

# The Continuing Violations Doctrine

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## I. INTRODUCTION

The potency of the “continuing violations doctrine”<sup>1</sup> was on full display in the recent case of *Bodner v. Banque Paribas*.<sup>2</sup> The plaintiffs in *Bodner* brought suit in the late 1990s to recover property allegedly misappropriated by the Nazis and their accomplices during World War II.<sup>3</sup> The passage of several decades between these seizures and the institution of the plaintiffs’ lawsuit seemed to dictate dismissal of the putative class’ claims pursuant to the applicable statute of limitations. Much to the defendants’ surprise and chagrin, the *Bodner* court determined that if the plaintiffs’ allegations were true, the statute of limitations had not yet even begun to run on their claims.<sup>4</sup> Instead, the defendants’ allegedly ongoing refusal to return the plaintiffs’ property would represent a “continuing violation” of international law that persisted up through the time of suit.<sup>5</sup> The continuing violations doctrine thus breathed new life into claims that otherwise might have accrued and expired more than a half-century earlier.

The basic theory behind the continuing violations doctrine<sup>6</sup> is deceptively easy to explain: In some situations, continuing misconduct by a defendant will justify the aggregation or parsing of its misbehavior, with the effect of rescuing a

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1. The “continuing violations doctrine” is also sometimes referred to as the “continuing wrong doctrine,” e.g., *Comm. of Blind Vendors v. District of Columbia*, Civ. A. No. 88-0412-OG, 1988 WL 129820, at \*3 (D.D.C. Nov. 22, 1988), or, when tort claims are involved, as the “continuing tort doctrine,” e.g., *Syms v. Olin Corp.*, 408 F.3d 95, 108 (2d Cir. 2005). The theory is also frequently termed the “continuing violation doctrine,” sometimes in the same opinions as use the term “continuing violations doctrine.” See, e.g., *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110, 114 (2002) (using both “continuing violation doctrine” and “continuing violations doctrine”). This article uses “continuing violations doctrine,” so as to better emphasize the dual nature of the theory, as discussed at length *infra*.

2. 114 F. Supp. 2d 117, 134-35 (E.D.N.Y. 2000).

3. *Id.* at 121-22.

4. *Id.* at 134-35.

5. See *id.* Perhaps emboldened by the *Bodner* plaintiffs’ successful invocation of the continuing violations doctrine, other plaintiffs bringing suits addressing historic wrongs also have relied, so far unsuccessfully, on the doctrine to rebut anticipated timeliness arguments. See, e.g., *In re African-American Slave Descendants Litig.*, 304 F. Supp. 2d 1027, 1071-72 (N.D. Ill. 2004), *aff’d* 471 F.3d 754 (7th Cir. 2006), *cert. denied sub nom. Farmer-Paellman v. Brown & Williamson Tobacco Corp.*, 128 S. Ct. 92 (2007), and *cert. denied sub nom. Hurdle v. R.J. Reynolds Tobacco Corp.*, 128 S. Ct. 92 (2007).

6. The term “continuing violation” also takes on special meanings in specific contexts. In environmental law, a plaintiff must allege an ongoing or “continuing” violation to have standing to bring a citizen suit under the Clean Water Act, 33 U.S.C. § 1365(a) (2000). See *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 64 (1987). In employment law, the term “continuing violation” has also been applied to the interpretation of a charge filed with the Equal Employment Opportunity Commission (“EEOC”) or an equivalent state agency prior to suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(e)(1) (2000). See *Freeman v. Oakland Unified Sch. Dist.*, 291 F.3d 632, 636, 638-39 (9th Cir. 2002).

plaintiff's claim or claims from the statute of limitations. Yet this seemingly straightforward principle has frustrated judges and litigants for many years,<sup>7</sup> for it has proven exceedingly difficult to determine which claims are "continuing" in nature, and which are not. The United States Supreme Court has stepped in to provide guidance as to specific causes of action, as it did this past term in a Title VII case, *Ledbetter v. Goodyear Tire & Rubber Co.*<sup>8</sup> No such help exists as to other claims, and in these contexts courts have embraced several different, and often conflicting, tests for discerning when wrongs "continue" over time.<sup>9</sup>

This doctrinal confusion<sup>10</sup> has brought about the disparate treatment of similar claims. Contemporary courts have disagreed about whether or how the continuing violations doctrine should apply to claims alleging civil conspiracy,<sup>11</sup> trespass,<sup>12</sup>

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7. More than fifty years ago, a seminal Harvard Law Review article on statutes of limitations discussed the problems associated with "[c]ontinuing or [r]epeated wrongs." Note, *Developments in the Law – Statutes of Limitations*, 63 HARV. L. REV. 1177, 1205-09 (1949-1950) [hereinafter *Developments in the Law*]. Other courts of yesteryear lamented how hard it was to identify certain types of continuing claims. See, e.g., *Rockwell v. Day*, 172 P. 754, 755 (Wash. 1918) (noting a "very marked conflict of authority" over whether the tort of seduction is continuing in nature); *Bd. of Directors of St. Francis Levee Dist. v. Barton*, 123 S.W. 382, 383 (Ark. 1909) (stating, with regard to differentiating between continuing and permanent nuisances and trespasses, "[t]here is perhaps no subject of the law about which there is a greater conflict of judicial opinion than the one concerning the application of the statute of limitations to injuries of this character, and scarcely any class of cases presents such difficulties for the application of settled principles").

8. 127 S. Ct. 2162 (2007).

9. See *infra* notes 66-136 and accompanying text.

10. See, e.g., *Berry v. Bd. of Supervisors of L.S.U.*, 715 F.2d 971, 979 (5th Cir. 1983) ("[T]he precise contours and theoretical bases of [continuing violations] are at best unclear . . ."). The California Supreme Court has discerned that the doctrine "refers not to a single theory, but to a number of different approaches, in different contexts and using a variety of formulations, to extending the statute of limitations . . ." *Richards v. CH2M Hill, Inc.*, 29 P.3d 175, 183 (Cal. 2001); see also *Elliott v. Sperry Rand Corp.*, 79 F.R.D. 580, 585-86 (D. Minn. 1978) (describing the doctrine as "a conglomeration of several different ideas").

11. Compare *White v. Bloom*, 621 F.2d 276, 280-81 (8th Cir. 1980) (determining that a conspiracy to violate civil rights is a continuing violation that accrues for limitations purposes upon the final act in furtherance of the conspiracy), with *Wells v. Rockefeller*, 728 F.2d 209, 216-17 (3rd Cir. 1984) (concluding that each overt act causing damage within a conspiracy gives rise to a separate claim and expressly disagreeing with *White*).

12. Compare *Hoery v. United States*, 64 P.3d 214, 218 (Colo. 2003) (holding that, as a general matter, a new trespass claim arises with each day's continuance of an existing trespass), with *Breiggar Props., L.C. v. H.E. Davis & Sons, Inc.*, 52 P.3d 1133, 1135-36 (Utah 2002) (concluding that a trespass that involves only a single affirmative act by the defendant is not a continuing tort), and *Handley v. Town of Shinnston*, 289 S.E.2d 201, 202 (W.Va. 1982) (determining that the statute of limitations begins to run on a trespass claim only once the trespass ends).

nuisance,<sup>13</sup> and other torts,<sup>14</sup> in addition to suits brought under civil rights,<sup>15</sup> copyright,<sup>16</sup> and environmental laws.<sup>17</sup> In fact, two years after the *Bodner* decision, another federal district court took issue with its reasoning and concluded that the continuing violations doctrine did not salvage World War II-era expropriation claims similar to those alleged by the *Bodner* plaintiffs.<sup>18</sup> This sort of chaos has undermined the repose interests that statutes of limitations try to protect, while offering few countervailing benefits to befuddled plaintiffs.<sup>19</sup>

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13. See *Provident Mut. Life Ins. Co. v. City of Atlanta*, 864 F. Supp. 1274, 1285 (N.D. Ga. 1994) (describing the application of the continuing violations doctrine to nuisance claims as “one of the most baffling areas of the law”); *Schneider Nat’l Carriers, Inc. v. Bates*, 147 S.W.3d 264, 272–73 (Tex. 2004) (“[I]n other jurisdictions there is no consensus as to where the line between permanent and temporary nuisances should be . . . or how it should be applied . . . .”); *City of Tucson v. Apache Motors*, 245 P.2d 255, 257 (Ariz. 1952) (“Much confusion has arisen in the various jurisdictions of the United States as to just what constitutes a permanent nuisance as distinguished from a temporary or continuing nuisance . . . .”).

14. Compare *Davis v. Young*, 16 S.W. 473, 473–74 (Tenn. 1891) (concluding that seduction is a continuing tort), with *Davis v. Boyett*, 48 S.E. 185, 187–88 (Ga. 1904) (concluding that seduction is not a continuing tort).

15. Compare *Moseke v. Miller & Smith, Inc.*, 202 F. Supp. 2d 492, 503–09 (E.D. Va. 2002) (concluding that a Fair Housing Act claim premised on allegations that building’s design disadvantages the handicapped is not a continuing violation), and *Ware v. Union Pacific R.R. Co. Omaha*, 278 F. Supp. 2d 1263, 1267 (D. Kan. 2003) (holding that continuing violation doctrine is categorically inapplicable to claims brought under 42 U.S.C. § 1981), with *E. Paralyzed Veterans Ass’n, Inc. v. Lazarus-Berman Assoc.*, 133 F. Supp. 2d 203, 212–13 (E.D.N.Y. 2001) (determining that a design-defect claim under the Fair Housing Act is a continuing violation), and *Madison v. IBP, Inc.*, 330 F.3d 1051, 1060–61 (8th Cir. 2003) (finding the continuing violations doctrine applicable to claims brought under § 1981).

16. Compare *Taylor v. Meirick*, 712 F.2d 1112, 1119 (7th Cir. 1983) (determining that copyright infringement is a continuing violation as to which the plaintiff can recover for all infringements, provided suit is brought within the limitations period following the final infringing act), with *Stone v. Williams*, 970 F.2d 1043, 1049–50 (2d Cir. 1992) (ruling that copyright infringement is not a continuing violation, and the limitations period runs separately from each infringement).

17. Compare *United States v. Westvaco Corp.*, 144 F. Supp. 2d 439, 444 (D. Md. 2001) (concluding that the failure by the owner of a pulp and paper mill to obtain preconstruction permits, as required by the Clean Air Act, was not a continuing violation), with *United States v. Duke Energy Corp.*, 278 F. Supp. 2d 619, 650–51 (M.D.N.C. 2003) (regarding a failure to obtain preconstruction permits as a continuing violation of federal law), *aff’d*, 411 F.3d 539 (4th Cir. 2005), *vacated and remanded sub nom. Env’tl. Def. v. Duke Energy Corp.*, 127 S. Ct. 1423 (2006).

18. See *Rosner v. United States*, 231 F. Supp. 2d 1202, 1207–08 (S.D. Fla. 2002).

19. This article does not discuss the continuing violations doctrine as it applies to criminal actions, since those proceedings implicate considerations that are quite different from those present in the civil realm. For present purposes, it suffices to say that continuing criminal offenses certainly exist, e.g., *Wright v. Superior Court*, 936 P.2d 101, 105 (Cal. 1997) (holding that a failure to register as a sex offender is a continuing offense), that the leading test rejects application of the doctrine unless “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

It has been intimated that the uncertainty surrounding the continuing violations doctrine owes to a failure to grasp its origins and modern-day contours.<sup>20</sup> This article treats this assertion as true, and tries to dispel at least some of this confusion. Toward this purpose, this article charts the conceptual landscape of this theory and explains how and why the doctrine has been and should be applied.

This analysis begins with the recognition of and distinction between two types of continuing violations. Though frequently confused or conflated, these two approaches are in fact quite different in both purpose and effect. The first sort of continuing violation aggregates multiple allegedly wrongful acts, failures to act, or decisions such that the limitations period begins to run on this collected malfeasance only when the defendant ceases its improper conduct.<sup>21</sup> The second type of continuing violation divides what might otherwise represent a single, time-barred cause of action into several separate claims, at least one of which accrues within the limitations period prior to suit.<sup>22</sup>

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continuing one," *Toussie v. United States*, 397 U.S. 112, 115 (1970), and that differences of opinion exist concerning the applicability of the continuing violations doctrine to certain offenses, *see, e.g., United States v. Blizzard*, 27 F.3d 100, 103 n.7 (4th Cir. 1994) (noting the division of opinion among state courts as to whether receiving and concealing stolen property is a continuing crime).

20. *Berry v. Bd. of Supervisors of L.S.U.*, 715 F.2d 971, 979 n.11 (5th Cir. 1983). On this point, courts disagree as to the origins of continuing-violations law, with some believing that the theory originated in decisions applying Title VII of the Civil Rights Act of 1964, *e.g., Selzer v. Bd. of Educ. of New York*, 113 F.R.D. 165, 170 (S.D.N.Y. 1986), and others espying its origins in tort law, *e.g., Dziura v. United States*, 168 F.3d 581, 583 (1st Cir. 1999). As for the academic literature, the continuing violations doctrine has been discussed at length as it applies to environmental and employment law, but its application in other settings has received very little notice. *See* Thelma A. Crivens, *The Continuing Violation Theory and Systemic Discrimination: In Search of a Judicial Standard for Timely Filing*, 41 VAND. L. REV. 1171 (1988); Charles C. Jackson & John H. Matheson, *The Continuing Violation Theory and the Concept of Jurisdiction in Title VII Suits*, 67 GEO. L.J. 811 (1979); Douglas Laycock, *Continuing Violations, Disparate Impact in Compensation, and Other Title VII Issues*, 49 LAW & CONTEMP. PROBS. 53 (1986); Albert C. Lin, *Application of the Continuing Violations Doctrine to Environmental Law*, 23 ECOLOGY L.Q. 723 (1996); Ramona L. Paetzold & Anne M. O'Leary-Kelly, *Continuing Violations and Hostile Environment Sexual Harassment: When Is Enough, Enough?*, 31 AM. BUS. L.J. 365 (1993); Robert J. Reid, *Confusion in the Sixth Circuit: The Application of the Continuing Violation Doctrine to Employment Discrimination*, 60 U. CIN. L. REV. 1335 (1992); William M. Bonilla, Note, *Continuing Violations in Private Suits Under Title VII of the Civil Rights Act of 1964*, 32 ARK. L. REV. 381 (1978); John Carty, Note, *The Continuing Violation Theory of Title VII After United Air Lines, Inc. v. Evans*, 31 HASTINGS L.J. 929 (1979); Vincent Cheng, Casenote, *National Railroad Passenger Corporation v. Morgan: A Problematic Formulation of the Continuing Violation Theory*, 91 CAL. L. REV. 1417 (2003); Tara-Ann Topputo, Note, *In Opposition to Applying the Continuing Violation Doctrine to Hostile Work Environment Claims: National Railroad Passenger Corp. v. Morgan*, 28 DAYTON L. REV. 449 (2002); Lisa S. Tsai, Note, *Continuing Confusion: The Application of the Continuing Violation Doctrine to Sexual Harassment Law*, 79 TEX. L. REV. 531 (2000); Note, *Continuing Violations of Title VII: A Suggested Approach*, 63 MINN. L. REV. 119 (1978).

21. *See infra* notes 51-59 and accompanying text.

22. *See infra* notes 53-57 and accompanying text.

Review and analysis of the case law applying the continuing violations doctrine yields the insight that the two types of continuing violations address different issues implicated by statutes of limitations. The first form of the doctrine has been invoked for primarily equitable reasons, as in situations where a plaintiff faces an impediment to timely filing not readily addressed by other accrual or tolling rules.<sup>23</sup> The second variation of the continuing violations doctrine promotes the efficient invocation of the judicial process in a variety of ways.<sup>24</sup>

The thesis of this article follows from its recognition of two types of continuing violations and its identification of the possible utilities associated with each branch of the doctrine. The gravamen of a claim and the terms of the pertinent limitations statute often permit, but do not require, application of the continuing violations doctrine. This article proposes that in deciding whether to recognize a continuing violation in these circumstances, courts should consider whether, among the various accrual and tolling rules, a form of the continuing violations doctrine provides the best method of addressing the equitable and efficiency concerns implicated by a statute of limitations defense.

In unfurling its explanation of the continuing violations doctrine, this article proceeds as follows. Section II provides an overview of the various accrual and tolling rules, including the two forms of the continuing violations doctrine, that may affect how a statute of limitations will run on a claim. Section III then examines the justifications that have been given for the continuing violations doctrine and concludes that all of these explanations have little descriptive or predictive utility.

To devise a better approach, Section IV peruses the recurring application of the continuing violations doctrine to various causes of action, including claims alleging false imprisonment, seduction, a hostile work environment, and the negligent or intentional infliction of emotional distress (all of which illustrate the first type of continuing violation); and nuisance, trespass, antitrust, and some civil rights claims (manifesting the second class of continuing violations). Though aberrant decisions appear, this review yields an evident tendency to recognize continuing violations principally in those situations in which the doctrine will advance equitable or efficiency interests to an extent unmatched by other accrual and tolling rules. Section V then discusses the United States Supreme Court's recent decision in *Ledbetter v. Goodyear Tire & Rubber Co.*<sup>25</sup> By a narrow majority, the *Ledbetter* Court ruled that a discriminatory-pay claim brought by a Title VII plaintiff was not a continuing violation. A review of the majority opinion and dissent reveals that the outcome in *Ledbetter* comports with the general principles regarding continuing violations set forth in this article. Finally, Section VI draws from *Ledbetter* in offering a few concluding remarks.

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23. See *infra* Part IV.A.

24. See *infra* Part IV.B.

25. *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007).

## II. ACCRUAL AND TOLLING RULES

The continuing violations doctrine offers just two of the several accrual and tolling rules that may apply to a claim.<sup>26</sup> Deciding which of these rules best applies to a particular set of circumstances implicates a complex brew of policy and practical considerations. Several potent arguments exist for starting the limitations clock relatively early and allowing the limitations period to run its course with little to no interruption. Advocates of the strict enforcement of limitations rules assert that this approach delivers deserved repose to potential defendants,<sup>27</sup> promotes the prompt enforcement of the substantive law,<sup>28</sup> conserves judicial resources and the time and money of actual and prospective litigants,<sup>29</sup> and enhances the reliability of the results reached in court.<sup>30</sup> Conversely, the desire to ensure that plaintiffs receive a fair opportunity to present their claims in court may argue in favor of loosened limitations rules,<sup>31</sup> particularly in situations where the countervailing repose, resource conservation, and reliability interests are weak.

These considerations can and should influence the terms and judicial interpretation of both limitations statutes and the claims to which these statutes apply. Legislatures sometimes write clear and specific accrual and tolling rules into the law, or define a claim in a way that leaves no doubt as to when the applicable limitations period starts to run on a plaintiff's cause of action.<sup>32</sup> More often, the gravamen of a claim and the language of the pertinent limitations statute do not yield indisputable accrual and tolling guidelines.<sup>33</sup> It is in these circumstances that courts must choose among the available limitations principles, determining which of these rules best balances the interests at stake.

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26. Courts do not agree about whether the continuing violations doctrine is an accrual or a tolling rule. Compare *Heard v. Sheahan*, 253 F.3d 316, 319 (7th Cir. 2001) (describing the doctrine as an accrual rule), with *Achee v. Port Drum Co.*, 197 F. Supp. 2d 723, 735 (E.D. Texas 2002) (describing the doctrine as a tolling rule). Though the disagreement on this point is in some respects merely semantic, to the extent that it matters, the author takes the position that the former view is the better founded.

