

Rethinking the Continuing Violation Doctrine: The Application of Statutes of Limitations to Continuing Tort Claims

Elad Peled

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Rethinking the Continuing Violation Doctrine: The Application of Statutes of Limitations to Continuing Tort Claims

ELAD PELED*

ABSTRACT

Any tort claim is barred by an applicable statute of limitations after the lapse of a prescribed period of time from its initial accrual. Where the occurrence giving rise to the claim has some continuing feature, e.g.: continuous trespass, continuous environmental nuisance, continuous discrimination or sexual harassment, continuous professional malpractice, a continuous or repetitive publication which harms the right to reputation, the right to privacy or copyright, and so forth—it is generally agreed that the limitation period is effectively tolled, so that the claim may also be filed subsequent to that date. Yet, essential questions about the application of statutes of limitations to continuing tort claims remain unanswered, or are answered in a plethora of contradicting ways.

Various positions voiced by judges and scholars in this respect, under the confines of the so-called “continuing tort doctrine” or “continuing violation doctrine,” have not only failed to obtain consensus and infuse the issue with clarity, but are also generally problematic in several respects. First, while it is intuitively deemed justified to prolong the limitation period where the wrongful occurrence is continuous, such intuition has not been successfully translated into a distinct, coherent, and defensible policy rationale. Second, the tests devised to define when torts are legally continuing do not yield consistent, predictable results, both due to the lack of a proper theoretical foundation on which they may be based, and since it is often inherently difficult to separate a given tortious event into discrete factual and normative components. Third, little efforts have been made to design a remedy that would be particularly suitable for the continuing tort scenario.

This article wishes to address the aforementioned flaws by offering a new theoretical perspective for the continuing violation doctrine, which challenges the implied, unquestioned premises currently underlying it, and derives from it a more coherent proposal for the

* Adjunct Professor, University of Haifa and Bar-Ilan University, Israel; Head of Research Division, Lexidale – International Policy Consulting. I am thankful to Ariel Porat, Ehud Guttel, Reinhard Zimmermann, Israel Gilead, Tally Kritzman-Amir, Jens Kleinschmidt, Hannes Rösler, Lotem Perry-Hazan, Ronit Levine-Schnur, Yuval Zilber, and Eli Pillersdorf, for their helpful comments. Correspondence should be addressed to peledelad@nyu.edu.

doctrine's application. Under the proposed analytical framework, the doctrine should not entitle the victim of a continuing tort to any compensation for her past losses—her eligibility for such compensation is better dealt with by other limitations doctrines. Rather, the only legitimate concern of the continuing violation doctrine is preventing the potentially infinite continuance of torts into the future. This construction coincides with the general principles and objectives of statutes of limitations, yields a relatively simple, practical test, which is primarily forward-looking and thus obviates most of the chronology-related complications, and generates a more just, balanced, and efficient remedy scheme, at the center of which stands an injunctive relief, ordering the defendant to put an end to the injurious state of affairs.

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I. INTRODUCTION

David commits a continuous tort against Susan by invading a part of her land and operating his business office there. The tort (trespass) began in January 2011 and was readily apparent to Susan from its very beginning, but due to her workload she neglected the matter. Eventually Susan sued David for trespass, but only in July 2013. The statutory period of limitations for tort claims in David and Susan's jurisdiction is two years. Should Susan's claim be entertained? If so, and assuming she prevails on the merits, which remedy should she be awarded? And why?

Any tort claim is barred by an applicable statute of limitations after the lapse of a prescribed period of time from its initial accrual.¹ Where the occurrence giving rise to the claim has some continuing feature, it is generally agreed that the limitation period is effectively tolled, so that the claim may also be filed subsequent to that date.² Yet, essential questions about the application of statutes of limitations to continuing tort claims remain unanswered, or are answered in a plethora of contradicting ways.³ Those questions will be thoroughly examined by the present article.

United States federal and state courts commonly discuss limitations issues related to continuing torts under the confines of the so-called "continuing tort doctrine," more commonly known as the "continuing violation doctrine."⁴ Typical scenarios falling under the ambit of the said doctrine include: continuous discrimination in the workplace and in other settings, actionable under civil rights laws;⁵ continuous or repetitive publication, particularly online, which harms protected rights such as the right to reputation, the right to privacy, and copyright,⁶

1. See RESTATEMENT (SECOND) OF TORTS § 899 cmt. a (1979).

2. Robert J. Reid, Comment, *Confusion in the Sixth Circuit: The Application of the Continuing Violation Doctrine to Employment Discrimination*, 60 U. CIN. L. REV. 1335, 1335 (1992).

3. Kyle Graham, *The Continuing Violation Doctrine*, 43 GONZ. L. REV. 271, 283-84 (2008).

4. See, e.g., *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 621 (2007); *Gregoire v. G.P. Putnam's Sons*, 81 N.E.2d 45, 46 (N.Y. 1948); Graham, *supra* note 3, at 279 n.44.

