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## SELECTIVE SERVICE—FAILING TO REGISTER NOT A CONTINUING OFFENSE

Robert Toussie was born on June 23, 1941, and, according to the terms of the Universal Military Training and Service Act,<sup>1</sup> he was obligated to register for the draft when he turned 18, or within five days thereafter. In Toussie's case, the last date allowed on which he could have registered would have been June 28, 1959. He failed to register at that time or any-time thereafter, however, and his default went unnoticed until he was twenty-five (1966), when an anonymous tipster informed his draft board. He was arrested in February, 1967, as a draft law violator, and was indicted in May of 1967. Toussie was convicted, after a jury trial in the United States District Court,<sup>2</sup> of failing to register for the draft: a violation of 50 U.S.C. § 462(a).<sup>3</sup> His conviction was affirmed by the Court of Appeals.<sup>4</sup>

Before trial, Toussie moved to dismiss the indictment, arguing, *inter alia*, that prosecution was barred by the running of the applicable five-year statute of limitations.<sup>5</sup> His initial failure to register occurred in 1959 and

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1. 50 U.S.C.A. § 453 (The Military Selective Service Act of 1967) 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 rules and regulations prescribed hereunder." The applicable Proclamation provides that "persons who were born on or after September 19, 1930, shall be registered on the day they attain the eighteenth anniversary of the day of their birth, or within five days thereafter." Presidential Proclamation No. 2799, July 20, 1948, 64 Stat. 604, issued under Congressional authority granted in 50 U.S.C.A. § 453. This policy was continued after passage of the Universal Military Training and Service Act by Proclamation No. 2942, August 30, 1951, 65 Stat. 35.

The applicable Selective Service Regulation is 32 C.F.R. § 1611.7(c) which provides: "The duty of every person subject to registration to present himself for and submit to registration *shall continue at all times*, and if for any reason such person is not registered on the day or one of the days fixed for his registration he shall immediately present himself for and submit to registration before the local board in the area where he happens to be." (Emphasis added).

2. *United States v. Toussie*, 280 F. Supp. 473 (E.D.N.Y. 1967).

3. 50 U.S.C. § 462(a) (1964), Offenses and penalties. This section makes it a crime to evade registration or to "neglect or refuse to perform any duty" required by Selective Service laws.

4. 410 F.2d 1156 (1969).

5. 18 U.S.C. § 3282 (1964), Offenses not capital. This section provides that, "Except as otherwise expressly provided by law, no person shall be prosecuted,

he was indicted in 1967—nearly eight years after the offense was completed. The government argued that the petitioner was under a continuing duty to register until age 26 (the last date on which he was obligated to register), and that the five-year statute of limitations would begin to run from that time.<sup>6</sup>

The United States Supreme Court held (in a five-to-three decision)<sup>7</sup> that the government's prosecution of Toussie was barred by the statute of limitations, and reversed his conviction. The gist of the Court's decision was that failure to register for the draft was not a continuing offense because it was not explicitly made so by the Selective Service statutes.<sup>8</sup> *Toussie v. United States*, 397 U.S. 112 (1970).

The significance of the *Toussie* decision lies in the fact that the United States Supreme Court overruled three cases which had all held that failure to register for the draft was a continuing offense. The purpose of this note is to examine the basis for enactment of statutes of limitations in criminal law, the relation of that basis to the continuing offense doctrine, and, finally, the relationship of the two concepts to the decision rendered in *Toussie v. United States*.

#### HISTORY OF, AND BASIS FOR, STATUTES OF LIMITATIONS

*Quod nullum tempus occurit regi*—no lapse of time bars [a prosecution by] the king. This rule existed as an element of the English common law from a very early period.<sup>9</sup> The common law fixed no time limit within

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tried, or punished for any offense, not capital, unless the indictment is found . . . within five years next after such offense shall have been committed." This provision for a period of limitation for non-capital offenses embodies a long standing congressional policy and is comprehensive in its language and purpose. See *United States v. Zisblatt Furniture Co.*, 78 F. Supp. 9 (D.N.Y. 1948); *United States v. Laut*, 17 F.R.D. 31 (1955); *United States v. McElvain*, 272 U.S. 633 (1926).

6. The government asserted that 50 U.S.C.A. §§ 454 and 453 were intended to be read *in pari materia* by Congress. For section 453 see *supra* note 1. Section 454 provides in part "[t]hat, notwithstanding any other provision of law, any registrant who has failed or refused to report for induction *shall continue to remain liable* for induction and when available shall be immediately inducted . . ." (Emphasis added). However, the government's contention was without merit as section 454 was enacted (in 1967) after section 453 (1951) and in order for the two sections to be read *in pari materia* they would have had to have been enacted at the same time. (Petitioner's Reply brief at 4).

7. Mr. Justice Black delivered the opinion of the Court in which Justices Douglas, Brennan, Stewart, and Marshall concurred. Mr. Justice White delivered the dissenting opinion in which Chief Justice Berger and Mr. Justice Harlan joined.

8. 50 U.S.C. §§ 453 and 454, quoted above in notes 1 and 6.

9. BRACTON, PEROGATIVES, E.5, at 561 and Britton, "De Droit Le Roy," c.18, at 29, as quoted in *United States v. Hoar*, 26 Fed. Cases 329, Fed. Case No. 15373, 2 Mason 311 (1821). In *United States v. Thompson*, 98 U.S. 486, at 489 (1878),

which a criminal prosecution had to be commenced.<sup>10</sup> Furthermore, it was held that even where parliament did create a statute of limitations, such a statute did not apply to the king, unless the statute expressly limited the king's right to prosecute.<sup>11</sup> The exemption of the crown from the operation of the statute of limitations was said to be based upon public policy. "It was deemed important that, while the sovereign was engrossed by the cares and duties of his office, the public should not suffer by the negligence of his servants."<sup>12</sup>

Contrary to England, European civil law jurisdictions readily adopted criminal statutes of limitations, based upon Roman law principles. Solicitor Murray has written:

[B]y the Roman law criminal liability was extinguished after the expiration of twenty years from the date of the crime. And this principle of equity, laid down by the Romans, has been followed in nearly all modern codes, with the important exception of the law of England.<sup>13</sup>

It should be noted that modern English law now provides for statutes of limitations for most crimes, bringing England in accord with most Western countries.

