 (7th Cir. 1999).

<sup>177</sup> In *Yashar*, the defendant Michael Yashar was charged with embezzlement of more than \$5000 during a one-year period from September 1, 1991 to September 1, 1992, in violation of 18 U.S.C. § 666, which makes it a federal crime for a government official to embezzle government property that is valued at more than \$5000 during any one-year period. *Id.* at 875. The effective date of his indictment was August 13, 1997. *Id.* Yashar moved to dismiss on statute of limitations grounds because the indictment failed to allege that he embezzled the requisite \$5000 amount between August 13, 1992 and September 1, 1992, and that the applicable five-year statute of limitations barred any actions preceding August 13, 1992. *Id.*

<sup>178</sup> See *United States v. Sunia*, 643 F. Supp. 2d 51, 75 (D.D.C. 2009) (embezzlement under 18 U.S.C. § 666 is not a continuing offense); *United States v. Rivlin*, No. 07-Cr-524, 2007 U.S. Dist. LEXIS 89323, at \*15 (S.D.N.Y. Dec. 5, 2007) (embezzlement under 18 U.S.C. § 664 is not a continuing offense); *United States v. Duhamel*, No. 10-CR-203, 2011 U.S. Dist. LEXIS 28076, at \*6 (D. Me. Mar. 18, 2011) (holding that embezzlement provision of § 641 does not state a continuing offense); *United States v. Young*, 694 F. Supp. 2d 25, 29 (D. Me. 2010) (same); *United States v. Bundy*, No. 08-196, 2009 U.S. Dist. LEXIS 56466, at \*25 (D. Me. Mar. 31, 2009) (same); *United States v. Pease*, No. 07-757, 2008 U.S. Dist. LEXIS 27331, at \*8 (D. Ariz. March 24, 2008) (same); *United States v. Beard*, 713 F. Supp. 285, 291 (S.D. Ind. 1989) (same).

<sup>179</sup> See *Beard*, 713 F. Supp. at 290–91 (noting that “[n]o reported cases have expressly addressed the question of whether conversion under paragraph one of section 641 is a continuing offense” and holding that the crime is not a continuing offense).

already used the charged conduct approach with several other criminal offenses where multiple alleged violations existed, construing them in the charging document as one continuous pattern yielding one continuing crime, often successfully.<sup>180</sup>

## 2. Courts Err When Adopting the Charged Conduct Approach to Determine Whether an Offense Is Continuing

The charged conduct approach suffers from multiple shortcomings, and there are compelling reasons to reject it as a misleading standard that improperly disregards vital legislative and judicial policies. The approach subverts the common law definition of a continuing offense, flatly contradicts Supreme Court precedent, undermines the intent of Congress and the policies behind statutes of limitations, and provides too much power to prosecutors.

The charged conduct approach has altered the meaning of a continuing offense as it has been understood in the federal common law. Under the approach, a continuing offense is simply a crime that “continues in a factual sense . . . where a defendant engages in a course of conduct comprised of repeated criminal violations . . . .”<sup>181</sup> The approach bestows the term “continuing offense” with its everyday meaning; a continuing offense under the approach is, in essence, simply a pattern of repeated criminal violations. This conceptualization flies in the face of the term’s common law definition. As explained by the Tenth Circuit Court of Appeals, “[a] continuing offense is not the same as a scheme or pattern of illegal conduct. [It] is a term of art that does not depend on everyday notions or ordinary meaning.”<sup>182</sup> The federal common law has defined a continuing offense as an offense that Congress legally defines as continuing,<sup>183</sup> and the offense generally involves continuous conduct “set on foot by a single impulse and operated by an unintermittent force”<sup>184</sup> that causes continuous harm.<sup>185</sup> Thus, the charged conduct approach’s definition of a continuing offense, merely a repeated pattern of criminal violations, demonstrates a misunderstanding of the term as it has been used in the federal common law.

The charged conduct approach also ignores the Supreme Court’s directives for determining whether an offense is continuing. In *Toussie*, the Court instructed courts to find a continuing offense “only in limited circumstances,” namely if the offense satisfies either the first or second prong in the *Toussie* test; both prongs solely focus on the language and meaning of the criminal statute at issue in an effort to discern congressional intent.<sup>186</sup> The charged conduct approach, with its spotlight on the factual allegations contained in the charging document, transfers the focus of the continuing offense

<sup>180</sup> See *supra* note 151 and accompanying text (providing instances where the charged conduct approach has been applied to additional criminal offenses).

<sup>181</sup> *Rivlin*, 2007 U.S. Dist. 89323, at \*6–7 (internal quotation marks and citation omitted).

<sup>182</sup> *United States v. Jaynes*, 75 F.3d 1493, 1506 (10th Cir. 1996) (internal quotation marks, brackets, and citation omitted).

<sup>183</sup> *Pease*, 2008 U.S. Dist. LEXIS 27331, at \*4 (explaining that a continuing offense “does not merely mean an offense that continues in a factual sense . . . but instead means a substantive criminal offense that Congress established as continuing.”) (quotation marks and citation omitted).

<sup>184</sup> *Toussie v. United States*, 397 U.S. 112, 136 (1970).

<sup>185</sup> *United States v. Morales*, 11 F.3d 915, 921 (9th Cir. 1993).