5. See, e.g., *Ledbetter*, 550 U.S. at 623; Allison Cimpl-Wiemer, Comment, *Ledbetter v. Goodyear: Letting the Air Out of the Continuing Violations Doctrine?*, 92 MARQ. L. REV. 355 (2008); Michael Lee Wright, *Civil Rights-Time Limitations for Civil Rights Claims-Continuing Violation Doctrine: Sharpe v. Cureton*, 319 F.3d 259 (6th Cir. 2003), 71 TENN. L. REV. 383, 384 (2004). For sources in support of the proposition that employment discrimination claims, where discussion of the continuing violation doctrine is very prevalent, are essentially tort claims, see *United States v. Burke*, 504 U.S. 229, 249 (1992) (O'Connor, J., dissenting) ("The purposes and operation of Title VII are closely analogous to those of tort law"); Kerry R. Lewis, *A Reexamination of the Constitutional Right to a Jury Trial Under Title VII of the Civil Rights Act of 1964*, 26 TULSA L.J. 571, 588-89 (1991); Gary Minda, *Employment Law*, 41 SYRACUSE L. REV. 265, 307 (1990); Jeffrey A. Van Detta, "Le Roi est Mort; Vive le Roi!": An Essay on the Quiet Demise of *McDonnell Douglas* and the Transformation of Every Title VII Case After *Desert Palace, Inc. v. Costa* into a "Mixed Motives" Case, 52 DRAKE L. REV. 71, 81-84 (2003).

6. See, e.g., Note, *The Single Publication Rule and Online Copyright: Tensions between Broadcast, Licensing, and Defamation Law*, 123 HARV. L. REV. 1315, 1316-17 (2010) [hereinafter

continuous violation of antitrust laws; nuisance and environmental torts caused, for instance, by the daily production of smoke by a factory, by a continuous leak of gasoline or other substances from a broken pipeline, or by the continuous presence of polluting waste in land or water; continuous trespass; continuous infliction of emotional distress; continuous alienation of affection; and continuous professional malpractice.⁷

Nearly every writer who addresses the continuing violation doctrine characterizes it as confusing, incoherent, and inconsistent.⁸ The controversies and ambiguities surrounding the doctrine refer to three basic questions.⁹

The most fundamental of these questions concerns the rationale and, in a sense even the very essence, of the continuing violation doctrine.¹⁰ While it is intuitively deemed justified to prolong the limitation period where the wrongful occurrence is continuous, in order to assist the plaintiff in obtaining relief for losses she suffered, such intuition has not been successfully translated into a distinct, coherent, and defensible policy rationale.¹¹ As will be explained below, various attempts to do so have failed, each for different doctrinal reasons.¹²

The second question is how to define a violation of rights as “continuing” in order to determine whether the limitation period should be tolled.¹³ Due to the lack of a proper theoretical foundation from which the test for defining continuing violations can be derived, none of the existing tests have yielded consistent, predictable results.¹⁴ The principal test devised by the U.S. Supreme Court for that purpose holds that a tort is continuing only where the unlawful conduct itself—as

Single Publication Rule]; Sapna Kumar, Comment, *Website Libel and the Single Publication Rule*, 70 U. CHI. L. REV. 639, 639-640 (2003); Odelia Braun, Comment, *Internet Publications and Defamation: Why the Single Publication Rule Should Not Apply*, 32 GOLDEN GATE U. L. REV. 325, 325-326 (2002). For sources in support of the proposition that intellectual property infringement claims are essentially tort claims, see John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 918-19 (2010).

7. James R. MacAyeal, *The Discovery Rule and the Continuing Violation Doctrine as Exceptions to the Statute of Limitations for Civil Environmental Penalty Claims*, 15 VA. ENVTL. L.J. 589, 619 (1996). For instance, medical malpractice claims concerning foreign objects negligently left in patients’ bodies: see Simon Turner Bailey, Note, *Doctor My Doctrine: Medical Malpractice and the Irrepressible Continuing Tort*, 62 ALA. L. REV. 439, 456 (2011).

8. See, e.g., Thelma A. Crivens, *The Continuing Violation Theory and Systemic Discrimination: In Search of a Judicial Standard for Timely Filing*, 41 VAND. L. REV. 1171, 1172 (1988); Lisa S. Tsai, Note, *Continuing Confusion: The Application of the Continuing Violation Doctrine to Sexual Harassment Law*, 79 TEX. L. REV. 531, 531 (2000); Reid, *supra* note 2, at 1343, 1362; see Cimpl-Wiemer, *supra* note 5, at 359-69; MacAyeal, *supra* note 7, at 636-40; Graham, *supra* note 3, at 283-84; Bailey, *supra* note 7, at 443.

9. See *infra* Part I.

10. See, e.g., MacAyeal, *supra* note 7, at 630-31, 636-37.

11. Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453, 500 (1997).