27. *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945); Charles C. Callahan, *Statutes of Limitation – Background*, 16 OHIO ST. L.J. 130, 136-37 (1955); Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453, 460-69 (1997).

28. Ochoa & Wistrich, *supra* note 27, at 492-93.

29. *Id.* at 480-81, 495-96.

30. *Bd. of Regents v. Tomanio*, 446 U.S. 478, 487 (1980); Ochoa & Wistrich, *supra* note 27, at 471; Harry B. Littell, *A Comparison of the Statutes of Limitations*, 21 IND. L.J. 23, 23-24 (1945-1946).

31. Ochoa & Wistrich, *supra* note 27, at 500-06.

32. See 51 AM. JUR. 2D *Limitation of Actions* § 171 (2000) (discussing the exceptions to standard accrual rules that may be found within limitations statutes).

33. See *infra* Parts IV.A.4, IV.B.2.

The first of these rules provides that the statute of limitations starts to run upon a claim (*i.e.*, the claim “accrues” for limitations purposes) as soon as its essential elements are in place such that a plaintiff has a viable cause of action.<sup>34</sup> This “traditional” approach<sup>35</sup> can produce several harsh results. This rule makes no accommodation for parties who remain blamelessly ignorant of their claims for some time after they accrue. It also offers no help to plaintiffs who are aware of their claims at the moment they accrue, but are prevented from bringing suit at that time due to forces beyond their control.<sup>36</sup> Finally, the rule fails to account for efforts to resolve the dispute through extrajudicial means, or other reasons why the limitations clock arguably should be stopped for a while.<sup>37</sup>

The “discovery rule” addresses the first of these concerns—the plaintiff who remains excusably ignorant of a claim—while equitable tolling deals principally with the latter two problems. When the discovery rule applies, the statute of limitations on a claim begins to run only when the plaintiff knew or should have known of the essential facts underlying the cause of action.<sup>38</sup> Tolling, meanwhile, may apply in situations in which fairness or policy considerations dictate a temporary postponement or cessation of the running of the limitations period.<sup>39</sup> For example, grounds for tolling may exist when the plaintiff suffers from a practical or legal disability that prevents him or her from bringing suit,<sup>40</sup> while a

34. *Norgart v. Upjohn Co.*, 981 P.2d 79, 88 (Cal. 1999); RESTATEMENT (SECOND) OF TORTS § 899 cmt. c (1979); 51 AM. JUR. 2D *Limitation of Actions* § 147 (2000); 54 C.J.S. *Limitations of Actions* § 110 (2005).

35. The limitations periods announced in the Limitations Act of 1623, regarded as the first modern limitations statute, commenced at the end of the ongoing session of Parliament or “after the cause of such actions or suit.” An Act for Limitations of Actions, and for Avoiding of Suits in Law, 21 JAC. I, ch. 16, § 3 (1623) [hereinafter *Limitations Act of 1623*], reprinted in 2 H.G. WOOD, A TREATISE ON THE LIMITATIONS OF ACTIONS OF LAW OR IN EQUITY 964 (2d ed. 1893), available at <http://books.google.com/books?id=Rg09AAAAIAAJ>.

36. *TRW Inc. v. Andrews*, 534 U.S. 19, 37 (2001) (Scalia, J., concurring) (describing the “traditional” rule and its implications).

37. *Cf.*, e.g., 15 U.S.C. § 16(i) (2000) (tolling the statute of limitations applicable to private antitrust claims while civil or criminal proceedings brought by the United States government are pending).

38. See *United States v. Kubrick*, 444 U.S. 111, 122-23 (1979); *Norgart*, 981 P.2d at 88; STUART M. SPEISER, CHARLES F. KRAUSE & ALFRED W. GANS, THE AMERICAN LAW OF TORTS § 5:27 (2003) (discussing judicial development of the discovery rule).

39. *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 151 (1984) (discussing circumstances justifying equitable tolling); *Taliani v. Chrans*, 189 F.3d 597, 597 (7th Cir. 1999) (describing equitable tolling as “the judge-made doctrine, well established in federal common law, that excuses a timely filing when the plaintiff could not, despite the exercise of reasonable diligence, have discovered all the information he needed in order to be able to file his claim on time”); 51 AM. JUR. 2D *Limitation of Actions* §§ 174–178 (2000); 54 C.J.S. *Limitations of Actions* § 115 (2005).

40. *E.g.*, *Hilao v. Estate of Marcos*, 103 F.3d 767, 773 (9th Cir. 1996); *Wolin v. Smith Barney Inc.*, 83 F.3d 847, 852 (7th Cir. 1996).



plaintiff pursues a different remedy against the defendant,<sup>41</sup> or when the defendant uses fraud to dissuade a plaintiff from going to court (the last situation commonly being known as “equitable estoppel”).<sup>42</sup>

The continuing violations doctrine offers two other methods of addressing some of the difficulties attendant to the traditional limitations rule. To the extent that it implies a single, uniform approach toward limitations problems, the phrase “continuing violations doctrine”<sup>43</sup> is a misnomer and the source of much confusion. Though this critical point is often overlooked by courts and commentators,<sup>44</sup> the “doctrine” encompasses two distinct approaches.<sup>45</sup> In both of its forms, the continuing violations doctrine achieves results somewhat similar to those brought about by the discovery rule and equitable tolling,<sup>46</sup> to wit, the rescue of an otherwise time-barred claim or claims.<sup>47</sup> But while both the discovery rule and equitable tolling simply manipulate when the statute of limitations begins or

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41. See, e.g., *Miller v. Runyon*, 77 F.3d 189, 191 (7th Cir. 1996); *Addison v. State*, 578 P.2d 941, 943 (Cal. 1978).

42. E.g., *Bontkowski v. Smith*, 305 F.3d 757, 762 (7th Cir. 2002); *Chapple v. Nat’l Starch and Chem. Co. & Oil*, 178 F.3d 501, 506–07 (7th Cir. 1999).

43. See *supra* notes 10-17 and accompanying text.

44. Compare 51 AM. JUR. 2D *Limitation of Actions* § 168 (2000) (“Under the continuing tort doctrine, while the statute of limitations is tolled by a continuing tortious act, recovery may be had for all damages accruing within the statutory period before the action, but not for damages accrued prior to the period.”), with 54 C.J.S. *Limitations of Actions* § 194 (2005) (“The ‘continuing tort doctrine’ provides that, in certain tort causes involving continuous or repeated injuries, the statute of limitations accrues upon the date of the last injury and that the plaintiff may recover for the entire period of the defendant’s negligence, provided that an act contributing to the claim occurs within the filing period.”).

45. E.g., *Laycock*, *supra* note 20, at 55-56.

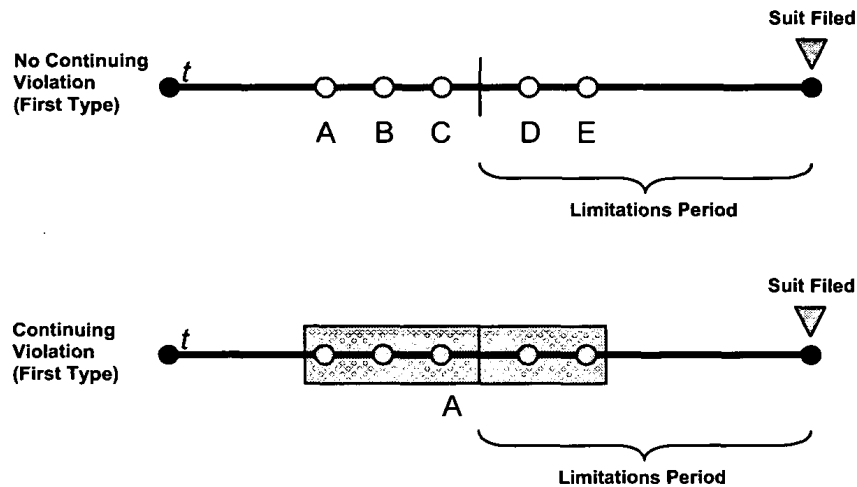
46. That these alternative rules serve vaguely similar ends is no secret. One court has said that the continuing violations doctrine is “allied with the discovery rule,” *Beard v. Edmondson & Gallagher*, 790 A.2d 541, 548 (D.C. 2002), while another has described the doctrine as an “equitable exception” to the traditional limitations rule, *Waltman v. Int’l Paper Co.*, 875 F.2d 468, 474 (5th Cir. 1989). Several other opinions have justified the continuing violations doctrine on grounds similar to those invoked on behalf of the discovery rule. See, e.g., *Martin v. Nannie & Newborns, Inc.*, 3 F.3d 1410, 1415 n.6 (10th Cir. 1993) (“The continuing violation doctrine is premised on the equitable notion that the statute of limitations should not begin to run until a reasonable person would be aware that his or her rights have been violated.”).

47. Neither the discovery rule nor the continuing violations doctrine (in either form) is invariably a more forgiving approach insofar as plaintiffs are concerned. If the defendant’s last wrongful act occurred long ago, the discovery rule may represent the only way that the plaintiff can recover for all of the defendant’s misconduct. However, if a plaintiff learns of his or her injury but then continues to place himself or herself in harm’s way, the discovery rule sometimes bars recovery for any aggravation of the injury as may have occurred after the plaintiff obtained notice of the general nature of the harm. E.g., *Mounts v. Grand Trunk Western R.R.*, 198 F.3d 578, 581 (6th Cir. 2000); *White v. Mercury Marine, Div. of Brunswick, Inc.*, 129 F.3d 1428, 1430-31 (11th Cir. 1997); *Fries v. Chicago & Nw. Transp. Co.*, 909 F.2d 1092, 1095-96 (7th Cir. 1990).

continues to run on a cause of action, the continuing violations doctrine takes the more drastic step of redefining the very claim or claims as to which the limitations period or periods apply.

The first type of continuing violation takes a series of related and assertedly wrongful acts, decisions, or failures to act (each of which may or may not be sufficient on its own to form the basis for a separate claim) occurring both within and outside of the limitations period prior to suit, and aggregates them into a single unit for limitations purposes.<sup>48</sup> Figure 1, below, illustrates how this sort of continuing violation combines otherwise discrete occurrences A through E, of which only D and E occurred within the limitations period, into a single, timely claim A.

Figure 1: The Effect of the Continuing Violations Doctrine (First Type)



This first branch of the doctrine permits a plaintiff to recover for wrongdoing transpiring outside of the limitations period, which is saved from the limitations bar because of its connection to more recent misconduct.<sup>49</sup> If this form of the continuing violations doctrine applies, the limitations period on a claim does not necessarily begin to run as soon as its essential elements first fall into place, or when the plaintiff becomes aware that he or she has the makings of a valid cause of action. Instead, a claim subject to this approach will continue to build and absorb

48. *Miller v. Beneficial Mgmt. Corp.*, 977 F.2d 834, 843-44 (3d Cir. 1992) (“[I]f the alleged discriminatory conduct is a ‘continuing violation,’ the statute of limitations begins to run on the date of the last occurrence of discrimination, rather than the first.”).

49. *See O’Rourke v. City of Providence*, 235 F.3d 713, 730 (1st Cir. 2001).

new wrongful acts for so long as the defendant perpetuates its misconduct. The statute of limitations will start to run upon the entirety of this accumulated malfeasance only when the defendant's misbehavior draws to a close.<sup>50</sup>

Hostile work environment claims brought under Title VII of the Civil Rights Act of 1964 offer the paradigmatic example of this type of continuing violation.<sup>51</sup> A plaintiff alleging a single hostile work environment can recover for all injurious manifestations of that environment, regardless of when they occurred, whether they would be actionable if sued upon individually, and when the plaintiff discovered the essential facts supporting his or her claim, provided that the same hostile environment persisted up into the limitations period prior to the filing of an administrative charge.<sup>52</sup>

The second type of continuing violation dissects misbehavior, instead of aggregating it. This branch of the continuing violations doctrine regards the perpetuation of, or (in some cases) failure to redress prior misconduct as wrongful and actionable in its own right, giving rise to a series of separate and fresh claims accruing within the limitations period on a day-by-day, act-by-act, or similarly parsed basis.<sup>53</sup> This type of continuing violation occupies the conceptual gray area between misconduct recognized as giving rise to multiple related but independent claims even without application of the continuing violations doctrine (such as a series of assaults) and activity that may comprise multiple acts or omissions, but which is understood as producing only a single claim. Figure 2 demonstrates how this type of continuing violation transforms what would otherwise represent a single, time-barred claim A into a series of fresh claims, identified as claims B, C, D, *etc.*, in the illustration below.

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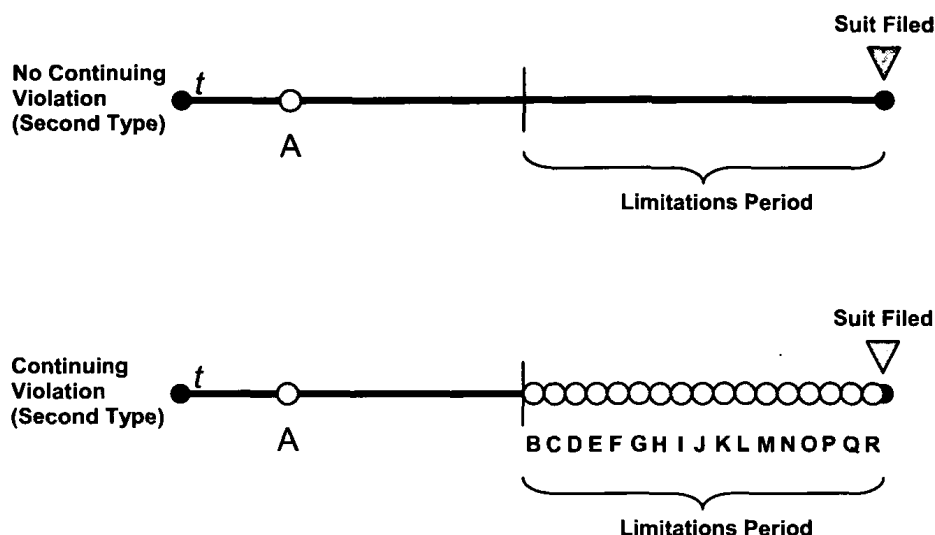
50. *See id.*

51. *See id.* at 727 (“[T]here is a natural affinity between the hostile work environment theory and the continuing violation doctrine.”).

52. *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 117 (2002). Under Title VII, a charge of discrimination must be filed with an appropriate administrative agency within either 180 or 300 days of the claimed discrimination, depending on the state. 42 U.S.C. § 2000e-5(e)(1) (2000).

53. *See, e.g., Heard v. Sheahan*, 253 F.3d 316, 318 (7th Cir. 2001) (“a series of wrongful acts creates a series of claims”); *Rapf v. Suffolk County*, 755 F.2d 282, 292 (2d Cir. 1985) (discussing how a continuing nuisance consists of a series of claims, accruing on a day-by-day basis).

Figure 2: The Effect of the Continuing Violations Doctrine (Second Type)



If the second form of continuing violation exists, a plaintiff may identify as independently wrongful, and then sue and recover upon, what might otherwise represent the mere consequences or effects of misconduct occurring long ago, as to which any claim would be time-barred.<sup>54</sup> Continuing nuisances offer an example of this kind of continuing violation.<sup>55</sup> A plaintiff who attacks a continuing nuisance may recover damages attributable to the maintenance of the nuisance within the limitations period prior to suit—even if this conduct is essentially passive, *i.e.*, a failure to correct or mitigate a nuisance initiated outside the limitations period.<sup>56</sup> This same plaintiff, however, cannot recover for other harms that may also have been caused by the same nuisance, but which the plaintiff suffered outside of the limitations period.<sup>57</sup> Unlike the first form of the continuing violations doctrine, the second branch of the theory does not permit a plaintiff to reach back that far.

54. Actually *acknowledging* that anything is a mere consequence or effect is like touching the third rail of continuing violations law. Today, virtually by definition, behavior recognized as a “consequence” or “effect” cannot support a claim. *Delaware State Coll. v. Ricks*, 449 U.S. 250, 257–58 (1980); *Knox v. Davis*, 260 F.3d 1009, 1013–14 (9th Cir. 2001) (discussing the distinction between the acts comprising a claim and activity representing a mere consequence or effect of a claim).

55. 54 C.J.S. *Limitations of Actions* § 205 (2005).

56. *Rapf*, 755 F.2d at 292; *Russo Farms, Inc. v. Vineland Bd. of Educ.*, 675 A.2d 1077, 1084 (N.J. 1996).

57. *Provident Mut. Life Ins. Co. of Philadelphia v. City of Atlanta*, 864 F. Supp. 1274, 1285 (N.D. Ga. 1994); 2 H.G. WOOD, *A TREATISE ON THE LIMITATIONS OF ACTIONS AT LAW AND IN EQUITY* § 187d(6) (4th ed. 1916).

To summarize, the first type of continuing violation *aggregates* wrongs to permit recovery for harm suffered *outside* of the limitations period prior to suit. The second type of continuing violation *divides* causes of action to create new claims and allow recovery for harms suffered *within* the limitations period. One of the few courts to have recognized that two types of continuing violations exist has labeled the first kind of continuing claim a “pure” continuing violation and the second the “modified” form of the doctrine.<sup>58</sup> For want of any better names, this article adopts these terms in the text that follows.

So, which of these various accrual and tolling rules *should* apply to a given claim? The remainder of this article tries to answer this question. To adumbrate what is to follow, while existing methodologies fail to accurately or appropriately distinguish between continuing violations and other types of claims, a review of situations in which the continuing violations doctrine has and has not been applied suggests that the proper response depends on how one answers two additional questions. First, which among the range of accrual and tolling rules comports with—or is at least not fundamentally inconsistent with—the recognized gravamen of the claim at hand and the language of the operative limitations statute?<sup>59</sup> Second, of this subset of suitable approaches, which rule maximizes the equities and efficiencies associated with the fair and prudent application of statutes of limitations? The response to the first question will winnow down the range of appropriate rules, for the nature of some claims and the terms of certain statutes of limitations will either require or forbid application of the continuing violations doctrine. However, the line separating continuing violations from other offenses is sometimes quite blurry, meaning that the continuing violations doctrine presents a viable option in many cases. In this subset of scenarios, the task remains to identify those situations in which application of the doctrine makes sense in light of the purposes served by limitations statutes and the other interests involved in the case at hand.

### III. WHAT IS A CONTINUING VIOLATION?

Courts have failed to develop a coherent test for distinguishing continuing violations from claims governed by other accrual and tolling rules.<sup>60</sup> Without exception, the methodologies that have been produced offer little help to judges and litigants. These prevailing approaches are framed in vague and generic terms,<sup>61</sup>

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58. *White v. Mercury Marine, Div. of Brunswick, Inc.*, 129 F.3d 1428, 1430 (11th Cir. 1997).

59. *See Hensler v. City of Glendale*, 876 P.2d 1043, 1057 (Cal. 1994) (“To determine the statute of limitations which applies to a cause of action it is necessary to identify the nature of the cause of action, i.e., the ‘gravamen’ of the cause of action.”).

60. *See infra* notes 66-135 and accompanying text.

