

1-1-2013

CRIMINAL LAW—AN EMBEZZLEMENT INTERMEZZO: SCHEMING TO SIDE-STEP TOUSSIE V. UNITED STATES'S CONTINUING OFFENSE TEST

Andrew P. O'Shea

Follow this and additional works at: <http://digitalcommons.law.wne.edu/lawreview>

Recommended Citation

Andrew P. O'Shea, *CRIMINAL LAW—AN EMBEZZLEMENT INTERMEZZO: SCHEMING TO SIDE-STEP TOUSSIE V. UNITED STATES'S CONTINUING OFFENSE TEST*, 35 W. New Eng. L. Rev. 249 (2013), <http://digitalcommons.law.wne.edu/lawreview/vol35/iss1/8>

This Note is brought to you for free and open access by the Law Review & Student Publications at Digital Commons @ Western New England University School of Law. It has been accepted for inclusion in Western New England Law Review by an authorized administrator of Digital Commons @ Western New England University School of Law. For more information, please contact pnewcombe@law.wne.edu.

CRIMINAL LAW—AN EMBEZZLEMENT INTERMEZZO: SCHEMING TO
SIDE-STEP *TOUSSIE V. UNITED STATES*'S CONTINUING OFFENSE TEST

ABSTRACT

Though federal statutes of limitations normally act as predictable time bars on prosecution, if a crime is a continuing offense then the statute will be tolled until the last act in furtherance of the crime is complete. Recently, a split has emerged among the federal circuit courts, and even within the Federal District Courts of Massachusetts, as to whether the crime of embezzlement is a continuing offense when it is performed as a passive scheme, such as via automated deposits into a checking account.

*The author argues that embezzlement, as codified in 18 U.S.C. § 641, should never be considered a continuing offense. The plain language of the statute does not label embezzlement a continuing offense. Furthermore, the *Toussie v. United States* decision, which created the modern test for whether a crime is a continuing offense, supports a narrow interpretation of the doctrine. The test for whether a crime is a continuing offense turns on the nature of a crime, not the manner in which it is committed in a specific case. Therefore, embezzlement cannot become a continuing offense when the particular mechanism used in the theft is automated. Rather, the continuing offense exception should not apply to embezzlement because embezzlement is closely related to larceny, an instantaneous offense. In addition, a narrow application of the continuing offense doctrine reduces the chance of unfair trials and limits the potential abuse of prosecutorial discretion. Instead of expanding the continuing offense doctrine, the judiciary should adhere to the legislature's decision to provide a five-year cutoff date for prosecutions of embezzlement.*

INTRODUCTION

The intersection of embezzlement and the continuing offense doctrine is best illustrated by a hypothetical. Let us assume that forty years ago the fictitious Vincent Villain crafted an accounting glitch to instantly embezzle ten thousand dollars from the federal government as well as an additional four hundred dollars once every month. Four years ago, Mr. Villain put a stop to his steady siphoning. This year, an audit revealed Mr. Villain's scheme and the federal government subsequently

indicted him for embezzling a total of two hundred and two thousand dollars, in violation of 18 U.S.C. § 641.¹

The statute of limitations period for embezzlement under 18 U.S.C. § 641 is five years.² If Mr. Villain lived in Virginia, part of the Fourth Circuit, where a passive scheme of embezzlement is considered a continuing offense, he could be prosecuted for all of his previous embezzlements, including the initial, forty-year-old theft of ten thousand dollars.³ In contrast, if Mr. Villain lived in Connecticut, part of the Second Circuit, he could only be prosecuted for the embezzlements occurring within the past five years—a total of forty-eight hundred dollars.⁴

Assuming Mr. Villain had no previous criminal convictions, his maximum punishment in Connecticut would be six months in prison; in Virginia, he could be jailed for two years and nine months for the same actions.⁵ And if Mr. Villain had performed his dastardly deeds in Massachusetts, the result would be entirely speculative due to discord on this issue among the district courts of the First Circuit.⁶

This incongruity results from differing interpretations of *Toussie v. United States*,⁷ which created the modern test for whether a crime is a continuing offense.⁸ Though the statute of limitations normally begins

1. See 18 U.S.C. § 641 (2006) (“Whoever embezzles . . . any record, voucher, money, or thing of value of the United States . . . [s]hall be fined under this title or imprisoned not more than ten years . . .”).

2. 18 U.S.C. § 3282 (2006) (“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.”).

3. See *United States v. Smith*, 373 F.3d 561, 567-68 (4th Cir. 2004).

4. See *United States v. Silkowski*, 32 F.3d 682, 690 (2d Cir. 1994).

5. See U.S. SENTENCING GUIDELINES MANUAL §§2B1.1(b)(1)(A), (G) (2010); §5A. The total theft for the past five years would have been \$4,800, an offense level of 6; the total theft of the past forty years would have been \$202,000, an offense level of 18. §2B1.1. These calculations assume that there are no other factors impacting the final offense level or justifying a departure of any sort from the recommendations of the Federal Sentencing Guidelines.

6. Compare *United States v. Trang Huydoan Phan*, 754 F. Supp. 2d 186, 191 (D. Mass. 2010) (holding that a passive scheme of embezzlement is a continuing offense), with Transcript of Record at 6-7, *United States v. Colon*, No. 08-10305-WGY, slip op. (D. Mass. Apr. 13, 2010) (holding that embezzlement as defined in § 641 is not a continuing offense), and *United States v. Bundy*, No. 08-196, 2009 WL 902064, at *9-10 (D. Me. Mar. 31, 2009) (stating that embezzlement under § 641 is “inherently not” a continuing offense), and *United States v. Young*, 694 F. Supp. 2d 25, 29 (D. Me. 2010) (adopting the reasoning of *Bundy* that embezzlement is not a continuing offense).

7. 397 U.S. 112, 113-14 (1970), *overruled by* 50 U.S.C. App. § 462 *on other grounds as stated by*, e.g., *United States v. Martinez*, 890 F.2d 1088, 1091-92 (10th Cir. 1989).

8. This Note addresses the criminal continuing offense doctrine. For an in-depth

to run immediately after a crime is committed,⁹ a continuing offense tolls the statute until the wrongdoer performs the last act in furtherance of the crime.¹⁰ Since *Toussie*, courts have declared various crimes to be continuing offenses.¹¹ However, a split has emerged among circuit courts¹²—and even among the district courts of the First Circuit¹³—as to whether the crime of embezzlement is a continuing offense when executed as a passive, automated scheme. This Note will argue that embezzlement, as criminalized in 18 U.S.C. § 641, is never a continuing offense. The judiciary should respect Congress’s decision to set a five-year statute of limitations by refusing to expand the narrow doctrine set forth in *Toussie*.¹⁴

Part I of this Note will review the history of embezzlement and its criminalization in 18 U.S.C. § 641 and will conclude with the history of the continuing offense doctrine through the *Toussie* decision, in which the Supreme Court defined the modern rule for discerning whether a crime is a continuing offense (hereinafter referred to as the “*Toussie* test”).¹⁵ Part II will examine the differing judicial decisions regarding whether embezzlement is a continuing offense. It will review a Seventh Circuit case holding that embezzlement is not a continuing offense and two cases reaching the contrary conclusion. Part III of this Note will

discussion of its civil counterpart, the “continuing violation,” *see generally* Kyle Graham, *The Continuing Violations Doctrine*, 43 GONZ. L. REV. 271, 283 (2008).

9. *Toussie*, 397 U.S. at 115.

10. Note, *The Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution*, 102 U. PA. L. REV. 630, 641-42 (1954) [hereinafter *Penetrable Barrier*].

11. *See, e.g.*, *United States v. Bailey*, 444 U.S. 394, 413 (1980) (holding that the crime of escape is a continuing offense); *United States v. Gray*, 876 F.2d 1411, 1418-19 (9th Cir. 1989) (holding that failure to appear is a continuing offense); *United States v. Banks*, 708 F. Supp. 2d 622, 625 (E.D. Ky. 2010) (holding that failure to disclose facts affecting a defendant’s right to Social Security benefits is a continuing offense).

12. *Compare* *United States v. Silkowski*, 32 F.3d 682, 690 (2d Cir. 1994) (reasoning that the defendant could not be punished for embezzlement that occurred before the five-year statute of limitations), *with* *United States v. Smith*, 373 F.3d 561, 567-68 (4th Cir. 2004) (holding that a passive scheme of embezzlement is a continuing offense).

13. *See supra* note 6.

14. One scholar recently addressed the expansion of the continuing offense doctrine by federal courts, asserting that the test for continuing offenses is based on the statutory definition of the crime, not the active or passive nature of a defendant’s conduct. Jeffrey R. Boles, *Easing the Tension Between Statutes of Limitations and the Continuing Offense Doctrine*, 7 NW. J. L. & SOC. POL’Y 219, 243-44 (2012). This Note will expand upon that article’s analysis, providing additional reasons why the crime of embezzlement in particular is not a continuing offense.

15. The two-pronged test states a crime is a continuing offense if “the explicit language of the substantive criminal statute compels such a conclusion, *or* the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one.” *Toussie v. United States*, 397 U.S. 112, 115 (1970) (emphasis added).

argue that the facts and language of the *Toussie* decision indicate the continuing offense doctrine should be narrowly applied. This Note will further argue that the common roots between embezzlement and larceny, which is traditionally not considered a continuing offense,¹⁶ support the conclusion that embezzlement, too, is not a continuing offense. Finally, Part III will conclude with an evaluation of public policy benefits provided by a narrow application of the continuing offense doctrine. Indeed, expanding the doctrine prevents statutes of limitations from providing a bright-line cutoff date for legal actions, which is a primary reason for their existence.¹⁷

I. THE HISTORY OF EMBEZZLEMENT UNDER 18 U.S.C. § 641 AND THE CONTINUING OFFENSE DOCTRINE

A. *The History of Embezzlement and Its Criminalization by 18 U.S.C. § 641*

Embezzlement in the American justice system finds its roots in English common law larceny.¹⁸ In the federal courts, embezzlement is “the fraudulent appropriation of property by a person to whom such property has been entrusted, or into whose hands it has lawfully come.”¹⁹ If “the original taking of the property was lawful, or with the consent of the owner,” the felonious conduct should be charged as embezzlement.²⁰ However, if the owner gave no consent to the seizure of property, such an action should be charged as larceny.²¹

16. *United States v. Tackett*, No. 11-15-ART, 2011 WL 4005347, at *4 (E.D. Ky. Sept. 8, 2011) (“Courts do not traditionally consider theft a continuing offense. A man who breaks into a bank vault five times in a month has committed five separate offenses, not a single continuing one.”).