12. See *infra* Part III.B.

13. MacAyeal, *supra* note 7, at 636-37.

14. *Id.* at 636.

opposed to merely its ill effects—is continuing.¹⁵ However, as will be demonstrated in this paper, the line between the two may be extremely blurred.¹⁶ For instance, the Justices of the Supreme Court itself failed to agree, in *Ledbetter v. Goodyear*,¹⁷ whether the tort involved in wage discrimination stemmed from each paycheck or from the preceding decision to pay the plaintiff less because of her gender.¹⁸ The latter view was finally adopted by the majority opinion, resulting in the dismissal of the suit, which was filed too late after the initial decision on the plaintiff's wage, but four Justices strongly dissented.¹⁹ Another example concerns injurious materials uploaded to the Internet, where it is unclear whether their presence on the web constitutes by its nature a continued act of rights-infringement or merely a consequence of the initial upload.²⁰ In light of this ambiguity, courts have classified such online torts as continuous under copyright law, thereby facilitating the extension of the limitation period, and as non-continuous under defamation and privacy laws, although both cases involve essentially identical scenarios.²¹ It is also inherently difficult in many additional types of cases to separate a given tortious event into discrete factual and normative components.²²

The third question is which remedy or remedies best suit the continuing violation scenario.²³ In the absence of a clear definition of the continuing violation doctrine's purpose, to which the remedies are to provide practical manifestation, tracing the appropriate remedy becomes particularly difficult.²⁴ As it is commonly assumed, monetary damages are the most readily available remedy for a continuing violation.²⁵ Yet, in certain cases damages are awarded for the entire period of the tort; whereas, in other cases they are only awarded for the limitation period preceding the commencement of the action, and there is no doctrine to determine when or why each kind of damages is due.²⁶ Furthermore, no remedial alternatives have seriously been considered.²⁷

The current state of the continuing violation doctrine, in light of the aforementioned, is unsatisfactory, especially considering that the legal

15. *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558, 560 (1977).

16. *See infra* Part III.C.

17. 550 U.S. 618 (2007).

18. *See id.* at 645.

19. *Id.* at 642-43.

20. *Single Publication Rule*, *supra* note 6, at 1332-33.

21. *Taylor v. Meirick*, 712 F.2d 1112, 1118-19 (7th Cir. 1983); 6 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 20:30-20:32 (2007); *contra Gregoire*, 81 N.E.2d at 47; *Oja v. U.S. Army Corps of Eng'rs*, 440 F.3d 1122, 1129-33 (9th Cir. 2006).

22. *See MacAyeal*, *supra* note 7, at 617-18.

23. *See id.* at 645-51.

24. *Id.* at 619, 636.

25. Jason R. Bent, *What the Lilly Ledbetter Fair Pay Act Doesn't Do: "Discrete Acts" and the Future of Pattern or Practice Litigation*, 33 RUTGERS L. REC. 31, 33, 38-39 (2009).

26. *See Douglas Laycock*, *Continuing Violations, Disparate Impact in Compensation, and Other Title VII Issues*, 49 LAW & CONTEMP. PROBS. 53, 55-56 (1986).

27. *See id.* at 56-59.

uncertainty it generates contradicts one of the very targets of limitations—enhancing legal certainty.²⁸ Therefore, it seems necessary to reconstruct the doctrine, endowing it with a sound theoretical basis, which would yield a coherent practical approach to the application of statutes of limitations to continuing torts.²⁹

Under the novel view offered by this article, derived from an analysis of the basic considerations pertaining to the limitation of actions, the focus of the continuing violation doctrine should not be the continuation of torts in the past.³⁰ Rather, the doctrine's only legitimate rationale should be to prevent the continuation of torts into the future.³¹

When a person subject to a continuing violation of her rights refrains from filing suit for a time longer than the limitation period, without any justification other than the very continuation of the violation, the underlying logic of statutes of limitations does not entitle her, in principle, for any relief for her past loss.³² In such cases, as will be elucidated, the unchallenged persistence of the tort entails reliance on the engendered status quo by potential defendants and third parties, and such reliance is generally considered by statutes of limitations as worthy of protection given its significant economic benefits for society.³³ Furthermore, the plaintiff's behavior in this type of case is less than diligent, and it indicates her indifference for her rights, which also justifies the barring of her claim under the theory of statutes of limitations.³⁴

What such plaintiff is entitled to, as an exception to the aforementioned rule and to the more general operation of statutes of limitations, and what ought to be the concern of the continuing violation doctrine, is to impede future infringement of her rights.³⁵ In this context the balance of interests involved in statutes of limitations tips in favor of the plaintiff, since a complete dismissal of her claim would expose her to a tort, which theoretically might continue infinitely.³⁶

In order to characterize the situations in which this prospectively-oriented continuing violation doctrine is applicable, so the proposal proceeds, a three-pronged test should be employed, examining (1) whether the injurious state of affairs is likely to continue absent legal intervention, (2) whether the defendant is factually and legally responsible for it in accordance with the pertinent substantive law, and

28. See 1 CALVIN W. CORMAN, LIMITATION OF ACTIONS 16 (1991); Ochoa & Wistrich, *supra* note 11, at 466. For elaboration on the objectives of statutes of limitations and their applicability to the present context, see *infra* Part II.