<sup>186</sup> *Toussie*, 397 U.S. at 121; see *supra* subpart II.D (explaining the Supreme Court’s continuing offense test under *Toussie*).

assessment from the congressional intent inherent in a criminal statute to the particular charged conduct in a given case.<sup>187</sup> Under this approach, determining whether an offense is continuing depends upon “the manner in which the offense is committed.”<sup>188</sup>

This alteration plainly violates the precepts of *Toussie* and the will of Congress. “The goal of the *Toussie* test is to ascertain what Congress ‘must assuredly have intended’ with respect to the application of the statute of limitations to the legal definition of the offense; there is nothing about the specific conduct charged in a given case that could possibly shed light on Congress’ intent.”<sup>189</sup> The charged conduct approach, in effect, creates a third prong for the *Toussie* test: whether the conduct alleged in the charging document is continuous.<sup>190</sup> Such a prong would functionally eradicate *Toussie*’s second prong because a court would not need to examine a statute in order to determine the nature of the criminal offense (under the second prong) if the prosecutor’s charging document simply listed criminal conduct that recurred over time.<sup>191</sup>

In addition, the charged conduct approach flouts the Supreme Court’s directives in *Bailey* for detecting a continuing offense.<sup>192</sup> The Court held, in *Bailey*, that a continuing offense creates a “continuing threat to society.”<sup>193</sup> In other words, if an offense is continuing, it causes renewed harm<sup>194</sup> each day it continues.<sup>195</sup> The charged conduct approach ignores this definitive feature of a continuing offense when it dictates, with broad brush, that in order to qualify as such an offense, the criminal course of conduct charged merely needs to continue over time.<sup>196</sup> The charged conduct argument is logically unsound, as a pattern of discrete criminal violations, recurring over time, does

<sup>187</sup> See *United States v. W.R. Grace*, 429 F. Supp. 2d 1207, 1241 (D. Mont. 2006); *United States v. Yashar*, 166 F.3d 873, 877 (7th Cir. 1999).

<sup>188</sup> *United States v. Smith*, 373 F.3d 561, 569 (4th Cir. 2004).

<sup>189</sup> *W.R. Grace*, 429 F. Supp. 2d at 1243; see also *United States v. Sunia*, 643 F. Supp. 2d 51, 58 (D.D.C. 2009) (“[T]he salient inquiry is not whether an offense can be concealed for an extended period of time or repeated *ad infinitum* under a particular set of circumstances, but whether there is something inherent in the nature of the offense that makes it a continuing one.”) (internal quotation marks, brackets and citation omitted).

<sup>190</sup> *Yashar*, 166 F.3d at 877.

<sup>191</sup> *Id.*

<sup>192</sup> In *Bailey*, the Supreme Court recognized escape from federal custody as a continuing offense. *United States v. Bailey*, 444 U.S. 394, 413 (1980) (“First, we think it clear beyond peradventure that escape from federal custody as defined in § 751(a) is a continuing offense and that an escapee can be held liable for failure to return to custody as well as for his initial departure.”). The defendants in *Bailey* were indicted for violating the federal custody statute after escaping from a District of Columbia jail. See *id.* at 396. The Court acknowledged the defendants’ argument that *Toussie* calls for restraint in labeling crimes as continuing offenses, but it reasoned,

The justification for that restraint, however, is the tension between the doctrine of continuing offenses and the policy of repose embodied in statutes of limitations. This tension is wholly absent where, as in the case of § 751(a), the statute of limitations is tolled for the period that the escapee remains at large.

*Id.* at 413–14.

<sup>193</sup> *Bailey*, 444 U.S. at 413.

<sup>194</sup> See *supra* note 66 (discussing the use of the term “harm” in the context of the continuing offense doctrine).

<sup>195</sup> See *supra* note 73 and accompanying text.

<sup>196</sup> See *supra* subpart III.C (explaining the continuing offense definition under the charged conduct approach).

not equate to a single criminal act that “brings into being an enduring illegality that intensifies with the passage of each new day irrespective of any new criminal conduct,”<sup>197</sup> such as the continuing offense of kidnapping.

The Fourth Circuit’s holding in *Smith*—that embezzlement is a continuing offense when a “recurring, automatic scheme” is present but may not be continuing when “different embezzlement conduct” is present<sup>198</sup>—plainly contravenes the directive in *Toussie* that courts should focus solely on statutory meaning and congressional intent.<sup>199</sup> *Toussie* never suggests that a particular offense may be continuing under some circumstances but not others, all depending on the conduct charged. Moreover, the nature of embezzlement is such that it does not transpire necessarily over a prolonged period of time causing renewed harm as each day passes. Hence, none of the elements to an embezzlement offense reflect a continuing quality or aspect that would satisfy the *Toussie* test’s second prong.<sup>200</sup> In other words, embezzlement, by its elements, is a discrete crime completed through an individual transaction, and nothing intrinsically makes it a prolonged course of conduct.<sup>201</sup> When faced with deciding whether an embezzlement statute is a continuing offense under the *Toussie* standard, courts should focus on the nature of the elements of the offense, not how the offense was committed in the particular case at hand.

Compounding matters is the unfair advantage the charged conduct approach creates for prosecutors and the harmful practical effects it brings to the statute of limitations’ operation. By focusing on the content of the charging document, the charged conduct approach transfers an excessive amount of power to the prosecutor. The prosecutor is able to control whether the offense will be deemed continuing by including the appropriate single-count language in the charging document.<sup>202</sup> The prosecutor has the option of either aggregating multiple violations of a criminal statute into a single count (thereby creating a continuing offense under the charged conduct approach) or charging the violations as multiple separate counts. The decision, in turn, could determine when the limitations period for each count would begin to run. In essence, if the court follows the charged conduct approach, the prosecutor would ultimately decide when the limitations period would begin to run.<sup>203</sup> The limitations period is “virtually unbounded”<sup>204</sup> with such a possibility, which diverges from the congressional and

<sup>197</sup> *United States v. Young*, No. 09-cr-140, 2010 U.S. Dist. LEXIS 6824, at \*7 (D. Me. Jan. 25, 2010).

<sup>198</sup> *United States v. Smith*, 373 F.3d 561, 567–68 (4th Cir. 2004).

<sup>199</sup> *See United States v. Sunia*, 643 F. Supp. 2d 51, 58 (D.D.C. 2009) (“The mere fact that the Fourth Circuit could conceive of ‘different embezzlement conduct’ that ‘must be differently characterized in this regard’ dispels any notion that ‘Congress must assuredly have intended that [the offense] be treated as a continuing one.’”) (citations omitted).

<sup>200</sup> *See supra* note 155 and accompanying text (discussing the general elements of an embezzlement offense).

<sup>201</sup> *See Smith*, 373 F.3d at 569 (Michael, J., dissenting) (explaining that embezzlement is a discrete crime).

<sup>202</sup> *See United States v. Yashar*, 166 F.3d 873, 879 (7th Cir. 1999) (describing abilities of the prosecution).