17. See Lindsey Powell, *Unraveling Criminal Statutes of Limitations*, 45 AM. CRIM. L. REV. 115, 116 (2008).

18. *United States v. Young*, 955 F.2d 99, 102 (1st Cir. 1992) (citing English case law). In the eighteenth century, English courts held that only those who unlawfully wrenched possession of money or goods from a victim might be charged with larceny. *Id.* Therefore, if one were given legal possession of property and later sold it or used it in an unauthorized manner, no crime had been committed. *Id.* The English parliament responded by enacting the first embezzlement statute, outlawing the conversion of lawfully obtained money or goods. *Id.*

19. *Moore v. United States*, 160 U.S. 268, 269 (1895).

20. *Id.* at 269-70.

21. *Id.*; see also *United States v. Stockton*, 788 F.2d 210, 216-17 (4th Cir. 1986). The *Stockton* court explained that:

The crime of embezzlement builds on the concept of conversion, but adds two further elements. First, the embezzled property must have been in the lawful possession of the defendant at the time of its appropriation. . . . Second,

Section 641 is one of many statutes criminalizing embezzlement.²² Its first two paragraphs punish two mutually exclusive crimes: stealing government property and knowingly receiving previously-stolen government property.²³ For example, if Vincent Villain received money from a falsified Social Security claim, he would be guilty of the first crime: embezzlement.²⁴ This crime has the following elements: “(1) a specific intent to (2) make a ‘knowing’ conversion (3) of governmental property.”²⁵

However, if someone else had set up the false Social Security claim and Vincent Villain accepted some of the resulting money, knowing its illicit origin, then he would instead be guilty of the second crime, which is mutually exclusive from the first: retaining embezzled government property for one’s own use.²⁶ There are three elements to this crime: (1) retaining a “thing of value” stolen from the government in violation of the first paragraph of § 641, (2) with the intent to convert it to one’s own use, and (3) knowing said property was stolen.²⁷ Both of these crimes are subject to the default federal five-year statute of limitations.²⁸

embezzlement requires knowledge that the appropriation is contrary to the wishes of the owner of the property.

Id.

22. See, e.g., 18 U.S.C. § 666 (2006) (outlawing embezzlement where government agents appropriate funds from local governments that have received federal funds); 18 U.S.C. § 664 (2006) (criminalizing embezzlement of “assets of any employee welfare benefit plan or employee pension benefit plan”); Paul C. Jorgensen, *Embezzlement*, 24 AM. CRIM. L. REV. 513, 513 n.5 (1987). 18 U.S.C. § 641 traces its roots as far back as 1875, though its most recent revision took place when the federal criminal code was revised in 1948. Peter J.G. Toren, *The Prosecution of Trade Secrets Thefts Under Federal Law*, PEPP. L. REV. 59, 91 (1994).

23. The first paragraph of 18 U.S.C. § 641 (2006) states “[w]hoever embezzles, steals, purloins, or knowingly converts to his use or the use of another . . . any record, voucher, money, or thing of value of the United States . . .” shall be fined or imprisoned. The second paragraph states “[w]hoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted” shall also be punished by a fine and/or imprisonment. 18 U.S.C. § 641 (2006). If the total value stolen in a single case was less than one thousand dollars, the maximum imprisonment would be one year. *Id.* Otherwise, the maximum imprisonment would be ten years. *Id.*

24. *United States v. Beard*, 713 F. Supp. 285, 288-89 (S.D. Ind. 1989) (citations omitted).

25. *Id.* at 288. Some embezzlement statutes have added a fourth element of acquiring the property through a trusting or fiduciary relationship. *United States v. Smith*, 373 F.3d 561, 564-65 (4th Cir. 2004).

26. *Beard*, 713 F. Supp at 289.

27. *Id.* at 287-88.

28. “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.” 18 U.S.C. § 3282 (2006); *United States v. Trang Huydoan Phan*, 754 F. Supp. 2d 186, 188 (D.

B. *A Brief History of the Statute of Limitations and the Continuing Offense Doctrine*

A statute of limitations is an attempt to balance the “relative interests of the State and the defendant in administering and receiving justice.”²⁹ It encompasses congressional weighing of the retributive goal to punish wrongdoers with more utilitarian concerns such as judicial efficiency and repose.³⁰ There has been a default criminal statute of limitations for all federal crimes in the United States since its founding.³¹ However, over the past few decades, courts and legislatures have created and expanded many means of tolling statutes of limitations, increasing the temporal reach of prosecutors.³² The continuing offense doctrine is one of these common law exceptions.³³ Over the past twenty years, its use by the courts has greatly increased.³⁴ This expansion of the doctrine coincides conspicuously with the recent rise of the retributive rationale for criminal punishment.³⁵

The phrase “continuing offense” is a legal term of art; its meaning is inconsistent with its ordinary interpretation as a continuing course of conduct.³⁶ Traditionally, a statute of limitations begins to run from the instant the offense is completed.³⁷ However, a continuing offense, in the legal sense, consists of an extended course of conduct where the crime is not *technically* complete until the last related act is committed, though

Mass. 2010).

29. United States v. Marion, 404 U.S. 307, 322 (1971).

30. J. Anthony Chavez, *Statutes of Limitations and the Right to a Fair Trial: When Is a Crime Complete?*, 10 CRIM. JUST. 2, 3 (1995).

31. *Id.* The initial default statute of limitations was two years, but was expanded to three years in 1876, then to its modern five-year form in 1954. *Id.*

32. See *Penetrable Barrier*, *supra* note 10, at 645-51 (describing various statutory and common law means to toll a statute of limitations, including waiver, fleeing the jurisdiction, and wartime suspension); Powell, *supra* note 17, at 137 (“Since the early 1990s, Congress has been creating exceptions to the general rule at an unprecedented pace.”).

33. Chavez, *supra* note 30, at 3; see generally Harvard Law Review Association, *Developments in the Law: Statutes of Limitations*, 63 HARV. L. REV. 1177, 1220-37 (1950) (listing exceptions to criminal statutes of limitations).

34. Boles, *supra* note 14, at 236-37.

35. See Powell, *supra* note 17, at 136-37.

36. United States v. Yashar, 166 F.3d 873, 875 (7th Cir. 1999); see also United States v. Rivlin, No. 07-CR-524 (SHS), 2007 WL 4276712, at *2 (S.D.N.Y. Dec. 5, 2007) (“[T]here can be a distinction between conduct that is deemed a ‘continuing offense’ under *Toussie* and conduct that constitutes a continuing course of criminal activity, but which is not deemed ‘continuing’ for limitations purposes.”).

37. *Toussie v. United States*, 397 U.S. 112, 115 (1970); see also United States v. Irvine, 98 U.S. 450, 452 (1878) (“Whenever the act or series of acts necessary to constitute a [crime] have transpired, the crime is complete, and from that day the Statute of Limitations begins to run against the prosecution.”).

all elements of the crime may have been met at an earlier point in time.³⁸ This effectively tolls the statute of limitations for the entire course of conduct until the most recent act is completed.³⁹ Though conspiracy is the classic example of a continuing offense,⁴⁰ federal courts have held that this doctrine applies to many other crimes such as escape,⁴¹ bigamy,⁴² and possession.⁴³ One primary goal of the continuing offense doctrine is to prevent the inherently arbitrary application of the statute of limitations to unlawful courses of conduct that continue beyond the fulfillment of each element of the offense.⁴⁴

The Supreme Court in *Toussie v. United States*⁴⁵ created the current test to determine whether a crime is a continuing offense, though the doctrine has been used as far back as 1879.⁴⁶ In a 6-3 decision, the *Toussie* Court held that failure to register for the draft is not a continuing offense,⁴⁷ despite the fact that many circuit courts had previously treated it as such.⁴⁸

Robert Toussie failed to register for the draft when he turned 18,⁴⁹ as required by the Universal Military Training and Service Act.⁵⁰ He was indicted for this crime eight years later, despite a five-year statute of limitations, under the theory that failure to register is a continuing offense.⁵¹ In deciding the appeal, the majority opinion stated that statutes of limitations should be “liberally interpreted in favor of repose” and the continuing offense doctrine “should be applied in only limited circumstances.”⁵² The Court held that a crime is a continuing offense

38. *Penetrable Barrier*, *supra* note 10, at 641-42.

39. *Id.* at 642.

40. *United States v. Yashar*, 166 F.3d 873, 875 (7th Cir. 1999); *see also* *United States v. Kissel*, 218 U.S. 601, 610 (1910).

41. *United States v. Bailey*, 444 U.S. 394, 413 (1980).

42. *Yashar*, 166 F.3d at 877.

43. *United States v. Waters*, 23 F.3d 29, 36 (2d Cir. 1994) (holding unlawful possession of a firearm is a continuing offense).

44. *United States v. Sunia*, 643 F. Supp. 2d 51, 70 (D.D.C. 2009).

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

46. *United States v. Irvine*, 98 U.S. 450, 450 (1879) (holding that the crime of withholding is not a continuing offense). Prior to *Toussie*, the vague definition of a continuing offense was “a continuous, 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.” *United States v. Midstate Horticultural Co.*, 306 U.S. 161, 166 (1939) (citations omitted).

47. *Toussie*, 397 U.S. at 122-23.

48. *Id.* at 135 n.19 (White, J., dissenting).

49. *Id.* at 113 (majority opinion).

50. Universal Military Training and Service Act, §§ 3, 12(a).

51. *Toussie*, 397 U.S. at 113-14; *see also* 18 U.S.C. § 3282 (2006).