61. *See, e.g., Schrader v. Tomlinson*, 311 F. Supp. 2d 21, 27 (D.D.C. 2004) (“[a] continuing

often fail to identify themselves as tests of limited or general applicability,<sup>62</sup> typically overlook the fact that there are two types of continuing violations,<sup>63</sup> and universally cannot be squared with how courts actually apply either branch of the doctrine.<sup>64</sup>

In order to grasp both the confusion that envelops the continuing violations doctrine and the possible paths out of this morass, it is important to examine these explanations of the doctrine, if only to grasp their limitations.<sup>65</sup> These frameworks can be divided into two groups. First are those approaches that dwell upon characteristics of the arguably continuing claims—*i.e.*, whether they involve repeated unlawful acts, cumulative injuries, or other attributes supposedly manifesting a continuing nature. Second are the standards that focus on whether treating a claim as continuing would advance or retard policy goals associated with statutes of limitations.

### A. *Related Unlawful Acts*

One simple methodology recognizes a continuing violation when a plaintiff alleges a series of “continual unlawful acts” that extends into the limitations period prior to suit.<sup>66</sup>

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violation exists “where the discriminatory practice is continuing in nature”) (quoting *Gary v. Washington Metro. Area Transit Auth.*, 886 F. Supp. 78, 89 (D.D.C. 1995)).

62. Such limitations may be implicit, but have been ignored by subsequent courts that freely draw continuing violations jurisprudence from numerous different contexts. *See, e.g.*, *Superior-FCR Landfill, Inc. v. County of Wright*, 59 F. Supp. 2d 929, 936 (D. Minn. 1999) (relying on discussions of the continuing violations doctrine in connection with claims brought under various federal laws and for common-law fraud in holding that the plaintiff failed to allege a continuing violation of the dormant commerce clause).

63. Decisions that tether the existence of a continuing violation to whether a plaintiff has alleged a “cumulative” harm, for example, implicate only the pure form of the doctrine, and these opinions typically do not even mention the existence of another branch of the theory. *See infra* notes 83–84 and accompanying text.

64. As will be discussed in the ensuing text, existing methodologies are invariably either over-inclusive, under-inclusive, or both, capturing claims that are not continuing violations and omitting others that are.

65. The discussion below focuses on the approaches most often invoked by courts. Other methodologies also appear from time to time. For example, the South Dakota Supreme Court has posited that “[a] continuing tort occurs when all elements of the tort continue.” *Holland v. City of Geddes*, 610 N.W.2d 816, 819 (S.D. 2000).

66. *Ward v. Caulk*, 650 F.2d 1144, 1147 (9th Cir. 1981); *see also Nat’l Adver. Co. v. City of Raleigh*, 947 F.2d 1158, 1166 (4th Cir. 1991); *Perez v. Laredo Junior Coll.*, 706 F.2d 731, 733–34 (5th Cir. 1983); *cf. S.E.C. v. Caserta*, 75 F. Supp. 2d 79, 89 (E.D.N.Y. 1999) (noting that a continuing violation exists “when a violation occurring outside the limitations period is so closely related to other violations which are not time-barred as to be viewed as part of a continuing practice for which recovery should be had for all violations”); *Day v. Moscow*, 769 F. Supp. 472, 477 (S.D.N.Y. 1991) (“In order to show a continuing violation, [a] plaintiff must show ‘a series of related acts, one or more

A threshold problem with this approach is that not all continuing violations in fact require multiple “acts.” In some situations, a single act of misconduct may produce a continuing duty to ameliorate the resulting state of affairs. One who falsely imprisons another has an ongoing duty to release the captive.<sup>67</sup> With a continuing nuisance, there may be a perpetual responsibility to fix the offensive condition.<sup>68</sup> An employer may have to fire a harassing employee, or face continued liability for the hostile work environment his mere presence creates.<sup>69</sup> In each of these contexts, a defendant’s failure to take affirmative steps to improve a bad situation of his or her own making may prolong a claim or give rise to new ones. Given that apparent *inaction* in these contexts will produce a continuing claim, to the extent that it seems to require multiple affirmative acts, the “continual unlawful acts” test comes across as quite under-inclusive. If, on the other hand, mere inactivity invariably satisfies the “continual unlawful acts” test, every unremedied violation of the law could be cast as a continuing violation.<sup>70</sup> Clearly, the correct approach lies somewhere between these two extremes. The “continual unlawful acts” standard, however, fails to elucidate which acts or omissions will produce a continuing claim, and which misbehavior will not have this effect.

This formulation of the continuing violations doctrine also leaves other key points unexplained. For example, this approach does not specify what will amount to “unlawful” conduct. The procedure for identifying “unlawful” behavior involves two sequential inquiries. Courts first ascertain the essential thrust of a claim, and then they determine which (if any) of the acts or events encompassed within the plaintiff’s allegations comprises the offense. Reasonable minds may disagree as to both of these points, and thus as to whether and when a given claim “continues” under the “continual unlawful acts” approach. For example, some jurisdictions hold that a trespass claim challenges only the initial placement of an invasive object on the lands of another.<sup>71</sup> Other courts disagree and treat an ongoing failure to

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of which falls within the limitations period.” (quoting *La Beach v. Nestle Co.*, 658 F. Supp. 676, 687 (S.D.N.Y. 1987)); 51 AM. JUR. 2d *Limitation of Actions* § 168 (2000) (“[T]he ‘continuous tort’ rule . . . holds that if a wrongful act is continuous or repeated, the statute of limitations runs from the date of each wrong or from the end of the continuing wrongful conduct.”). Though few decisions make this point clear, this definition of a continuing violation is non-tautological only to the extent that it implicates the pure form of the doctrine. Insofar as the modified branch of the doctrine is concerned, one would anticipate that activities already classified as separate violations of the law would have their own limitations periods.

67. See RESTATEMENT (SECOND) OF TORTS § 45 (1965).

68. See *Rapf v. Suffolk County*, 755 F.2d 282, 292 (2d Cir. 1985); *Russo Farms, Inc. v. Vineland Bd. of Educ.*, 675 A.2d 1077, 1084 (N.J. 1996).

69. See *Ellison v. Brady*, 924 F.2d 872, 881–82 (9th Cir. 1991).

70. *Fitzgerald v. Seamans*, 553 F.2d 220, 230 (D.C. Cir. 1977) (“The mere failure to right a wrong and make plaintiff whole cannot be a continuing wrong which tolls the statute of limitations.”).

71. *E.g., Breiggar Props., L.C. v. H.E. Davis & Sons, Inc.*, 52 P.3d 1133, 1135–36 (Utah 2002).

remove a trespassory object as itself a type of trespass.<sup>72</sup> On its own, an approach that looks to “continual unlawful acts” as the basis for a continuing violation offers no means of resolving this sort of impasse over what is “unlawful” and what is merely a consequence of actionable misconduct. Courts are left to define “unlawful” conduct as best they can, but “[d]rawing the line between something that amounts to a ‘fresh [unlawful] act’ each day and something that is merely a lingering effect of an earlier, distinct[] violation is not always easy.”<sup>73</sup>

Moreover, the “continual unlawful acts” approach fails to delineate the circumstances in which even admittedly unlawful acts within the limitations period will rescue earlier, otherwise time-barred claims. A close factual relationship is not necessarily enough. If A strikes B, his neighbor, on the nose every day for a year, most courts would hold that B has 365 separate battery claims, each with its own limitations period, instead of one claim, encompassing all of the blows, which accrues for limitations purposes only when the last punch connects.<sup>74</sup> These claims will be regarded as distinct even if A had precisely the same motive each time he hit B, struck B in exactly the same manner each time, caused similar injuries with each blow, and hit him at the same time each day. Something more is needed to connect these claims, and an approach solely focused on “continual unlawful acts,” by itself, doesn’t explain what that something is.

### B. Hybrid Act / Injury Approaches

A second set of methodologies requires continuing wrongful acts *and* continuing injuries for the continuing violations doctrine to apply.<sup>75</sup> One test, applied in some civil rights cases, provides that for a modified continuing violation to exist: (1) the defendant’s wrongful conduct must continue after the precipitating event that began the pattern of misbehavior; (2) injury to the plaintiff must accrue after that event; and (3) further injury to the plaintiff must have been avoidable if the defendant had at any time ceased his or her wrongful conduct.<sup>76</sup> Likewise, in antitrust law, a modified continuing violation arises when the defendant commits a “new and independent act that is not merely a reaffirmation of a previous act,”

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72. *E.g.*, *Hoery v. United States*, 64 P.3d 214, 218–20 (Colo. 2003).

73. *Pitts v. City of Kankakee*, 267 F.3d 592, 595 (7th Cir. 2001); *see also* *Dixon v. Anderson*, 928 F.2d 212, 216 (6th Cir. 1991) (“The distinction between continuing effects and continually recurring violations can be subtle.”).

74. *See* *Seaton v. Seaton*, 971 F. Supp. 1188, 1195 (E.D. Tenn. 1997) (holding that repeated assaults by a spouse are not a continuing tort).

75. *See, e.g.*, *Kuhnle Bros., Inc. v. County of Geauga*, 103 F.3d 516, 521 (6th Cir. 1997); *Baker v. F & F Inv. Co.*, 489 F.2d 829, 836 (7th Cir. 1973).

76. *Kuhnle Bros., Inc.*, 103 F.3d at 522.



provided that the new act “inflict[s] new and accumulating injury on the plaintiff.”<sup>77</sup>

These approaches do not solve the problems that afflict the “continual unlawful acts” definition of a continuing violation. Methodologies that tie a continuing violation to continuing wrongful behavior and evolving injuries still offer little guidance regarding the types of misbehavior that will represent continuous malfeasance. That such behavior must be continually “injurious” does not clarify the issue.<sup>78</sup> Instead, the additional “accruing injuries” element merely forces courts to engage in the conceptually slippery chore of tethering the plaintiff’s injuries to specific decisions, acts, or failures to act by the defendant.

In practice, courts purporting to look for continuing injuries often simplify this task by linking accrual to when the plaintiff had notice of the full parameters of his or her claimed injury.<sup>79</sup> As a test for ascertaining the existence of a continuing violation, this approach leaves something to be desired. While the continuing violations doctrine may dovetail in some respects with the discovery rule, the two methodologies are not identical. When courts tether the doctrine to the plaintiff’s awareness of a claim, they ignore a core differentiating element of this theory, namely, that some claims “continue” even after the plaintiff becomes aware of the essential facts behind the grievance. Simultaneously, to the extent that this approach implies that a plaintiff who is unaware of the nature and extent of his or her injury *does* allege a continuing violation, it conflicts with the black-letter principle that so long as a plaintiff has suffered and realized *some* injury caused by the defendant, he or she need not appreciate the full parameters of the harm for the limitations clock to start running on the claim.<sup>80</sup> A battery claim does not

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77. *Varner v. Peterson Farms*, 371 F.3d 1011, 1019 (8th Cir. 2004); *see also* *DXS, Inc. v. Siemens Med. Sys., Inc.*, 100 F.3d 462, 467-68 (6th Cir. 1996).

78. Recognition of injuries as “continuing” depends on several ill-defined factors, including the level of abstraction at which the court characterizes the injury at issue. To illustrate this point, a claim that alleges a gradual worsening of hearing may be styled as one for “hearing loss” generally, or the court may treat each aggravation of the hearing loss as a separate injury. If the former, absent application of the pure form of the continuing violations doctrine, the statute of limitations will run on the plaintiff’s claim at a relatively early juncture. If the latter, the claim may be treated as a modified continuing violation. *Compare* *White v. Mercury Marine, Div. of Brunswick, Inc.*, 129 F.3d 1428, 1435 (11th Cir. 1997) (applying the discovery rule to find time-barred a plaintiff’s claim for gradually worsening hearing loss), *with* *Mix v. Delaware & Hudson Ry. Co.*, 345 F.3d 82, 88-91 (2d Cir. 2003) (allowing a plaintiff to recover for incremental hearing loss, provided certain conditions are satisfied).

79. *E.g.*, *Varner v. Peterson Farms*, 371 F.3d 1011, 1020 (8th Cir. 2004).

80. *See* *Highland Indus. Park, Inc. v. BEI Def. Sys. Co.*, 357 F.3d 794, 797 (8th Cir. 2004) (“[W]e know of no state whatever in which an injured party must know the full extent of the damages that it may recover before the statute of limitations begins to run on its claim.”); *WOOD*, *supra* note 57, § 179 (“[i]n actions from injuries resulting from the negligence or unskillfulness of another, the statute [of limitations] attaches and begins to run from the time when the injury was first inflicted, and not from the time when the full extent of the damages sustained has been ascertained”). *But see* 54 C.J.S. *Limitation of Actions* § 204 (2005) (“Where a continuing tort causes a single,

“continue” simply because additional injuries manifest themselves years after a blow is struck,<sup>81</sup> why should other claims be treated any differently? The “continuing injuries” framework does not provide a convincing answer to this question.

### C. Cumulative Wrongs

A third approach recognizes a pure continuing violation in situations in which “no single incident in a continuous chain of tortious activity can ‘fairly or realistically be identified as the cause of significant harm,’”<sup>82</sup> such that the plaintiff’s “cause of action arises not from individually identifiable wrongs but rather from a series of acts considered collectively.”<sup>83</sup>

Like the continuing act/continuing injury framework just discussed, this methodology implicates the tricky matter of assigning injuries to specific acts. The other weaknesses of this approach can be viewed through the lens of one of the lead cases applying this standard, the decision by the United States Court of Appeals for the District of Columbia Circuit in *Page v. United States*.<sup>84</sup>

The plaintiff in *Page* alleged that the government had been prescribing drugs to him in a negligent manner for many years.<sup>85</sup> The *Page* court treated it as a given that the plaintiff could sue for harm attributable to drug administrations occurring within the limitations period prior to suit.<sup>86</sup> After some discussion, it also found timely the plaintiff’s challenge to the entire eight-year regimen that was administered after an earlier, unsuccessful suit.<sup>87</sup> The court based the latter conclusion on its view that:

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indivisible injury, the cause of action accrues at, and limitations begin to run from, the time when the nature and extent of the damage are ascertainable, which may be at the inception of the tort or not until the last date of the tortious conduct.”).

81. See *Glover v. Palmer*, 129 S.W.3d 498, 500 (Mo. Ct. App. 2004); *Kang v. Kang*, 11 P.3d 218, 219 (Okla. Civ. App. 2000).

82. *Page v. United States*, 729 F.2d 818, 821–22 (D.C. Cir. 1984) (quoting *Fowkes v. Pennsylvania R.R. Co.*, 264 F.2d 397, 399 (3d Cir. 1959)).

83. *Rodrique v. Olin Employees Credit Union*, 406 F.3d 434, 442 (7th Cir. 2005); see also *Flowers v. Carville*, 310 F.3d 1118, 1126 (9th Cir. 2002); *Landman v. Royster*, 354 F. Supp. 1302, 1315 (E.D. Va. 1973); *Bustamento v. Tucker*, 607 So. 2d 532, 542 (La. 1992) (“[W]hen the acts or conduct are continuous on an almost daily basis, by the same actor, of the same nature, and the conduct becomes tortious and actionable because of its continuous, cumulative, synergistic nature, then prescription does not commence until the last act occurs or the conduct is abated.”).

84. *Page*, 729 F.2d at 821–23.

85. *Id.* at 819.

86. *Id.* at 821.

87. *Id.* at 823.

[T]he injury claimed by [the plaintiff is] gradual, resulting from the cumulative impact of years of allegedly tortious drug treatment. To us it seems unrealistic to regard each prescription of drugs as the cause of a separate injury, or as a separate tortious act triggering a new limitation period. [The plaintiff] charges precisely the sort of continuous conduct accreting physical and mental injury that justifies characterization as a continuing tort.<sup>88</sup>

The *Page* court added that the plaintiff's

awareness [eight years before the regimen ended] of his addiction and the attendant harm does not defeat application of the continuing-tort doctrine since its very purpose would be to deny [the government] an open-ended license to continue the drug program that assertedly caused and maintained [the plaintiff's] addiction.<sup>89</sup>

The *Page* court thus advanced at least two rationales for treating the plaintiff's "cumulative" claim as a pure continuing violation. The first argument implied that limiting the plaintiff to harms suffered within the limitations period prior to suit would render his claim unintelligible and nugatory, for the injuries inflicted upon the plaintiff within the limitations period could only be understood and evaluated by reference to activity occurring outside of the period. The second contention asserted that applying an alternative accrual rule would confer upon the defendant a license to continue its misconduct.<sup>90</sup> Neither of these arguments withstands scrutiny.

In response to the first point, the fact that a claim builds upon a factual foundation laid outside of the limitations period prior to suit does not provide a compelling justification for treating the cause of action as a continuing violation. An employee hired outside the limitations period can sue for on-the-job discrimination occurring within the period, and a prisoner incarcerated decades ago may challenge cruel and unusual punishment he recently has suffered at his jailers' hands. In these and other instances, the origination of essential facts outside of the limitations period does not necessarily make either the traditional accrual rule or the discovery rule inapposite. If the *Page* court meant only to say that it would be *unfair* to allow the plaintiff to recover only for the incremental worsening of his condition within the limitations period, this leaves the question: Why? Returning to the simple A-hitting-B fact pattern, the measure of damages for A's second blow to B is the amount of damage caused by *that* specific punch. A's first attack may well influence how much damage B suffers from the second blow, and thus how much B should be awarded for that attack, but that doesn't give courts free license to treat

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88. *Id.* at 822–23.

89. *Id.* at 823.

90. *See id.* at 821–22.

the two beatings as one for statute of limitations purposes. If the difference between this battery hypothetical and the *Page* fact pattern is that only in the latter case can it be said that “no single incident in a continuous chain of tortious activity can ‘fairly or realistically be identified as the cause of significant harm,’”<sup>91</sup> the rejoinder remains obvious. If the *Page* plaintiff’s condition was indeed worsened due to cumulative misconduct occurring within the limitations period prior to suit, he might have been permitted to recover for the totality of the harm he suffered during that span. If the one or many prescriptions during this stretch caused no aggravation of his condition within the limitations period, then recovery could have been disallowed.

The second argument embraced in *Page* is equally flawed, for it presents the continuing violations doctrine as the solution to an imaginary dilemma. The *Page* court’s conclusion that it had to apply the pure form of the continuing violations doctrine to avoid giving the defendant a “license” to perpetuate its misconduct<sup>92</sup> overlooks the fact that the court *already* had found that the plaintiff could sue for drug administrations occurring within the limitations period prior to suit (in effect, regarding the plaintiff as having alleged a modified continuing violation).<sup>93</sup> A suit attacking these more recent prescriptions presumably also could have included an injunctive component, offering another means of addressing the “license” issue.<sup>94</sup>

Perhaps just as important, the result reached in *Page* seems to strike an unfair balance among the interests implicated in that case.<sup>95</sup> By all indications, the plaintiff in *Page* believed for many years that the defendant’s prescriptions were harming him, yet after his first lawsuit was turned back, he permitted the allegedly negligent course of conduct to continue for quite some time and without additional attempts to mitigate his damages by seeking redress.<sup>96</sup> Treating the plaintiff as having alleged a modified continuing violation and allowing him to recover only for harms suffered within the limitations period prior to suit might have better balanced the plaintiff’s desire to recover for his claimed injury, the defendant’s interest in repose, and the shared goals of averting needless damages, the fair and accurate adjudication of disputes, and putting a stop to unquestionably baneful conduct.

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91. *Id.* (quoting *Fowkes v. Pennsylvania R.R. Co.*, 264 F.2d 397, 399 (3d Cir. 1959)).