<sup>203</sup> *See supra* subpart II.B (discussing the mechanics regarding limitations periods and the continuing offense doctrine); *see also Yashar*, 166 F.3d at 878 (observing the prosecutor’s influence in determining the running of the limitations period); *United States v. W.R. Grace*, 429 F. Supp. 2d 1207, 1243 (D. Mont. 2006) (discussing the impact of a prosecutor’s abilities).

<sup>204</sup> *Yashar*, 166 F.3d at 879.

Supreme Court dictates regarding the statute of limitations.<sup>205</sup> Whether the statute of limitations bars the prosecution of a stale offense should not be dependent upon the prosecutor's charging language in a particular case.

When the government argues for a continuing offense under the charged conduct approach, courts should follow the only sensible path by both abiding by the Supreme Court's directives in *Toussie* and rejecting the charged conduct approach as an improper method for determining whether an offense is continuing. The result will protect defendants' rights and will not disadvantage the prosecution, as a court may simply truncate the charged offense to the period that falls within the applicable statute of limitations.<sup>206</sup>

*D. Courts Adopting the Fraudulent Scheme Approach Have Misapplied the Supreme Court's Toussie Test and Improperly Concluded Fraud Crimes Are Continuing Offenses*

The second major problematic area developing within the continuing offense case law involves federal crimes of fraud. While the commission of fraud traditionally has been viewed as discrete in nature for statute of limitations purposes,<sup>207</sup> a number of cases have concluded that fraud crimes are continuing offenses. These cases use a novel analysis that can be best characterized as a "fraudulent scheme" approach. The approach essentially dictates that the presence of the word "scheme" in a criminal statute demonstrates congressional intent for the crime to be treated as a continuing offense because the ordinary meaning of "scheme" signifies ongoing behavior.<sup>208</sup> Thus, under the fraudulent scheme approach, the statute of limitations begins to run once the scheme comes to an end. Though not as widespread in influence as the charged conduct approach, the fraudulent scheme approach nevertheless is impacting the judiciary's treatment of fraud crimes that transpire over time. This section explores the fraudulent scheme approach, highlights the circuit splits it has caused, explores its troublesome reasoning, and offers a solution to resolve the discord it has generated.

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<sup>205</sup> As explained in *supra* subpart I.D, Congress has declared a policy in 18 U.S.C. § 3282 that statutes of limitations are not to be extended "except as otherwise provided by law," and the Supreme Court has stressed that statutes of limitations are to be strictly construed in favor of defendants.

<sup>206</sup> See *United States v. Duhamel*, No. 10-CR-203, 2011 U.S. Dist. LEXIS 28076, at \*6 (D. Me. Mar. 18, 2011) (truncating the charged conduct to the period falling within the five-year statute of limitations for a set of embezzlement violations, after finding that the particular embezzlement crime is not a continuing offense). As noted by the *Duhamel* court, a "ruling limiting the temporal scope of [an] Indictment does not foreclose the Government from seeking to introduce evidence of actions taken prior to [the beginning of the limitations period], so long as the Government establishes that the evidence is relevant and otherwise admissible under the Federal Rules of Evidence." *Id.* at \*6-7. This additional factor further alleviates any harm to the prosecution if a court rejects the charged conduct approach and truncates the temporal scope of the charging document.

<sup>207</sup> See, e.g., *United States v. Niven*, 952 F.2d 289, 293 (9th Cir. 1991) (holding that mail and wire fraud are not continuing offenses); *United States v. St. Gelais*, 952 F.2d 90, 96 (5th Cir. 1992) (concluding that wire fraud is not a continuing offense).

<sup>208</sup> See THE AMERICAN HERITAGE COLLEGE DICTIONARY 1219 (3d ed. 1993) (defining "scheme" as, *inter alia*, "[a] systematic plan of action").

## 1. Fraud Crimes and the Development of the Fraudulent Scheme Approach

Fraud crimes, under federal law, generally follow a similar statutory structure.<sup>209</sup> The mail fraud,<sup>210</sup> wire fraud,<sup>211</sup> bank fraud,<sup>212</sup> health care fraud,<sup>213</sup> and Major Fraud Act<sup>214</sup> statutes penalize the execution or attempted execution of a fraudulent scheme. Prosecutors have utilized the fraudulent scheme approach to argue that each of these crimes is a continuing offense for statute of limitations purposes, with varying degrees of success.

### i. Mail and Wire Fraud Are Not Continuing Offenses

The federal mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343 respectively, punish the use of the mail and wires in furtherance of a scheme to defraud.<sup>215</sup> Their purpose is to prevent the use of the post office and communications media correspondingly as a means to effectuate fraud.<sup>216</sup> Courts in near unison agree that (1) given the plain language of the statutes and the statutes' purpose, the discrete mailing or wire transmission, not the scheme, is the gist of the offense;<sup>217</sup> and, similarly, (2) each mailing or wire transmission creates a separate offense, even though the defendant may be engaged in a fraudulent scheme that transpires over a prolonged period of time.<sup>218</sup> The

<sup>209</sup> See *United States v. Refert*, No. 05-30090, 2007 U.S. Dist. LEXIS 548, at \*5 (D.S.D. Jan. 3, 2007) (“The health care fraud statute is modeled after the bank fraud statute, 18 U.S.C. § 1344, and the bank fraud statute was modeled after the federal mail and wire fraud statutes, §§ 1341 and 1343.”) (internal quotation marks and citation omitted); *United States v. Reitmeyer*, 356 F.3d 1313, 1317–18 (10th Cir. 2004) (discussing the similar structure and “nearly identical language” of the bank fraud statute and Major Fraud Act).

<sup>210</sup> The mail fraud statute provides in pertinent part, “Whoever, having devised or intending to devise any scheme or artifice to defraud, . . . places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service . . . shall be fined . . . or imprisoned . . .” 18 U.S.C. § 1341 (2006).

<sup>211</sup> The wire fraud statute provides in pertinent part, “Whoever, having devised or intending to devise any scheme or artifice to defraud, . . . transmits or causes to be transmitted by means of wire, radio, or television communication . . . any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined . . . or imprisoned . . .” 18 U.S.C. § 1343 (2006).