52. *Toussie*, 397 U.S. at 115 (quoting *United States v. Habig*, 390 U.S. 518, 522

only if (1) “the explicit language of the substantive criminal statute compels such a conclusion, or . . .” (2) “the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one.”⁵³

Although the government agency charged with enforcing the draft registration statute officially interpreted the duty to register as being continuous until one turns twenty-six,⁵⁴ the *Toussie* majority held that the duty only lasted for five days after turning eighteen.⁵⁵ The Court stated that congressional silence on the issue of whether failure to register was a continuing offense was evidence that this narrow doctrine should not be applied.⁵⁶ Additionally, it contrasted failure to register with the classic continuing offense of conspiracy, in which “each day’s acts bring a renewed threat of the substantive evil Congress sought to prevent.”⁵⁷ The majority favored a strict reading of the ambiguous registration statute because Congress must speak in clear and definite language in order to authorize the punishment of conduct.⁵⁸

The dissent recognized the presumption that an offense is not continuous.⁵⁹ However, it proposed that an offense should be deemed continuing if “the unlawful course of conduct is ‘set on foot by a single impulse and operated by an unintermittent force,’ until the ultimate illegal objective is finally attained.”⁶⁰ The language of this rule focuses on the intent and actions of the defendant, in contrast to the majority’s test, which is based on the nature of the crime itself.⁶¹ Additionally, the dissent criticized the majority’s narrow reading of the registration statute, pointing to a hearing transcript where Congress indicated its belief that the duty to register had been continuous.⁶² After the Court’s decision in *Toussie*, Congress amended the draft registration statute to expressly state that the crime of failing to register for the draft is continuous in nature from the time an individual turns eighteen until he

(1932)).

53. *Id.*

54. The President had ordered persons to register for the draft “on the day they attain the eighteenth anniversary of the day of their birth, or within five days thereafter.” *Id.* at 118.

55. *Id.* at 118-19.

56. *Id.* at 120.

57. *Id.* at 122.

58. *Id.*

59. *Id.* at 135 (White, J., dissenting).

60. *Id.* at 136 (quoting *United States v. Midstate Co.*, 306 U.S. 161, 166 (1939)).

61. See *Toussie*, 397 U.S. at 115 (majority opinion) (holding that a crime is a continuing offense if “the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one”) (emphasis added).

62. *Id.* at 129-30 (White, J., dissenting).

turns twenty-six.⁶³

In summary, the continuing offense doctrine is one of many exceptions to criminal statutes of limitations. A crime qualifies as a continuing offense if “the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one.”⁶⁴ However, when applying this test to a passive scheme of embezzlement under 18 U.S.C. § 641, courts have reached opposing conclusions.

II. JUDICIAL APPLICATIONS OF THE CONTINUING OFFENSE DOCTRINE TO EMBEZZLEMENT

This Part will review persuasive judicial authority on both sides of the issue of whether a violation of 18 U.S.C. § 641 in the form of a passive scheme of embezzlement is a continuing offense. Part II.A examines a circuit court’s reasoning in holding that passive schemes of embezzlement are not continuing offenses. Part II.B describes the reasoning of a circuit court and a district court reaching the opposite conclusion.

Since *Toussie*, courts have disagreed over whether a violation of the first paragraph of 18 U.S.C. § 641 is a continuing offense.⁶⁵ The majority of courts considering this issue have agreed that conversion in general is not a continuing offense.⁶⁶ And most courts have concluded that active embezzlement is not a continuing offense, even if done repeatedly as part of a single scheme.⁶⁷ But passive schemes of

63. Chavez, *supra* note 30, at 4.

64. *Toussie*, 397 U.S. at 115.

65. See *United States v. Trang Huydoan Phan*, 754 F. Supp. 2d 186, 189 (D. Mass. 2010).

66. See *United States v. Silkowski*, 32 F.3d 682, 690 (2d Cir. 1994); *United States v. Sunia*, 643 F. Supp. 2d 51, 75 (D.D.C. 2009); *United States v. Pease*, No. CR-07-757-PHX-DGC, 2008 WL 808683, at *3 (D. Ariz. Mar. 28, 2008); *United States v. Beard*, 713 F. Supp. 285, 290 (S.D. Ind. 1989) (“The court finds that there is nothing in the explicit language of the first paragraph of section 641 that would compel the conclusion that Congress extended the limitations period for the crime of conversion.”). *But see United States v. Neusom*, 159 Fed. App’x. 796, 798-99 (9th Cir. 2005) (citing *United States v. Morales*, 11 F.3d 915 (9th Cir. 1993)) (defining an offense to be an entire scheme as opposed to each individual time all elements of a crime are met).

67. See *United States v. Smith*, 373 F.3d 561, 567-68 (4th Cir. 2004) (limiting its holding that embezzlement is a continuing offense to only when the embezzlement is part of a *passive* scheme); *United States v. Tackett*, No. 11-15-ART, 2011 WL 4005347, at *1, *6 (E.D. Ky. Sept. 8, 2011); *United States v. Duhamel*, 770 F. Supp. 2d 414, 416 (D. Me. 2011). *But see United States v. Thompkins*, No. 1:08CR65, 2008 WL 3200629, at *2 (W.D.N.C. Aug. 5, 2008) (holding that recurring, active embezzlement, which is part of a single scheme,

embezzlement are a different story. If a defendant puts a scheme in motion resulting in the recurring and passive embezzlement of funds, a significant number of courts would hold that such a scheme is a continuing offense, tolling the statute of limitations until the time of the most recent embezzlement.⁶⁸ An example of a passive scheme is when one embezzles monthly Social Security benefits from the Social Security Administration by direct deposit to a bank account.⁶⁹ The initial culpable behavior enabling the monthly embezzlement had required active conduct, but the embezzler thereafter performs no additional act to further the wrongful transfer of funds. In 2004, a divided Fourth Circuit Court of Appeals held that such a passive scheme of embezzlement is a continuing offense.⁷⁰ Since then, district courts from a variety of jurisdictions have followed its reasoning,⁷¹ while others have criticized it.⁷²

A. *Courts Reasoning That a Passive Scheme of Embezzlement Is Not a Continuing Offense*

Of the courts holding that embezzlement is not a continuing offense, even when done via a passive scheme, the Seventh Circuit Court of Appeals in *United States v. Yashar* provided particularly robust reasoning for its conclusion.⁷³ In 1997, the federal government

is a continuing offense).

68. See *Smith*, 373 F.3d at 568; *Trang Huydoan Phan*, 754 F. Supp. 2d at 191; *United States v. Gibson*, No. 08-03057-01-CR-S-DGK, 2008 WL 4838226, at *2 (W.D. Mo. Nov. 6, 2008); *United States v. Street*, No. 3:07CR181TSL-JCS, 2008 WL 4372737, at *4 (S.D. Miss. Sept. 19, 2008); *United States v. Miller*, 200 F. Supp. 2d 616, 618 (S.D. W.Va. 2002); *United States v. Aubrey*, 53 F. Supp. 2d 1355, 1356 (E.D. Tex. 1999).

69. E.g., *Smith*, 373 F.3d at 567-68; *Silkowski*, 32 F.3d at 682.

70. *Smith*, 373 F.3d at 567-68.

71. See, e.g., *United States v. Easley*, No. 4:10CR00240-01-BRW, 2011 WL 2265116 (E.D. Ark. June 8, 2011); *United States v. Trang Huydoan Phan*, 754 F. Supp. 2d 186, 190-91 (D. Mass. 2010); *United States v. Gibson*, No. 08-03057-01-CR-S-DGK, 2008 WL 4838226, at *2 (W.D. Mo. Nov. 6, 2008); *United States v. Street*, No. 3:07CR181TSL-JCS, 2008 WL 4372737, at *3 (S.D. Miss. Sept. 19, 2008); *United States v. Thompkins*, No. 1:08CR65, 2008 WL 3200629, at *2 (W.D.N.C. Aug. 5, 2008).

72. See *United States v. Young*, 694 F. Supp. 2d 25, 29 (D. Me. 2010); *United States v. Bundy*, No. 08-196-P-H, 2009 WL 902064, at *6-7 (D. Me. Mar. 31, 2009); *United States v. Sunia*, 643 F. Supp. 2d 51, 73-74 (D.D.C. 2009); see also *United States v. Colon*, No. 08-cr-10305-WGY, slip op. at *6-7 (D. Mass. Apr. 13, 2010). Notice the split among district courts within the First Circuit as to whether to endorse or reject *Smith*. Though the *Young* and *Bundy* courts initially rejected the *Smith* reasoning, the *Trang Huydoan Phan* court has endorsed it. See *Trang Huydoan Phan*, 754 F. Supp. 2d at 190-91.

73. *United States v. Yashar*, 166 F.3d 873 (7th Cir. 1999). The court in *United States v. Silkowski* implied that embezzlement under § 641 is not a continuing offense, but did not squarely address the issue. 32 F.3d 682, 687, 690 (2d Cir. 1994).

effectively charged Michael Yashar for embezzlement of \$9,223 from the city of Chicago between June 1, 1989 and September 1, 1992.⁷⁴ The government indicted him under 18 U.S.C. § 666,⁷⁵ which proscribes a government agent's embezzlement of government funds, under certain conditions.⁷⁶ The statute is substantially similar to 18 U.S.C. § 641 since both criminalize embezzlement,⁷⁷ vary the level of punishment based on the value of what was stolen,⁷⁸ and have a five-year statute of limitations under 18 U.S.C. § 3282.⁷⁹

In evaluating the issue on appeal, the court applied the *Toussie* test⁸⁰ to Yashar's indictment, focusing on whether "the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one."⁸¹ The court rejected the government's argument that the test for a continuing offense turns on whether the conduct of the defendant, giving rise to a criminal indictment, was ongoing.⁸² Instead, the court reasoned that such an interpretation would greatly expand the continuing offense doctrine, which turns on the "wording and intent"⁸³ of Congress, not on the prosecutor's description of the charged conduct.⁸⁴

74. *Yashar*, 166 F.3d at 875. Though Yashar was indicted in 1998, he had signed a waiver on August 13, 1997 as part of a criminal investigation that tolled the statute of limitations indefinitely on his crimes. *Id.* Therefore, in order for the government to charge him for the alleged conduct committed before August 13, 1992, it needed to demonstrate that some exception to the statute of limitations applied to Yashar's crimes.

75. *Id.*

76. 18 U.S.C. § 666 (2006).

77. Compare 18 U.S.C. § 641 (2006) ("Whoever embezzles . . . [s]hall be fined under this title or imprisoned not more than ten years, or both . . ."), with 18 U.S.C. § 666 (2006) ("Whoever . . . embezzles . . . shall be fined under this title, imprisoned not more than 10 years, or both.").