92. *Id.* at 822.

93. *See id.* at 819, 821.

94. *See Galloway v. General Motors Serv. Parts Operations*, 78 F.3d 1164, 1167 (7th Cir. 1996) (observing that the prospect of injunctive relief offers an argument against treating a claim as continuing in perpetuity). Furthermore, as applied to the facts before it, the *Page* court’s “license” argument sidesteps the fact that the plaintiff claimed to have freed himself from his alleged addiction to the prescribed medication prior to filing suit. *Page*, 729 F.2d at 819.

95. *Cf. Hipp v. Liberty Nat’l Life Ins. Co.*, 252 F.3d 1208, 1222 (11th Cir. 2001) (stating that a claim does not “continue” solely because the putative plaintiff has knowingly failed to seek relief).

96. *Page*, 729 F.2d at 819.

Indeed, the prevalence of similar concerns has meant that not all “cumulative” wrongs are treated as pure or even modified continuing violations. Fifty years ago, lawsuits that alleged gradually accumulating harm due to workplace exposures to toxic substances were perceived as archetypal continuing violations.<sup>97</sup> Today, the vast majority of courts apply the discovery rule to these claims.<sup>98</sup> These courts have concluded this notice-based rule best reconciles the various concerns implicated in these cases.<sup>99</sup>

#### D. Approaches Sounding in Public Policy

Other approaches differ from the standards set forth above by focusing more on the *effects* of recognizing a particular type of continuing violation than on the *intrinsic nature* of the claim at issue. Some of these policy-driven methodologies hone in on particular functions served by limitations statutes, while others leave it to individual courts to decide which policies are at stake in a given case.

Since Judge Richard Posner has devoted more discussion to the continuing violations doctrine within his opinions than perhaps any other jurist, it seems fitting to introduce the policy-oriented subset of approaches toward the doctrine by examining two opinions he has authored, *Taylor v. Meirick*<sup>100</sup> and *Heard v. Sheahan*.<sup>101</sup> These decisions posit two very different justifications for treating claims as pure continuing violations.

In *Taylor v. Meirick*, the defendant was accused of copying and selling the plaintiff’s copyrighted maps over the course of several years.<sup>102</sup> The defendant invoked the statute of limitations as a defense.<sup>103</sup> The *Taylor* court held that this defense failed, and the plaintiff could recover (proof permitting) for any and all of the alleged infringements, regardless of when they occurred vis-à-vis the limitations cut-off.<sup>104</sup> Writing for a unanimous panel, Judge Posner opined that allowing the plaintiff to sue for infringements occurring both within and outside of the limitations period prior to suit “strikes a balance between the plaintiff’s interest

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97. See *Developments in the Law, supra* note 7, at 1207 (noting that some courts “have permitted recovery of damages for all exposures, if the plaintiff had been exposed to some injurious conditions within the limitations period”).

98. *Childs v. Haussecker*, 974 S.W.2d 31, 37 & n.2 (Tex. 1998) (listing jurisdictions that apply the discovery rule to occupational exposure claims and stating that “almost every jurisdiction applies some formulation of the discovery rule . . . in latent injury and disease cases”).

99. See *Gomez v. State*, 975 P.2d 1258, 1262–63 (Mont. 1999) (rejecting application of the continuing violations doctrine to a latent occupational exposure claim).

100. 712 F.2d 1112 (7th Cir. 1983).

101. 253 F.3d 316 (7th Cir. 2001).

102. *Taylor*, 712 F.2d at 1117.

103. *Id.*

104. *Id.* at 1118–19.

in being spared having to bring successive suits, and the two distinct interests . . . that statutes of limitations serve,” specifically, reducing the error rate in legal proceedings and conferring deserved repose upon would-be defendants.<sup>105</sup> With regard to maintaining a low error rate, Posner wrote that if the last act in an “unlawful course of conduct” occurred within the limitations period, “[s]ome of the evidence” of this alleged misconduct, “at least, will be fresh.”<sup>106</sup> As for conferring repose, Posner noted that any uncertainty the defendant may have about whether he or she will be sued will evaporate upon the expiration of the limitations period following the final infringement.<sup>107</sup> While the court recognized that treating all infringements as timely may leave the defendant uncertain regarding the extent of his or her liability, such concerns were “often true in litigation.”<sup>108</sup>

Eighteen years later, in *Heard v. Sheahan*, Judge Posner returned to the continuing violations doctrine while addressing a claim brought under 42 U.S.C. § 1983.<sup>109</sup> In *Heard*, a state prisoner alleged that prison staffers were deliberately indifferent to his medical needs by denying him treatment for his hernia over an extended period of time.<sup>110</sup> The *Heard* court initially surmised that each day of unnecessarily prolonged pain marked a “fresh infliction of punishment that caused the statute of limitations to start running anew.”<sup>111</sup> Although this language describes a modified continuing violation, the court ultimately applied the pure form of the doctrine to the plaintiff’s claim. The court resolved that “all the pain after the date of onset, as it were, of deliberate indifference was fair game for the plaintiff’s suit” under this theory.<sup>112</sup>

By way of justification, the *Heard* panel invoked concerns sounding in both fairness and judicial economy.<sup>113</sup> “A violation is called ‘continuing,’ signifying that a plaintiff can reach back to its beginning even if that beginning lies outside the statutory limitations period,” the court determined, “when it would be unreasonable to require or even permit him to sue separately over every incident of the defendant’s unlawful conduct.”<sup>114</sup> Judge Posner explained that it would have been unreasonable to ask the plaintiff before it to bring a separate suit challenging each day’s indifference or to demand that a court entertain all of these suits and apportion damages among the plaintiff’s claims.<sup>115</sup> The *Heard* court distinguished

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105. *Id.* at 1119.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Heard v. Sheahan*, 253 F.3d 316, 317 (7th Cir. 2001).

110. *Id.*

111. *Id.* at 318.

112. *Id.*

113. *Id.* at 320.

114. *Id.* at 319.

115. *Id.* at 319–20.

the situation before it, which it saw as involving “a continuous series of events giv[ing] rise to a cumulative injury,” from cases in which a “single event gives rise to continuing injuries” (governed by the traditional or discovery rule) and those suits “in which repeated events give rise to discrete injuries” (treated as giving rise to a series of separate claims).<sup>116</sup> The defining characteristic of the third situation that was missing in the case before it, the *Heard* court opined, was that “the damages from each discrete act . . . would be readily calculable without waiting for the entire series of acts to end.”<sup>117</sup>

Both *Taylor* and *Heard* are seriously flawed decisions. The *Taylor* court never explained with any precision the circumstances that justified treating copyright infringements as pure continuing violations. *Taylor* did not identify any language in the copyright laws that supported its analysis. Nor did the court establish that copyright plaintiffs encounter difficulties in recognizing or developing their claims that are dissimilar from those encountered by litigants who bring lawsuits governed by the traditional or discovery rules. Instead, *Taylor* downplayed the significance of its limitations analysis by blithely asserting that even when several claims are concatenated, “[s]ome of the evidence, at least, will be fresh.”<sup>118</sup> This statement gives short shrift to the fact that in situations where *some* of the evidence is fresh, *the rest* of the evidence may be compromised or lost—one of the key problems that limitations statutes are designed to prevent. It is little wonder that several other federal circuits have rejected *Taylor*’s analysis when addressing similar statute of limitations issues arising under the copyright laws, and have instead opted to treat each alleged copyright infringement as giving rise to a separate claim, with its own limitations period.<sup>119</sup>

The *Heard* decision is just as misguided. As had the *Taylor* court, the *Heard* panel did not adequately explain why application of the traditional rule, the discovery rule, or the modified form of the continuing violations doctrine to the plaintiff’s claim would somehow produce an unfair or otherwise improper result. Meanwhile, the *Heard* court’s asserted justifications for applying the pure form of the continuing violations doctrine all fail to persuade. Most notably, the *Heard* court raised the prospect of a separate suit for each day’s pain suffered by the plaintiff.<sup>120</sup> This supposed tidal wave of lawsuits presented a purely chimerical threat. Neither the traditional rule nor the discovery rule would have produced this result. Both of these approaches allow a plaintiff to collect in a single suit any and

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116. *See id.*

117. *Id.* at 320.

118. *Taylor v. Meirick*, 712 F.2d 1112, 1119 (7th Cir. 1983).

119. *See, e.g.*, *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 202 (4th Cir. 1999); *Makedwde Publ’g Co. v. Johnson*, 37 F.3d 180, 182 (5th Cir. 1994); *Roley v. New World Pictures*, 19 F.3d 479, 481 (9th Cir. 1994); *Kregos v. Associated Press*, 3 F.3d 656, 662 (2d Cir. 1993).

120. *See Heard*, 253 F.3d at 318-19.

all claims (and wrongful acts subsumed therein) as may have accrued within the limitations period prior to filing. Of course, had the *Heard* court applied either of these rules, it might have led to a finding that the plaintiff's suit was time-barred. This may have been the fair result under the circumstances. Even if it wasn't, then the perceived injustice could have been better addressed by treating the plaintiff's claim as a modified continuing violation. Contrary to Judge Posner's remarks, this approach also would not lead to an avalanche of deliberate indifference litigation. Courts are hardly reeling before an onslaught of seriatim nuisance and trespass lawsuits. Instead, a plaintiff with a deliberate indifference claim governed by the modified continuing violation rule could bring one suit to recover for any aggravation of his or her injuries within the limitations period preceding suit. This plaintiff also could pursue injunctive relief, which would further allay any "license" concerns comparable to those raised by the *Page* court.

Furthermore, to the extent that *Heard* connected the pure form of the continuing violations doctrine to situations in which "a continu[ous] series of events gives rise to a cumulative injury,"<sup>121</sup> it failed to account for the various scenarios that fit this description but remain subject to discovery rule. In fact, just five years before he wrote *Heard*, Judge Posner decided not to apply the pure form of the continuing violations doctrine to a claim that fit squarely within *Heard*'s "continuous series of events giv[ing] rise to a cumulative injury"<sup>122</sup> rubric. In 1996, Judge Posner penned *Galloway v. General Motors Service Parts Operations*,<sup>123</sup> a decision that applied a form of the discovery rule, not the continuing violations doctrine, to a Title VII hostile work environment claim.<sup>124</sup> Claims alleging a hostile work environment present a much stronger case for invoking the pure form of the continuing violations doctrine than the allegations in *Heard* did. Nevertheless, the *Galloway* court held that if a hostile work environment plaintiff encounters recognizably actionable harassment, but then waits to file an administrative charge until some of the offensive acts lie outside the limitations period, the plaintiff cannot incorporate any of this earlier misbehavior within his or her hostile work environment claim. In such a case, the plaintiff "ha[s] no excuse for waiting that long" before challenging the misconduct.<sup>125</sup> Instead, he or she can only sue and recover upon whatever acts occurred within the limitations period prior to the filing of the charge.<sup>126</sup> By way of further explanation, the *Galloway* court added, "[a]n additional consideration is that the bringing of the suit is almost certain to stop the harassment. . . . What is more, [the

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121. *Id.* at 320.

122. *Id.*

123. 78 F.3d 1164 (7th Cir. 1996).

124. *Id.* at 1166.

125. *Id.* at 1167. As will be discussed *infra*, the United States Supreme Court's subsequent decision in *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 105 (2002), rejected this view.

126. See *Galloway*, 78 F.3d at 1167.



plaintiff] can always seek injunctive relief against a continuation of the unlawful conduct.”<sup>127</sup> The *Heard* court failed to explain how this reasoning did not apply in even stronger force to the plaintiff before it.

Even the United States Court of Appeals for the Seventh Circuit itself seems to balk at the *Heard* analysis, for it has applied a different rule than the one adopted in *Heard* to deliberate indifference claims brought by federal prisoners.<sup>128</sup> With these suits, the discovery rule applies, with the circuit having found the continuing violations doctrine inapplicable to these claims when they are pursued under the Federal Tort Claims Act.<sup>129</sup> The end result is a curious distinction in the law of the Seventh Circuit: a *state* prisoner alleging deliberate indifference<sup>130</sup> posits a pure continuing violation, while a *federal* prisoner bringing an otherwise factually identical claim states no continuing violation at all.<sup>131</sup>

The Seventh Circuit decision that first decided that the discovery rule applies to a deliberate indifference claim brought by a federal prisoner, *Cooper v. United States*, arrived at this result by way of its own policy-driven approach toward continuing violations problems.<sup>132</sup> Unlike all of the methodologies discussed to this point, this formulation considers both the substance of the claim at hand *and* the policy interests that are implicated when courts apply the continuing violations doctrine. Unfortunately, the approach is too vague to provide much useful guidance. Under this standard, a court deciding whether to apply the doctrine looks to “[t]he particular policies of the statute of limitations in question, as well as the nature of the wrongful conduct and harm alleged.”<sup>133</sup> Unsurprisingly, the *Cooper* court found that these policies weighed in favor of granting repose to potential defendants, a conclusion that caused the panel in that case to reject the continuing violations doctrine and apply the discovery rule instead. The plaintiff’s cause of action for deliberate indifference, *Cooper* determined, “accrued at the time when he knew or should have known that no treatment was to be forthcoming.”<sup>134</sup> Subsequent applications of the *Cooper* test in other contexts have reached similar defendant-friendly results. These outcomes follow from the call of the questions posed by the *Cooper* framework. Any inquiry into “policies of the statute[s] of limitations in question” is tilted heavily in favor of defendants. After all, statutes of limitations are enacted to benefit defendants, not plaintiffs.<sup>135</sup> The “nature of the

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127. *Id.*

128. *Cooper v. United States*, 442 F.2d 908, 912 (7th Cir. 1971).

129. *Id.*

130. *Heard v. Sheahan*, 253 F.3d 316, 318 (7th Cir. 2001).

131. *Cooper*, 442 F.2d at 912.

132. *Id.* at 912.

133. *Id.*

134. *Id.*

135. *Id.*; *see, e.g., Faulkenbury v. Teachers’ & State Employees’ Ret. Sys. of N.C.*, 424 S.E. 420, 425–26 (N.C. Ct. App. 1993).

wrongful conduct and harm alleged” component of this approach is more useful, as it forces courts to focus upon the gravamen of the claim at issue.<sup>136</sup> However, since many claims arguably possess a continuing nature, this inquiry premises recognition of a continuing violation on a judgment call unlikely to command universal agreement. Accordingly, this element provides a poor capstone to any test.

By now, hopefully a basic point has been made. Existing frameworks for recognizing a continuing violation are inadequate to the task, for they fail to provide appropriate and concrete guidance to courts and litigants. Rather than tinker with these approaches, the next section of this article starts from the ground up, reviewing specific claims that courts have identified as continuing violations for clues as to how and why the doctrine should apply.

#### IV. “PURE” AND “MODIFIED” CONTINUING VIOLATIONS: A SURVEY AND APPRAISAL

This article now segues from theory to practice. More specifically, the text below discusses several torts and statutory causes of action that courts have identified as either pure or modified continuing violations, and ventures explanations for why judges have treated them as they have. This review suggests that in each case, the answer lies in the gravamen of the claim at issue and the equitable and efficiency interests that would be served by treating the claim as continuing in nature.

##### A. “Pure” Continuing Violations

###### 1. False Imprisonment

False imprisonment constitutes a pure continuing violation. Someone who has been falsely imprisoned has an actionable claim from the moment his or her false imprisonment commences.<sup>137</sup> However, as a general rule, a false imprisonment claim accrues for limitations purposes only when the prisoner is released.<sup>138</sup> Each additional moment of an uninterrupted imprisonment offers the prospect of enhanced damages, but not a separate claim.<sup>139</sup>

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136. *Cooper*, 442 F.2d at 912.

137. *See* RESTATEMENT (SECOND) OF TORTS § 35 (1965).

138. *Donaldson v. O’Connor*, 493 F.2d 507, 529 (5th Cir. 1974); *Milliken v. City of South Pasadena*, 158 Cal. Rptr. 409, 412 (Cal. Ct. App. 1979); *Matovina v. Hult*, 123 N.E.2d 893, 897 (Ind. App. 1955); *Hackler v. Miller*, 112 N.W. 303, 303 (Neb. 1907); RESTATEMENT (SECOND) OF TORTS § 899 cmt. c (1979); 54 C.J.S. *Limitation of Actions* § 200 (2005); WOOD, *supra* note 57, § 187d(4).

139. *See supra* note 138 and accompanying text.

The gravamen of false imprisonment lies partially in the initial decision to detain and partially in the continuation of an improper detention.<sup>140</sup> Both components are reasonably understood as harmful: the initial imprisonment violates one's right to bodily integrity and control, and any extension of a detention not only has the same effect but also can cause other injuries such as lost income. The twofold nature of a false imprisonment claim connotes that this cause of action *may* "continue" over time; fairness interests dictate that it *should*. If these claims accrued for limitations purposes upon the plaintiff's initial capture, the defendant could create an absolute defense simply by detaining the plaintiff and cutting off his or her access to the courts until the limitations period expired. Even if the modified form of the continuing violations doctrine applied and generated a new claim for each day's imprisonment, by keeping the plaintiff in custody for a sufficiently long time, the defendant still could shield part of an extended detention from attack.<sup>141</sup> That leaves the pure form of the continuing violations doctrine as the sole accrual rule that will permit full recovery by the plaintiff, the equitable result under the circumstances.

## 2. Seduction and Spousal Violence

The pure form of the continuing violations doctrine extends to other torts that, like claims for false imprisonment, implicate misconduct in which the defendant exercises a measure of control over the plaintiff and thereby inhibits the plaintiff's ability to vindicate his or her rights. Seduction claims of yesteryear and contemporary spousal-abuse claims alleging "battered woman's syndrome" demonstrate how principles similar to those that inform equitable tolling may justify application of the pure form of the continuing violations doctrine in these situations.

A century ago, several jurisdictions regarded the tort of seduction as continuous in nature. A seduction plaintiff (typically a young woman or her father) could file suit after the first act of tortious intercourse. He or she also could sue at any time until the expiration of the limitations period following the last exchange of carnal relations. Even if the plaintiff delayed suit in this manner, he or she was still permitted to recover for the entirety of the seduction, including incidents occurring outside of the limitations period prior to suit.<sup>142</sup> The typical explanation for this

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140. See RESTATEMENT (SECOND) OF TORTS §§ 35, 45 (1965).

141. One might avoid these problems by treating a sustained false imprisonment as giving rise to a series of claims, with a new claim accruing on each day of custody and with the limitations period being equitably tolled as to all of these claims until the moment of release. But treating false imprisonment as a pure continuing violation has the same effect vis-à-vis the limitations period as this alternative approach would, with the added advantage of relative conceptual simplicity.