<sup>212</sup> The bank fraud statute provides in pertinent part, “Whoever knowingly executes, or attempts to execute, a scheme or artifice—(1) to defraud a financial institution; or (2) to obtain any of the moneys . . . of a financial institution, by means of false or fraudulent pretenses, representations, or promises; shall be fined . . . or imprisoned . . .” 18 U.S.C. § 1344 (2006).

<sup>213</sup> The health care fraud statute provides in pertinent part, “Whoever knowingly and willfully executes, or attempts to execute, a scheme or artifice . . . to defraud any health care benefit program . . . in connection with the delivery of or payment for health care benefits, items, or services, shall be fined . . . or imprisoned . . .” 18 U.S.C. § 1347 (2006).

<sup>214</sup> The Major Fraud Act provides in pertinent part, “Whoever knowingly executes, or attempts to execute, any scheme or artifice . . . to defraud the United States . . . shall . . . be fined . . . or imprisoned . . .” 18 U.S.C. § 1031 (2006).

<sup>215</sup> *United States v. Donahue*, 539 F.2d 1131, 1135 (8th Cir. 1976). The mail and wire fraud statutes are *in pari materia* and consequently are given the same construction. *Id.* See *supra* notes 210–211 for the pertinent language of these statutes.

<sup>216</sup> *Parr v. United States*, 363 U.S. 370, 389 (1960).

<sup>217</sup> See, e.g., *Rude v. United States*, 74 F.2d 673, 675 (1935) (“[T]he gist of the [mail fraud] offense is the use of the mail for the purpose of executing or attempting to execute such scheme . . .”).

<sup>218</sup> *United States v. Calvert*, 523 F.2d 895, 913–14 (8th Cir. 1975) (“It is well settled that each use of the

crimes are thus complete at the time of the execution (i.e., the mailing or wire transmission).<sup>219</sup> “The actual duration of the scheme is of no import.”<sup>220</sup> For these reasons, courts have routinely and correctly held that mail and wire fraud are discrete and not continuing offenses for statute of limitations purposes under a *Toussie* test analysis,<sup>221</sup> and the statute of limitations commences at the time of the mailing or wire transmission, not when the fraudulent scheme ends.<sup>222</sup> Case law addressing the Major Fraud Act has reached the same conclusion.<sup>223</sup>

One court has held to the contrary. The Tenth Circuit concluded in *United States v. Williams* that wire fraud is a continuing offense for statute of limitations purposes. The opinion introduced the fraudulent scheme approach into the wire fraud case law.<sup>224</sup> The defendant Larry Williams was indicted for wire fraud based on an alleged scheme to defraud his employer. The scheme involved Williams wiring company funds to his personal bank accounts from the beginning of August 1999 through July 26, 2006.<sup>225</sup> Indicted on September 16, 2008, Williams argued that the applicable five-year statute of limitations barred restitution for any wire transmitted before September 2003.<sup>226</sup> The court disagreed, adopting a fraudulent scheme approach through its reasoning that the wire fraud statute “focuses on the scheme itself, and not individual executions of that scheme.”<sup>227</sup> The court found that the limitations period began when Williams was caught on July 26, 2006.<sup>228</sup> The court’s logic is puzzling, given that the explicit language of the wire fraud statute specifically punishes the wire transmission, not the existence of a

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mails is a separate offense under the mail fraud statute, notwithstanding the fact that the defendant may have been engaged in one fraudulent scheme. . . . The same is true of the use of the wires under the wire fraud statute.”); *see also* *United States v. St. Gelais*, 952 F.2d 90, 97 (5th Cir. 1992) (“It is not the scheme to defraud but the use of the mails or wires that constitutes mail or wire fraud.”).

<sup>219</sup> *United States v. Niven*, 952 F.2d 289, 293 (9th Cir. 1991).

<sup>220</sup> *United States v. Barger*, 178 F.3d 844, 847 (7th Cir. 1999).

<sup>221</sup> *See, e.g., Niven*, 952 F.2d at 293 (holding that mail and wire fraud are not continuing offenses); *United States v. Scarano*, 975 F.2d 580, 585 (9th Cir. 1992) (same); *St. Gelais*, 952 F.2d at 96 (holding that wire fraud is not a continuing offense); *United States v. Miro*, 29 F.3d 194, 198 (5th Cir. 1994) (“Notwithstanding the continuing nature of the scheme itself, each mailing constitutes a completed offense.”); *Barger*, 178 F.3d at 847 (“Mail fraud is not an offense listed as a ‘continuing offense’ whose statute of limitations begins at the end of a continuous course of criminal conduct.”).

<sup>222</sup> *United States v. Lowry*, 409 F. Supp. 2d 732, 738 (W.D. Va. 2006); *see also* *United States v. Howard*, 350 F.3d 125, 128 (D.C. Cir. 2003) (“In applying the statute of limitations to mail and wire fraud the circuits appear uniformly to focus on the . . . mailing and use of the wires. No court has in any way suggested that the statute of limitations would be satisfied [if] . . . part of the scheme fell within the period.”).

<sup>223</sup> The Tenth Circuit in *United States v. Reitmeyer* appears to be the only court that has addressed whether a violation of the Major Fraud Act is a continuing offense for statute of limitations purposes. 356 F.3d 1313, 1322 (10th Cir. 2004). The *Reitmeyer* court held that the Major Fraud Act by its explicit statutory language punishes each individual execution of a fraudulent scheme, rather than the scheme itself. *Id.* at 1323. “[T]he discrete nature of a Major Fraud Act violation makes it unlikely Congress intended it to be a continuing offense for statute of limitations purposes.” *Id.*; *see also supra* note 214 (providing the text of the Major Fraud Act).

<sup>224</sup> *United States v. Williams*, 356 Fed. App’x. 167, 171 (10th Cir. 2009).

<sup>225</sup> *Id.* at 168.

<sup>226</sup> *Id.* at 170.

<sup>227</sup> *Id.* at 171.