78. Compare 18 U.S.C. § 641 (2006) ("but if the value of such [embezzled] property in the aggregate . . . does not exceed the sum of \$1,000, he shall be fined . . . or imprisoned not more than one year, or both."), with 18 U.S.C. § 666 (2006) (enabling punishment only for embezzlement of property "valued at \$5,000 or more").

79. See *Yashar*, 166 F.3d at 875; *United States v. Trang Huydoan Phan*, 754 F. Supp. 2d 186, 188 (D. Mass. 2010).

80. A crime is a continuing offense only if "the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one." *Toussie v. United States*, 397 U.S. 112, 115 (1970).

81. *Id.*

82. *Yashar*, 166 F.3d at 877.

83. *Id.*

84. *Id.*; see also *United States v. Niven*, 952 F.2d 289, 293 (9th Cir. 1991) ("As this passage makes clear, the analysis turns on the nature of the substantive offense, not on the specific characteristics of the conduct in the case at issue."), *overruled on other grounds by United States v. Scarano*, 76 F.3d 1471, 1477 (9th Cir. 1996).

The *Yashar* court further stated “the active or passive nature of a defendant’s actions has never been the benchmark of a continuing offense under *Toussie*.”⁸⁵ It pointed out that conspiracy, an offense where affirmative conduct is required, is considered a classic continuing offense.⁸⁶ However, certain offenses based on passive conduct, such as escape and bigamy, are also classic continuing offenses.⁸⁷ Therefore, the court concluded that the active or passive nature of the actions giving rise to an indictment cannot determine whether the crime itself is a continuing offense.⁸⁸

Additionally, the *Yashar* court reasoned that if the test for whether a crime is a continuing offense were based on whether the actions described in the indictment were continuous, then prosecutorial power would be unduly expanded.⁸⁹ The court declared “[t]his approach would transform the limitations period from a check on governmental delay in prosecution to a function of prosecutorial discretion.”⁹⁰ Ultimately, the Seventh Circuit held that embezzlement under § 666 is not a continuing offense, and therefore the government was limited to charging *Yashar* for the offenses committed after August 13, 1992.⁹¹ Following the publication of the *Yashar* decision in 1999, some courts have expressly endorsed its logic when determining whether a crime is a continuing offense, including when holding that a passive scheme of embezzlement is not a continuing offense under 18 U.S.C. § 641.⁹²

B. *Courts Reasoning That a Passive Scheme of Embezzlement Is a Continuing Offense*

Five years after the *Yashar* decision, the Fourth Circuit in *United States v. Smith*⁹³ held that passive embezzlement is a continuing offense.⁹⁴ On January 24, 2003, Alfred Smith was indicted for failure to

85. *Yashar*, 166 F.3d at 877.

86. *Id.*

87. *Id.*

88. *Id.*; see also Boles, *supra* note 14, at 243-46 (arguing the test for a continuing offense is based on the statutory definition of a crime, not the conduct of a defendant).

89. *Yashar*, 166 F.3d at 878.

90. *Id.* at 879.

91. *Id.* at 880.

92. See, e.g., *United States v. Sunia*, 643 F. Supp. 2d 51, 70 (D.D.C. 2009); *United States v. Bundy*, No. 08-196P-H, 2009 WL 902064, at *6-7 (D. Me. Mar. 31, 2009).

93. *United States v. Smith*, 373 F.3d 561 (4th Cir. 2004).

94. Other federal courts had also held that embezzlement was a continuous offense, but none provided a detailed explanation of the conclusion. See, e.g., *United States v. Neusom*, 159 Fed. App'x. 796, 798-99 (9th Cir. 2005) (finding passive schemes of embezzlement to be continuing offenses under plain error review, but providing no support for the decision save a

report the death of his mother to the Social Security Administration.⁹⁵ Instead of notifying the government of this information, he had continued to electronically collect her benefits, totaling \$26,336, in a joint bank account from March 1994 through February 1998.⁹⁶ The trial court allowed the prosecutor to aggregate the forty-eight deposits (including those beyond the five-year statute of limitations) into a single charge.⁹⁷ After his conviction, Mr. Smith appealed the lower court's decision and the circuit court, in a divided opinion, affirmed the trial court, holding that embezzlement is a continuing offense.⁹⁸

The *Smith* court reasoned “the nature of embezzlement is such that Congress must have intended that, in some circumstances, it be treated in § 641 as a continuing offense.”⁹⁹ The court pointed out that embezzlement often occurs repeatedly over a period of time in small, secretive amounts in order to avoid detection.¹⁰⁰ Therefore, it reasoned that “in those cases where the defendant created a recurring, automatic scheme of embezzlement under section 641 by conversion of funds voluntarily placed in the defendant's possession by the government, and maintained that scheme without need for affirmative acts linked to any particular receipt of funds,” Congress must assuredly have intended the crime to be a continuing offense.¹⁰¹ The court concluded that this satisfies the second prong of the *Toussie* test,¹⁰² enabling the tolling of the statute of limitations until the final act of embezzlement was committed as part of the scheme.¹⁰³

In contrast with the *Yashar* court, the *Smith* court used a fact-based analysis in reaching its decision, reasoning “the specific conduct at issue

cite to *United States v. Morales*). The *Morales* court did not address embezzlement, but bribery, and also failed to apply the *Toussie* test. *United States v. Morales*, 11 F.3d 915, 918 (9th Cir. 1993).

95. *Smith*, 373 F.3d at 563.

96. *Id.*

97. *Id.*

98. *Id.* at 563, 568.

99. *Id.* at 564.

100. *Id.* at 567. Some state courts have also embraced the continuing nature of embezzlement. *See, e.g.*, *MacEwen v. State*, 71 A.2d 464, 468-69 (Md. 1950) (“[I]n many cases [embezzlement] runs for a long period of time and consists of converting different sums of money on many dates to the use of the thief.”); *State v. Roussin*, 189 S.W.2d 983, 985 (Mo. 1945) (“We understand our statutory embezzlement lends itself much more readily to an offense of a continuing nature.”).

101. *Smith*, 373 F.3d at 567-68.

102. *Toussie v. United States*, 397 U.S. 112, 115 (1970) (A crime is a continuing offense if “the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one”).

103. *Smith*, 373 F.3d at 568.

here is more properly characterized as a continuing offense rather than a series of separate acts.”¹⁰⁴ It concluded that, though the specific type of embezzlement committed by Smith was a continuing offense, not all embezzlement necessarily fits under this exception.¹⁰⁵

The *Smith* dissent stated that the *Toussie* test is expressly narrow in scope,¹⁰⁶ and the crime of embezzlement under § 641 does not meet its requirements.¹⁰⁷ The dissent reasoned that the second prong of the *Toussie* test turns on the nature of the crime, not the specific conduct of the defendant, stating “whether an offense is continuing in nature does not change depending on the manner in which the offense is committed.”¹⁰⁸ The dissenting opinion further pointed out that embezzlement is not *inherently* a continuing offense because it can be done as a single, instantaneous offense or over time as a scheme, as the majority stated.¹⁰⁹ Finally, the dissenting opinion endorsed the reasoning of the *Yashar*¹¹⁰ court, as *Yashar*’s passive embezzlement was similar in nature to that committed by Smith.¹¹¹

Many lower courts have adopted the reasoning in *Smith*.¹¹² For example, the court in *United States v. Trang Huydoan Phan* created a split within the district courts of the First Circuit when it held that embezzlement under § 641 is a continuing offense when executed as a passive scheme.¹¹³ In April 2010, Trang Huydoan Phan (Ms. Phan) was indicted for embezzling Social Security funds between 1999 and 2006.¹¹⁴ While working as a case manager helping immigrants, Ms. Phan assisted a certain Mr. Luong in his successful application for Social

104. *Id.* Compare the *Yashar* case, which focused on the inherent nature of the statutory crime. *United States v. Yashar*, 166 F.3d 873, 877 (7th Cir. 1999); *see also* *United States v. Sunia*, 643 F. Supp. 2d 51, 74 (D.D.C. 2009) (“It is impossible to reconcile [*Smith*’s] analysis with the actual language of *Toussie*.”).

105. *United States v. Smith*, 373 F.3d 561, 568 (4th Cir. 2004).

106. *Id.* at 569 (Michael, J., dissenting) (“As the Supreme Court said in *Toussie*, ‘continuing offenses are not to be too readily found.’”) (quoting *Toussie*, 397 U.S. at 116).

107. *Id.* at 568.

108. *Id.* at 569; *see also Yashar*, 166 F.3d at 877; *United States v. Jaynes*, 75 F.3d 1493, 1506 n.12 (10th Cir. 1996); *United States v. Niven*, 952 F.2d 289, 293 (9th Cir. 1991), *overruled on other grounds by* *United States v. Scarano*, 76 F.3d 1471, 1477 (9th Cir. 1996).

109. *Smith*, 373 F.3d at 569 (Michael, J., dissenting).

110. *Yashar*, 166 F.3d 873.

111. *Smith*, 373 F.3d at 569-70 (Michael, J., dissenting).

112. *See, e.g., United States v. Trang Huydoan Phan*, 754 F. Supp. 2d 186, 191 (D. Mass. 2010); *United States v. Gibson*, No. 08-03057-01-CR-S-DGK, 2008 WL 4838226, at *3 (W.D. Mo. Nov. 6, 2008); *United States v. Thompkins*, No. 1:08CR65, 2008 WL 3200629, at *2 (W.D.N.C. Aug. 5, 2008).

113. *Trang Huydoan Phan*, 754 F. Supp. 2d at 191.

114. *Id.* at 187-88.