29. Ochoa & Wistrich, *supra* note 11, at 459, 466-68.

30. See *infra* Part IV.A.

31. See *id.*

32. See, e.g., Laycock, *supra* note 26, at 55-56.

33. Ochoa & Wistrich, *supra* note 11, at 464.

34. *Id.* at 483-84.

35. Laycock, *supra* note 26, at 61.

36. Ochoa & Wistrich, *supra* note 11, at 505.

(3) whether he is practically capable of terminating it.³⁷ In this manner, most of the chronology-related complications created by the existing test may be avoided.³⁸ If all three tests are met, the appropriate remedy to be employed is an injunctive relief ordering the defendant to put an end to the injurious state of affairs (*e.g.*, the discriminatory wage policy, the availability of an injurious publication online, the nuisance, etc.), by either ceasing or modifying his conduct, taking safeguards to prevent its ill-effects, undoing its consequences, and so forth.³⁹ Damages only play a secondary role in this scheme; forward-looking compensation can be used as a conceptual substitute for the injunction where its issuance is impractical, inefficient, or grossly unjust.⁴⁰

The portrayed position, as will be explained below, provides the continuing violation doctrine with an identifiable, concrete rationale consistent with the objectives of statutes of limitations.⁴¹ It renders its outcomes more just by fulfilling tort victims' most crucial interest—the actual realization of their legal rights—while, at the same time protecting injurers from excessive liability.⁴² It increases the doctrine's predictability for the benefit of actual and potential litigants and of society at large, and it incentivizes potential plaintiffs to act in an economically efficient manner.⁴³

The article shall commence with a brief presentation of the nature and objectives of statutes of limitations, brought in Part II.⁴⁴ Part III will discuss the operation of the continuing violation doctrine within the scope of those statutes' application under current law and academic analyses.⁴⁵ After portraying the general contours of the doctrine and distinguishing it from other principles that might apply to certain continuing violation scenarios, a closer look will be taken at the rationales associated with it, at the tests it includes, and at its remedial aspects.⁴⁶ Part IV will then articulate a new perspective of each of these three dimensions.⁴⁷

II. STATUTES OF LIMITATIONS AND THEIR RATIONALES

Statutes of limitations—a term which also includes specific provisions on limitations contained in broader statutes—prescribe a time period within which a plaintiff must assert a claim for relief for a

37. See Graham, *supra* note 3, at 286; MacAyeal, *supra* note 7, at 617-19.

38. See MacAyeal, *supra* note 7, at 618.

39. *Id.* at 631; BLACK'S LAW DICTIONARY (10th ed. 2014).

40. RESTATEMENT (SECOND) OF TORTS § 933 cmt. a (1979).

41. See *infra* Part IV.

42. See *infra* Part IV.

43. See *infra* Part IV.

44. See *infra* Part II.

45. See *infra*. at Part III.

46. See *id.* at Parts III B(2), C, D.

47. See *id.* at Part IV.

violation of law.⁴⁸ Even in a single legal system there might exist numerous of such statutes,⁴⁹ differing in their specific details, in the subject matter of the claims they bar, in their scope of coverage, and in the length of the limitation period they define.⁵⁰ However, the limitation of actions in general is commonly referred to as one body of law, comprised of principles and policy concerns that guide the shaping and the application of all statutes of limitations.⁵¹

There is widespread consensus as to the primary goals of the limitation of actions.⁵² The most significant of them seems to be to provide repose to defendants, allowing them to rely on settled expectations that liability will not attach for acts long past.⁵³ This rationale recognizes that people have an interest to maintain a status quo that has become entrenched because of the passage of time, and to be able to order their affairs in accordance with it.⁵⁴ Protecting the said interest becomes even more important for two reasons.⁵⁵ First, the status quo and the financial stability it entails are presumably relied on by third parties having business or employment relations with the potential defendant.⁵⁶ Second, retaining constant preparedness for possible claims relating to any prior event would compel large groups of potential defendants to maintain financial reserves, avoid certain transactions, or purchase insurance policies for high prices.⁵⁷ In this manner, resources and activities that could benefit both potential defendants and society at large would be lost.⁵⁸

48. *Crown, Cork & Seal Co. Inc., v. Parker*, 462 U.S. 345, 352 (1983); *Developments in the Law Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185 (1950) [hereinafter *Developments in the Law*]; MacAyeal, *supra* note 7, at 590.

49. Ochoa & Wistrich, *supra* note 11, at 454.

50. *Id.* at 457-59.