Before the creation of our federal government, colonial legislatures had

Justice Swayne noted that "The rule of *nullum tempus occurit regi* has existed as an element of the English law from a very early period. It is discussed in Bracton, and has come down to the present time." A more recent case, *United States v. Fraidin*, 63 F. Supp. 271 (S.D.N.Y. 1945) these principles were summarized as follows: "[A]t common law there was no limitation upon prosecution in criminal cases and therefore, prosecutions might be instituted at any time after the alleged commission of a criminal act, unless the time for doing so was limited by statute." See also, *Bush v. International Alliance*, 55 C.A.2d 357 (1942).

10. *United States v. Thompson*, *supra* note 9, at 489, "The common law fixed no time as to the bringing of actions. Limitations derive their authority from statutes." See also, 102 U. PA. L. REV. 630 (1954) citing 2 Stephen, *History of The Criminal Law of England* (1883) for examples of old English cases in which prosecution was begun many years after the commission of the crime.

11. In *United States v. Hoar*, *supra* note 9, at 329 it was said: ". . . no statute of limitations has been held to apply to actions brought by the crown, unless there has been an express provision including it." It was said in *United States v. Thompson*, *supra* note 9, at 489 that "The King was held never to be included, unless expressly named."

12. *United States v. Thompson*, *supra* note 9, at 489.

13. Murray, *The Prescription of Crime*, 50 SCOT. L. REV. 259 (1934). Among the European Civil law jurisdictions that adopted statutes of limitations are France, Germany, Italy, Austria, and Switzerland. The early French statutes appeared in the CODE D'INSTRUCTION CRIMINELLE which was promulgated in 1808. The French Code was widely imitated in other European nations. Generally, these codes provide for different time periods based on the seriousness and nature of the offense. For a more detailed account see Murray. Numerous examples of English statutes of limitations can be found in HALSBURY'S LAWS OF ENGLAND, vol. ix, 2d ed. (1933), at 82-83.

enacted statutes of limitations as early as 1652.<sup>14</sup> In the federal system, periods of limitations for most crimes had been adopted by 1790,<sup>15</sup> and such statutes have persisted to the present day.<sup>16</sup> It has been suggested by some authorities that the far more extensive use of statutory limitations here rather than in England may have resulted from the fact that early in the development of American law there was a contest between the civil and common law for acceptance in the colonies, which resulted in the adoption of civil law concepts.<sup>17</sup>

This historical framework is broadened by an examination of the underlying basis for such statutes. What purpose do they serve society by protecting the offender, who may some day utilize the defense that the statute of limitations has run? First, statutes of limitations eliminate the evil of having to defend oneself against stale charges:

Statutes of limitations 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>18</sup>

Within this expression of policy can be seen an admonition to prosecutors that they should be diligent in preparing and bringing cases to trial.

Statutes of limitations also help insure that prosecutions will be based upon evidence that is reasonably fresh. Such statutes are legislative rec-

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14. See U. PA. L. REV., *supra* note 10, at 631, citing WHITMORE, COLONIAL LAWS OF MASSACHUSETTS 163 (1889); CHARTER AND LAWS OF THE PROVINCE OF PENNSYLVANIA 1682-1700, 173-74 (Nead and McComant ed. 1879).

15. 1 *United States Statutes at Large*, Ch. 9, § 32 (1790). This section provided that there could be no prosecution or punishment for treason or other capital offenses unless the indictment be found within three years, nor in other cases unless within two years.

16. 18 U.S.C. §§ 3281-91 (1964). These sections prescribe the periods of limitations for various crimes. For example, section 3281 provides that "An indictment for any offense punishable by death may be found at any time without limitation. . . ." Section 3282 is quoted in footnote 5. Section 3290 provides that no statute of limitation shall extend to any person fleeing from justice. See *United States v. Parrino*, 180 F.2d 613 (2nd Cir. 1950).

The proposition that there should be prescribed periods of time within which prosecution for offenses must be commenced is widely accepted in the United States. Only South Carolina and Wyoming impose no limitations.

In determining the proper length for periods of limitation legislatures consider the seriousness of the offense and generally, the more serious crimes have the longest periods of limitation—or none at all. This is based on the rationale that the more serious the offense the greater the likelihood that the offender is a continuing danger to society.

17. See U. PA. L. REV., *supra* note 10, at 631, citing HOWE, READINGS IN AMERICAN LEGAL HISTORY 19 *et seq.* (1949); RADIN, ANGLO-AMERICAN LEGAL HISTORY § 79 (1936).

18. *United States v. Eliopoulos*, 45 F. Supp. 777, at 781 (D.N.J. 1942).

ognition<sup>19</sup> of the fact that with the passage of time memories become less reliable, witnesses may die, and physical evidence becomes more difficult to obtain and identify. In short, there is less possibility of an erroneous conviction if prosecution is not unreasonably delayed.<sup>20</sup>

Third, if the offender refrains from further criminal activity, the likelihood increases, with the passage of time, that he has reformed, thereby diminishing the necessity for imposing criminal sanctions. In *United States v. Bonanno*,<sup>21</sup> the court said statutes of limitations serve "to cut off prosecution for crimes a reasonable time after completion, when no further danger to society is contemplated from the criminal activity."<sup>22</sup>