Security disability benefits.¹¹⁵ However, Mr. Luong's checks were mailed to Ms. Phan's office where she would cash them, giving Mr. Luong only \$300 of his monthly benefits and keeping the remainder for herself.¹¹⁶ In 2003, Mr. Luong recovered from his disability, but instead of notifying the Social Security Agency of this fact, Ms. Phan arranged for direct deposit of Mr. Luong's benefits into her own account every month through December 2006.¹¹⁷ Ms. Phan filed a motion to dismiss the charges for the conduct committed prior to April of 2005.¹¹⁸ However, the trial court held that the scheme of embezzlement that Ms. Phan carried out was a continuing offense.¹¹⁹

Although the *Trang Huydoan Phan* court recognized that all previous district courts within the First Circuit had held embezzlement under § 641 was not a continuing offense, it ultimately disagreed with those courts.¹²⁰ The court reasoned that a passive scheme of embezzlement is similar to the classic "continuing offenses of escape, possession, and conspiracy."¹²¹ These crimes continue until affirmative action is taken to stop them, similar to "[w]rongfully continuing to receive SSI benefits as a result of an initial misrepresentation."¹²² Furthermore, the court reasoned that there is no need to worry about enlarging prosecutorial power by declaring that embezzlement "is [sometimes] a continuing offense because such prosecutorial discretion exists in all cases charging continuing offenses."¹²³

In addition, the court reasoned that the "deleterious effect on society of [Ms. Phan's] initial misrepresentation continued at least until the payments stopped."¹²⁴ Moreover, the court noted Ms. Phan's alleged

115. *Id.* at 187.

116. *Id.* at 188.

117. *Id.*

118. *Id.*

119. *Id.* at 191.

120. *Id.* at 189-90.

121. *Id.* at 190.

122. *Id.* Additionally, the second paragraph of § 641 criminalizes concealment and retention—two crimes that are commonly considered continuing offenses. *See* *United States v. Banks*, 708 F. Supp. 2d 622, 625-26 (E.D. Ky. 2010) (discussing other courts that have held concealment is a continuing offense); *United States v. Blizzard*, 27 F.3d 100, 103 (4th Cir. 1994) (holding retention is a continuing offense). Therefore, it is more likely that Congress intended its criminalization of embezzlement in the first paragraph to also be a continuing offense. *See* *United States v. Gibson*, No. 08-03057-01-CR-S-DGK, 2008 WL 4838226, at *3 (W.D. Mo. Nov. 6, 2008).

123. *Trang Huydoan Phan*, 754 F. Supp. 2d at 190.

124. *Id.* *See also* *United States v. Morales*, 11 F.3d 915, 921 (9th Cir. 1993) (O'Scannlain, J., dissenting) (stating one feature of "continuing offenses is that the harm done to society through their commission necessarily continues on for as long as the crime is

conduct was strikingly similar to the conduct at issue in *Smith*, justifying the adoption of that court's holding that passive schemes of embezzlement are continuing offenses under § 641.¹²⁵

The *Trang Huydoan Phan* court also seemed to consider a duplicity ruling on an indictment as relevant to the decision of whether a crime is a continuing offense.¹²⁶ An indictment for a crime is duplicitous if it improperly joins multiple distinct crimes into a single count.¹²⁷ The goal of this doctrine is to ensure that a jury has found beyond a reasonable doubt that the defendant has committed every crime for which he or she is punished.¹²⁸ The *Trang Huydoan Phan* court seemed to find the duplicity of the defendant's indictment as relevant to whether embezzlement was a continuing offense by citing *United States v. Billingslea*¹²⁹ and *United States v. Daley*¹³⁰ as support for its view that passive embezzlement is a continuing offense.¹³¹ *Billingslea* dealt exclusively with the issue of whether separate offenses may be aggregated into a single count for purposes of calculating the total amount stolen.¹³² And *Daley* merely answered the question of whether a scheme of embezzlement, charged as a single offense, is duplicitous.¹³³ Neither addressed the doctrine of continuing offenses.

As seen above, there is sharp disagreement in the federal courts over whether embezzlement under § 641 is a continuing offense. Though the *Smith* decision has been persuasive for many district courts, others have followed the logic of the *Yashar* court,¹³⁴ applying the *Toussie* test narrowly to identify continuing offenses.

ongoing").

125. *Trang Huydoan Phan*, 754 F. Supp. 2d at 190-91.

126. *Id.* at 191.

127. Separate offenses must be charged as distinct counts in an indictment. FED. R. CRIM. P. 8(a). If an indictment "sets forth separate and distinct crimes in one count," then it is duplicitous. *United States v. Davis*, 306 F.3d 398, 415 (6th Cir. 2002).

128. *Davis*, 306 F.3d at 415 (6th Cir. 2002).

129. *United States v. Billingslea*, 603 F.2d 515 (5th Cir. 1979).

130. *United States v. Daley*, 454 F.2d 505 (1st Cir. 1972).

131. *Trang Huydoan Phan*, 754 F. Supp. 2d at 191.

132. *Billingslea*, 603 F.2d at 518.

133. *Daley*, 454 F.2d at 509. The doctrines of duplicity and continuing offense are easily confused, especially since "the presence of a common scheme uniting discrete acts has traditionally been found to be relevant in determining whether an indictment should be dismissed for duplicity." *United States v. Sunia*, 643 F. Supp. 2d 51, 70 (D.D.C. 2009). However, these doctrines have distinct tests and goals. *Id.* at 70-71.

134. *United States v. Yashar*, 166 F.3d 873 (7th Cir. 1999).

III. EMBEZZLEMENT UNDER 18 U.S.C. § 641 SHOULD NEVER BE CONSIDERED A CONTINUING OFFENSE

This Part of the Note argues that the tenor of the *Toussie*¹³⁵ opinion, the nature of embezzlement as a crime, and the policy goals of a statute of limitations each support a conclusion that embezzlement is not a continuing offense. *Smith* and its progeny have improperly expanded the continuing offense doctrine, defeating congressional intent to confine embezzlement indictments under § 641 to within five years of the commission of the crime.¹³⁶

Part III.A argues that the language and facts of the *Toussie* decision support a narrow interpretation of the continuing offense doctrine. Part III.B examines the roots of embezzlement in larceny, which is not a continuing offense, and asserts that the overlapping natures of the two crimes justify treating embezzlement as an instantaneous offense. Finally, Part III.C discusses various policy considerations advanced by a narrow application of the continuing offense doctrine.¹³⁷

Though the recent trend toward retributive justifications for punishment encourages courts to vitiate criminal statutes of limitations,¹³⁸ the judiciary must not ignore precedent and legislation in applying the continuing offense doctrine. If embezzlement is to become a continuing offense, it is the responsibility of Congress, not the judiciary, to make it so. Given the inherently arbitrary nature of statutes of limitations, it is much more appropriate for the legislature to make a careful inquiry into value judgments regarding criminal time bars.

A. *The Language of the Toussie Decision Compels a Narrow Application of the Continuing Offense Doctrine*

The *Toussie* court expressly stated “that continuing offenses are not to be too readily found.”¹³⁹ Additionally, statutes of limitations should

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

136. See 18 U.S.C. § 3282 (2006) (restricting the government from prosecuting crimes to “within five years next after such offense shall have been committed”).

137. Jeffrey Boles, in *Easing the Tension Between Statutes of Limitations and the Continuing Offense Doctrine*, clearly described a fourth reason that embezzlement is not a continuing offense. Namely, the second prong of the *Toussie* test is based on the nature of the crime at issue. It was improper for the *Smith* court and others following its example to instead focus on the actual actions of the defendant in determining whether the crime was a continuing offense. See Boles, *supra* note 14, at 238-46 (analyzing and critiquing the “charged conduct” approach by courts expanding the *Toussie* test).

138. See, e.g., Powell, *supra* note 17, at 124.

139. *Toussie*, 397 U.S. at 116.

“be liberally interpreted in favor of repose.”¹⁴⁰ Furthermore, when deciding between two interpretations of a criminal statute, the *Toussie* majority stated that Congress must speak “in language that is clear and definite” in order to apply the harsher interpretation.¹⁴¹ The above language demonstrates that the *Toussie* test must be narrowly construed.¹⁴² Indeed, the Supreme Court has repeatedly stood as a bulwark against expansion of various exceptions to statutes of limitations by the lower courts.¹⁴³

The *Smith* court seemed to reason that the continuing offense doctrine could expand the five-year statute of limitations defined in 18 U.S.C. § 3282 since it fits under that statute’s allowance of exceptions that are “expressly required by law.”¹⁴⁴ However, the doctrine of continuing offenses is not an express requirement because it should be applied narrowly,¹⁴⁵ and derives from common law rather than statute.¹⁴⁶ There is no reference to continuing offenses in the plain language of § 641,¹⁴⁷ just as there was none in the Universal Military Training and Service Act upon the *Toussie* court’s evaluation.¹⁴⁸

In addition, the *Trang Huydoan Phan* court erroneously relied on

140. *Id.* at 115 (quoting *United States v. Scharton*, 285 U.S. 518, 522 (1932)).

141. *Id.* at 122 (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952)). In addition, the rule of lenity should be applied, which states that unclear statutory language should be construed in favor of the defendant. Boles, *supra* note 14, at 254.

142. *See United States v. Beard*, 713 F. Supp. 285, 291 (S.D. Ind. 1989) (construing the continuing offense doctrine narrowly in regards to conversion under 18 U.S.C. § 641 in order to be “consistent with the *Toussie* mandate that criminal statutes ‘be liberally construed in favor of repose’”); *Penetrable Barrier*, *supra* note 10, at 645 (the continuing offense doctrine “should be applied only on a limited scale; by applying the doctrine loosely, courts have a potentially powerful weapon for the avoidance of statutes of limitations”).

143. *Chavez*, *supra* note 30, at 3 (listing cases over the past century where the Supreme Court has held the statute of limitations barred criminal prosecutions).

144. 18 U.S.C. § 3282; *United States v. Smith*, 373 F.3d 561, 563 (4th Cir. 2004).

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

146. *See United States v. Irvine*, 98 U.S. 450, 451-52 (1879). In *Irvine*, the Supreme Court fashioned the basic test for deciding when the statute of limitations begins to run against the government. *Chavez*, *supra* note 30, at 4.

147. *Compare* 18 U.S.C. § 641 (2006) (never using the phrase “continuing offense”), with 18 U.S.C. § 3284 (2006) (“The concealment of assets of a debtor in a case under title 11 shall be deemed to be a continuing offense . . .”), and 22 U.S.C. § 618(e) (2006) (“Failure to file any such registration statement or supplements thereto as is required by either section 612(a) or section 612(b) of this title shall be considered a continuing offense.”). *See also* Boles, *supra* note 14, at 232 (“Most federal criminal offense statutes, however, do not contain explicit language addressing whether the offense is a continuing one.”).