142. *Gunder v. Tibbits*, 55 N.E. 762, 767 (Ind. 1899); *Briener v. Nugent*, 111 N.W. 446, 447-48 (Iowa 1907); *Russell v. Chambers*, 16 N.W. 458, 458 (Minn. 1883); *Davis v. Young*, 16 S.W. 473,

rule focused upon the male defendant's presumed Svengali-like control over his female victim, who was seen as having been lulled into complacency by the same importunings that overcame her virtue. The Indiana Supreme Court treated the existence of such control as a given, defending its treatment of seduction as a continuing violation on the ground that "[i]f an act is done under any sort of constraint, plain justice forbids the defendant to count the time of his control as a part of the period of limitations."<sup>143</sup> In another leading case, *Davis v. Young*, the Tennessee Supreme Court elaborated upon the equitable foundation for treating seduction as a continuing violation:

[T]he seduction is made up of the several violations by the defendant, and he will not be permitted to confine her remedy to the first illicit act, as the only one of seduction, and, when sued, relieve himself by showing that first act to have occurred more than 12 months before suit was brought. Such limitation places it in the power of the unprincipled to effect the ruin of the confiding female, and then, by flattering the confidence and hopes of his victim, persevere in her debauchery at his will, and at last ignore all his cruel deceptions of the mean time, and insult the disgrace he has brought about by [pleading] the 12-months statute as applicable to the first act in his series of villainy [sic]. It should never be that one, by confessing his infamy, may, by multiplying the evidences of that infamy, acquit himself from accountability for its consequences.<sup>144</sup>

So understood, the decision to treat seduction as a continuing tort borrowed from two branches of equitable tolling doctrine: the notion that the limitations period will not run when a plaintiff is incapable of bringing suit, and the related principle that a defendant's fraudulent concealment of a claim will toll the statute of limitations.<sup>145</sup>

There is another reason why the courts of yesteryear may have cast seduction as a pure continuing violation. Somewhat counterintuitively, extending the limitations period for seduction claims may have resulted in fewer of these suits being filed. The typical seduction suit of a century ago involved a plaintiff who alleged that she had sex with her boyfriend because he promised to marry her if she consented to intercourse.<sup>146</sup> A rule that required prospective seduction plaintiffs to sue early, or not at all, would have clumsily interjected the law between the parties

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474 (Tenn. 1891). Other jurisdictions refused to allow the claim to continue after the first act of intercourse. *Davis v. Boyett*, 48 S.E. 185, 187-88 (Ga. 1904); *Taylor v. Rann*, 80 P.2d 376, 379 (Mont. 1938).

143. *Gunder*, 55 N.E. at 767.

144. *Davis*, 16 S.W. at 474.

145. See generally John P. Dawson, *Fraudulent Concealment and Statutes of Limitation*, 31 MICH. L. REV. 875 (1933).

146. See, e.g., *Davis*, 16 S.W. at 473.

to an intimate relationship. If given an ample opportunity to work through the dispute, these couples could conceivably weather and resolve the conflict without getting the courts involved. By allowing seduction plaintiffs to hold their claims in abeyance until their relationships completely ruptured, the continuing violations doctrine may have produced marriages, instead of court cases.

A century after the heyday of the seduction tort, New Jersey courts recognized a new type of continuing violation, one that also arises within intimate relationships gone awry.<sup>147</sup> Claims implicating “battered woman’s syndrome” subtly restyle into a single cause of action what might otherwise represent a series of distinct battery or assault claims. A claim alleging “battered woman’s syndrome” charges a spouse or partner with various acts of physical or emotional abuse, occurring at different moments in time.<sup>148</sup> On one condition, the abused spouse or companion may aggregate all of the instances of abuse, regardless of when they occurred, into a single claim that accrues for limitations purposes only upon the final harmful act.<sup>149</sup> That single condition hearkens to the same theme of helplessness that permeated the seduction decisions of a century ago—the plaintiff can only collect the abusive conduct into a single claim if she proves an “inability [on her part] to take any action [during the course of abusive conduct] to improve or alter the circumstances in her marriage unilaterally.”<sup>150</sup> With claims alleging “battered woman’s syndrome,” recognition of a pure continuing violation thus hinges once again on whether the defendant’s misconduct effectively places the plaintiff under his or her control.

### 3. Continuing Professional Treatment or Representation

Another type of continuing claim also implicates an “unbalanced” relationship between the parties. When a physician or other professional commits malpractice, and fails to promptly correct the same,<sup>151</sup> the “continuous treatment” or “continuous representation” rule may apply to postpone the running of the limitations period until the end of the treatment or representation in which the professional error occurred.<sup>152</sup> Though some courts characterize the continuous

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147. *Giovine v. Giovine*, 663 A.2d 109, 114–15 (N.J. Super. Ct. App. Div. 1995).

148. *Id.*

149. *Id.*; *Cusseaux v. Pickett*, 652 A.2d 789, 794 (N.J. Super. Ct. 1994). The *Giovine* court was careful to note that “battered woman’s syndrome” is not a tort in and of itself, merely a condition that allows for the aggregation of multiple tortious acts. *Giovine*, 663 A.2d at 115.

150. *Id.* at 117.

151. In the case that first announced the continuing treatment rule, *Gillette v. Tucker*, 65 N.E. 865 (Ohio 1902), a surgeon accidentally left a surgical sponge in the patient. The court concluded that the plaintiff’s resulting “injuries blended and extended during the entire period the surgeon was in charge of the case,” *id.* at 871, and “each day’s failure to remove the sponge was a fresh breach of the contract implied by the law,” *id.* at 872.

152. See *Cuccolo v. Lispky, Goodkin & Co.*, 826 F. Supp. 763, 768 (S.D.N.Y. 1993);

treatment or representation rule as a type of tolling,<sup>153</sup> others regard the professional's failure to remedy his or her past negligence as negligence in and of itself, resulting in a continuing claim.<sup>154</sup> However the rule is characterized, the plaintiff has the option of suing while the negligent treatment or representation is ongoing, or at any time within the limitations period after the conclusion of the treatment or representation.<sup>155</sup>

These malpractice claims are regarded as continuing for reasons similar to those that support the analogous treatment of false imprisonment, seduction, and "battered woman's syndrome" allegations. By postponing the running of the limitations period on a malpractice claim as long as the treatment or representation continues, the "continuing treatment" and "continuing representation" rules recognize the patient's or client's position of relative disadvantage in an ongoing relationship.<sup>156</sup> Discussing both the doctor-patient and attorney-client bond, one court applying the continuing representation rule remarked,

In both instances the relationship between the parties is marked by trust and confidence; in both there is presented an aspect of the relationship not sporadic but developing; and in both the recipient of the service is necessarily at a disadvantage to question the reason for the tactics employed or the manner in which the tactics are executed.<sup>157</sup>

In addition, as is the case with seduction claims, application of the continuing violations doctrine to some malpractice claims reflects an understanding that the relationship that produced the dispute may resolve the grievance as well, so long as the parties are given an ample opportunity to address the matter outside of court.<sup>158</sup>

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Huysman v. Kirsch, 57 P.2d 908, 912 (Cal. 1936); Beard v. Edmondson & Gallagher, 790 A.2d 541, 546 n.8 (D.C. 2002); R.D.H. Comm'ns v. Winston, 700 A.2d 766, 771-72 (D.C. 1997); Schmitt v. Esser, 226 N.W. 196, 197 (Minn. 1929); Williams v. Elias, 1 N.W.2d 121, 124 (Neb. 1941); Aykan v. Goldzweig, 569 A.2d 905, 907 (N.J. Super. Ct. Law. Div. 1989); Borgia v. City of New York, 187 N.E.2d 777, 778-79 (N.Y. 1962); Gillette, 65 N.E. at 879; Peteler v. Robinson, 17 P.2d 244, 249-50 (Utah 1932). See generally Melanie Fitzgerald, *The Continuous Treatment Rule: Ameliorating the Harsh Result of the Statute of Limitations in Medical Malpractice Cases*, 52 S.C. L. REV. 955 (2001); John D. Nichols, Note, *Limitations on Actions - Arkansas Adopts Continuous Treatment Rule to Toll Statute of Limitations in Medical Malpractice Actions*, 11 U. ARK. LITTLE ROCK L. REV. 405 (1988).

153. E.g., Roberts v. Francis, 128 F.3d 647, 651 (8th Cir. 1997).

154. E.g., Huysman, 57 P.2d at 912.

155. 54 C.J.S. *Limitation of Actions* § 215 (2005).

156. See Huysman, 57 P.2d at 912.

157. Siegel v. Kranis, 288 N.Y.S.2d 831, 834 (N.Y. App. Div. 1968).

158. DeLeo v. Nusbaum, 821 A.2d 744, 749 (Conn. 2003); R.D.H. Comm'ns v. Winston, 700 A.2d 766, 769 (D.C. 1997); Borgia v. City of New York, 187 N.E.2d 777, 779 (N.Y. 1962).

## 4. Hostile Work Environment Claims

Currently, the pure form of the continuing violations doctrine is most closely associated with claims alleging discrimination in employment<sup>159</sup> and in particular, with hostile work environment claims.<sup>160</sup>

Title VII of the Civil Rights Act of 1964 proscribes a range of discriminatory employment “practices.”<sup>161</sup> This law provides that a victim of these practices must file a charge with an appropriate administrative agency as a precursor to suit, and that the period to take this step commences as soon as the complained-of practice “occurred.”<sup>162</sup>

One prohibited practice under Title VII is a hostile work environment, meaning a workplace so laced with discriminatory animus as to fundamentally undermine the employment relationship.<sup>163</sup> Hostile work environments typically involve the cumulative effects of a number of incidents<sup>164</sup>—a sexist remark here, an inappropriate touching there. For many years, courts disagreed about when the Title VII limitations period should begin to run on the individual incidents that allegedly added up to a hostile environment. Some courts held that plaintiffs could accumulate and sue upon all acts within a single hostile environment, regardless of when they occurred, provided that these acts were sufficiently related to one another and at least one discriminatory act occurred within the limitations period preceding the filing of a charge.<sup>165</sup> Other decisions, such as the *Galloway* opinion

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159. See *Remigio v. Kelly*, No. 04 Civ. 1877 (JGK) (MHD), 2005 U.S. Dist. LEXIS 16789, at \*17 (S.D.N.Y. August 12, 2005) (“The continuing-violation doctrine has usually—but not exclusively—been applied in the context of Title VII discrimination claims.”).

160. See *O’Rourke v. City of Providence*, 235 F.3d 713, 727 (1st Cir. 2001). The continuing violations doctrine has grown so closely associated with employment discrimination claims that some courts have assumed that the doctrine originated in cases interpreting Title VII. *Velazquez v. Chardon*, 736 F.2d 831, 833 (1st Cir. 1984); *Ware v. Union Pac. R.R. Co. Omaha*, 278 F. Supp. 2d 1263, 1267 (D. Kan. 2003); *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 310 F. Supp. 2d 819, 844 (S.D. Tex. 2004).

161. 42 U.S.C. § 2000e-2 (2000).

162. 42 U.S.C. § 2000e-5(e)(1). In response to the United States Supreme Court’s decision in *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900 (1989), a 1991 amendment to Title VII provides that an intentionally discriminatory seniority system “occurs” (1) when it is adopted; (2) when an individual becomes subject to the system, or (3) when a “person aggrieved” is injured by application of the system. Civil Rights Act of 1991, Pub. L. No. 102-166, § 112, 1991 U.S.C.A.N. (105 Stat.) 1071, 1079 (codified as amended at 42 U.S.C. § 2000e-5(e)(2)). No similarly specific statutory advisements apply to other Title VII claims, however.

163. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986).

164. *Galloway v. Gen. Motors Serv. Parts Operations*, 78 F.3d 1164, 1166 (7th Cir. 1996).

165. E.g., *Anderson v. Reno*, 190 F.3d 930, 936 (9th Cir. 1999) (finding the continuing violations doctrine applicable to a hostile work environment claim, provided that the plaintiff established “related discriminatory acts”).

that was discussed earlier in this article, applied a variation of the discovery rule to these suits.<sup>166</sup> A third, hybrid approach combined elements of the continuing violations doctrine and the discovery rule to determine the timeliness of hostile work environment claims.<sup>167</sup>

The United States Supreme Court resolved this dispute in *National Railroad Passenger Corporation v. Morgan*,<sup>168</sup> decided in 2002. The *Morgan* decision sided with those lower courts who regarded hostile work environments as pure continuing violations. The Court held that the entirety of a hostile work environment represents a single discriminatory “practice,” so that a charge attacking the environment and any of its components is timely so long as it is filed within the limitations period following a manifestation of the pervasively hostile atmosphere.<sup>169</sup> The *Morgan* majority<sup>170</sup> observed that the “entire hostile work environment encompasses a single unlawful employment practice” because the “very nature” of a hostile work environment “involves repeated conduct.”<sup>171</sup> Given this construction of a hostile work environment claim, the Court concluded that when a single hostile work environment “practice” persists into the limitations period prior to suit,<sup>172</sup> the plaintiff can recover damages resulting from any and all of the hostile acts comprising that environment regardless of when the acts took place.<sup>173</sup> The *Morgan* court thus treated the issue before it as a straightforward statutory interpretation question, one that revolved around the meaning Congress assigned to the terms “practice” and “occurred” in Title VII.<sup>174</sup> The conclusions drawn by the majority followed from its determination that a hostile work environment is a single discriminatory “practice,” and that the word “occurred”

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166. *E.g.*, *Galloway*, 78 F.3d at 1167.

167. *E.g.*, *O'Rourke v. City of Providence*, 235 F.3d 713, 731 (1st Cir. 2001); *West v. Philadelphia Elec. Co.*, 45 F.3d 744, 755 n.9 (3d Cir. 1995). This approach adhered to the three-pronged test for recognizing a continuing violation that was first announced in *Berry v. Bd. of Supervisors of L.S.U.*, 715 F.2d 971, 981 (5th Cir. 1983). The *Berry* test focuses upon the factual similarities among the discriminatory acts alleged to comprise the continuing violation, the frequency of the discriminatory acts, and whether and when the discrimination attained a “degree of permanence which should trigger an employee’s awareness of and duty to assert his or her rights.” *Id.*

168. 536 U.S. 101 (2002).

169. *Id.* at 122.

170. The Court split 5-4 on this issue, with the dissenting opinion favoring application of the discovery rule. *See id.* at 123-28 (O’Connor, J., dissenting).

171. *Id.* at 115, 117.

172. As manifested by an act contributing to the hostile work environment claim occurring within the filing period. *Id.* at 117.

173. *Id.* The *Morgan* court noted that a defendant may assert equitable and laches defenses if a hostile work environment plaintiff has unduly delayed filing his or her administrative charge. *Id.* at 121-22.

174. *Id.* at 110.



applies to the “practice” as a whole and not to specific incidents of misconduct comprising that “practice.”<sup>175</sup>

Had the *Morgan* majority not regarded the plain language of Title VII as dispositive,<sup>176</sup> it could have advanced some potent policy arguments in favor of treating hostile work environment claims as pure continuing violations. Specifically, the peculiar nature of these claims renders the application of alternative accrual rules problematic. Hostile work environments involve both a subjective component (the plaintiff must appreciate that discrimination is in the air) and an objective requirement (the workplace must become sufficiently infested with discrimination that a reasonable person would find it hostile or abusive).<sup>177</sup> When combined with the fact that hostile work environments typically are comprised of many slights instead of a single egregious event,<sup>178</sup> the dual subjective and objective nature of hostile work environment claims makes it especially difficult for potential plaintiffs to determine when their claims have accrued. The aggrieved party must ascertain a palpable change in the work environment based on a series of incremental acts, *and* guess when an objective observer would feel the same way.<sup>179</sup> Absent application of the continuing violations doctrine, prospective plaintiffs would find themselves in a tough spot. A sensitive employee who filed a charge early on might find that the objective component of his or her claim had not been satisfied, and that he or she burned their bridges with an employer by seeking redress. On the other hand, a hardier employee who tried to wait out the hostile environment may discover that his or her claim had accrued well outside of the limitations period, making it impossible for him or her to recover for some the initial offensive incidents comprising the environment.<sup>180</sup> Sensitive application of the discovery rule could mitigate some of this guesswork, but not entirely. Prior to *Morgan*, a plaintiff subject to the discovery rule still had to gauge when a “reasonable” person in his or her position would view the work environment as hostile or offensive.<sup>181</sup> If this plaintiff guessed wrong, he or she risked having the older portion of his or her hostile work environment claim lopped off by a court. This result could cause the entire claim to collapse if the more recent incidents were less offensive than the earlier misconduct and as a result proved insufficient to support a cause of action.

Yet as the Supreme Court giveth, so too may it taketh away. Before the *Morgan* decision fundamentally altered the discourse, lower courts recognized two types of pure continuing violations of Title VII: serial violations and systemic

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175. *See id.* at 109-11, 114.

176. *See id.* at 122.

177. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

178. *See King v. Bd. of Regents of the Univ. of Wis. Sys.*, 898 F.2d 533, 537 (7th Cir. 1990).

179. *See id.*

180. *See Tsai, supra* note 20, at 531-32 (discussing this problem).

181. *See Galloway v. Gen. Motors Serv. Parts Operations*, 78 F.3d 1164, 1167 (7th Cir. 1996).

violations.<sup>182</sup> A serial violation occurred when the defendant committed a series of discriminatory acts directed against a single plaintiff. Provided that an anchoring act of discrimination occurred within the limitations period preceding the filing of an administrative charge, the plaintiff could recover for all related instances of discrimination, subject to certain additional requirements that varied from circuit to circuit.<sup>183</sup> Systemic violations alleged that a discriminatory policy or practice that originated outside of the limitations period prior to the filing of a charge remained in effect within that period.<sup>184</sup> Several courts regarded the continued existence of the policy as a sufficient timeliness hook for suits by plaintiffs who last had the policy directly applied to them outside of the limitations period, but who remained at least theoretically subject or susceptible to the policy within the period.<sup>185</sup>

The *Morgan* court abrogated serial violations (except insofar as hostile work environment claims are concerned) and cast the fate of systemic violations into doubt. As to the former theory, all nine justices agreed that the plain language of Title VII forbade the aggregation of discrete discriminatory practices directed at a single plaintiff.<sup>186</sup> This, because past practices such as failures to hire and promote “occurred,” and the statute of limitations began to run on them, when they happened, not when a later act of discrimination transpired.<sup>187</sup> The *Morgan* court had no comparable opportunity to comment directly on systemic violations, since the plaintiff had not proceeded under any such theory.<sup>188</sup> However, the Court did conspicuously observe that it had no occasion to decide whether its abolition of serial violations affected “pattern or practice” suits<sup>189</sup> alleging class-wide

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182. *E.g.*, *O'Rourke v. City of Providence*, 235 F.3d 713, 731 (1st Cir. 2001).

183. *Sabree v. United Bhd. of Carpenters & Joiners Local No. 33*, 921 F.2d 396, 401 (1st Cir. 1990); *Sosa v. Hiraoka*, 920 F.2d 1451, 1456 (9th Cir. 1990); *Held v. Gulf Oil Co.*, 684 F.2d 427, 430, 432 (6th Cir. 1982).

184. *Muniz-Cabrero v. Ruiz*, 23 F.3d 607, 611 (1st Cir. 1994); *Reed v. Lockheed Aircraft Corp.*, 613 F.2d 757, 762 (9th Cir. 1980).

185. *E.g.*, *Williams v. Owens-Illinois, Inc.*, 665 F.2d 918, 924 (9th Cir. 1982), *modified on denial of reh'g*, 1982 WL 308873 (9th Cir. 1982).

186. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002). While some state courts in the post-*Morgan* era have repudiated their previous continuing violations jurisprudence, *e.g.*, *Garg v. Macomb County Cmty. Mental Health Servs.*, 696 N.W.2d 646, 658-59 (Mich. 2005), *overruling Sumner v. Goodyear Tire & Rubber Co.*, 398 N.W.2d 368 (Mich. 1986), other courts have decided not to apply *Morgan's* abrogation of “serial” violations to similarly concatenated claims brought under state anti-discrimination laws. *See, e.g.*, *Yanowitz v. L'Oreal USA, Inc.*, 116 P.3d 1123, 1140-42 (Cal. 2005).