<sup>228</sup> *Id.*

scheme: “Whoever . . . *transmits or causes to be transmitted* by means of wire . . . any writings . . . for the purpose of executing such scheme or artifice, shall be fined.”<sup>229</sup> Moreover, the court failed to acknowledge the overwhelming weight of authority examining the same statutory provision and reaching the opposite conclusion: that wire fraud was a discrete offense. The *Williams* court’s procedure for addressing the issue is also suspect, given that the court neither acknowledged *Toussie* nor followed its test to determine whether the offense is continuing. In holding that wire fraud was a continuing offense, the Tenth Circuit created a rift with the numerous other circuits that have consistently held that wire fraud is not a continuing offense for statute of limitations purposes.<sup>230</sup>

## ii. Bank Fraud Is Not a Continuing Offense

The fraudulent scheme approach has made a stronger impact in the area of bank fraud. Modeled after the mail and wire fraud statutes,<sup>231</sup> the bank fraud statute, 18 U.S.C. § 1344, criminalizes frauds perpetrated against FDIC-insured financial institutions.<sup>232</sup> Its purpose is to protect the interests of those institutions and the federal government as their insurer.<sup>233</sup> The statute punishes anyone who “knowingly executes, or attempts to execute, a scheme or artifice . . . to defraud a federally chartered or insured financial institution.”<sup>234</sup> Courts generally agree that to “execute” under the statute is to place a bank at risk of financial loss.<sup>235</sup>

The Eleventh Circuit, in *United States v. De La Mata*,<sup>236</sup> conducted a formal *Toussie* analysis and determined that bank fraud is not a continuing offense. The defendants in *De La Mata* entered into fraudulent lease agreements and collected lease payments going forward until the defendants were indicted.<sup>237</sup> The government argued that the defendants’ bank fraud continued until their scheme ended. The court, however, did not endorse the government’s argument and highlighted the absurdity of the fraudulent scheme approach: “[t]aken to its logical conclusion, the collection of rents on a lease obtained by fraud, for a term of 99 years, would toll the statute of limitations for 99 years. We think this goes too far.”<sup>238</sup> The court viewed the defendants’ collection of lease payments as conduct in furtherance of their scheme to defraud, conduct not covered under the bank fraud statute.<sup>239</sup> The court’s holding is logically sound: when the

<sup>229</sup> 18 U.S.C. § 1343 (2006) (emphasis added).

<sup>230</sup> *United States v. Barger*, 178 F.3d 844 (7th Cir. 1999) (listing cases finding that wire fraud is not a continuing offense).

<sup>231</sup> *Neder v. United States*, 527 U.S. 1, 20–21 (1999).

<sup>232</sup> *United States v. Bennett*, 621 F.3d 1131, 1135 (9th Cir. 2010).

<sup>233</sup> *See United States v. Davis*, 989 F.2d 244, 247 (“[T]he purpose of [the bank fraud statute] is not to protect people who write checks to con artists but to protect the federal government’s interest as an insurer of financial institutions.”); *Bennett*, 621 F.3d at 1135 (“The [bank fraud] statute is ‘designed to provide an effective vehicle for the prosecution of fraud in which the victims are financial institutions.’”) (quoting S. Rep. No. 98-225 at 377 (1983)).

<sup>234</sup> 18 U.S.C. § 1344 (2006).

<sup>235</sup> *United States v. Anderson*, 188 F.3d 886, 888 (7th Cir. 1999).

<sup>236</sup> *United States v. De La Mata*, 266 F.3d 1275, 1289 (11th Cir. 2001).

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*



defendants executed the fraudulent loans, it caused them to collect lease payments; but the statute punishes the execution, not its effects. Effects that continue over time, such as the lease payments in *De La Mata*, do not turn the underlying bank fraud violation into a continuing offense.

In contrast, in *United States v. Longfellow*, the Seventh Circuit introduced the fraudulent scheme approach into the bank fraud case law.<sup>240</sup> The defendant, bank executive Robert Longfellow, was indicted for making six fraudulent loans to his customers. He argued that the statute of limitations barred his prosecution because the transactions fell outside the applicable limitations period.<sup>241</sup> Focusing on the fact that Longfellow refinanced two of the loans during times that fell within the limitations period, the court held that the refinancing constituted “executions” of Longfellow’s scheme to defraud his employer bank. It concluded, “[t]he fact that only one or two executions fell within the statute of limitations does not detract from the entire pattern of loans’ [sic] being a scheme, and renders Longfellow no less culpable for the entire scheme.”<sup>242</sup> In keeping with the fraudulent scheme approach, the *Longfellow* holding stands for the principle that the statute of limitations will not bar executions of bank fraud that occur outside of the applicable limitations period so long as at least one execution within the entire fraudulent scheme falls within that limitations period. The holding also treats the fraudulent scheme, not the execution, as the unit of offense for statute of limitations purposes. Under *Longfellow*, bank fraud is a continuing offense for which the statute of limitations does not commence until the fraudulent scheme ends.

In *United States v. Najjor*,<sup>243</sup> the Ninth Circuit subsequently expanded the principles elucidated in *Longfellow*. Defendant Frank Najjor had challenged his bank fraud conviction and asserted that the statute of limitations barred the conviction because all of the conduct constituting the alleged bank fraud transpired before the applicable ten-year statute of limitations had commenced.<sup>244</sup> The court disagreed, and, after minimal analysis, held that bank fraud, under 18 U.S.C. § 1344, was a continuing offense apparently because the statute, by its terms, implicates schemes.<sup>245</sup> The court then focused on Najjor’s signing of a loan note that occurred within the ten-year window and found that the loan note signing was in furtherance of Najjor’s scheme to defraud. It explained, “[t]he [bank fraud] charge was brought within ten years of the date that Najjor signed the note. Thus, the . . . indictment was returned within the limitations period and the government could prosecute Najjor for the entire scheme to defraud.”<sup>246</sup> *Najjor* maintains that the statute of limitations will not prohibit any conduct in furtherance of a bank fraud scheme that occurs outside of the applicable limitations period so long as at least one act in furtherance of the entire fraudulent scheme falls within that limitations period. The holding significantly augments the principles illustrated in *Longfellow* because it relaxes the standard needed to trigger the extension of the statute of limitations—from executions of a fraudulent scheme to any act in furtherance of such

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<sup>240</sup> *United States v. Longfellow*, 43 F.3d 318, 325 (7th Cir. 1994).