148. *Compare* Universal Military Training and Service Act, §§ 3, 12(a) (never using the phrase “continuing offense”), with the statutes cited *supra*, note 147.

the fact that a passive scheme of embezzlement may be charged as a single count, without being duplicitous, as support for its conclusion that embezzlement is a continuing offense.¹⁴⁹ In fact, the purposes of the duplicity doctrine are distinct from those of the continuing offense doctrine.¹⁵⁰ The continuing offense doctrine attempts to prevent the arbitrary application of the statute of limitations to the few crimes in which the evil that Congress sought to prevent continues past the commission of all the elements of the crime.¹⁵¹ In contrast, the duplicity doctrine attempts to address concerns of double jeopardy, notice for the defendant, and “the danger that a conviction was produced by a verdict that may not have been unanimous as to any one of the crimes charged.”¹⁵² These concerns do not overlap with the goals of the statute of limitations¹⁵³ or the continuing offense doctrine.¹⁵⁴ The confusion of the doctrines may partially be explained by the fact that whether conduct is a scheme or not is one test for determining if a charge is duplicitous.¹⁵⁵ Though “separate acts united by a common scheme or pattern may be charged together without any concern of impermissible duplicity,”¹⁵⁶ “a continuing offense is not the same as a scheme or pattern of illegal conduct.”¹⁵⁷ Therefore, whether an indictment is duplicitous or not is irrelevant to determining whether the *Toussie* test is met.¹⁵⁸

Moreover, the facts of the *Toussie* decision demonstrate just how narrowly the continuing offense doctrine must be applied. Before

149. *United States v. Trang Huydoan Phan*, 754 F. Supp. 2d 186, 191 (D. Mass. 2010); see *Smith*, 373 F.3d at 568.

150. *United States v. Sunia*, 643 F. Supp. 2d 51, 70-71 (D.D.C. 2009).

151. *Id.* at 70.

152. *Id.* at 71 (quoting *United States v. Bruce*, 89 F.3d 886, 890 (D.C. Cir. 1996)).

153. These goals include protecting defendants against the degradation of evidence and promoting repose. See *supra* Part I.A. and *infra* Part III.C.

154. *Sunia*, 643 F. Supp. 2d at 72.

155. A crime may be charged in a single count if the defendant is alleged to have concocted “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.” *United States v. Billingslea*, 603 F.2d 515, 520 (5th Cir. 1979). This test expressly allows for passive schemes. *Id.* However, the *Toussie* test is entirely distinct, and does *not* explicitly refer to schemes or the active/passive nature of conduct. See *Sunia*, 643 F. Supp. 2d at 71.

156. *Sunia*, 643 F. Supp. 2d at 71.

157. *United States v. Jaynes*, 75 F.3d 1493, 1506 (10th Cir. 1996); see also *United States v. Mubayyid*, 567 F. Supp. 2d 223, 241 (D. Mass. 2008) *aff'd in part, rev'd in part*, 658 F.3d 35 (1st Cir. 2011) (stating that a “scheme” of concealment is not a continuing offense).

158. The converse is also true—the fact that embezzlement is not a continuing offense does not support the argument that an indictment is duplicitous. See *United States v. Gray*, CRIM. 11-13, 2012 WL 1554649, at *3 (W.D. Pa. May 1, 2012) (sidestepping the issue of whether embezzlement is a continuing offense, but still holding that the indictment for embezzlement over a decade was not duplicitous).

Toussie, many federal courts held that failure to register for the draft was a continuing offense.¹⁵⁹ Indeed, the state of being unregistered is continuous in nature, similar to the state of being escaped from incarceration. Additionally, the government agency in charge of applying the Universal Military Training and Service Act had issued an official interpretation, declaring failure to register for the draft to be a continuing offense.¹⁶⁰ There was even evidence that Congress desired the duty to register to be continuous, enabling indictment from the time one turns eighteen until thirteen years later.¹⁶¹ Congressional intent seems especially likely given that after *Toussie* was decided, Congress immediately revised the Act to expressly convert failure to register for the draft into a continuing offense.¹⁶² However, the *Toussie* majority found that these indicia did not provide enough evidence to satisfy the second prong of the narrow test “that Congress must assuredly have intended”¹⁶³ failure to register to be a continuing offense.

Likewise, there is not enough evidence of congressional intent to substantiate a finding that embezzlement fits under the narrow continuing offense doctrine. Section 641 traces its origins to before the first Supreme Court case considering the continuing offense doctrine and there is no evidence Congress considered such a doctrine when enacting the statute.¹⁶⁴ Furthermore, when § 641 was last recodified in 1948, the federal courts had applied the continuing offense doctrine for over seventy years.¹⁶⁵ Yet, Congress did not use the opportunity to include any indications that it wished to apply the doctrine to embezzlement. As the *Toussie* court reasoned, “congressional silence is stronger in favor of not construing this Act as incorporating a continuing-offense theory.”¹⁶⁶ Given this lack of legislative history suggesting a desire for embezzlement to be a continuing offense, the argument that embezzlement as criminalized in § 641 is a continuing offense is much weaker than the same argument used in *Toussie*.

In addition, unlike other statutes criminalizing continuing offenses,

159. See *Toussie v. United States*, 397 U.S. 112, 119 (1970).

160. *Id.* at 115-116.

161. *Id.* at 129 (White, J., dissenting) (arguing that “every other guide to statutory interpretation points to” failure to register being a continuing offense).

162. Chavez, *supra* note 30, at 4.

163. *Toussie*, 397 U.S. at 115.

164. Section 641 traces its roots to 1875, while the first United States Supreme Court case addressing the continuing offense doctrine was in 1878. See *United States v. Irvine*, 98 U.S. 450, 450 (1879); *supra* Part I.B.

165. See *supra* Part I.B.

166. *Toussie v. United States*, 397 U.S. 112, 120 (1970).

§ 641 does not “clearly contemplate[] a prolonged course of conduct.”¹⁶⁷ The statute authorizes punishment for anyone who “embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of” government property.¹⁶⁸ The acts of stealing, purloining, converting, selling, conveying, and disposing of property are all logically discrete—each occurs at an exact point in time and ceases thereafter. Therefore, Congress likely considered embezzlement to be similarly discontinuous in nature. Though the second paragraph of the statute criminalizes the continuing offenses of retention and concealment of stolen property,¹⁶⁹ that paragraph addresses a distinct crime from the first—the crime of knowingly holding property that someone else converted from the government.¹⁷⁰ If the accused committed the initial theft, he or she cannot be charged under that paragraph.¹⁷¹

This Note’s recommendation to narrowly apply the continuing offense doctrine stems from the desire to defer to legislative intent.¹⁷² Congress has expressly proscribed punishment for embezzlement committed more than five years prior to an indictment.¹⁷³ If Congress wished to expand this window, it could modify the current statute of limitations or enact a new one, increasing the time limit specifically for crimes of embezzlement, as it has done repeatedly for other crimes.¹⁷⁴

167. *Id.*; see 18 U.S.C. § 641 (2006).

168. 18 U.S.C. § 641 (2006).

169. *Id.* (“Whoever receives, conceals, or retains [stolen property] with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted . . .”).

170. *United States v. Beard*, 713 F. Supp. 285, 289 (S.D. Ind. 1989).

171. *Id.* The government could make an interesting argument to circumvent the statute of limitations using the continuing offense doctrine if it indicted an embezzler of Social Security funds under the crime of concealment instead of embezzlement. See *United States v. Banks*, 708 F. Supp. 2d 622, 623-27 (E.D. Ky. 2010) (holding concealment of facts affecting defendant’s right to social security benefits, as criminalized in 42 U.S.C. § 1383a(a)(3)(A), is a continuing offense). However, even if a court held the concealment was a continuing offense, the embezzlement would still be a separate crime requiring a distinct continuing offense evaluation.

172. *Toussie*, 397 U.S. at 121 (“[Q]uestions of limitations are fundamentally matters of legislative [] decision.”).

173. See 18 U.S.C. § 3282 (2006).

174. See Powell, *supra* note 17, app. at 154-55 (listing many crimes, including espionage, terrorism, and sexual abuse of children, for which Congress has individually expanded the statute of limitations beyond the five-year default).

B. *The Discrete and Discreet Natures of Embezzlement*

The nature of embezzlement demonstrates that Congress could not have “assuredly . . . intended”¹⁷⁵ for it to be a continuing offense. Since embezzlement finds its roots in larceny, it shares a common nature with that crime.¹⁷⁶ Federal courts have often used larceny as an example of an instantaneous offense that does not satisfy the *Toussie* test.¹⁷⁷ Thus, embezzlement, too, should be classified in that manner.

The crime of larceny is completed “as soon as there has been an actual taking of the property of another without consent, with the intent permanently to deprive the owner of its use.”¹⁷⁸ Therefore, the statute of limitations for the crime begins running as soon as the taking is completed, and does not toll for as long as the wrongdoer continues to possess the stolen property.¹⁷⁹ A time bar on the crime of embezzlement should operate in exactly the same way as the larceny time bar because all of the elements of embezzlement are also completed upon the initial conversion of the funds.¹⁸⁰

Notably, the crime of larceny contains one nuance implying that it is not as instantaneous as it initially appears. Larceny is broken down into two elements: (1) the unlawful taking of property from another and (2) the intent to steal the property.¹⁸¹ The element of taking is itself

175. *Toussie*, 397 U.S. at 115.

176. *United States v. Young*, 955 F.2d 99, 102 (1st Cir. 1992); *supra* Part I.B.

177. *See* *United States v. Sunia*, 643 F. Supp. 2d 51, 75 (D.D.C. 2009); *United States v. McGoff*, 831 F.2d 1071, 1078 (D.C. Cir. 1987); *see also* *Doane v. Com.*, 237 Se.2d 797, 798 (1977) (finding larceny to be a continuing offense in the realm of venue, but refusing to extend the theory to satisfy the elements of felony-murder); *Johnson v. State*, 314 P.2d 366, 371 (Okla. Crim. App. 1957) (holding that multiple larcenies as part of a single scheme must be charged as separate offenses). *But see* *United States v. Barlow*, 470 F.2d 1245, 1250 (D.C. Cir. 1972) (assuming in passing that larceny is a continuous offense); *Gomez v. Herndon*, SA CV 08-0800 ODWFMO, 2009 WL 1481115, at *4 (C.D. Cal. May 26, 2009) (assuming larceny to be a continuing offense until the asportation element is complete).