Finally, an argument closely allied to the third argument is that, as time goes by, the retributive impulse which may have existed within the community is likely to yield to a sense of compassion for the person prosecuted for an offense long forgotten. An interesting example of this involves the story of Cornelius Pytsch, alias Frank Raboski, who escaped from a California prison to reside in Northlake, Illinois, where he became a respected citizen. Raboski got married and made a good living as a mechanic. In addition, he was the first president of a local homeowners' association, served on a local government committee, and helped establish a local crime commission. Eventually, California authorities found Raboski and demanded his return, but Raboski's neighbors rallied behind him, raising money for his bail and drafting a clemency appeal to California Governor Earl Warren. A Northlake minister was quoted as saying: "This community cannot afford to lose him."<sup>23</sup>

The outcome of Raboski's fate is unknown, but nevertheless his story

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19. "[T]he very existence of the statute is a recognition . . . by the legislature of the fact that time, while it gradually wears out proofs of innocence, has assigned to it fixed and positive periods in which it destroys proofs of guilt." Quote from *Hogoboom v. State*, 120 Neb. 525, at 527-28, 234 N.W. 422, 423 (1931). See also, *People v. Ross*, 325 Ill. 417, 421, 156 N.E. 303, 304 (1927); *People ex rel. Reibman v. Warden of the County Jail at Salem, N.Y.*, 242 App. Div. 282, 284, 275 N.Y. Supp. 59, 62 (1934).

20. MODEL PENAL CODE, § 1.07, Comment (Tent. Draft No. 5, 1956). See also, *People v. Ross*, *supra* note 19. In *United States v. McWilliams*, 69 F. Supp. 812, 815, (D.D.C. 1946) it was stated "As in all long delayed cases, the witnesses now are scattered; some are not accessible, more particularly to the defendants . . . the memories of witnesses as to events occurring many years ago are not clear. It is for those reasons among others that the Constitution of the United States . . . has imposed a statute of limitations to prevent long delayed prosecutions." *Affirmed and quoted in United States v. McWilliams*, 163 F.2d 695, 696; See also, *United States v. Cadaw*, 197 U.S. 475 (1905); *Ex parte Altman*, 34 F. Supp. 106 (S.D. Cal. 1940).

21. *United States v. Bonanno*, 177 F. Supp. 106 (D.N.Y. 1959).

22. *Id.* at 112.

23. *Time*, May 11, 1953, at 24, col. 3.

raises the question whether society is in fact benefited by prosecuting or returning an escapee to prison where it can be shown that he has rehabilitated *himself*. After all, one of the stated objectives of criminal punishment is to rehabilitate the criminal to the point that he can return to society as a useful and productive citizen. Where this objective has been attained through the offender's own efforts, society has little to fear from his future conduct—and little to gain from his re-incarceration.<sup>24</sup>

#### THE CONTINUING OFFENSE DOCTRINE AND THE OPERATION OF STATUTES OF LIMITATIONS

Crimes can be classified as either instantaneous or continuing, and the distinction becomes important in determining when the statute of limitations begins to run. Most crimes are considered to be instantaneous: that is, a crime in which all of the elements occur within a relatively short span of time and "the criminal objective is speedily attained."<sup>25</sup> For example, rape, robbery, or murder would be properly classified as instantaneous crimes, for all their elements are completed at the consummation of the single act.

In contrast to an instantaneous offense is a continuing offense. This is an offense that involves "a continuous course of conduct, impelled by a single impulse, to achieve an ultimate unlawful objective."<sup>26</sup> The distinguishing feature of the continuing offense is that *one* illegal act cannot accomplish the ultimate objective: it is attained only by a *pattern* of illegal conduct.<sup>27</sup>

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24. For a more detailed discussion of this point, see U. PA. L. REV., *supra* note 10, at 633. As noted by the author, [t]he criminal who has not been prosecuted for a number of years and has chosen to rehabilitate himself would be encouraged by knowing that whatever success he achieves will not be destroyed by the prosecution of a crime that is in his distant past. After a period of time a person ought to be able to live without fear of prosecution."

25. Government brief, in *Toussie v. United States*, at 16. See also, *United States v. Midstate Co.*, 306 U.S. 161, 166 (1939); *United States v. Universal Corp.*, 344 U.S. 218, 224 (1952).

26. Government brief, at 6.

27. *Id.* at 16. See also *Bramblett v. United States*, 231 F.2d 489, *cert. denied*, 350 U.S. 1015 (1956), in which the defendant was charged with falsification of payroll authorization in violation of 18 U.S.C. 1001. The Supreme Court held that this was a continuing crime since the scheme involved a *pattern of conduct*, rather than individual acts which merely exemplified that pattern. *But cf.* *United States v. Irvine*, 98 U.S. 450 (1878); here an attorney was convicted of wrongfully withholding pension money from a pensioner. The duty to pay it over was certainly a continuing one, but the Court held that the statute of limitations applied, and it began to run as soon as the demand for the money was made and the defendant refused to pay. This case illustrated that a court is not always going to find a continuing offense where there was a continuing duty. A distinction must be

In the dissenting opinion of *Toussie*, Mr. Justice White noted that "the continuing offense is hardly a stranger to American jurisprudence."<sup>28</sup> The concept encompasses such crimes as embezzlement,<sup>29</sup> conspiracy,<sup>30</sup> bigamy,<sup>31</sup> failure to provide support,<sup>32</sup> failure to notify a draft board of a change of address,<sup>33</sup> failure of an alien to register in compliance with the Alien Registration Act,<sup>34</sup> and, until the *Toussie* decision, failure to register for the draft.<sup>35</sup>

The continuing offense doctrine can be rationalized as follows: in most cases where it applies, either the nature of the crime itself prevented its discovery, or else the offender's conduct was such that each day it was in violation of the law. An example of the former is embezzlement, and an example of the latter is bigamy. In each case, the state's attorney's ability to prosecute would be hampered if the offender was given the benefit of the statute of limitations, for either the crime would not be discovered until after the statute had run, or the same law would be repeatedly violated, but the statute would have run as to the initial violations. Even here there remains a danger in allowing evidence of events long past as proof of the offense, a danger best typified by continuing conspiracy cases.<sup>36</sup> Thus,

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made between the situation where there is a true continuing offense and where an offense is instantaneous but the harm caused by it continues over a long period. This is the distinction that was made in *Irvine* and implicitly in *Toussie*.