51. See, e.g., Kathleen L. Cerveney, *Limitation Tolling When Class Status Denied: Chardon v. Fumero Soto and Alice in Wonderland*, 60 NOTRE DAME L. REV. 686, 686 (1985); Alan R. Romero, *Interpretive Directions in Statutes*, 31 HARV. J. ON LEGIS. 211, 229 (1994); Jett Hanna, *Statute of Limitations Issues in FDIC and RTC Claims Against Attorneys Representing Failed Financial Institutions*, 12 REV. LITIG. 619, 642 (1993); Paul B. O'Neill, "Mother of Mercy, Is This the Beginning of RICO?": *The Proper Point of Accrual of a Private Civil RICO Action*, 65 N.Y.U. L. REV. 172, 223 (1990); Ochoa & Wistrich, *supra* note 11, at 454-55; Alexandra B. Klass & Elizabeth J. Wilson, *Climate Change and Carbon Sequestration: Assessing a Liability Regime for Long-Term Storage of Carbon Dioxide*, 58 EMORY L.J. 103, 147 (2008).

52. For a general review, touching also less salient policy considerations that may be associated with the limitation of actions and will not be discussed here, see Ochoa & Wistrich, *supra* note 11, at 514.

53. *Wilson v. Garcia*, 471 U.S. 261, 271 (1985); *Tulsa Prof'l Collection Servs., Inc., v. Pope*, 485 U.S. 478, 486 (1988); MacAyeal, *supra* note 7, at 591; O'Neill, *supra* note 51, at 190.

54. See *Bd. of Regents v. Tomasio*, 446 U.S. 478, 487 (1980); Oliver W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897); Ochoa & Wistrich, *supra* note 11, at 464-65; Reinhard Zimmermann & Jens Kleinschmidt, *Prescription: General Framework and Special Problems Concerning Damages Claims*, in EUROPEAN TORT LAW 2007 26, at 31 (Helmut Koziol & Barbara C. Steininger, eds., 2008).

55. Ochoa & Wistrich, *supra* note 11, at 467-68.

56. *Id.*

57. *Id.*

58. *Id.* at 466-67; MacAyeal, *supra* note 7, at 591; Israel Gilead, *Economic Analysis of Prescription in Tort Law*, in EUROPEAN TORT LAW 2007 112, at 119-20, 122-23 (Helmut Koziol & Barbara C. Steininger, eds., 2008).

Another purpose of limitations is to avoid the unfairness of exposing defendants to stale claims.⁵⁹ Defendants' ability to defend such claims while proving their factual allegations in court is presumably impaired by the lapse of time, as memories inevitably fade and relevant witnesses and documents disappear or become hard to trace.⁶⁰ In addition, staleness is also thought to increase litigation costs.⁶¹

Additionally, statutes of limitations promote efficient judicial administration.⁶² On the one hand, resolving historical disputes is of lower social importance than resolving recent ones.⁶³ On the other hand, the former task is far more complicated and time-consuming, and it involves greater risk of judicial error.⁶⁴

Finally, statutes of limitations arguably encourage "plaintiffs to diligently pursue their claims."⁶⁵ This goal is driven by either the social dislike of procrastination, the interest to promote the quick enforcement of substantive law, or the desire to further the other enumerated goals of limitations.⁶⁶ In a related vein, it is thought that a plaintiff who does not promptly seek to enforce her rights demonstrates indifference for them, which in turn diminishes the weight that society should ascribe to those rights.⁶⁷

At the other side of the normative equation stands a very powerful interest that opposes limitations, namely, the interest in vindicating meritorious claims.⁶⁸ Denying a person of the opportunity to protect her rights is thought to be unjust,⁶⁹ and it frustrates the implementation of the principal substantive-law policies of compensating victims and deterring potential wrongdoers.⁷⁰ In the initial period following the occurrence of an alleged wrong, this set of considerations is perceived to

59. Ochoa & Wistrich, *supra* note 11, at 494-95.

60. *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 428 (1964); Ochoa & Wistrich, *supra* note 11, at 483-84; O'Neill, *supra* note 51, at 190; MacAyeal, *supra* note 7, at 590-91; Albert C. Lin, *Application of the Continuing Violations Doctrine to Environmental Law*, 23 *ECOLOGICAL L.Q.* 723, 755 (1994).

61. Ochoa & Wistrich, *supra* note 11, at 481; Zimmermann & Kleinschmidt, *supra* note 54, at 31.

62. MacAyeal, *supra* note 7, at 591-92.

63. *Id.*

64. See Ochoa & Wistrich, *supra* note 11, at 471-79; CORMAN, *supra* note 28, at 16; O'Neill, *supra* note 51, at 191; MacAyeal, *supra* note 7, at 591-92; Lin, *supra* note 60, at 756.

65. Ochoa & Wistrich, *supra* note 11, at 457.

66. *Id.* at 488-493.