187. *Morgan*, 536 U.S. at 109-10.

188. *Id.* at 110.

189. A “pattern-or-practice” suit alleges that a business has engaged in discrimination on a sufficiently systematic basis that it has become the entity’s standard operating procedure. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977). The plaintiff in a pattern-or-practice suit “[m]ust establish that some form of intentional discrimination against the class of which plaintiff was a member was the company’s ‘standing operating procedure.’” *EEOC v. Penton Indus. Publ'g Co.*,

discrimination.<sup>190</sup> Since “pattern or practice” suits often involve systemic violations, some observers have surmised that the *Morgan* decision does not implicate systemic claims at all.<sup>191</sup> However, several courts have read *Morgan* differently and concluded that the Court’s demolition of serial violations pared back the systemic theory as well. Citing *Morgan*, this second school of thought holds that plaintiffs cannot rescue claims premised on otherwise untimely discriminatory acts simply by alleging that the acts occurred under the aegis of a single corporate policy that predated, but extended into, the limitations period.<sup>192</sup>

The *Morgan* decision offers important lessons regarding how the continuing violations doctrine applies to claims crafted by legislatures. *Morgan* establishes that the statutory language that defines the claim or claims at issue and explains when the limitations period starts to run on these claims represents the first and most important resource in determining whether a statutory cause of action is “continuing.”<sup>193</sup> *Morgan* also teaches that neither a close relationship between the parties to a statutory cause of action nor a short limitations period will necessarily justify treating the claim as continuing in nature. These points might militate in favor of applying the discovery rule to the theory of relief,<sup>194</sup> but they will not authorize the more drastic step of redefining the claim through application of the continuing violations doctrine.

### 5. *Intentional and/or Negligent Infliction of Emotional Distress*

Finally, several courts have found that claims for the intentional or negligent infliction of emotional distress may represent pure continuing violations,<sup>195</sup> depending on the nature of the underlying misconduct.

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851 F.2d 835, 838 (6th Cir. 1988).

190. *Morgan*, 536 U.S. at 115 n.9.

191. *Tenenbaum v. Caldera*, 45 F. App’x 416, 419 n.3 (6th Cir. 2002); *EEOC v. Kovacevich “5” Farms*, No. CV-F-06-165 OWW/TAG, 2007 WL 1174444, at \*10 (E.D. Cal. Apr. 19, 2007); *Gulino v. Bd. of Educ.*, 236 F. Supp. 2d 314, 327 (S.D.N.Y. 2002); *Anderson v. Boeing Corp.*, 222 F.R.D. 521, 547 (N.D. Okla. 2004); *see also* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, QUESTIONS AND ANSWERS: ISSUANCE OF REVISION TO EEOC COMPLIANCE MANUAL SECTION ON THRESHOLD ISSUES (2005), *available at* <http://www.eeoc.gov/policy/docs/thresholdrevision-qanda.html> (observing that the *Morgan* decision “had no effect on the time frames for challenging pattern-or-practice claims. If a pattern or practice of discrimination continues into the filing period, then all of the component acts are timely.”).

192. *Davidson v. America Online, Inc.*, 337 F.3d 1179, 1185–86 (10th Cir. 2003); *Cherosky v. Henderson*, 330 F.3d 1243, 1246–47 (9th Cir. 2003); *Stocking v. AT&T Corp.*, 436 F. Supp. 2d 1014, 1018–20 (W.D. Mo. 2006).

193. *See Morgan*, 536 U.S. at 110–14.

194. *See, e.g., United States v. Kubrick*, 444 U.S. 111, 118–21, 120 n.7 (1979) (pointing to a short limitations period as a reason why the discovery rule should apply to medical malpractice claims brought under the Federal Tort Claims Act).

195. *Curtis v. Firth*, 850 P.2d 749, 753–55 (Idaho 1993); *Feltmeier v. Feltmeier*, 798 N.E.2d

Harkening to allegations of “battered woman’s syndrome,” one recurring scenario in which courts have applied the continuing violations doctrine to infliction of emotional distress claims arises when an estranged spouse or cohabitant accuses a former paramour of a pattern of abuse.<sup>196</sup> For example, a Texas court ruled in the case of *Twyman v. Twyman* that a husband’s repeated demands that his wife engage in deviant sexual acts with him amounted to a continuing tort.<sup>197</sup> A few years later, in *Curtis v. Firth*, the Idaho Supreme Court relied upon *Twyman v. Twyman* in holding that a woman stated a continuing claim for emotional distress against her former cohabitant, whom she accused of physical and emotional abuse occurring throughout their ten-year relationship.<sup>198</sup> The court held that the limitations period on the entirety of this misconduct began to run only when the abuse ended.<sup>199</sup> A decade later, the Illinois Supreme Court reached the same result, rejecting a husband’s argument that each act of abuse against his former wife during their eleven-year marriage gave rise to a separate claim.<sup>200</sup>

The reasons for treating infliction of emotional distress claims as pure continuing violations are not hard to fathom. Like hostile work environment claims under Title VII, claims for the intentional or negligent infliction of emotional distress may involve conduct that is harmful only when viewed in the aggregate. Emotional distress that is substantial enough to support a tort claim may result only from a series of slights, each of which is modest on its own terms, but which deliver a substantial blow when taken together. On its own, this attribute would not preclude application of the discovery rule to these claims; the plaintiff could be charged with the requisite knowledge at the time the conduct reached a breaking point. The accrual problem that justifies application of the continuing violations doctrine in this context is that (again, like hostile work environment suits) claims for the intentional or negligent infliction of emotional distress entail both a subjective and an objective component.<sup>201</sup> This characteristic can make it especially difficult for a potential plaintiff who has suffered emotional distress due

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75, 89 (Ill. 2003); *Pavlik v. Kornhaber*, 761 N.E.2d 175, 187–88 (Ill. App. Ct. 2001); *Bustamento v. Tucker*, 607 So. 2d 532, 538–39 (La. 1992); *Shannon v. MTA Metro-N. R.R.*, 704 N.Y.S.2d 208, 209 (N.Y. App. Div. 2000); *Stram v. Farrell*, 646 N.Y.S.2d 193, 196 (N.Y. App. Div. 1996); *Twyman v. Twyman*, 790 S.W.2d 819, 820–21 (Tex. App. 1990); *Retherford v. AT&T Commc’ns of Mountain States, Inc.*, 844 P.2d 949, 975 (Utah 1992).

196. *Feltmeier*, 798 N.E.2d at 86–88; *Curtis*, 850 P.2d at 754–55; *Twyman*, 790 S.W.2d at 821.

197. *Twyman*, 790 S.W.2d at 820–21.

198. *Curtis*, 850 P.2d at 755.

199. *Id.*

200. *Feltmeier*, 798 N.E.2d at 86–87.

201. As generally formulated, the tort of intentional and/or negligent infliction of emotional distress requires extreme and outrageous conduct (viewed under an objective standard) that, in fact, causes severe emotional distress (the subjective element). See RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).

to a series of misdeeds to discern when his or her claim has accrued.<sup>202</sup> Fairness interests thus argue in favor of applying a different accrual rule to these claims, particularly in circumstances in which the defendant, through his or her own misconduct, seems to have exercised some control over the plaintiff.

An additional consideration also factors into the treatment of certain infliction of emotional distress claims as continuing in nature. While it may seem strange to say that society has an interest in promoting relationships that involve the infliction of emotional distress, as a practical matter, we probably do.<sup>203</sup> Even courts that have recognized claims for emotional distress arising out of marital discord have been careful to note that the infliction of emotional distress (putting acts of violence to one side) is a regrettable but perhaps inevitable part of any close and devoted relationship.<sup>204</sup> Whether we want to encourage suits based on these distressful words and acts, and perhaps destroy the underlying relationship in the process, is debatable. By allowing the postponement of suits premised on conduct arising in the course of committed relationships, application of the continuing violations doctrine gives the parties an ample opportunity to ride out tough roads together.

The foregoing review of the situations in which courts have recognized pure continuing violations yields an evident pattern: Pure continuing violations arise most often in situations where the plaintiff faces an impediment to timely filing that is not readily addressed by other accrual and tolling rules. With false imprisonment, seduction, “battered woman’s syndrome,” and certain malpractice claims, this obstacle takes the form of the defendant’s exercise of continued control over the plaintiff through the very misconduct that is the subject of the suit. With hostile work environment suits and intentional or negligent infliction of emotional distress claims, the hindrance consists of characteristics of the claims that make application of either the traditional rule or the discovery rule problematic. As to all of these claims, recognizing a pure continuing violation ensures the plaintiff a fair opportunity to present his or her grievance in court.

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202. *Retherford v. AT&T Commc’ns of Mountain States, Inc.*, 844 P.2d 949, 975 (Utah 1992) (“Because of the nature of [infliction of emotional distress claims], it can be difficult to determine when all its elements—intentional, outrageous conduct proximately causing extreme distress—have come into being.”).

203. Other emotional distress claims recognized as continuing violations have likewise involved longtime relationships, such as between employees and employers, *e.g.*, *Pavlik v. Kornhaber*, 761 N.E.2d 175, 187–88 (Ill. App. Ct. 2001); *Bustamento v. Tucker*, 607 So. 2d 532, 542 (La. 1992); or neighbors, *e.g.*, *Stram v. Farrell*, 646 N.Y.S.2d 193, 194 (N.Y. App. Div. 1996).

204. *Feltmeier v. Feltmeier*, 777 N.E.2d 1032, 1036–38 (Ill. App. Ct. 2002), *aff’d*, 798 N.E.2d 75 (Ill. 2003).

## B. "Modified" Continuing Violations

### 1. Nuisance and Trespass

Nuisance and trespass claims represent the touchstone modified continuing violations.<sup>205</sup> Decisions dating back to the 1500s have recognized that a nuisance or trespass claim does not arise once and for all when the offensive activity at issue first manifests itself. Instead, each day's maintenance of, or failure to remove, an existing nuisance or trespass will give rise to a new and separate cause of action.<sup>206</sup> Blackstone regarded this "well established" rule as axiomatic in his Commentaries, stating that "every continuance of a nuisance is [considered] a fresh one."<sup>207</sup>

Though the precise origins of this accrual rule are lost to time, one can hypothesize a few possible reasons behind its adoption. Unlike most of the primitive torts of yesteryear, claims of trespass and nuisance were (and are) sufficiently conceptually amorphous to provide some flexibility in determining the moment when they arise and accrue.<sup>208</sup> This amorphousness was not (and is not), by itself, an affirmative reason to treat nuisance and trespass claims as ongoing in nature. However, it has removed a potential roadblock to the application of the continuing violations doctrine to these theories.

Meanwhile, the parties to most of the nuisance and trespass disputes of the late Middle Ages and beyond were well-situated to negotiate a mutually satisfactory resolution to these conflicts. The disputants were typically neighbors and the claimed damages were modest. The crux of the grievance usually involved a stray fence, a diversion of water, or some other localized claim.<sup>209</sup> The nature of these controversies and the informality attendant to dispute resolution in these earlier times meant that the transaction costs associated with informal negotiations aimed at resolving nuisance and trespass disputes were quite low.<sup>210</sup> Furthermore,

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205. RESTATEMENT (SECOND) OF TORTS § 161 cmt. c, § 899 cmt. d (1965); *id.* § 930 (1979).

206. *Beswick v. Cunden*, Cro. Eliz. 402, 402, 78 Eng. Rep. 646 (K.B. 1593); *Moore v. Dame Browne*, 3 Dyer 319, 320, 73 Eng. Rep. 723 (K.B. 1571).

207. WILLIAM BLACKSTONE, 3 COMMENTARIES \*219-20.

208. *See* W. PAGE KEETON et al., PROSSER AND KEETON ON THE LAW OF TORTS § 86 (5th ed. 1984) ("There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.'").

209. *See* William A. McRae, Jr., *The Development of Nuisance in the Early Common Law*, 1 U. FLA. L. REV. 27, 37 (1948) (discussing typical nuisance claims of the medieval period); P.H. Winfield, *Nuisance as a Tort*, 4 CAMBRIDGE L.J. 189, 192 n.20 (1931) (discussing typical nuisance claims of the thirteenth century).

210. *See* CHRISTOPHER W. BROOKS, LAWYERS, LITIGATION AND ENGLISH SOCIETY SINCE 1450, at 125 (1998). Discussing the informality of proceedings in the manorial courts of the late Middle Ages, Brooks writes:

The importance of juries composed of local inhabitants in reaching decisions, and what we imagine as the informality of proceedings which might be held out of doors, at a shop

because these nuisance claims typically involved neighbors who presumably wanted to stay on each other's good side, these negotiations had at least a fair chance of success.<sup>211</sup>

Treating trespasses and nuisances as modified continuing violations facilitated these informal negotiations by allowing the parties an enhanced opportunity to gather additional information about the costs and injuries associated with a potential claim. If A's neighbor, B, erected a dam on his own property one winter, and that dam threatened to flood A's adjoining lands, A did not have to sue as soon as he appreciated the potential threat. Instead, A could wait and see if his holdings actually would be flooded, and if so, how often and how badly, and bring suit for each intrusion upon his land.<sup>212</sup> Since the costs associated with these suits were fairly low, it did not impose a particularly onerous burden upon A to require him to bring multiple actions, if necessary. Treating each trespass as a separate claim thereby afforded B the opportunity to keep his dam in place for a time, allowing him to better ascertain how useful the structure would be and thus how much he could or would pay A to compensate him for any injuries. At the same time, this policy gave A a chance to observe and appreciate how harmful, if at all, the dam would be to *his* interests. Having these effects, the continuing violations doctrine simultaneously promoted comity, encouraged efficient bargaining, and contributed to more-accurate damages calculations in disputes that, by their very nature, involved parties ideally positioned to arrive at appropriate terms.<sup>213</sup>

Up through the early-to-mid 1800s, American courts uniformly treated nuisances and trespasses as modified continuing violations.<sup>214</sup> Then, beginning

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front or in an alehouse, as well as in the moot hall, suggests that such courts may have had more in common with what jurists today would describe as alternative dispute resolution than with litigation as we understand it: that is, they rarely had much to do with legal technicalities and they put a stress on reconciliation rather than an adversarial process where the parties fought it out until one of them was declared the winner.

*Id.*

211. Also, the remedy of self-help through abatement also seems to have been more liberally invoked by aggrieved individuals back then. Presumably, this option provided an additional incentive for potential defendants to come to the bargaining table. *See, e.g., Dominus Rex v. Rosewell*, 2 Salk. 459, 459, 91 Eng. Rep. 397 (K.B. 1699).

212. *See* 54 C.J.S. *Limitation of Actions* § 205 (2005) ("A nuisance may be considered temporary if it is uncertain whether any future injury will occur, if future injury is liable to occur only at long intervals, or if the nuisance is occasional, intermittent, or recurrent, or is sporadic and contingent upon some irregular force such as rain.").

213. Also, in some situations a failure to challenge a prospective nuisance or trespass eventually could give the defendant a prescriptive right to continue (or refuse to abate) this activity. *See* WOOD, *supra* note 57, §§ 180, 181. By removing the prospect of eternal liability, the prospect of prescription also may have quieted objections to allowing plaintiffs an enhanced opportunity to wait and sue.

214. *See* *Staple v. Spring*, 10 Mass. 72, 74 (1813); *Vedder v. Vedder*, 1 Denio 257, 261 (N.Y. Sup. Ct. 1845); J.K. ANGELL, A TREATISE ON THE LIMITATIONS OF ACTIONS AT LAW AND SUITS IN

with an 1851 decision by the New Hampshire Supreme Court, the notion of a permanent nuisance or trespass emerged and muddied the conceptual waters.<sup>215</sup> A permanent nuisance or trespass exists when all harm to the plaintiff is presumed to flow from the original institution of the activity representing the claimed nuisance or trespassory invasion.<sup>216</sup> Since the initial trespass or creation of the nuisance is treated as the source of all of the plaintiff's damages, only one claim accrues (in which the plaintiff will recover all past, present, and future damages attributable to the nuisance or trespass), and the limitations period begins to run on that claim as soon as the plaintiff suffers compensable harm, or learns (or should learn) that he or she will incur this harm.<sup>217</sup>

"Permanent" and "continuing" nuisances and trespasses coexist to this day, though somewhat uneasily. For more than 150 years, courts have unsuccessfully tried to distinguish permanent nuisances and trespasses from claims that "continue" over time.<sup>218</sup> Various tests devised for this purpose populate the case digests. One such approach focuses on whether the asserted nuisance or trespass was recognizable as a harmful and permanent condition from the moment it first appeared.<sup>219</sup> Another methodology asks whether the harm-causing condition is realistically abatable.<sup>220</sup> Widespread acceptance of the thrust, if not the precise

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EQUITY AND ADMIRALTY 325 (1846).

215. See generally *Town of Troy v. Cheshire R.R. Co.*, 23 N.H. 83 (1851). The *Cheshire R.R. Co.* court ruled that the plaintiff *could*—but did not have to—recover prospective as well as retrospective damages from a trespasser: “[w]herever the nuisance is of such a character, that its continuance is necessarily an injury, and where it is of a permanent character, that will continue without change from any cause but human labor, there, the damage is an original damage, and may be at once fully compensated.” *Id.* at 102. Subsequent courts transmogrified this rule to hold that where permanent nuisances and trespasses were concerned, the plaintiff *had* to sue for all damages—past, present, and future—within the limitations period following the original manifestation of the harmful conduct. See WOOD, *supra* note 57, § 180.

216. *Walker Drug Co. v. La Sal Oil Co.*, 902 P.2d 1129, 1232 (Utah 1995) (“Where a nuisance or trespass is of such character that it will presumably continue indefinitely it is considered permanent . . . the limitations period runs from the time the nuisance or trespass is created.”).

217. RESTATEMENT (SECOND) OF TORTS § 899 cmt. d (1979); WOOD, *supra* note 57, § 180.

218. See *Provident Mut. Life Ins. Co. v. City of Atlanta*, 864 F. Supp. 1274, 1285 (N.D. Ga. 1994) (describing line-drawing efforts between continuing and permanent nuisances as “one of the most baffling areas of the law”); *Bd. of Dirs. of St. Francis Levee Dist. v. Barton*, 123 S.W. 382, 383-84 (Ark. 1909); E.H. Schopler, Annotation, *When Statute of Limitation Commences to Run Against Damage from Overflow of Land Caused by Artificial Construction or Obstruction*, 5 A.L.R. 2d 302, 309-10 (1949) (stating that “the question under annotation is one beset with extreme difficulties, on which the authorities are in greatest conflict and exhibit a good deal of confusion”).

219. *Reynolds Metal Co. v. Wand*, 308 F.2d 504, 509 (9th Cir. 1962); *Bd. of Dirs. of St. Francis Levee Dist.*, 123 S.W. at 383; *Schneider Nat'l Carriers, Inc. v. Bates*, 147 S.W.3d 264, 272 (Tex. 2004); WOOD, *supra* note 57, § 187d(7); Charles T. McCormick, *Damages for Anticipated Injury to Land*, 37 HARV. L. REV. 574, 582 (1924).