<sup>241</sup> *Id.* at 319, 322.

<sup>242</sup> *Id.* at 325.

<sup>243</sup> *United States v. Najjor*, 255 F.3d 979, 983 (9th Cir. 2001).

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* at 983.

<sup>246</sup> *Id.* at 983–84.

scheme—so that prosecutors may reap the benefits of the continuing offense doctrine. It is far easier for a prosecutor to argue that a particular action is in furtherance of a scheme to defraud, as opposed to demonstrating that the action is an execution that put a bank at a risk of loss.<sup>247</sup>

The *Longfellow* and *Najjor* decisions were incorrectly decided due to the courts' use of the fraudulent scheme approach. The cases, and the fraudulent scheme approach more generally, assume that the presence of the term “scheme” in 18 U.S.C. § 1344 creates a continuing offense for statute of limitations purposes. The language of the statute plainly contradicts this assumption. Akin to mail and wire fraud, bank fraud prohibits executions or attempted executions of a scheme, not the scheme itself, nor conduct in furtherance of the scheme. The crime is complete and the statute of limitations begins to run upon an execution or attempted execution, and each execution constitutes a separate offense under the statute.<sup>248</sup> Furthermore, an execution does not necessarily continue over time. Entering into a fraudulent bank transaction, like fraudulently depositing material in the mail or wiring funds across state lines, frequently occurs instantaneously and is discrete by nature. In short, bank fraud, under 18 U.S.C. § 1344 is not a continuing offense, as neither the statutory language nor the nature of the crime satisfies the first or second prongs of the *Toussie* test, respectively. Congress proclaimed its intent that bank fraud is complete at the time of the execution, so the statute of limitations begins at the time of the execution for this discrete offense.

### iii. Health Care Fraud Is Not a Continuing Offense

The fraudulent scheme approach is shaping the courts' treatment of health care fraud at the district court level. Modeled after the bank fraud statute and mirroring its structure,<sup>249</sup> the health care fraud statute, 18 U.S.C. § 1347, punishes one who “executes or attempts to execute” a scheme to defraud a health care program.<sup>250</sup> Decisions addressing the relationship between health care fraud and the statute of limitations endorse the fraudulent scheme approach and hold that health care fraud is a continuing offense.<sup>251</sup> These cases follow the same flawed logic found in the bank fraud decisions of *Longfellow* and *Najjor*. They conclude that the presence of a scheme to defraud that continues into the applicable statute of limitations period causes the offense to be timely under the statute of limitations.<sup>252</sup> These decisions are misguided because they ignore the nature of the health care fraud statute as drafted by Congress—namely that the crime is complete, and that the statute of limitations commences at the moment one *executes* the scheme to defraud.<sup>253</sup> For instance, falsely representing that one is eligible for services at

<sup>247</sup> United States v. De La Mata, 266 F.3d 1275, 1288 (11th Cir. 2001) (comparing an execution of a scheme with conduct in furtherance of a scheme).

<sup>248</sup> United States v. Anghaie, No. 09-CR-37, 2011 U.S. Dist. LEXIS 23863, at \*4 (N.D. Fla. Feb. 21, 2011).

<sup>249</sup> See 18 U.S.C. § 1343, *supra* note 211 and accompanying text.

<sup>250</sup> 18 U.S.C. § 1347 (2006); *see also* 18 U.S.C. § 1344; *supra* note 212 (providing the pertinent language of 18 U.S.C. § 1347).

<sup>251</sup> See United States v. Refert, No. 05-30090, 2007 U.S. Dist. LEXIS 548, at \*6 (D.S.D. Jan. 3, 2007); United States v. Mermelstein, 487 F. Supp. 2d 242, 255 (E.D.N.Y. 2007); United States v. Schickle, No. 10-CR-34, 2010 U.S. Dist. LEXIS 65937, at \*3 (D. Me. July 1, 2010).

<sup>252</sup> *Id.*

<sup>253</sup> See United States v. Cooper, 283 F. Supp. 2d 1215, 1231 (D. Kan. 2003) (holding that the unit of the

a health care facility, or issuing a fraudulent reimbursement claim for health care services, take place at a specific moment and do not continue over time or present an ongoing harm, the two staples of a continuing offense.<sup>254</sup>

## 2. Eliminate the Fraudulent Scheme Approach

For statute of limitations purposes, federal fraud crimes should not be classified as continuing offenses, as reflected by their statutory language and underlying nature. Congress expressed its intent that the applicable fraud crimes are complete at the time of the execution or attempted execution by expressly prohibiting only the execution itself. With a fixation on the presence of the term “scheme” in the fraud statutes, the fraudulent scheme approach, at its core, misinterprets the statutes and should be recognized for what it is—a technique for the government to sidestep the statute of limitations unfairly. Courts should decline to follow the fraudulent scheme approach when proffered by the government and instead implement the *Toussie* test, as many courts have already done, to conclude that fraud crimes are not continuing offenses.

## IV. A THREE-PART SOLUTION TO REFORM THE CONTINUING OFFENSE DOCTRINE

The foregoing examination reveals widespread inconsistencies and resulting confusion surrounding the application of the continuing offense doctrine, with courts applying the same test to the same crime and producing conflicting results on whether the crime is continuing. As explored in Part III, the increase in the number of crimes deemed continuing is a troubling trend<sup>255</sup> that flouts the long-established practice of courts rarely finding exceptions to the statute of limitations’ stated terms.<sup>256</sup>

The trend can be viewed as part of a larger shift in the criminal law toward retributivism, a theory of criminal justice which espouses the belief that proportionate punishment is a justified response to criminal behavior.<sup>257</sup> The expansion of the continuing offense doctrine falls in line with retributivists’ aims. In the eyes of the retributivist, those who commit crimes should be punished proportionately to the harm created, regardless of when those crimes are prosecuted.<sup>258</sup> Hence, statutes of limitations can be seen as an impediment to justice according to this viewpoint. Correspondingly, the

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offense for health care fraud is either execution or attempted execution of the scheme to defraud).