67. See Holmes, *supra* note 54, at 476; Ochoa & Wistrich, *supra* note 11, at 490; Zimmermann & Kleinschmidt, *supra* note 54, at 31.

68. Ochoa & Wistrich, *supra* note 11, at 505.

69. O'Neill, *supra* note 51, at 240; R. Christopher Yingling, *The Ohio Supreme Court Sets the Statute of Limitations and Adopts the Discovery Rule for Childhood Sexual Abuse Actions: Now it is Time for Legislative Action!*, 43 *CLEV. ST. L. REV.* 499, 521 (1995); Jim Greiner, *Federal Common Law and Gaps in Federal Statutes: The Case of Erisa Plan Limitation Periods for Section 502(A)(1)(B) Actions*, 93 *MICH. L. REV.* 382, 388, 405 (1994); Ochoa & Wistrich, *supra* note 11, at 505.

70. Ochoa & Wistrich, *supra* note 11, at 505-06.

have the upper hand.⁷¹ The passage of time gradually increases the weight of the arguments for limitations, up to a certain point—whose precise determination inevitably involves some degree of arbitrariness—in which the scales are tipped in their favor.⁷²

Balancing the aforementioned considerations, including variations of them pertaining to particular sub-contexts, is the formative basis of the laws on the limitation of actions.⁷³ This balancing will also serve as the foundation for this article's thesis, to be portrayed below.⁷⁴

III. THE CONTINUING VIOLATION DOCTRINE IN CURRENT DISCOURSE

A. Background

1. The Doctrine in General

The limitation period, at the expiry of which any claim is barred, commences—according the common judicial approach—when the claim accrues, that is, at the time the plaintiff's rights are violated by a wrongful conduct and all the elements of the wrong exist.⁷⁵ In many cases, the act or event giving rise to the claim is continuing in nature.⁷⁶ If all parts of it lie within the limitation period prior to filing suit, there is no reason to bar the claim or any part of it on limitations grounds.⁷⁷ A difficulty arises, however, when only the later parts of the occurrence lie within the limitation period, whereas its earlier parts are outside of that period.⁷⁸ For dealing with this kind of situation, courts have developed the continuing violation doctrine.⁷⁹

The continuing violation doctrine actually has two versions.⁸⁰ Under the first version, all instances of unlawful behavior are regarded as a single, unitary violation.⁸¹ The plaintiff's cause of action constantly absorbs new wrongful acts or omissions, and does not completely accrue until the defendant ceases them.⁸² Only when the defendant's misbehavior terminates does the limitation clock for the entire period start to run.⁸³ Consequently, where the violation persists up into the

71. *See id.* at 483-84.

72. *See id.* at 511-12.

73. *Id.* at 454-55.

74. *See infra* Part III.A.1.

75. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338-39 (1971); MacAyeal, *supra* note 7, at 594-95.

76. *Zenith*, 401 U.S. at 338-39; *see infra* notes 82-84 and accompanying text.

77. MacAyeal, *supra* note 7, at 591-92, 622-23.

78. *Hendrix v. City of Yazoo City*, 911 F.2d 1102, 1103 (5th Cir. 1990); MacAyeal, *supra* note 7, at 616-17.

79. MacAyeal, *supra* note 7, at 589.

80. *Id.* at 589, 617-21.

81. *Id.* at 597, 617-19.

82. *Id.* at 618.

83. *Wilson v. Giesen*, 956 F.2d 738, 743 (7th Cir. 1992); CORMAN, *supra* note 28, at 600-01; MacAyeal, *supra* note 7, at 618; Graham, *supra* note 3, at 280-281.

limitation period prior to filing suit, recovery may be had for its entire duration.⁸⁴

The second variation of the continuing violation doctrine, sometimes referred to as the “separate accrual” rule, regards each act of infringement as a separate, independently actionable event, which restarts the limitation period.⁸⁵ As a result, a series of distinct claims is recognized, each with its own limitation period.⁸⁶ The plaintiff may recover damages attributable to any wrongful act or omission for which the limitation period has not lapsed.⁸⁷ In other words, she may only recover for occurrences within the statutory period preceding the commencement of the action.⁸⁸

2. The Doctrine in Context

The continuing violation doctrine should be distinguished from other principles employed to determine the beginning and the ending of the limitation period, which might apply alongside it or instead of it in certain kinds of continuous tortious occurrences.⁸⁹

The first of such principles is what is usually labeled the discovery rule or the discoverability rule.⁹⁰ Under the discovery rule, the limitation period begins to run only when the plaintiff discovers, or should have discovered through the exercise of reasonable diligence, all essential facts underlying her claim.⁹¹ Most commonly, this rule serves to postpone the limitation period when the plaintiff’s injury is initially hard to discover.⁹² In continuing violation scenarios the discovery rule may create a longer limitation period than would the continuing violation doctrine, where the harm becomes discoverable long after the unlawful conduct has ceased, or—in cases the separate accrual version of the doctrine is applicable—long after the particular segment of the conduct which caused the harm took place.⁹³ What must be borne in

84. Nat’l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 117 (2002); *Hendrix*, 911 F.2d at 1103; CORMAN, *supra* note 28, at 600-01; MacAyeal, *supra* note 7, at 616; Graham, *supra* note 3, at 281.