28. *Toussie v. United States*, 397 U.S. 112, 134 (1970).

29. *State v. Thang*, 188 Minn. 224, 246 N.W. 891 (1933); *But cf. State v. Marple*, 13 N.J. Misc. 793, 181 A. 278 (Sup. Ct. 1935).

30. *Gruenwald v. United States*, 353 U.S. 391 (1957); *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States v. Kissel*, 218 U.S. 601 (1910). *See also, Bramblett and Irvine, supra* note 27.

31. *Cox v. State*, 117 Ala. 103, 23 So. 806 (1898); *compare People v. Brady*, 257 App. Div. 1000, 13 N.Y.S.2d 789 (2d Dept. 1939), *with Commonwealth v. Ross*, 248 Mass. 15, 142 N.E. 791 (1924).

32. *Richardson v. State*, 30 Del. (7 Boyce) 534, 109 A. 124 (Ct. Gen. Sess. 1920); *Towns v. State*, 24 Ga. App. 265, 100 S.E. 575 (1919).

33. *United States v. Guertler*, 147 F.2d 796 (2d Cir. 1945).

34. *United States v. Franklin*, 188 F.2d 182 (7th Cir. 1951).

35. *Fogel v. United States*, 162 F.2d 54 (5th Cir. 1947); *Gara v. United States*, 178 F.2d 38, 40 (6th Cir. 1949), *aff'd. by an equally divided Court*, 340 U.S. 857 (1950); *McGregor v. United States*, 206 F.2d 583 (4th Cir. 1953). *But cf. United States v. Salberg*, 287 F. 208 (N.D. Ohio 1923) holding the duty under the 1917 Act not to be continuing.

36. For example in *United States v. Kissel, supra* note 30, the defendants were indicted for conspiracy to restrain trade in violation of the Sherman Act, 15 U.S.C. §§ 1-7 (1946). The Court, per Holmes, held the conspiracy could be continuing up to the period of abandonment or success concluded (at 607) that, . . . [w]hen the plot contemplates bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators . . . and there is such continuous cooperation, it is a perversion of natural thought and of natural language to call such continuous cooperation a cinematographic series of distinct conspiracies, rather than to call it a single one.



while the continuing offense doctrine serves a useful purpose by delaying the time from which the statute of limitations will begin to run, its application should be limited, for too loose an interpretation would allow courts drastically to debilitate the protection afforded by statutes of limitations.<sup>37</sup>

For example, in *State v. Ireland*,<sup>38</sup> an architect was convicted of negligent manslaughter and of creating a public nuisance. The case arose when a structure designed in violation of the building code collapsed thirteen years after it was built. The defendant tried to have the indictment quashed by arguing that the two-year statute of limitations had run. The court held that the initial violation of the building code constituted a *continuing public nuisance* which lasted until abated. Hence, the conviction was affirmed. The A.L.I. Model Penal Code has cited this case as illustrative of the danger of applying the continuing offense doctrine too freely.<sup>39</sup> Rather than using the doctrine to undermine the statute of limitations, perhaps it would be better to have the legislature provide for a longer period of limitation in certain cases.

#### WHEN DOES THE STATUTE OF LIMITATIONS BEGIN TO RUN?

In deciding when the statute of limitations begins to run in a particular case, all but two jurisdictions<sup>40</sup> hold that the period commences at the time the offense is committed.<sup>41</sup> In the instantaneous crime, the offense is committed when every element occurs,<sup>42</sup> for it is at that time the offense is complete.<sup>43</sup> However, where the crime involved is "continuing," the offense is not complete, for purposes of the statute of limitations, as long as the proscribed course of conduct continues.<sup>44</sup> In effect, the continuing offense doctrine extends the statute of limitation beyond its stated term. As stated by one commentator, where a continuing offense is involved, the statute of limitations will run "not from the initial act, which may in itself embody all of the elements of the crime, but from the occurrence

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37. *Supra* note 10, U. PA. L. REV., at 645.

38. *State v. Ireland*, 126 N.J.L. 444, 20 A.2d 69 (1941).

39. MODEL PENAL CODE, at 23.

40. ART. 8 LA. CODE CRIM. PROC. (1928); Note, 6 LA. L. REV. 274 (1945); GA. CODE ANN. § 27-601(4). Louisiana and Georgia held that the period starts to run from the time the offense is discovered.

41. MODEL PENAL CODE § 1.07, Comment (Tent. Draft No. 5, 1956); *see also* *Pendergast v. United States*, 317 U.S. 412, 418 (1943).

42. MODEL PENAL CODE § 1.07, Comment (Tent. Draft No. 5, 1956).

43. *See Pendergast v. United States*, *supra* note 41 at 418; *see also* *United States v. Irvine*, *supra* note 27.

44. *Supra* note 28, *see also* *United States v. Cores*, 356 U.S. 405, 409 (1958), *United States v. Kissel*, *supra* note 30, and MODEL PENAL CODE, § 1.07, Comment (Tent. Draft No. 5, 1956).

of the most recent act."<sup>45</sup> For example, in Toussie's case, the government argued that his failure to register for the draft was a continuing offense. The five-year statute of limitations, therefore, would not begin to run until Toussie was 26, when he would no longer be obligated to register for the draft. On the other hand, it was argued for Toussie that the offense was completed five days after his 18th birthday, and that the five-year statute of limitations began to run from the end of that day: five days after his 23d birthday it would have run its course.