178. *McGoff*, 831 F.2d at 1078. Some courts have sidestepped this issue by defining the entire scheme to be an “offense.” *See, e.g.*, *United States v. Morales*, 11 F.3d 915, 918 (9th Cir. 1993); *United States v. Neusom*, 159 Fed. App’x. 796, 798-99 (9th Cir. 2005). However, as the *Morales* dissent argued, a scheme can only be a single continuing offense if the *Toussie* test is met, therefore such an expansive definition of “offense” fails to evade the application of the test. *Morales*, 11 F.3d at 919 (O’Scannlain, J., dissenting); *see also* *United States v. Yashar*, 166 F.3d 873, 878 (7th Cir. 1999) (reviewing the continuing offense limitations decisions in *Morales* and comparing them with other jurisdictions).

179. *McGoff*, 831 F.2d at 1078; *State v. King*, 282 So.2d 162 (Fla. 1973) (stating that larceny, which includes elements of conversion, “[is] complete [] upon the taking”).

180. *See* *United States v. Beard*, 713 F. Supp. 285, 288-89 (S.D. Ind. 1989) (finding that conversion of government funds satisfies the § 641 embezzlement statute).

181. *Gomez v. Herndon*, SA CV 08-0800 ODW (FMO), 2009 WL 1481115, at *5 (C.D. Cal. May 26, 2009).

broken down into two aspects: (1) the actual transfer of possession (caption) and (2) the transportation of the property (asportation).¹⁸² An act of larceny is not considered complete until the asportation aspect of the taking concludes.¹⁸³ Therefore, an act of larceny continues while a thief is moving the recently-stolen property to a secure location. For example, let us assume a crafty collection of conspirators arranges to abscond with a substantial quantity of ice cream from a warehouse using a refrigeration truck. The statute of limitations would not begin to run for these potential defendants until the truck arrives at a safe house with its illicit-yet-delicious cargo. In this way, larceny is not inherently instantaneous in nature, as the actual theft could potentially take place over a period of time.

Despite the fact that larceny is not always instantaneously performed, courts have often referred to it as an example of a crime that is decidedly not a continuing offense.¹⁸⁴ Though an act of larceny may occasionally be continuing in the manner of its performance, this does not satisfy the narrow second prong of the *Toussie* test that Congress must *assuredly* have intended for the crime to be a continuing offense. Similarly, a single act of embezzlement might be continuing in performance, but that cannot be enough to satisfy the rigid *Toussie* standard. Notably, the major difference between larceny and embezzlement is that the latter requires the prosecution to prove an extra element—that the stolen property was lawfully entrusted with the defendant when he or she converted it.¹⁸⁵ This element does not contemplate any additional ongoing conduct strong enough to justify treating the latter as a continuing offense.

Furthermore, a passive scheme of embezzlement is not sufficiently continuous in nature to be a continuing offense. In the well-settled continuing offense of possession,¹⁸⁶ all elements of the crime are met every nanosecond that the perpetrator has possession of the property; the statute of limitations does not begin to run until the defendant loses

182. *Id.*

183. *Id.*; *see also* United States v. Barlow, 470 F.2d 1245, 1253 (D.C. Cir. 1972) (“The crime of larceny obviously continues as long as the asportation continues and the original asportation continues at least so long as the perpetrator of the crime indicates by his actions that he is dissatisfied with the location of the stolen goods immediately after the crime and with no more than a few minutes delay causes another to continue the asportation.”).

184. *See, e.g., McGoff*, 831 F.2d at 1078; United States v. Sunia, 643 F. Supp. 2d 51, 75 (D.D.C. 2009).

185. *Moore v. United States*, 160 U.S. 268, 269 (1895); *supra* Part I.B.

186. *See* United States v. Berndt, 530 F.3d 553, 554-55 (7th Cir. 2008) (citing cases holding that possession is a continuing offense).

possession of the property.¹⁸⁷ Therefore, it is impossible to split the period in which a single act of possession occurs into separate crimes to charge individually. And, as a result, it is logical that Congress did not intend for the statute of limitations to begin to run until the accused loses possession of the property. This reasoning works analogously for the continuing offenses of bigamy, escape, concealment, and retention, since they also cannot be separated into discrete events at which the crimes were committed.¹⁸⁸

Conversely, a passive scheme of embezzlement *can* be split into discrete events—when separate acts of embezzlement occur. Every time property is converted by the accused, even if the conversion was set up long ago by an automated mechanism, the elements of embezzlement are met.¹⁸⁹ As in larceny, once the piece of property has been converted, the elements of embezzlement are no longer being met by the accused and the statute of limitations begins to run.¹⁹⁰ Since an embezzlement scheme can be split into discrete actions that could be charged individually, the conduct is not so inseparable “that Congress must assuredly have intended” it to be a continuing offense.¹⁹¹

187. See *United States v. Krstic*, 558 F.3d 1010, 1017 (9th Cir. 2009); See *Berndt*, 530 F.3d at 555 (“Everyday experience tells us that we possess things until we lose them, abandon them or they are taken from us.”); *United States v. Winnie*, 97 F.3d 975, 976 (7th Cir. 1996).

188. See *United States v. Yashar*, 166 F.3d 873, 877 (7th Cir. 1999) (discussing classic continuing offenses).

189. See *United States v. Beard*, 713 F. Supp. 285, 288-89 (S.D. Ind. 1989); see also *United States v. Mubayyid*, 567 F. Supp. 2d 223, 242 (D. Mass. 2008) (rejecting the government’s argument that concealment under 18 U.S.C. § 1001(a)(1) is a continuing offense because “[e]ach new affirmative act of concealment is a new criminal act, triggering a new limitations period. Mere continuation or acceptance of an illegally-obtained benefit . . . is not enough to extend the accrual of the limitations period”), *aff’d in part, rev’d in part*, 658 F.3d 35 (1st Cir. 2011).

190. *United States v. Tackett*, No. 11-15-ART, 2011 WL 4005347, at *4 (E.D. Ky. Sept. 8, 2011) (“Courts do not traditionally consider theft a continuing offense. A man who breaks into a bank vault five times in a month has committed five separate offenses, not a single continuing one.”); see also *United States v. Sydnor*, 12 F. App’x 141, 143 (4th Cir. 2001) (holding that theft from two cubicles in a short period of time was correctly charged as two separate crimes); *United States v. Kramer*, 73 F.3d 1067, 1072-73 (11th Cir. 1996) (noting that each transfer of money as part of a money laundering scheme is a separate offense); *United States v. Johnson*, 612 F.2d 843, 846-47 (4th Cir. 1979) (holding multiple conversions of gasoline from a pipeline terminal which occurred over a single night were three separate crimes). “A criminal’s single intent to commit multiple acts, however, affords no ground for disregarding congressional intent to make each distinct act a single unit of prosecution.” *Id.* at 847.

191. *Toussie v. United States*, 397 U.S. 112, 115 (1970). It may be argued that passive schemes of embezzlement are similar to the classic continuing offense of conspiracy as both consist of discreet actions and passive conduct to further the crime. However, one element of conspiracy is an ongoing agreement. *United States v. Falcone*, 311 U.S. 205, 210 (1940). The definition of embezzlement contains no element with such a continuous nature.

Additionally, a passive scheme of embezzlement does not share the trait of all continuing offenses that “each day’s acts bring a renewed threat of the substantive evil Congress sought to prevent.”¹⁹² Just as in larceny, when the elements of embezzlement are met, the crime is complete.¹⁹³ In criminalizing embezzlement, Congress sought to prevent the evil of the conversion of the property.¹⁹⁴ If a passive scheme of embezzlement were a continuing offense then, even after meeting every element of the crime, an immediate threat of that embezzlement would have to remain. However, since that property cannot be embezzled from that victim again, there is no more threat.¹⁹⁵ Therefore, embezzlement should not be considered a continuing offense.

C. *Policy Considerations Supporting a Narrow Application of the Continuing Offense Doctrine*

Although a time bar “permit[s] a rogue to escape,”¹⁹⁶ it also advances a variety of salutary policy goals. The primary justification for a statute of limitations is to ensure fairness for a defendant by decreasing the likelihood of an unjust trial resulting from the degradation of evidence.¹⁹⁷ However, it provides a host of additional benefits by creating repose for potential defendants,¹⁹⁸ providing a bright temporal

Therefore, the similarity between conspiracy and passive embezzlement does not justify the conclusion “that Congress must assuredly have intended” the conduct to be a continuing offense, especially given the *Toussie* Court’s repeated admonitions to narrowly apply the test. *Id.*

192. *Toussie*, 397 U.S. at 122.

193. *See Beard*, 713 F. Supp. at 288-89.

194. *Tackett*, 2011 WL 4005347, at *4 (“The ‘evil’ may resume a few days later when the thief steals again, but it is a new evil, separate from the first.”).

195. *See Toussie*, 397 U.S. at 122. In a passive scheme of monthly, automated embezzlement of funds, one might argue that the threat of the next month’s embezzlement is renewed each day, making such a scheme more like a continuing offense. However, the future embezzlement threatened is a different crime from the embezzlements that have already occurred. This stands in contrast to the crimes of conspiracy or possession, where the evil threatened is the continuation of the same conspiracy or possession.

196. *Pendergast v. United States*, 317 U.S. 412, 418 (1943).

197. James Herbie DiFonzo, *In Praise of Statutes of Limitations in Sex Offense Cases*, 41 HOUS. L. REV. 1205, 1209 (2004); Harvard Law Review Association, *supra* note 33, at 1185. *See Stogner v. California*, 539 U.S. 607, 615 (2003) (explaining that time bars partly result from “concern that the passage of time has eroded memories or made witnesses or other evidence unavailable”).