220. *Mangini v. Aerojet-Gen. Corp.*, 912 P.2d 1220, 1226 (Cal. 1996). The *Mangini* court interpreted “abatable” as meaning “that the nuisance can be remedied at a reasonable cost by



terms, of these approaches means that a condition that *might* cause the plaintiff damage and which the defendant can inexpensively remove or render harmless will more often than not be deemed a continuing source of harm. Meanwhile, a situation that obviously *will* cause the plaintiff harm, and prove exceedingly costly for the defendant or anyone else to abate, will more often be labeled a permanent nuisance or trespass.

The recognition of permanent nuisances and trespasses likely owes to the emergence of new types of injurious activity, as to which the efficiency arguments that lie behind the treatment of other nuisances and trespasses as continuing in nature do not apply. More precisely, the concept of a permanent nuisance or trespass developed hand-in-hand with the rise of large-scale industrial operations and public works in the United States, and in particular, with the advent of railroads.<sup>221</sup> The expansive nature of rail operations raised the specter of waves of successive nuisance or trespass suits brought by numerous plaintiffs aggrieved by the construction and operation of rail lines. This litigation threatened efforts by railroads to improve their cost certainty as the industry matured and rates stabilized in the mid-to-late 1800s.<sup>222</sup> Even if only sporadically applied, the classification of certain intrusions as “permanent” helped make operating costs more predictable by requiring nuisance and trespass plaintiffs to bring their claims early or find them time-barred. After the initial limitations period applicable to these claims elapsed, potential defendants could be assured of lessened liability, and of a minimized risk of potentially disastrous injunctive relief.<sup>223</sup> As for any overpayment of damages due to an insufficient opportunity for fact-finding, that was simply a cost of doing business, a cost that the companies’ well-trained lawyers could mitigate.

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reasonable means.” *Id.* at 1229.

221. See *Hoery v. United States*, 64 P.3d 214, 219 (Colo. 2003) (explaining that permanent nuisances have been recognized “to distinguish those unique factual situations—primarily in the context of irrigation ditches and railway lines—where the trespass or nuisance would and should continue indefinitely”). Railroads or public utilities were the defendants in a number of cases that endorsed or elaborated upon the concept of a “permanent” nuisance in the second half of the nineteenth century. See, e.g., *Chicago & E.I.R. Co. v. McAuley*, 11 N.E. 67, 69 (Ill. 1887); *Stodghill v. Chicago, B. & Q.R. Co.*, 5 N.W. 495, 497–98 (Iowa 1880); *Powers v. City of Council Bluffs*, 45 Iowa 652, 656 (1877); *Louisville & N. R. Co. v. Orr*, 15 S.W. 8, 9 (Ky. Ct. App. 1891); *Ortwin v. Baltimore*, 16 Md. 387, 395–96 (1860); *Fowle v. New Haven & Northampton Co.*, 112 Mass. 334, 338–39 (1873); *Bird v. Hannibal & St. Joseph R.R. Co.*, 30 Mo. App. 365, 378–79 (Ct. App. 1888); *Ridley v. Seaboard & R. R. Co.*, 24 S.E. 730, 735 (N.C. 1896); *Rosenthal v. Taylor, B. & H.R.Y. Co.*, 15 S.W. 268, 269 (Tex. 1891); *Lyles v. Tex. & N. O. R. Co.*, 11 S.W. 782, 783 (Tex. 1889); *Guinn v. Ohio River R. Co.*, 33 S.E. 87, 88 (W.Va. 1899).

222. See JOHN F. STOVER, *AMERICAN RAILROADS* 108 (2d ed. 1997).

223. See Charles T. McCormick, *Damages for Anticipated Injury to Land*, 37 HARV. L. REV. 574, 585 (1924) (observing that treating public works and other substantial projects as continuing nuisances “would be often an intolerable discouragement to semi-public entrepreneurs”).

At the same time, to the extent that rail companies and similar enterprises emerged as frequent defendants in nuisance and trespass disputes, it became less important to give the parties a generous opportunity to resolve their disputes outside of court. The absentee ownership of these corporate entities<sup>224</sup> lessened the likelihood that the parties would resolve these grievances cheaply and informally over the proverbial backyard fence. Moreover, corporations tend not to take nuisance and trespass lawsuits personally, minimizing the need to delay proceedings in order to avoid fracturing a mutually beneficial relationship between neighbors. In sum, treating rail (and canal, and other substantial) operations as continuing nuisances and trespasses offered several cost disadvantages with few countervailing benefits. This diminution of the efficiency interests served by treating nuisances and trespasses as continuing claims likely factored into the creation of a new class of “permanent” causes of action.

## 2. Antitrust Claims

Some antitrust claims have long been likened to continuing nuisances,<sup>225</sup> and today the modified form of the continuing violations doctrine is well-ingrained within antitrust law. Discussion here begins with the language of the Sherman Act, which defines the universe of prohibited anticompetitive conduct vaguely and broadly.<sup>226</sup> With commensurate inexactitude, the operative limitations statute provides that the limitations period on private antitrust claims begins to run when a cause of action “accrues.”<sup>227</sup> The statutory language thus leaves open not only the sorts of misconduct proscribed under the law, but also when these claims will accrue for limitations purposes.

The Supreme Court recognized decades ago that at least some conduct made actionable under the antitrust laws is “continuing” in nature.<sup>228</sup> In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*,<sup>229</sup> the plaintiff alleged that the defendant had embraced a practice of leasing, but not selling, its shoe manufacturing machines in order to monopolize the market for these devices.<sup>230</sup> This policy had been in effect

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224. See JAMES W. ELY, JR., *RAILROADS AND AMERICAN LAW* 16–17 (2002).

225. *Momand v. Universal Film Exch.*, 43 F. Supp. 996, 1006–07 (D. Mass. 1942) (likening antitrust violations to continuing nuisances).

226. See 15 U.S.C. § 1 (2000) (“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”); *id.* § 2 (“Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . .”).

227. *Id.* § 15b.

228. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

229. *Id.*

230. *Id.* at 483–84.

for several decades at the time of suit, and the defendant invoked the statute of limitations as a defense.<sup>231</sup> The Supreme Court agreed with the courts below that this claimed defense was of no avail to the alleged monopolist, observing that:

We are not dealing with a violation which, if it occurs at all, must occur within some specific and limited time span. . . . Rather, we are dealing with conduct which constituted a continuing violation of the Sherman Act and which inflicted continuing and accumulating harm on [the plaintiff].<sup>232</sup>

In a decision rendered three years later, *Zenith Radio Corporation v. Hazeltine Research, Inc.*,<sup>233</sup> the Court reaffirmed that at least some violations of the antitrust laws represent modified continuing violations. In *Zenith Radio*, the Court posited the general rule that in the antitrust context, “each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act.”<sup>234</sup>

Subsequent decisions have developed rough guidelines for when an antitrust claim “continues” and when it does not. One approach provides that a fresh claim will result only from a “new and independent act that is not merely a reaffirmation of a previous act,” and that “inflict[s] new and accumulating injury on the plaintiff.”<sup>235</sup> A similar standard provides that a continuing violation “must be based on some injurious [conduct] actually occurring during the limitations period, not merely the abatable but unabated inertial consequences of some pre-limitations action.”<sup>236</sup> If a violation of the antitrust laws is “final at its impact,”<sup>237</sup> or manifests a decision that is “irrevocable, immutable, permanent and final,”<sup>238</sup> suit must be brought, if at all, within the limitations period following the initial transgression.

In practice, these tests boil down to matters of notice and scope—*i.e.*, when did the plaintiff learn that the defendant had undertaken, or would undertake, the complained-of conduct (notice), and did the defendant exacerbate his or her alleged

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231. *Id.* at 495.

232. *Id.* at 502 n.15 (internal citations omitted).

233. 401 U.S. 321 (1971). In *Zenith*, the Supreme Court tolled the limitations statute as to claims for future damages on the ground that these damages would have been speculative, at best, in any suit filed at an earlier juncture. *Id.* at 341–42. Though cast as a tolling rule, this principle meshes neatly with the practice of recognizing a “continuing” instead of a “permanent” nuisance in situations where the harmfulness of the defendant’s conduct cannot be determined in the limitations period following its initiation. See *supra* notes 209–213 and accompanying text.

234. *Zenith*, 401 U.S. at 338.

235. *Varner v. Peterson Farms*, 371 F.3d 1011, 1019 (8th Cir. 2004); *DXS, Inc. v. Siemens Med. Sys., Inc.*, 100 F.3d 462, 468 (6th Cir.1996).

236. *Al George, Inc. v. Envirotech Corp.*, 939 F.2d 1271, 1274 (5th Cir. 1991).

237. *Poster Exch., Inc. v. Nat’l Screen Serv. Corp.*, 517 F.2d 117, 126–27 (5th Cir. 1975).

238. *In re Multidistrict Vehicle Air Pollution*, 591 F.2d 68, 72 (9th Cir. 1979).

malfeasance within the limitations period, causing more harm to the plaintiff than he or she reasonably might have anticipated from the defendant's activity outside the limitations period (scope).<sup>239</sup> Given the importance attached to the plaintiff's awareness of the pertinent facts, it might fairly be questioned whether a "continuing violation" arises even when these methodologies identify multiple claims within a given course of conduct. Instead, it might be said that these approaches embrace a modified form of the discovery rule, peculiar to antitrust law.

That being said, antitrust law does embrace at least two types of true continuing violations, in which the plaintiff's prior awareness of the defendant's malfeasance is regarded as besides the point. First, each sale made to a consumer pursuant to a price-fixing or market-allocation conspiracy will give rise to a separate claim with its own limitations period, even if these sales were the completely predictable result of a notorious agreement to manipulate the market perfected outside of the limitations period.<sup>240</sup> Second, as illustrated by the *Hanover Shoe* decision,<sup>241</sup> claims challenging ongoing, generally applicable policies or practices of the defendant do not accrue once and for all when the policy or practice is first adopted or when it is first applied to the plaintiff before the court. This rule holds true even if the defendant makes it perfectly clear that this policy will remain in effect for all time.<sup>242</sup> Instead, anticompetitive policies of general applicability will remain actionable for so long as they remain in force.<sup>243</sup>

With price-fixing conspiracies, treating each sale as giving rise to a separate claim avoids absurdities that might follow from strict application of the discovery rule. A plaintiff attacking a price-fixing conspiracy might have learned about the illegal agreement long before, but declined to bring suit at that time because he or she was not a consumer of the affected product. It is only upon becoming a consumer and paying the inflated price that the buyer has reason to challenge the conspiracy. One might start the limitations clock running at the time of the plaintiff's first purchase of the affected product, so that future sales might be immune from attack if the plaintiff did not promptly challenge the price-fixing plot. This approach, however, would only create another problem. The class of victims of price-fixing conspiracies is rarely static. Instead, most such conspiracies sap

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239. See PHILLIP E. AREEDA, HERBERT HOVENKAMP, & ROGER D. BLAIR, 2 ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 320c (2d ed. 2000) (discussing the importance of the plaintiff's knowledge in determining whether to "toll" the statute of limitations for various types of antitrust claims).

240. *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997) (discussing the applicability of the continuing violations doctrine to this type of claim); *Midwestern Mach. Co. v. Nw. Airlines, Inc.*, 392 F.3d 265, 269-70 (8th Cir. 2004); *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1052 (8th Cir. 2000); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 295 (2d Cir. 1979); *In re K-Dur Antitrust Litig.*, 338 F. Supp. 2d 517, 551 (D.N.J. 2004).

241. *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 502 & n.15 (1968).

242. *Id.* at 502 n. 15.

243. *Id.*

wealth from dynamic pools of individual consumers. This means that a consistent flow of new market entrants will have fresh claims, even if the plaintiff before the court has only a stale grievance. Because other victims not before the court may have timely claims, any dismissal of the plaintiff's case on statute of limitations grounds would merely postpone to another day a challenge to the conspiracy. In the interim, the allegedly harmful behavior may continue unabated, inflicting a shared social cost of the sort that the antitrust statutes try to deter.

Under these circumstances, a plaintiff's sloth does not carry quite the same weight as it otherwise would. Limiting the plaintiff to recovery for harm suffered within the limitations period, as the modified form of the continuing violations doctrine does, comes across as an appropriate "penalty." Similar logic applies to challenges to anticompetitive policies and practices of general application. Even if the plaintiff before the court has slept on his or her rights vis-à-vis this malfeasance, the suit also vindicates the interests of other potential claimants who may possess timely claims. Treating a claim attacking this sort of misconduct as a modified continuing violation imposes a qualified penalty on the claimant for his or her delay, while encouraging challenges to anticompetitive policies or practices that may be injurious to society in general.

### 3. Civil Rights Claims

Last, but not least, a wide range of claims brought under 42 U.S.C. § 1983 and other civil rights laws have been classified as modified continuing violations, allowing plaintiffs to attack at least part of a course of unlawful conduct long after its inception. Decisions addressing the continuing violations doctrine in the civil rights setting have approached the limitations issues before them in a variety of ways. The following summaries of several decisions produced by federal courts of appeals shed light on the similarities and differences among these approaches.

#### a. Decisions Recognizing Continuing Violations

##### i. Virginia Hospital Association v. Baliles<sup>244</sup>

*Virginia Hospital Association v. Baliles* involved a challenge under 42 U.S.C. § 1983 to a state procedure for reimbursing hospitals for the cost of treating Medicaid patients.<sup>245</sup> The plaintiff, a non-profit organization of Virginia health care providers, sought injunctive relief and a court order declaring the procedure unlawful.<sup>246</sup> The state invoked the statute of limitations as a defense, arguing that

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244. 868 F.2d 653 (4th Cir. 1989).

245. *Id.* at 656.

246. *Id.*

the plaintiff's claim was time-barred because the policy had been enacted more than two years (the relevant limitations period) prior to the filing of suit.<sup>247</sup>

In rejecting the state's argument, the United States Court of Appeals for the Fourth Circuit agreed with the district court that the plaintiff "had alleged an ongoing constitutional violation, and that the statute [of limitations] would not have begun to run until the violation ended."<sup>248</sup> The court of appeals also agreed with the district court's conclusion that "[t]he continued enforcement of an unconstitutional statute cannot be insulated by the statute of limitations,"<sup>249</sup> citing the United States Supreme Court's decision in *Brown v. Board of Education*<sup>250</sup> for this principle.

ii. *National Advertising Company v. City of Raleigh*<sup>251</sup>

This case concerned a Raleigh, North Carolina ordinance that restricted off-premises outdoor advertising signage.<sup>252</sup> The plaintiff, a billboard company, alleged that the ordinance produced an uncompensated regulatory taking of its property and claimed that the measure violated its free-speech rights as well.<sup>253</sup> The plaintiff brought suit more than five years after the ordinance was enacted, at the conclusion of an amortization period provided for in the measure.<sup>254</sup> The timing of the suit meant that if the plaintiff's claims accrued at the time the ordinance was passed, the statute of limitations barred the action in its entirety.<sup>255</sup>

The United States Court of Appeals for the Fourth Circuit affirmed the district court's dismissal of the action. The appellate court determined that the plaintiff's takings claim accrued when the ordinance was enacted, not when the plaintiff actually incurred financial losses at the close of the amortization period.<sup>256</sup> However, the court applied a different analysis to the plaintiff's First Amendment claim. Prior to dismissing this claim on other grounds, the court assumed that the plaintiff's allegations were timely "[b]ecause it is doubtful that an ordinance facially offensive to the First Amendment can be insulated from challenge by a statutory limitations period."<sup>257</sup> While this assertion represented dicta in the context of the *National Advertising* opinion, subsequent courts have applied this language

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247. *Id.* at 663.

248. *Id.*

249. *Id.*

250. 347 U.S. 483 (1954).

251. 947 F.2d 1158 (4th Cir. 1991).

252. *Id.* at 1160.

253. *Id.*

254. *Id.* at 1161.

255. *Id.* at 1161-62.

256. *Id.* at 1168.

257. *Id.*

in finding statutes of limitations inapplicable to comparable First Amendment claims.<sup>258</sup>

iii. *Palmer v. Board of Education*<sup>259</sup>

The plaintiffs in *Palmer v. Board of Education* were a class of African-American parents and children living in a Chicago-area neighborhood.<sup>260</sup> They alleged that the local school district closed a school in a predominantly African-American neighborhood for discriminatory reasons.<sup>261</sup> The plaintiffs filed suit under 42 U.S.C. § 1983 more than one year after the school was closed.<sup>262</sup> The defendants argued that the statute of limitations provided a complete defense to the plaintiffs' suit.<sup>263</sup>

The United States Court of Appeals for the Seventh Circuit disagreed. Just as the *Virginia Hospital Association* court had cited *Brown v. Board of Education* for the principle that the limitations clock will not run on the enforcement of an unconstitutional statute, the *Palmer* court foreshadowed its holding by framing the issue at hand as "whether the suits that produced *Brown v. Board of Education* . . . should have been dismissed as untimely rather than decided on the merits."<sup>264</sup> Unsurprisingly, the court answered this question in the negative, concluding that the situation before it entailed a "series of wrongful acts" that "create[d] a series of claims."<sup>265</sup> Finding the lawsuit timely, the court determined that:

Every fall the school board decides which buildings to use and which children shall be assigned to which schools. If, as plaintiffs believe, the school board's explanation for closing [the school in the predominantly African-American neighborhood] is a pretext for discrimination, then each year's decision to leave the building shuttered is a new violation—as is each assignment plan that compels black pupils to board busses for a distant junior high school.<sup>266</sup>

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258. *E.g.*, *Lavey v. City of Two Rivers*, 994 F. Supp. 1019, 1023 (E.D. Wis. 1998).

259. 46 F.3d 682 (7th Cir. 1995).

260. *Id.* at 683.

261. *Id.*

262. *Id.* at 683-84 (one year was the applicable limitations period).

263. *Id.* at 683.

264. *Id.* (internal citations omitted).

265. *Id.* at 686.

266. *Id.*

## b. Decisions Rejecting Application of the Continuing Violations Doctrine

i. *Knox v. Davis*<sup>267</sup>

In *Knox v. Davis*, another § 1983 case, the plaintiff (an attorney) claimed that state prison officials violated her constitutional rights by suspending her visitation privileges as to an incarcerated client, who was also her husband.<sup>268</sup> Although the suspension was imposed outside the limitations period prior to suit, the plaintiff's rebuffed attempts to visit her husband occurred inside the limitations period.<sup>269</sup> When the plaintiff brought suit, the district court held that her claim had accrued once and for all when she received the letter notifying her of the suspension and dismissed the action pursuant to the operative statute of limitations.<sup>270</sup>

On appeal, the United States Court of Appeals for the Ninth Circuit upheld the dismissal.<sup>271</sup> Over a dissent, the majority rejected the plaintiff's argument that her claim represented a modified continuing violation, with each denial of visitation constituting a separate unlawful act with its own limitations period.<sup>272</sup> The appellate court concluded that because none of these snubs involved "independent consideration" by the defendants, the denials represented a mere "continuing impact" of a past violation, namely the original suspension, and not grounds for separate claims.<sup>273</sup>

ii. *Pitts v. City of Kankakee*<sup>274</sup>

The plaintiffs in *Pitts v. City of Kankakee* complained that local officials had violated their rights by placing signs which read "SLUM PROPERTY" on properties they owned.<sup>275</sup> The plaintiffs claimed that the signs had been posted to retaliate for the plaintiffs' political views.<sup>276</sup> The signs were put in place in June 1997 and remained visible for more than two years.<sup>277</sup> The plaintiffs filed suit in November 1999.<sup>278</sup> The limitations period for their § 1983 claim was two years.<sup>279</sup>

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267. 260 F.3d 1009 (9th Cir. 2001).