The *Toussie* case shows the importance of the initial determination, *i.e.*, that of classifying a given offense as instantaneous or continuing. Viewed as an instantaneous crime, no prosecution could have been commenced after Toussie's 23d birthday; but viewed as a continuing offense, prosecution could have been commenced as late as thirteen years after the initial violation of the law. Consideration must now be given to the guidelines used in determining when an offense is a continuing one for purposes of statutes of limitations.

In the *Toussie* decision, the Court discussed the factors which are usually considered in determining when an offense will be deemed to be "continuing." Because of the conflict between the purposes of statutes of limitations and the continuing offense doctrine, courts are hesitant to apply the concept too freely.<sup>46</sup> Further, Congress had declared a policy that the statute of limitations, embodied in 18 U.S.C. §3282 should not be extended "[e]xcept as otherwise expressly provided by law."<sup>47</sup> Finally, Supreme Court decisions emphasize that any exception to a general statute of limitations "is to be construed strictly, and held to apply only to cases shown to be clearly within its purpose . . . ,"<sup>48</sup> and that criminal limitation statutes are "to be liberally interpreted in favor of repose."<sup>49</sup> These factors lead courts to apply the continuing offense doctrine only in limited situations.<sup>50</sup> Therefore, it is the declared policy of the Supreme Court that an offense will not be regarded as a continuing one "unless the explicit language of the substantive criminal statute compels such a conclusion, or

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45. *Supra* note 10, U. PA. L. REV., at 642.

46. *Supra* note 28, at 115.

47. *Supra* note 28, at 115. Historically, an extension of a *statute* of limitations is a *legislative* not an executive function. The very phrase "statute of limitations" connotes legislative action. Consequently, an attempt by the executive to extend a statute of limitation by proclamation would be a usurpation of legislative authority. (Petitioner's Brief at 20-23).

48. *United States v. Dickson*, 40 U.S. (15 Pet.) 141 (1841); *Ryan v. Carter*, 93 U.S. 78, 83 (1876); *see also*, *United States v. McElvain*, *supra* note 5, at 639.

49. *United States v. Scharton*, 285 U.S. 518, 522 (1932); *United States v. Habig*, 390 U.S. 222, 227 (1968).

50. *Supra* note 28, at 115.

the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one."<sup>51</sup> It is clear from the Court's position that anyone seeking to establish that a given offense is a continuing one will have a heavy burden of proof, as such offenses are not to be readily implied.

#### FAILURE TO REGISTER BEFORE *Toussie*

If prior cases were to be prophecy, *Toussie's* conviction should have been affirmed by the Supreme Court. However, in *Toussie's* case, the court held that failing to register for the draft was not a continuing offense. This result was reached because the Court thought the explicit language of the substantive criminal statute did not compel such a conclusion, and coupled that with the fact that there was no indication that Congress intended that the crime be deemed a continuing one. But three prior cases had convicted defendants on facts similar to *Toussie*. The Supreme Court would have to find at least equally convincing reasoning for reversal, even though these cases were not precedent.

The first case to hold that the failure to register for the draft was a continuing offense was *Fogel v. United States*.<sup>52</sup> Fogel was prosecuted for violating the 1940 Selective Training and Service Act;<sup>53</sup> he was indicted in 1947 for failing to register in 1942. At that time, the applicable statute of limitations was three years,<sup>54</sup> and Fogel argued on appeal that his prosecution was barred by the statute. The United States Court of Appeals for the 5th Circuit said:

Fogel's duty and obligation to register did not end on registration day. . . . The regulations promulgated under the Act make this exceedingly clear. Section 611.5 (d), Selective Service Regulations, 2d Ed., provides: The duty of every man subject to registration to present himself for and submit to registration *shall continue at all times, and if for any reason any such man is not registered on the day fixed for his*

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51. *Supra* note 28, at 115. It is interesting to note that the MODEL PENAL CODE, § 1.07, Comment (Tent. Draft No. 5, 1956) ". . . in effect provides a presumption against a finding that an offense is a continuing one for purposes of time limitation. The assumption is that the continuing offense exception too freely applied is inconsistent with the purpose of time limitations."

52. *Fogel v. United States*, 162 F.2d 54 (5th Cir.), *cert. denied*, 332 U.S. 791 (1947).

53. 50 U.S.C.A. App. § 302 *et. seq.* The relevant portion of the act provided: "Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States, who is between the ages of nineteen and forty-five at the time fixed for his registration shall be liable for training and service in the land or naval forces of the United States."

54. 18 U.S.C.A. § 582.

registration, *he shall immediately present himself* for and submit to registration before the local board in the area where he happens to be.<sup>55</sup>

The court concluded by observing that since Fogel had a continuing duty to register, his failure to register was a continuing offense. By stating that Fogel committed *an offense that continued right up to the date of finding the indictment*,<sup>56</sup> the court in effect said that there was no statute of limitations to Fogel's offense. Presumably, if he was indicted when he was 85 years old the indictment would not be barred. Judge Sibley's dissent in *Fogel* took note of the harshness of the court's decision. He said: "The theory of his conviction is that by doing nothing [failing to register] he renewed his crime every day to the date of the trial; which amounts to saying there is no statute of limitations for this offense."<sup>57</sup> The fact that Judge Sibley dissented was probably of no consequence to Fogel, who had to spend eighteen months in the penitentiary, but at least it represented one view that was skeptical about applying the continuing offense doctrine to this type of offense, in the absence of congressional intent that it be treated as such.

A second case in which the failure to register for the draft was said to be a continuing offense was *McGregor v. United States*.<sup>58</sup> Here, the court relied explicitly on *Fogel* and affirmed McGregor's conviction of failing to register under the 1948 Selective Service Act.<sup>59</sup> The court rejected McGregor's argument that registration was confined to a single date and pointed to the "continuing duty regulation" that was the basis of Fogel's conviction. This regulation was issued by President Truman under authority of the 1948 Act and it was identical<sup>60</sup> to the one issued under the 1940 Act. The *McGregor* court concluded its opinion by saying:

A similar regulation promulgated by the President under the Selective Service and Training Act of 1940 was construed by the court in *Fogel* . . . to create a continuing obligation, so that every day was a day of registry. We are in accord with this deci-

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55. *Supra* note 52, at 55 (court's emphasis); 162 F.2d 54.