85. MacAyeal, *supra* note 7, at 620.

86. *Id.*

87. *Id.*

88. *Santiago v. Lykes Bros. S.S. Co.*, 986 F.2d 423, 428 (11th Cir. 1993); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1104-05 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989); *Stone v. Williams*, 970 F.2d 1043, 1049-50 (2d Cir. 1992); *Russo Farms, Inc. v. Vineland Bd. of Educ.*, 675 A.2d 1077, 1084 (N.J. 1996); *Bridgeport Music, Inc. v. Diamond Time, Ltd.*, 371 F.3d 883, 889 (6th Cir. 2004); CORMAN, *supra* note 28, at 604; MacAyeal, *supra* note 7, at 620; PATRY, *supra* note 21, at § 20:23; Graham, *supra* note 3, at 282.

89. MacAyeal, *supra* note 7, at 622.

90. MacAyeal, *supra* note 7, at 594-98.

91. *United States v. Kubrick*, 444 U.S. 111, 113, 123 (1979); *Cullen v. Margiota*, 811 F.2d 698, 725 (2d Cir. 1987), *cert. denied*, 483 U.S. 1021 (1987); Lin, *supra* note 60, at 756-57; MacAyeal, *supra* note 7, at 595; Graham, *supra* note 3, at 278.

92. MacAyeal, *supra* note 7, at 595-96.

93. See, e.g., *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1464 (7th Cir. 1992); *Rodriguez v. Banco Cent.*, 917 F.2d 664, 666 (1st Cir. 1990); *Dana P. Babb, Asked But Not Answered—Accrual of Private Civil RICO Claims Following Klehr v. A.O. Smith Corp.*, 76 WASH. U. L.Q. 1149, 1155

mind, however, is that the discovery rule is normally considered an equitable exception to the ordinary, default rule of accrual.⁹⁴ Under the latter, the occurrence of the events that constitute the cause of action according to substantive law is the subject of inquiry, whereas the plaintiff's actual or potential knowledge of them at the time they occur is irrelevant or presumed.⁹⁵ Since the continuing violation doctrine—under its aforementioned basic definition, and as will further be explained⁹⁶—is also predicated on the objective characterization of occurrences, it seems more appropriate methodologically not to regard questions of discoverability within its general, principled policy analysis.⁹⁷ At stake, then, are two distinct doctrines and two different grounds for tolling the limitation period,⁹⁸ whose relations—namely, the question of which doctrine prevails, in which circumstances, and in what manner—have been described as highly muddled and controversial.⁹⁹ Those relations exceed the scope of the present research; there is a good point to sort out the continuity-related issues thoroughly and independently before making a synthesis between them and the knowledge-related issues.¹⁰⁰

Another potentially relevant principle, whose logic resembles that of the discovery rule, holds that where the plaintiff's harm is gradually developing, the cause of action accrues and the statute of limitations begins to run only when the harm become substantial and certain enough to support an award.¹⁰¹ This principle might conflict with the continuing violation doctrine where the harm produced by an ongoing tort is not formed yet, where the fact of its existence is too speculative,

(1998); Robert J. Gonnello, *Closing One Door and Opening Another: The End of the Paycheck Accrual Rule and the Need for a Legislative Discovery Rule*, 39 SETON HALL L. REV. 1021, 1021 (2009).

94. Gene J. Heady, Comment, *Stuck Inside These Four Walls: Recognition of Sick Building Syndrome Has Laid the Foundation to Raise Toxic Tort Litigation to New Heights*, 26 TEX. TECH L. REV. 1041, 1067 (1995).

95. See, e.g., CORMAN, *supra* note 28, at 134-35; Vest v. Bossard, 700 F.2d 600, 608 (10th Cir. 1983); Barrett v. United States, 689 F.2d 324, 327 (2d Cir. 1982); Heady, *supra* note 94, at 1067; Ved P. Nanda, *Access to Justice in the United States*, 46 AM. J. COMP. L. 503, 511 (1998); John Leone, *Sprint's Expensive Failure to Act: Invoking the Statute of Limitations to Bar Recovery of Damages for Unlawfully High DDS Rates*, 65 GEO. WASH. L. REV. 719, 720-21 (1997); Scott D. Deatherage et al., *Environmental Law*, 55 SMU L. REV. 979, 1015 (2002); A. Samuel Oddi, *Patent Attorney Malpractice: An Oxymoron No More*, 2004 U. ILL. J.L. TECH. & POL'Y 1, 64 (2004); Christian P. Walk, Note, *The Statute of Limitations for Medical Malpractice Actions in Iowa: No Longer Forcing Patients to "Play Doctor"*, 56 DRAKE L. REV. 1143, 1147-48 (2008); William A. Gray, Note, *A Proposal for Change in Statutes of Limitations in Childhood Sexual Abuse Cases*, 43 BRANDEIS L.J. 493, 496 (2005); Casey Tourtillott & Matthew E. Birch, *The Right to Bring A Wrongful Death Claim in Kansas: Does the Statute of Limitations Begin to Run at Death?*, 70 UMKC L. REV. 103, 105 (2001).