<sup>254</sup> See *supra* subpart II.A (defining a continuing offense).

<sup>255</sup> Interestingly, this trend coincides with a legislative movement in Congress to create numerous exceptions to its general five-year limitations rule that extends the limitations periods applicable to a number of crimes. See Powell, *supra* note 30, at 124–25 (discussing Congress’s enactments to extend the limitations periods for numerous crimes). Scholars have noted that Congress has created roughly a dozen new exceptions over the last two decades, in contrast to the one or two exceptions traditionally created every few decades. *Id.*

<sup>256</sup> *United States v. Del Percio*, 657 F. Supp. 849, 852 (W.D. Mich. 1987) (“In most instances the limitations period starts to run when a crime is complete . . . Exceptions to this rule are rare.”).

<sup>257</sup> See White, *supra* note 11, at xi. The congressional movement towards extending limitations periods also aligns with retributivism. See Powell, *supra* note 30, at 136–37 (analyzing the relationship between extensions of statutes of limitations and the retributivism movement).

<sup>258</sup> See Powell, *supra* note 30, at 139 (discussing how, from a retributivist’s perspective, statutes of limitations are “only . . . obstructions in the way of securing a justly merited conviction.”).

continuing offense doctrine decreases the likelihood of a criminal offender escaping punishment by dispelling any statute of limitations challenge.

The expansion nevertheless has riddled case law with exceptions to the normal operation of statutes of limitations and convoluted the proper application of justice expressed by Congress. This Article suggests a three-part solution to reforming the continuing offense doctrine and restoring order in this area of jurisprudence. The Article proposes: (1) amending the second prong of the *Toussie* test; (2) applying the rule of lenity to ambiguous offenses; and (3) revising federal legislation as needed.

#### A. Amend the *Toussie* Test

The Supreme Court should retain the *Toussie* test as the singular method for courts to determine whether Congress intended for an offense to be continuing. Resolving the underlying issue demands a bright-line rule, rather than flexible guidelines, to ensure that the analysis is made in a uniform, predictable way consistently across courts. The *Toussie* test meets this requirement because it is an organized assessment of congressional intent that, in principle, should deliver accurate results. The test correctly focuses on the intent of Congress, given that the legislature creates and controls the terms of both statutes of limitations and criminal offense statutes.<sup>259</sup> Nevertheless, certain features of the test could be amended to provide more concrete guidance to the judiciary and boost the test's reliability.

The first prong of the *Toussie* test needs no revision. Its singular focus on the explicit language of the criminal statute is a logically sound starting point for the continuing offense analysis. Courts have had virtually no trouble analyzing statutory text to fulfill the prong's requirements, nor have courts reached opposing outcomes when examining a given criminal statute under this prong.

The *Toussie* test's second prong, on the other hand, needs reform. The problematic applications detailed in Part III essentially arise from a lack of clarity and specificity within the prong.<sup>260</sup> The vague notion of the "nature of the crime" should be revised to reflect a more concrete standard.<sup>261</sup> To determine the "nature of the crime," the Supreme Court should direct the judiciary to analyze each of the legal elements of the criminal offense at issue<sup>262</sup> to see whether the elements cause harm continuously as each day passes.<sup>263</sup> If one or more elements do not continuously cause harm, then the offense in question, per its nature, should not be deemed continuing.

Applying the revised second prong shows that the elements of conspiracy, escape,

<sup>259</sup> See *United States v. Villa*, 470 F. Supp. 315, 320 n.4 (N.D.N.Y. 1979) ("[S]ince limitations questions are fundamentally legislative matters, they may not be lengthened or shortened by judicial fiat.").

<sup>260</sup> *Toussie v. United States*, 397 U.S. 112, 115 (1970).

<sup>261</sup> See *supra* subpart III.B (discussing the vagueness inherent in the second *Toussie* test prong).

<sup>262</sup> In order to discern congressional intent inherent in a criminal statute, a court should examine the statutorily defined legal elements of the particular offense in isolation from the particular facts within the court's instant case.

<sup>263</sup> Such a revision would mirror contemporary understandings of the continuing offense doctrine. *United States v. Morales*, 11 F.3d 915, 922 (9th Cir. 1993); see also *United States v. Yashar*, 166 F.3d 873 (7th Cir. 1999); *United States v. Fleetwood*, 489 F. Supp. 129, 131 (D. Or. 1980) ("The government contends . . . that the crime charged is a continuing offense. If so, the statute of limitations would begin to run from . . . the last day all elements of the offense were present.").

and crimes of possession cause harm to society continuously as a matter of course each day they exist, and thus the offenses satisfy this revised prong and merit their continuing offense status. The elements of other crimes such as embezzlement do not inherently continue over time, and thus these offenses should not be deemed continuing.<sup>264</sup> While some of the elements of fraud, such as the presence of a scheme to defraud, could in theory cause harm each day in existence, other elements, such as the execution or attempted execution, do not so continue due to the execution's discrete nature.<sup>265</sup> Hence fraud crimes should not be deemed continuing offenses under this revised prong.

### B. Apply the Rule of Lenity

When applying the *Toussie* test, courts should implement the rule of lenity if they find that a criminal offense is ambiguous regarding whether its nature is discrete or continuing. This time-honored principle of statutory construction dictates that criminal statutes be strictly construed and any ambiguities resolved in favor of the defendant.<sup>266</sup> If a court determines that a criminal statute is ambiguous as to whether its offense is continuing, the court should conclude that such offense is not continuing under the rule of lenity.

The rule of lenity harmonizes with the common law rules that dictate that (1) the continuing offense doctrine should be interpreted narrowly<sup>267</sup> and (2) the statute of limitations should be construed in favor of the defendant in criminal cases “[w]hen doubt exists about the statute of limitations.”<sup>268</sup> The underlying policies behind the statutes of limitations, including the protection of defendants and promotion of law enforcement efficiency, buttress the common law rules and support the use of the rule of lenity in the continuing offense context.<sup>269</sup> Moreover, applying the rule of lenity coincides with the explicit congressional directive in 18 U.S.C. § 3282 that statutes of limitations should not be extended “except as otherwise expressly provided by law.”