56. *Supra* note 52, at 55.

57. *Supra* note 52, at 56.

58. *McGregor v. United States*, 206 F.2d 583 (4th Cir. 1953).

59. The conscription act in effect during World War II was expressly reenacted in 1946, except as to specified provisions (Act of June 29, 1946, § 1, 60 STAT. 341). The 1946 Act expired by operation of law on March 31, 1947 (§ 7, 60 STAT. 342), but 15 months later Congress reactivated the draft with the enactment of the Selective Service Act of 1948 on June 24, 1948 (62 STAT. 604). In 1951, the 1948 Act was broadly amended and redesignated the Universal Military Training and Service Act (65 STAT. 75). In 1967, the Act was again substantially revised and renamed the Military Selective Service Act of 1967 (81 STAT. 100). (Government Brief pp. 15-16).

60. The 1942 regulation was renumbered 32 C.F.R. § 1611.7 in 1948 and it is presently so designated. See text of note 1 *supra*.

sion and the same reasoning requires the conclusion that the present prosecution was not barred by limitations.<sup>61</sup>

Thus, two lower courts reached the same conclusion by relying explicitly on the "continuing duty" regulation, rather than the Selective Service Statute itself. This point was not missed by the *Toussie* Court.

It was successfully argued by the government in *Fogel* and *McGregor* that, since the regulation imposed a continuing duty to register, by analogy the failure to register was a continuing offense. The argument was also successful in *Gara v. United States*.<sup>62</sup> In *Gara*, the defendant was convicted of counseling Charles Rickert to refuse to register as required by the 1948 Selective Service Act. Gara argued that since Rickert refused to register on September 10, 1948, his offense was complete as of that date, hence Gara's advice on November 8, 1948, that Rickert should not change his mind could not affect Rickert's action nor constitute a violation of the statute. The court said that:

Rickert's failure to perform his obligation to register constituted a completed offense on September 10, but it was repeated on every day thereafter during the period involved herein, for he was under a continuing duty to register.<sup>63</sup>

The *Gara* court made no mention of when the statute of limitations would begin to run for Rickert, and so it can be presumed that it would never begin to run on the offense—just as in *Fogel*. As noted in the petitioner's brief, in these three decisions "[t]he continuing duty imposed was deemed to be open ended with no time limitation whatever."<sup>64</sup> Judge Dooling of the district court in which *Toussie* was convicted recognized this problem and held that a man continues under a duty to present himself for registration as long as he is liable for service in the armed forces: that is, from eighteen years and six months until the twenty-sixth anniversary of his birth.<sup>65</sup> Thus, under Judge Dooling's interpretation, the continuing duty ended at age twenty-six, and it is from that time that the general statute of limitations would begin to run. Judge Feinberg of the court of appeals agreed with Judge Dooling's interpretation of the regulation.<sup>66</sup>

There was one district court decision, *United States v. Salberg*,<sup>67</sup> which held that the 1917 Selective Service Act<sup>68</sup> did not impose a continuing

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61. *Supra* note 58, at 584.

62. *Gara v. United States*, 178 F.2d 38 (6th Cir. 1949), *aff'd. by an equally divided Court*, 340 U.S. 857 (1950).

63. *Gara v. U.S.*, 178 F.2d 38 at 40 (6th Cir. 1949).

64. Petitioner's Brief, at 19.

65. *Supra* note 3, at 474.

66. *Supra* note 4, at 1157.

67. *United States v. Salberg*, 287 Fed. 208 (N.D. Ohio 1923).

68. 40 STAT. 76 (1917 Draft Law).

duty to register.<sup>69</sup> Since the 1917 Act provided no limitation on a prosecution, it was governed by the general three-year statute of limitations.<sup>70</sup> The 1917 Act, also, was not accompanied by any Presidential Proclamations (regulations) which spelled out a continuing duty to register, as did the 1940 and 1948 Selective Service Acts under which Fogel, McGregor, and Gara were convicted.<sup>71</sup> As Mr. Justice Black noted in *Toussie*:

It is significant that the courts that have concluded that failure to register is a continuing offense have done so by relying explicitly on the regulation [32 C.F.R. § 1611.7(c)] . . . [and] the only court that concluded that the offense was not a continuing one [*Salberg*] did so at a time when there was no "continuing duty" regulation issued to implement the registration provisions.<sup>72</sup>

When the Court decided *Toussie*, the continuing duty regulation was still in existence and the government reasserted their argument that where there is such a continuing duty, failure to perform that duty is a continuing offense. However, this time the government's attempt to obtain a conviction was thwarted by the Court.

#### THE *Toussie* DECISION

Nearly twenty years lapsed between the *McGregor* and *Toussie* decisions. Attention will now be centered on the *Toussie* decision itself, to determine the "why" of the Court's decision to reverse. In its opinion, the Supreme Court reviewed the history of the early draft laws to determine the nature of the present Act, and noted that "throughout the administration of the first draft law, registration was thought of as a single, instantaneous act to be performed at a given time, and failure to register at that time was a completed criminal offense."<sup>73</sup> When the 1940 Selective Service and Training Act was passed, Congress authorized registration "at such time or times and place or places"<sup>74</sup> as the President might designate by proclamation. The first proclamation under the 1940 Act provided a uniform date for the registration of all men.<sup>75</sup> Two years

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69. The draft law of 1917 provided that certain persons were subject to registration and that "upon proclamation by the President . . . stating the time and place of such registration it shall be the duty of all [such] persons . . . to present themselves for registration." 40 STAT. 76, 80.

70. 18 U.S.C.A. § 582. This provision is no longer in effect as quoted in *Toussie*, *supra* note 28 at 116, and the general statute of limitations is now five years. (18 U.S.C. § 3282).