268. *Id.* at 1011-12.

269. *Id.* at 1013.

270. *Id.* at 1012, 1014.

271. *Id.* at 1016.

272. *Id.* at 1013.

273. *Id.* at 1014-15.

274. 267 F.3d 592 (7th Cir. 2001).

275. *Id.* at 594.

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*



The plaintiffs addressed the limitations problem by arguing that the continued presence of the signs on their properties amounted to a continuing violation of their free-speech rights.<sup>280</sup>

The United States Court of Appeals for the Seventh Circuit held otherwise.<sup>281</sup> First, it noted that the city's only affirmative acts were to place the signs on the plaintiffs' properties and that these placements all occurred outside of the limitations period prior to suit.<sup>282</sup> "As of that moment," the court observed, "the plaintiffs knew they had suffered an injury; and nothing new happened thereafter to change the nature of the injury."<sup>283</sup> The court then followed the accrual rule applicable to what the panel regarded as the most analogous common-law claim, the tort of defamation.<sup>284</sup> Treating the continued presence of the signs as akin to the ongoing existence of a single defamatory publication, the court held that the plaintiffs' claims were not continuing in nature.<sup>285</sup> Rather, the claims were complete when the signs were first posted.<sup>286</sup> On this basis, the court of appeals affirmed the district court's dismissal of the plaintiffs' suit as untimely.<sup>287</sup>

### iii. *Lyons v. England*<sup>288</sup>

The plaintiffs in *Lyons v. England* were four African-American men who alleged that they had been subjected to a pattern of disparate treatment in work assignments and promotions because of their race and gender.<sup>289</sup> The history of wrongful acts alleged by the plaintiffs extended back to 1991, six years before any of them contacted an Equal Employment Opportunity counselor.<sup>290</sup> The plaintiffs argued that even the earliest acts of discrimination were still actionable in light of the continuing violations doctrine, since they had alleged a pattern of misconduct in violation of Title VII.<sup>291</sup>

The United States Court of Appeals for the Ninth Circuit disagreed and found the older claims were time-barred, although the plaintiffs were allowed to proceed on their other, timely allegations of discrimination.<sup>292</sup> After observing that "[t]he

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280. *Id.* at 595.

281. *Id.* at 597.

282. *Id.* at

283. *Id.* at 596.

284. *Id.* at 596-97.

285. *Id.*

286. *Id.* at 597.

287. *Id.*

288. 307 F.3d 1092 (9th Cir. 2002).

289. *Id.* at 1100-01.

290. *Id.* at 1105.

291. *Id.* at 1106-07.

292. *Id.* at 1107-08.

Supreme Court's decision in *Morgan* invalidated our previous application of the continuing violation doctrine to discrete acts of discrimination and retaliation,<sup>293</sup> the *Lyons* court determined that "[i]f a plaintiff chooses to bring separate claims based on each discriminatory act, his assertion that this series of discrete acts flows from a company-wide, or systematic, discriminatory practice will not succeed in establishing the employer's liability for acts occurring outside the limitations period."<sup>294</sup> The *Lyons* court added, "[a] discriminatory practice, though it may extend over time and involve a series of related acts, remains divisible into a set of discrete acts, legal action on the basis of each of which must be brought within the statutory limitations period."<sup>295</sup> In adopting these views, the *Lyons* panel cast the Ninth Circuit's vote with those courts that have interpreted the *Morgan* decision as undermining not just the "serial" theory of continuing violations, but the "systemic" approach as well.

As the foregoing discussion makes clear, courts have embraced a variety of tests for determining whether the plaintiffs before them alleged a continuing violation of their civil rights— "independent consideration," resort to common-law analogues, the *Morgan* "discrete acts" approach, *etc.* The reasoning behind some of these decisions seems rather dubious. The *Palmer* court, for instance, strained mightily to locate discriminatory decisions made within the limitations period, apparently regarding these decisions as necessary prerequisites for a "continuing" claim. But would the *Brown v. Board of Education* litigation have been untimely if the Topeka Board of Education had made just a single decision decades earlier to segregate city schools, then vowed that its decision was final and not subject to reconsideration? Presumably not; the policy of segregation remained subject to challenge for so long as it remained in effect, regardless of whether any new "decisions" reaffirming the scheme were made within the limitations period.

Notwithstanding this confused reasoning, the results reached in these opinions reveal a trend similar to the one detected in the antitrust case law. At one end of the analytical spectrum lie cases such as *Pitts* in which the plaintiffs allege claims that arguably could be cast as continuing, but as to which any harms attendant to dismissal will be realized solely by the plaintiffs before the court, or by a contingent of similarly situated potential claimants.<sup>296</sup> Courts have been disinclined to find continuing violations in these cases unless the plaintiff can ascribe new or additional harm to an act or decision occurring within the limitations period prior to suit.<sup>297</sup> At the other extreme, courts have applied the continuing violations doctrine

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293. *Id.* at 1106.

294. *Id.* at 1107.

295. *Id.* at 1108.

296. In this context, a "similarly situated" individual or entity is one that suffered a loss comparable to that of the plaintiff and had a comparable opportunity to file suit at an early juncture.

297. *Cf. Lin, supra* note 20, at 753 ("[T]here seems to be little disagreement [in the anti-trust

most often and with the fewest misgivings to claims that challenge a policy of general application affecting an evolving class of prospective plaintiffs.<sup>298</sup> That is the classic *Brown v. Board of Education* fact pattern, invoked by both the *Virginia Hospital Association* and the *Palmer* courts. In such cases, more than just the rights of the plaintiff before the court are at stake. Furthermore, if the court rejects the plaintiff's challenge on statute of limitations grounds, a substantively similar but timely suit brought by a different plaintiff could land in the judge's lap soon thereafter. Efficiency interests thus counsel in favor of entertaining the claim at hand, but limiting the plaintiff to only those damages suffered within the limitations period and, perhaps more important, to injunctive relief.

#### V. *LEDBETTER*: THE LATEST WORD ON CONTINUING VIOLATIONS

This past term, the United States Supreme Court returned to the familiar<sup>299</sup> subject of continuing violations in the workplace.<sup>300</sup> In *Ledbetter v. Goodyear Tire & Rubber Co.*, the court ironed out a longstanding wrinkle in continuing violations jurisprudence by holding that a Title VII plaintiff cannot rescue an otherwise time-barred claim simply by alleging that he or she received "discriminatory pay."

More specifically, in *Ledbetter* the Court considered whether a Title VII plaintiff's "pay discrimination" claim represented a modified continuing violation, with each unequal paycheck giving rise to a separate claim with its own limitations period, or whether this type of claim in fact challenged the decision or decisions that produced the uneven pay, in which case the limitations period would begin to run once and for all when the discriminatory decisions were made, or at the latest, when they became known to the plaintiff.<sup>301</sup> The *Ledbetter* court adopted the second of these constructions.<sup>302</sup>

By way of background, "equal pay" claims under Title VII had long represented a conceptual speed bump in the law of continuing violations. In the *per curiam* decision of *Bazemore v. Friday*, decided in 1986, the Supreme Court had held that the statute of limitations did not insulate from challenge a state agency's allegedly ongoing failure to remedy a pay disparity between Caucasian and

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context] that a continuing violation requires at least some sort of affirmative act by the defendant that injures the plaintiff.").

298. See also *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380-81 (1981) (finding the Fair Housing Act's 180-day limitations period "no bar" to a suit attacking a "continuing pattern, practice, and policy of unlawful racial steering").

299. See *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002); *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900 (1989); *Bazemore v. Friday*, 478 U.S. 385 (1986) (*per curiam*); *Chardon v. Fernandez*, 454 U.S. 6 (1981) (*per curiam*); *Del. State Coll. v. Ricks*, 449 U.S. 250 (1980); *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977).

300. See *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007).

301. *Id.* at 2167-69.

302. *Id.* at 2169.

African-American workers.<sup>303</sup> This gap owed to an earlier, abandoned bifurcation of the agency into a “white branch” and a “Negro branch.”<sup>304</sup> African-American employees brought a “pattern or practice” suit challenging their unequal pay.<sup>305</sup> The agency raised a statute of limitations defense. In rejecting this defense, the *Bazemore* court determined:

[T]hat the [agency] discriminated with respect to salaries *prior* to the time it was covered by Title VII does not excuse perpetuating that discrimination *after* the [agency] became covered by Title VII. To hold otherwise would have the effect of exempting from liability those employers who were historically the greatest offenders of the rights of blacks. A pattern or practice that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon Title VII’s effective date, and to the extent an employer continued to engage in that act or practice, it is liable under that statute. While recovery may not be permitted for pre-1972 acts of discrimination, to the extent that this discrimination was perpetuated after 1972, liability may be imposed.

Each week’s paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII.<sup>306</sup>

Over the next twenty years, even as the Supreme Court reined in the continuing violations doctrine as it applied to other types of Title VII claims,<sup>307</sup> lower courts, citing *Bazemore*, recognized a “narrow channel” through which plaintiffs, by attacking their pay, could indirectly challenge discriminatory acts occurring outside the limitations period.<sup>308</sup> These Title VII claims were treated as modified continuing violations, with each allegedly discriminatory paycheck giving rise to a separate claim.<sup>309</sup> This result followed even if the unequal pay within the limitations period resulted from a discriminatory decision or decisions that had been made long before and were insulated from challenge by the Title VII statute of limitations.<sup>310</sup> The treatment of pay claims as modified continuing violations

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303. *Bazemore*, 478 U.S. at 395.

304. *Id.* at 390.

305. *Id.* at 386.

306. *Id.* at 395-96 (Brennan, J., concurring in part).

307. *See, e.g.*, *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002).

308. *E.g.*, *Reese v. Ice Cream Specialties, Inc.*, 347 F.3d 1007, 1013 (7th Cir. 2003).

309. *Id.*

310. *Id.* at 1012; *Goodwin v. Gen. Motors Corp.*, 275 F.3d 1005, 1009 (10th Cir. 2002); *Cardenas v. Massey*, 269 F.3d 251, 258 (3d Cir. 2001); *Anderson v. Zubieta*, 180 F.3d 329, 335-37 (D.C. Cir. 1999); *Ashley v. Boyle’s Famous Corned Beef Co.*, 66 F.3d 164, 168 (8th Cir. 1995) (en banc); *Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336, 346-47 (4th Cir. 1994); *Gibbs v. Pierce County Law Enforcement Support Agency*, 785 F.2d 1396, 1400 (9th Cir. 1986); *Hall v. Ledex, Inc.*,

became increasingly difficult to reconcile with an accumulating body of case law produced by the Supreme Court and lower tribunals fixing the moment of accrual for most employment discrimination claims as the time when the defendant committed a consciously discriminatory act, not when the plaintiff suffered the consequences of that act.<sup>311</sup> While the issuance of an imbalanced paycheck could be considered a discriminatory act, the ministerial nature of this task arguably makes it seem more like a consequence of an earlier decision to discriminate.

The *Ledbetter* case came to the Supreme Court after the United States Court of Appeals for the Eleventh Circuit, arguably stretching the permissible interpretive aperture under *Bazemore*, ruled that a Title VII plaintiff alleging a disparate pay claim and faced with a statute of limitations defense “may look no further into the past than the last affirmative decision directly affecting the employee’s pay immediately preceding the start of the limitations period,” at least if the employer had in place a system for periodically reviewing and resetting employee pay.<sup>312</sup> The court of appeals ruled that if this decision was not infected by discrimination, the Title VII statute of limitations would apply to cut off the plaintiff’s remedy.<sup>313</sup> Were the rule otherwise, the court of appeals surmised, “[s]o long as the plaintiff received one paycheck within the limitations period that was based on the pay level he or she objects to, the plaintiff could effectively call into question every decision made contributing to his or her being paid at that level,” even if those decisions were made long before.<sup>314</sup> Such a result, the court opined, would undermine the purposes served by the Title VII statute of limitations.<sup>315</sup>

At the Supreme Court, Justice Alito authored a 5-4 decision that affirmed the Eleventh Circuit and adopted an even more restrictive approach to equal pay claims brought under Title VII.<sup>316</sup> The *Ledbetter* majority agreed with the Eleventh Circuit that the plaintiff’s claim, at root, attacked the decision that led to her disparate pay.<sup>317</sup> Therefore, instead of supplying grounds for additional claims in and of themselves, her paychecks represented the mere consequences of these earlier decisions, as to which any claim was time-barred.<sup>318</sup> “The EEOC charging period is triggered when a discrete unlawful practice takes place,” Justice Alito wrote,<sup>319</sup> adding that “[a] new violation does not occur, and a new charging period

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669 F.2d 397, 398 (6th Cir. 1982).

311. *E.g.*, *Del. State Coll. v. Ricks*, 449 U.S. 250 (1980); *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977).

312. *Ledbetter v. Goodyear Tire & Rubber Co.*, 421 F.3d 1169, 1182-83 (11th Cir. 2005).

313. *Id.* at 1182.

314. *Id.*

315. *Id.*

316. *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2169 (2007).

317. *Id.*

318. *Id.*

319. *Id.*

does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination.”<sup>320</sup>

The *Ledbetter* majority took pains to distinguish the *Bazemore* decision, which the plaintiff characterized as announcing a “‘paycheck accrual rule’ under which each paycheck, even if not accompanied by discriminatory intent, triggers a new EEOC charging period during which the complainant may properly challenge any prior discriminatory conduct that impacted the amount of that paycheck, no matter how long ago the discrimination occurred.”<sup>321</sup> To the *Ledbetter* majority, however, *Bazemore* provided only that:

[W]hen an employer adopts a facially discriminatory pay structure that puts some employees on a lower scale because of race, the employer engages in intentional discrimination whenever it issues a check to one of these disfavored employees. An employer that adopts and intentionally retains such a pay structure can surely be regarded as intending to discriminate on the basis of race as long as the structure is used.<sup>322</sup>

With these words, *Ledbetter* cast discriminatory *policies* regarding pay as modified continuing violations that remain subject to attack for so long as they are applied, though plaintiffs can recover only those damages suffered within the limitations period. In the case before it, the Court found that there was no discriminatory “structure” evincing discriminatory intent in place during the limitations period.<sup>323</sup> Accordingly, *Bazemore* did not salvage the plaintiff’s Title VII claim.<sup>324</sup>

320. *Id.*

321. *Id.* at 2172.

322. *Id.* at 2173.

323. *Id.* at 2174.

324. Underscoring the importance in the continuing violations analysis of subtle nuances in how a claim is defined, the *Ledbetter* majority noted that the outcome might have been different had the plaintiff pled and proved a claim under the Equal Pay Act, rather than Title VII. *Id.* at 2165 (majority opinion). The Equal Pay Act provides, in pertinent part, as follows:

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions . . . .

29 U.S.C. § 206(d)(1) (2000). More so than Title VII’s prohibition of discriminatory “practices,” this language (“discriminate . . . by paying wages”) lends itself to a regime in which each week’s paycheck will give rise to a separate claim. Indeed, courts routinely find that each inappropriately imbalanced payment to an employee will give rise to a fresh Equal

In dissent, Justice Ginsburg disputed the *Ledbetter* majority's characterization of the unlawful "practice" at issue.<sup>325</sup> She wrote that "[o]ur precedent suggests, and lower courts have overwhelmingly held, that the unlawful practice [at issue] is the *current payment* of salaries infected by gender-based (or race-based) discrimination—a practice that occurs whenever a paycheck delivers less to a woman than to a similarly situated man."<sup>326</sup> The *Ledbetter* dissent also likened disparate pay claims to hostile work environments, stressing that both of these "practices" can represent the sum of several different acts or decisions.<sup>327</sup> Furthermore, the dissent asserted that the difficulty some employees may encounter in ascertaining whether they are receiving discriminatorily low pay also weighs in favor of treating each paycheck as giving rise to a separate claim.<sup>328</sup> On this point, the dissent emphasized that a disparate pay claim requires knowledge of a gap between the wages paid to the plaintiff and the amounts paid to other employees, and that a plaintiff may not know what his or her co-workers are being paid for some time after his or her own pay is set.<sup>329</sup>

The analysis and ultimate conclusions in *Ledbetter* make sense. Both the majority and the dissent started with the proper threshold issue, identifying the gravamen of the claim at issue. By the slimmest of margins, the Court concluded that the discriminatory decision setting or affecting pay was the true unlawful "practice," and that unbalanced paychecks represented the mere consequences of those decisions.<sup>330</sup> The dissent would have identified the issuance of a paycheck "infected by . . . discrimination" as itself an unlawful practice.<sup>331</sup> Both positions had some merit; the majority's simply had one more vote behind it. That battle lost, Justice Ginsburg's other arguments in dissent make a good case for application of the discovery rule to disparate pay allegations, but not necessarily for treating each paycheck as giving rise to a separate Title VII claim.

Furthermore, the distinction drawn by the *Ledbetter* majority between claims attacking a discriminatory pay structure and those addressing decisions specific to an individual employee comports with the purposes served by the modified form of the continuing violations doctrine. A discriminatory pay structure or policy is likely to affect the rights of an evolving class of claimants, in addition to the plaintiff

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Pay Act claim, regardless of whether the amount of pay was set outside of the limitations period. *E.g.*, *O'Donnell v. Vencor, Inc.*, 466 F.3d 1104, 1112 (9th Cir. 2006); *Pollis v. New Sch. for Soc. Research*, 132 F.3d 115, 118 (2d Cir. 1997); *Gandy v. Sullivan County*, 24 F.3d 861, 865 (6th Cir. 1994).

325. *Ledbetter*, 127 S. Ct. at 2179 (Ginsburg, J., dissenting).

326. *Id.*

327. *Id.* at 2181.

328. *Id.*

329. *Id.* at 2181–82.

330. *Id.* at 2165 (majority opinion).

331. *Id.* at 2179 (Ginsburg, J., dissenting).

before the court. Therefore, as with certain antitrust and civil rights claims, permitting challenges to these policies by anyone injured by them within the limitations period—regardless of how long ago a particular policy was instituted, when the plaintiff learned of it, or when the policy was first applied to the plaintiff—eliminates the prospect of repetitive lawsuits directed at the same unlawful conduct. This approach also facilitates the consideration and possible correction of misbehavior that affects a large number of potential claimants. In both respects, allowing the suit to proceed promotes efficiency, the common denominator to all modified continuing violations.

## VI. CONCLUSION

The *Ledbetter* decision reaffirmed a baseline principle concerning the continuing violations doctrine: In deciding whether the doctrine should apply, the initial inquiry should examine the gravamen of the claim at hand and the language of the pertinent limitations statute. Assuming that a claim *may* be cast as continuing, the inquiry then should turn to—or at a minimum, incorporate consideration of—whether treating the claim as continuing in nature will promote equity or efficiency interests more effectively than the application of other accrual and tolling options would. This analysis most often will lead courts to reject both forms of the doctrine, and employ another rule instead. This result is perfectly understandable, since judicious application of the traditional accrual rule, the discovery rule, and equitable tolling principles will address most of the fairness and efficiency concerns implicated by a statute of limitations defense. But exceptions exist, such as where the defendant's misconduct places the plaintiff under his or her prolonged control, or where malfeasance affects a broad swath of potential claimants. In these and a handful of other situations, either the pure or the modified version of the continuing violations doctrine may represent the optimal means of producing fair and efficient outcomes.