Utilizing the rule of lenity in continuing offense decisions could bring beneficial results. The rule of lenity could directly assist the judiciary by providing a guiding hand when it is unclear whether the nature of the offense is discrete or continuing. It could also protect against the arbitrary application of the continuing offense doctrine and help provide clarity, uniformity, and predictability in the criminal law, matters of central societal importance,<sup>270</sup> by reducing the number of courts that adopt conflicting positions on whether an offense is continuing.

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<sup>264</sup> See *supra* subpart III.C (discussing the elements of embezzlement).

<sup>265</sup> See *supra* subpart III.D (discussing fraud crimes). As explained in subpart III.D, some of the elements of fraud (i.e., the presence of a scheme to defraud) continue over time, but other elements (e.g., the execution or attempted execution) do not.

<sup>266</sup> *United States v. Enmons*, 410 U.S. 396, 411 (1973); see also Phillip M. Spector, *The Sentencing Rule of Lenity*, 33 U. TOL. L. REV. 511, 511–12 (2002).

<sup>267</sup> See *supra* subpart I.D (discussing the Supreme Court's interpretation of the continuing offense doctrine).

<sup>268</sup> *United States v. Gilbert*, 136 F.3d 1451, 1454 (11th Cir. 1998).

<sup>269</sup> See *supra* subpart I.B (exploring the policies underlying criminal statutes of limitations).

<sup>270</sup> See *United States v. McGoff*, 831 F.3d 1071, 1077 (D.C. Cir. 1987) (“In the criminal context, courts have traditionally required greater clarity in draftsmanship. . . commensurate with the bedrock principle that in a free country citizens who are potentially subject to criminal sanctions should have clear notice of the behavior that may cause sanctions to be visited upon them.”).

### *C. Revise Criminal Statutes as Needed*

This Article recognizes that statutes of limitations can provoke the ire of the public, particularly those who embrace retributivist principles, given that the statutes may allow those who commit crimes to escape justice.<sup>271</sup> Indeed, those adopting a retributivist perspective to criminal justice fault the mechanical operation of statutes of limitations for providing amnesty to defendants from prosecution.<sup>272</sup> The Supreme Court of Florida has provided an apt response to such criticisms:

There are those advocates of “law and order” among us who will view this decision as another example of courts being “soft on criminals.” We would respond by reminding these persons that the petitioners could have been prosecuted had their alleged crimes been detected, and had proceedings been commenced at any time within [the limitations period]. More significantly, it must be remembered that without law there can be no order. The law must be applied evenhandedly to all lest we run the risk of selective prosecutions.<sup>273</sup>

Limitations statutes are intended to balance the government’s interest in administering justice with society’s interest in protecting those individuals who may have lost their ability to defend themselves due to the passage of time.<sup>274</sup> If a particular statute of limitations upsets the balance by creating significant difficulty for the government in investigating and prosecuting a particular offense in a timely manner, then it is the responsibility of the legislature to correct the imbalance and revise the statute. The legislature, not the judiciary, has the authority to create and modify the terms of criminal offenses and the duration of the limitations periods, if any, that apply to those offenses.

The continuing offense doctrine fundamentally upsets this separation of powers by permitting courts to extend limitations periods. By its operation, the doctrine weakens the set of protections inherent in statutes of limitations each time a court deems an offense to be continuing. The Supreme Court has cautioned against applying the doctrine due to these dangers,<sup>275</sup> but, as explored in Part III of this Article, many courts nonetheless have been applying the doctrine with increasing frequency. This practice is a poor and improper substitute for legislative reform. If consensus emerges that certain crimes should be treated as continuing offenses for statute of limitations purposes, then Congress should take note and amend the pertinent criminal statutes to indicate that the crimes should be treated as continuing offenses.

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<sup>271</sup> *Toussie v. United States*, 397 U.S. 112, 123 (1970) (“[E]very statute of limitations . . . may permit a rogue to escape.”); *see supra* subpart I.C (discussing criticisms surrounding statutes of limitations).

<sup>272</sup> *See United States v. Del Percio*, 657 F. Supp. 849, 852 (W.D. Mich. 1987) (discussing the retributivist movement); *see also Powell, supra* note 30, at 135–36 (same).

<sup>273</sup> *Reino v. State*, 352 So.2d 853, 861 (Fla. 1977).

<sup>274</sup> *See United States v. Otto*, 742 F.2d 104, 107 (3d Cir. 1984) (“[T]he applicable statute of limitations . . . balances the government interest in prosecution with the need to protect those who may lose their means of defense.”) (citation omitted).

<sup>275</sup> *See Toussie*, 397 U.S. at 115 (“[T]he doctrine of continuing offenses should be applied in only limited circumstances . . .”).

## CONCLUSION

Criminal statutes of limitations serve important public interests, including protecting the accused against stale criminal charges, motivating law officials to gather fresh evidence and issue timely notice of any accusations, and providing relief to the judiciary from adjudicating long-abandoned crimes. Enacted by the legislature, the statutes are to be liberally interpreted to favor the defendant.

By creating the continuing offense doctrine, the Supreme Court has developed an exception to the standard operation of the statute of limitations that stalls the commencement of the limitations period for offenses deemed continuing, almost always to the detriment of the defendant. Since the advent of the *Toussie* test, the judiciary has struggled with the process of determining whether offenses are discrete or continuing for statute of limitations purposes.

A troubling pattern has emerged from this confusion where courts have applied the continuing offense doctrine haphazardly, straying from the Supreme Court's dictate that the continuing offense doctrine be applied narrowly due to its drastic effects upon the statute of limitations' operation. If continued, the pattern will eradicate the protections afforded by the statute of limitations for any offense where a set of alleged violations have transpired over a period of time.

To combat the excessive use of the continuing offense doctrine, the doctrine should be reformed by amending the Supreme Court's *Toussie* test, employing the rule of lenity in continuing offense cases, and revising criminal offense statutes and statutes of limitations as needed. This combination of measures may well steer the continuing offense doctrine back to its originally intended purpose and thwart the practice of deeming an inherently discrete offense to be continuing, a practice that sidesteps the proper operation of the statute of limitations.