71. The continuing duty regulation was first promulgated under the 1940 Act on June 5, 1941. Selective System Regulation Vol. 2, § IX, 205(d), 6 Fed. Reg. 2747.

72. *Supra* note 28, at 121 n.17.

73. *Supra* note 28, at 117.

74. 50 U.S.C. § 453.

75. Proclamation No. 2425, Sept. 16, 1940 (54 STAT. 2739).

later, the President issued another proclamation which provided for different registration dates for different groups of men.<sup>76</sup> That same proclamation established the basic registration procedure of the present system.

The 1940 Act expired March 31, 1947, but Congress again decided to register men for the draft and declared that men between the ages of 18 and 26 would be subject to registration. To provide for initial registration of men between 18 and 26, Congress again authorized the President to designate the times and places of registration. This was necessary because at the time there were men of various ages who had to register. The President required registration of all men between 18 and 26 during September, 1948, "and all those born after September 19, 1930, were required to register 'on the day they attain the eighteenth anniversary of the day of their birth, or within five days thereafter.'" <sup>77</sup> The registration provisions of the 1948 Act have remained in force to the present time. The Court said:

Viewed in the light of history we do not think the Act intended to treat continued failure to register as a renewal of the original crime or the repeated commission of new offenses, but rather perpetuated the conception of the first registration that a man must register at a particular time and his failure to do so at that time is a single offense.<sup>78</sup>

The Court continued by pointing out that whether or not the process of registration is continuing depends upon one's vantage point. From the Selective Service System's viewpoint the process of registration is a continuing one. But from the registrant's viewpoint the obligation arises at a specific time. In Toussie's case it arose when he turned 18. He was allowed a five-day period in which to fulfill the duty, but when he did not do so, he then and there committed the crime of failing to register.<sup>79</sup>

The Government, in arguing that Toussie's offense should be considered a continuing one, pointed out that the "continuing duty" regulation was first promulgated under the 1940 Act in June, 1941, and that most lower federal courts have held that failing to register is a continuing offense for purposes of the statute of limitations. It was further argued that since Congress had been silent on the issue, this was an indication that Congress intended the failure to register to be treated as a continuing offense. The Court disposed of the government's argument by saying that:

[s]ince there is no specific evidence that Congress actually was aware of this limitations question when it acted . . . and since *we are reluctant to imply a continuing offense except in limited circumstances*, we conclude that any argument based on con-

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76. Proclamation No. 2572, Nov. 17, 1942 (56 STAT. 1982).

77. Proclamation No. 2799, July 20, 1948 (62 STAT. 2532).

78. *Supra* note 28, at 119.

79. *Supra* note 28, at 119.

gressional silence is stronger in favor of *not* construing this Act as incorporating a continuing offense theory.<sup>80</sup>

Interestingly enough, the Court acknowledged the fact that the regulation (32 C.F.R. § 1611.7(c)) might be read as making "explicit what Congress implicitly said in the Act itself, that is that registration is a duty that continues until age 26 and failure to register before then is a criminal offense that can be punished as late as five years after the 26th birthday."<sup>81</sup> But the Court resisted the attempt by the government to use the regulation to stretch the five-year statute of limitations into a thirteen-year one. The Court said:

While it is true that the regulation does in explicit terms refer to registration as a continuing duty, we cannot give it the effect of making this criminal offense a continuing one. Since such offenses are not to be implied except in limited circumstances, and since questions of limitations are fundamentally matters of legislative not administrative decision, we think this regulation should not be relied upon effectively to stretch a five-year statute of limitations into a thirteen-year one, *unless the statute itself, apart from the regulation, justifies that conclusion.*<sup>82</sup>

The Court's strong position against the use of the continuing offense doctrine in order to avoid the effect of the statute of limitations is designed to preserve the effectiveness and purposes of such statutes. Implicit in the opinion is an admonition by the Court to Congress to be explicit when it wants an offense to be a continuing one for purposes of the statute of limitations and a further warning to the Executive that he does not have the authority to alter statutes of limitations by proclamation.

In the final analysis, the *Toussie* Court viewed its task to be that of interpreting an ambiguous statute. Note that the Supreme Court, in trying to determine Congressional intent, disregarded the content of the regulation (issued by the President) and focused solely upon the language of the statute. This approach was just the opposite of the *Fogel* and *McGregor* courts which chose the regulation in lieu of the statute. In *United States v. Universal Corporation*,<sup>83</sup> in the context of considering the continuous offense doctrine, the Supreme Court said:

[W]hen a choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication.<sup>84</sup>

This view is consistent with the Constitutional prohibition against the enactment of vague and ambiguous laws.

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80. *Supra* note 28, at 120 (Emphasis added).

81. *Supra* note 28 at 116.

82. *Supra* note 28, at 121 (Emphasis added).

83. *Supra* note 25.

84. *United States v. Universal Corp.*, *supra* note 25, at 221-22.



The Court concluded that since the Selective Service Statute was ambiguous in that it did not expressly say that failing to register would be a continuing offense, any ambiguity in interpreting the statute must be resolved in favor of the defendant. The Court was mindful of the fact that when Congress wanted to make an offense continuing it knew how to use clear and unambiguous language. For example, Congress has specifically provided for a continuing liability for induction in 18 U.S.C.A. § 454 (a).<sup>85</sup>

Thus, in Toussie's case the Court held that the statute of limitations began to run at the initial failure to register on the last day required by law. Since Toussie failed to register prior to June 28, 1959, the statute began to run at that time and prosecution based on an indictment returned almost eight years later was barred. The opinion of Mr. Justice Black was vigorously opposed by a dissenting opinion delivered by Mr. Justice White.