198. *See Bridges v. United States*, 346 U.S. 209, 215-16 (1953) (There is a “long-standing congressional ‘policy of repose’ that is fundamental to our society and our criminal law”). Repose has four functions: “(a) to allow peace of mind; (b) to avoid disrupting settled expectations; (c) to reduce uncertainty about the future; and (d) to reduce the cost of measures designed to guard against the risk of untimely claims.” Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453, 460 (1997).

line as to when a crime may be prosecuted,¹⁹⁹ decreasing the costs of prosecution,²⁰⁰ encouraging efficiency in criminal investigations,²⁰¹ and limiting the potential for abuse of government power.²⁰²

Time bars provide a fair trial to defendants by “protect[ing] individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time”²⁰³ Evidence degrades over the years—memories erode, witnesses become unavailable, and physical artifacts deteriorate.²⁰⁴ When a defendant is indicted for an offense allegedly committed years ago, not only does he lose access to exculpatory evidence, but prosecutors are also unable to base their case on credible data.²⁰⁵

If the hypothetical Vincent Villain had lived in the Fourth Circuit, then there would be serious concerns over the accuracy of the forty-year-old evidence required to prosecute the case. A trial based on such atrophied evidence would have an increased risk of a false conviction.²⁰⁶ Therefore, the fundamental right to a fair trial supports a narrow application of the continuing offense doctrine.²⁰⁷

Additionally, a narrow interpretation of the continuing offense doctrine is congruent with the congressional policy of repose for individuals and the nation—a policy “that is fundamental to our society and our criminal law.”²⁰⁸ A statute of limitations is the primary

199. Powell, *supra* note 17, at 116.

200. Yair Listokin, *Efficient Time Bars: A New Rationale for the Existence of Statutes of Limitations in Criminal Law*, 31 J. LEGAL STUD. 99, 100-01 (2002).

201. *Toussie v. United States*, 397 U.S. 112, 115 (1970); *Penetrable Barrier*, *supra* note 10, at 633.

202. *United States v. Yashar*, 166 F.3d 873, 878-79 (7th Cir. 1999).

203. *Toussie*, 397 U.S. at 114. See also *Stogner v. California*, 539 U.S. 607, 615 (2003) (“[A] statute of limitations reflects a legislative judgment that, after a certain time, no quantum of evidence is sufficient to convict.”).

204. *Stogner*, 539 U.S. at 615; see also *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 348-49 (1944) (“Statutes of limitation . . . are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.”).

205. Powell, *supra* note 17, at 129.

206. *Id.*

207. See *Id.*; see also *Penetrable Barrier*, *supra* note 10, at 642 (“[T]he effect of the doctrine [of continuing offenses] may be a conflict with the purposes of the statute of limitations since evidence of acts which would ordinarily be barred by the statute are admissible to prove acts which are not so barred.”).

208. *Bridges v. United States*, 346 U.S. 209, 215-16 (1953) (quoting *United States v. Scharton*, 285 U.S. 518, 522 (1932)); *Toussie v. United States*, 397 U.S. 112, 115 (1970) (criminal statutes of limitations are “to be liberally interpreted in favor of repose”). The fact that a statute of limitations exists at all for criminal behavior evidences congressional concern

constraint on the government's ability to punish for aged culpable conduct.²⁰⁹ In effect, when the statute has run, the criminal has been forgiven for his past conduct.²¹⁰ This is a generous act of mercy by the government that provides many benefits to the individual and the country. For example, it encourages societal healing by limiting prosecutions for older crimes.²¹¹

Furthermore, refusing to apply the continuing offense doctrine to embezzlement does not allow criminals to completely evade punishment for their actions. Rather, the temporal reach of the government is merely shortened. In the case of Vincent Villain, a holding that his passive embezzlement had not been a continuing offense would not prevent the government from charging him for his illicit conduct over the past five years—allegations that could result in his incarceration.²¹²

A narrow approach to the continuing offense doctrine creates a brighter line between crimes that are continuing offenses and crimes that are not. Since the *Toussie* test is not fact-based, but is instead based on the language of the criminal statute,²¹³ a narrow approach encourages consistency among courts and prevents courts from having to decide whether particular factual allegations are continuing offenses. Indeed, a fact-based approach for whether conduct is a scheme or not defeats one of the primary goals of statutes of limitations: to “limit[] the need for case-by-case inquiry into the appropriateness of prosecution.”²¹⁴

In addition, a strict construction of the *Toussie* test for continuing offenses places an important check on prosecutorial power.²¹⁵ Prosecutors currently enjoy a significant degree of discretion in the criminal justice system.²¹⁶ For example, prosecutors may decide which crimes to include in an indictment or complaint.²¹⁷ In exercising such discretion, prosecutors subject defendants to their individual biases,

over repose. See 18 U.S.C. § 3282 (2006); see also *Bridges*, 346 U.S. at 215-16.

209. See *Penetrable Barrier*, *supra* note 10, at 630 (“A criminal statute of limitations . . . is an act of grace . . .”).

210. See *id.* at 630 (“Absent such a statute a criminal act may be the basis of a prosecution at any time after its commission.”).

211. Powell, *supra* note 17, at 130.

212. See U.S. SENTENCING GUIDELINES MANUAL §2B1.1 (2010); §5G1.1; §5 Sentencing Table.

213. See *supra* note 136.

214. Powell, *supra* note 17, at 116.

215. *United States v. Yashar*, 166 F.3d 873, 878-79 (7th Cir. 1999).

216. WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 3-5 (2011).

217. ANGELA DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 5 (Oxford University Press 2007).

potentially resulting in similarly situated individuals facing very different criminal charges.²¹⁸ Prosecutors also engage in the process of overcharging defendants with crimes in order to gain an advantage in plea-bargaining.²¹⁹ These practices can lead to the haphazard application of embezzlement law to alleged criminals.²²⁰ To prevent such arbitrary application of criminal law, courts should limit prosecutorial discretion in deciding whether to write an indictment as a continuing offense.

Moreover, as the *Yashar* court reasoned, an expansion of the continuing offense doctrine would cause the running of the statute of limitations to turn on the prosecutor's charging decision.²²¹ If a prosecutor chose to word the indictment as a single crime, it would be a continuing offense and the defendant could be punished for each act of embezzling in the scheme. But, if a prosecutor wrote the indictment in such a way that it listed the individual embezzlements as separate counts, the embezzlements older than five years would be dismissed. As the court noted, "[t]his approach would transform the limitations period from a check on governmental delay in prosecution to a function of prosecutorial discretion."²²² A crime should inherently be a continuing offense—the distinction should not be based on whether a prosecutor words the embezzlement as a single count of an ongoing scheme or separates it into individual acts of embezzlement.

Also, "[a]rtful prosecutors rarely are barred by limitations, even when the critical events occurred in the distant past."²²³ Should courts adopt a narrow application of the continuing offense doctrine, the government would still retain significant abilities to evade a time bar when charging for embezzlement. Instead of charging for the actual embezzlement of the funds, the government could charge for retention or possession of the stolen money, both of which are continuing offenses.²²⁴ It could also charge for the concealment of any stolen property.²²⁵ If the property was embezzled from the Social Security

218. *Id.* at 35.

219. *Id.* at 31.

220. *Id.* at 35.

221. *United States v. Yashar*, 166 F.3d 873, 878-79 (7th Cir. 1999).

222. *Id.*

223. *Chavez*, *supra* note 30, at 2; *see also* DAVIS, *supra* note 217, at 15-17 (expressing concerns over the wide discretion afforded to prosecutors).

224. However, the government would not be able to use the second paragraph of § 641 for this, since that paragraph only applies to a party who did not initially steal the government property. *See United States v. Beard*, 713 F. Supp. 285, 289 (S.D. Ind. 1989).

225. 18 U.S.C. § 3284 (2006); *United States v. Blizzard*, 27 F.3d 100, 103 (4th Cir. 1994) (concealing and retaining stolen property is a continuing offense).

Administration through not revealing information that would cause a cessation of benefits, then the prosecutor could even charge for concealment of information.²²⁶ Therefore, applying the *Toussie* test narrowly would not allow a rogue to completely escape punishment. Rather, it would merely prevent the State from using one of the many criminal charges at its disposal for the theft, decreasing the potential total punishment.

Additionally, Congress could choose to expand the statute of limitations for embezzlement. Since embezzlement inherently involves some measure of deception it would be sensible to give investigators extra time to identify when the crime occurred. Congress could also amend § 641 to specifically indicate that embezzlement is a continuing offense.²²⁷ However, since embezzlement is significantly distinct in nature from other continuing offenses,²²⁸ it would be more appropriate to specifically expand the statute of limitations on embezzlement in general.²²⁹

CONCLUSION

Embezzlement is never a continuing offense, even when executed as a passive, automated scheme. The test for continuing offenses is expressly narrow²³⁰ and should not be lightly expanded into new crimes, as this would directly conflict with the congressional intent of a predictable time bar.²³¹ Furthermore, embezzlement by nature does not share the same characteristics of classic continuing offenses, such as bigamy. In addition, a narrow construction of the continuing offense exception to criminal statutes of limitations accomplishes various beneficial policy goals.

Though there is an understandable desire to ensure that deserving criminals are punished, improperly expanding the continuing offense doctrine beyond the clear instructions of the United States Supreme

226. 42 U.S.C. § 408(a)(4) (2006). *See, e.g.*, *United States v. Morrison*, 43 F.R.D. 516, 519 (N.D. Ill. 1967) (defendant's alleged failure to disclose death of her mother to the Social Security Administration was the continuing offense of concealment).

227. If Congress took this action, it would make the crime a continuing offense under the first prong of the *Toussie* test, since "the explicit language of the substantive criminal statute [would] compel[] such a conclusion . . ." *Toussie v. United States*, 397 U.S. 112, 115 (1970).

228. *See supra* Part III.A-C.

229. Congress has taken this approach for many other crimes. For a comprehensive list of specific crimes which have an expanded statute of limitations *see* Powell, *supra* note 17, at 154.

230. *See supra* Part III.A.

231. *See* 18 U.S.C. § 3282 (2006).

Court and Congress is not an appropriate solution. The *Toussie* test should not be expanded to accomplish retributive goals. Instead, courts should defer to the legislature's decision that the statute of limitations for passive and active embezzlement, as criminalized in 18 U.S.C. § 641, is five years.

*Andrew P. O'Shea**

* J.D., Western New England University, 2013. I am grateful to the *Western New England Law Review* staff, especially Peter Ferony, for the insightful feedback during the production process. And I am deeply thankful for the love and support of my parents, brother, and sister.