#### THE DISSENT

Mr. Justice White argued that the question presented in Toussie's case was simply when the five-year statute of limitations began to run. The answer to that question depended upon what the offense was for which the petitioner was being tried, and when it was that he committed that offense. The dissent held Toussie's offense was continuing, and agreed with the district and appeals courts that the statute of limitations would begin to run from the time Toussie reached his 26th birthday. This conclusion was reached by reading 50 U.S.C.A. § 453 as creating "the offense of being at one and the same time, unregistered after having been required to register, and being between the ages of eighteen and twenty-six."<sup>86</sup> For the dissent, the only questions to be resolved were "whether, at any time within five years preceding the indictment, those two characteristics accurately described the accused."<sup>87</sup>

In criticizing the majority opinion, the dissent felt that the majority's

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85. See text of note 6, *supra*. See also 18 U.S.C. § 3284 where Congress has provided that concealment of a bankrupt's assets shall be "[deemed] a continuing offense . . . and the period of limitations shall not begin to run until . . . final discharge or denial of discharge."

*But cf.* Warren v. United States, 199 F. 753 (5th Cir. 1912, decided before the enactment of 18 U.S.C. § 3284) in which a bankrupt, charged with concealing assets from his Trustee, was protected by the statute of limitations. Since the bankrupt did no new affirmative acts after his first failure to disclose the crime was then complete and the period of limitation began to run from that time. This case illustrates that in the absence of express Congressional intent that a crime be regarded as continuing, it will not be so regarded.

86. *Supra* note 28, at 125.

87. *Supra* note 28, at 126.

conclusion was contrary not only to the purposes of the entire Act, but also to the regulations, administrative interpretations, and even the proclamation of the President.<sup>88</sup> The dissenting justices felt that the Selective Service regulation issued by the President was clearly within the scope of his authority. They justified their position by asserting that 50 U.S.C.A. § 460(b) granted the President the general authority to promulgate all regulations necessary to fulfill the Act's purposes,<sup>89</sup> and that section 453 itself expressly requires registrations at the times and places and in the manner prescribed by both Presidential proclamation and promulgated rules and regulations.<sup>90</sup> While what the dissent says is true, its criticism of the majority opinion failed to recognize that the majority did not deny the authority granted by sections 453 and 460: it stated merely that the President exceeded the authority of those sections by making the statement in question.

Furthermore, the majority said:

We do not hold, as the dissent seems to imply . . . that the continuing duty regulation is unauthorized by the Act. All we hold is that neither the regulation nor the Act itself requires that failure to register be treated as the type of offense that effectively extends the statute of limitations.<sup>91</sup>

The key element in the majority's opinion was their refusal to go outside of the statute in order to make the offense a continuing one, while the dissenting opinion felt that it was proper for the administrative regulation to be read in conjunction with the statute, thereby creating a continuing duty to register and making failure to register a continuing offense. The majority admonished Congress to state explicitly when it wants an offense to be a continuing one, as Congress had done on other occasions, so that questions of the type presented in Toussie's case would not arise. But Mr. Justice White sharply criticized the majority opinion for erecting an insurmountable obstacle to the declaration of a continuing offense without express language to that effect in the applicable statute.<sup>92</sup> The dissent felt that to require Congress to use special language would be to abdicate the judicial function of interpretation.<sup>93</sup>

#### CONCLUSION

Since the Court has decided that failing to register for the draft is not a continuing offense and that the five-year statute of limitations will begin to run five days after a young man's 18th birthday, it might appear that

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88. *Supra* note 28, at 126.

89. 50 U.S.C. App. § 460(b).

90. 50 U.S.C. App. § 453.

91. *Supra* note 28, at 121 n.17.

92. *Supra* note 28, at 135.

93. *Supra* note 28, at 135.

the *Toussie* decision will offer many young men an incentive for not registering, thereby causing wholesale draft evasion. However, neither the Court nor legal experts feel that the decision will have this effect. As Mr. Justice Black noted, the *Toussie* decision has not diminished the gravity of the offense and the crime is still subject to heavy criminal penalties.<sup>94</sup>

We are not convinced that limiting prosecution to a period of five years following the initial failure to register will significantly impair either the essential function of raising an army or the prosecution of those who fail to register. We do feel that the threat of criminal punishment and the five year statute of limitations is a sufficient incentive to encourage compliance with the registration requirements.<sup>95</sup>

The Court has thus tried to put the meaning of its decision in perspective.

It should be emphasized that the *Toussie* decision will not affect the status of those young men who have fled to Canada either to avoid registration or induction; they can be prosecuted within five years after their return. Furthermore, a young man who would contemplate taking the course that *Toussie* did must ask himself if the threat of criminal prosecution is any less real because it is limited to five instead of thirteen years. Professor Michael Tigar concludes that "It's simply too great a risk for a young man not to register."<sup>96</sup>

It appears that the cornerstone of the *Toussie* decision was a desire to preserve the integrity and purposes of the statute of limitations. Mr. Justice Black, in anticipating adverse public reaction to the *Toussie* decision noted that:

There is some cause to feel that dismissal of the indictment in such a case is an injustice in a society based on full and equal application of the laws. But while Congress has said that failure to register is a crime, it has also made prosecution subject to the statute of limitations. "Every statute of limitations, of course, may permit a rogue to escape . . ." but when a court concludes that the statute does bar a given prosecution, it must give effect to the clear expression of congressional will that in such a case "no person shall be prosecuted, tried, or punished."<sup>97</sup>

Perhaps some will feel that *Toussie* is one of the rogues who escaped, but respect must be given to congressional will that no person shall be prosecuted, tried, or punished for a non-capital offense unless the indictment is found within five years after the commission of the offense. For if the courts do not respect the statutes of limitation—or try to avoid their effect—the statutes would not serve their purpose.

Loren J. Mallon

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94. Failure to register for the draft is punishable by fine, imprisonment or both. 50 U.S.C. § 162(a).

95. *Supra* note 28, at 123.

96. As quoted in *Time*, March 16, 1970, at 47, col. 2.

97. *Supra* note 28, at 123-24.