96. See *infra* Part III.B.2.

97. MacAyeal, *supra* note 7, at 597-98.

98. Page v. United States, 729 F.2d 818, 821 n.23 (D.C. Cir. 1984).

99. Galloway v. Gen. Motors Serv. Parts Operations, 78 F.3d 1164, 1165 (7th Cir. 1996); Ehud Guttel & Michael T. Novick, *A New Approach to Old Cases: Reconsidering Statutes of Limitation*, 54 U. TORONTO L.J. 129, 165 n.68 (2004); Bailey, *supra* note 7, at 452.

100. MacAyeal, *supra* note 7, at 597-98.

101. Lin, *supra* note 60, at 759.

or where its amount and nature cannot be proved, during the time in which the unlawful conduct is committed or in the initial period following its termination.¹⁰² However, as in the previous case, the principle under discussion is an exception to the general accrual rule, which assumes that a plaintiff's injury becomes sufficiently concrete and calculable shortly after it is inflicted.¹⁰³ Furthermore, this principle is not grounded in the continuation of the tortious conduct but rather in the nature of the injury; slow evolution of the latter can hardly be equated with continuity.¹⁰⁴ As such, it also extends beyond the scope of this article.

Additional types of scenarios appear on their faces to be continuing violations, but the critical questions they raise actually relate to the very definition of liability under substantive law.¹⁰⁵ Thus, in certain cases the defendant's lingering unlawful conduct or the lingering situation he unlawfully created first affects the rights of the particular plaintiff relatively late after its commencement.¹⁰⁶ In those cases the courts have to decide whether plaintiff's actual harm is an essential component of the cause of action for the defendant's violation of law.¹⁰⁷ For instance, in the context of accessibility barriers infringing the Americans with Disabilities Act, the Ninth District recently held that the statute of limitations in any given claim does not begin to run until the individual plaintiff actually encounters such barrier.¹⁰⁸ This is so even if the accessibility barrier existed long before that date, so that the plaintiff could have theoretically encountered it and other similarly situated people encountered it in fact.¹⁰⁹ A different class of cases, falling under the same general category, concerns violations whose definition inherently requires repetitive or persistent conduct.¹¹⁰ Since this scenario is often associated—mistakenly, in my opinion—with the

102. *Zenith*, 401 U.S. at 338-39; *Bankers*, 859 F.2d at 1104; Babb, *supra* note 93, at 1155-58; *Developments in the law*, *supra* note 48, at 1206-07; Lin, *supra* note 60, at 759.

103. See, e.g., *Klehr v. A. O. Smith Corp.*, 521 U.S. 179, 190-91 (1997); *Lancianese v. Bank of Mount Hope*, 783 F.2d 467, 470 (4th Cir. 1986); Lin, *supra* note 60, at 759; Tara-Ann Topputo, Note, *In Opposition to Applying the Continuing Violation Doctrine to Hostile Work Environment Claims: National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), 28 U. DAYTON L. REV. 449, 472 (2003); Robert Brina, Comment, *Complexities of Accrual: The Antitrust Statute of Limitations in a Contractual Context*, 31 UCLA L. REV. 1061, 1062 n.7, 1067-68 (1984); Michael D. Green, *The Paradox of Statutes of Limitations in Toxic Substances Litigation*, 76 CALIF. L. REV. 965, 972-73 (1988); Laura Callaway Hart et al., *From Offense to Defense: Defending Legal Malpractice Claims*, 45 S.C. L. REV. 771, 785 (1994); Rosemarie Ferrante, Note, *The Discovery Rule: Allowing Adult Survivors of Childhood Sexual Abuse the Opportunity for Redress*, 61 BROOK. L. REV. 199, 221 (1995).

104. Lin, *supra* note 60, at 759.

105. See, e.g., MacAyeal, *supra* note 7, at 664-65.

106. See, e.g., *id.* at 617.

107. See Robert G. Schwemm, *Barriers to Accessible Housing: Enforcement Issues in "Design and Construction" Cases Under the Fair Housing Act*, 40 U. RICH. L. REV. 753, 848-49 (2006).

108. See, e.g., *Pickern v. Holiday Quality Foods Inc.*, 293 F.3d 1133, 1135 (9th Cir. 2002).

109. See, e.g., *Frame v. City of Arlington*, 657 F.3d 215, 238-39 (5th Cir. 2011).

110. See, e.g., *Richards v. CH2M Hill, Inc.*, 29 P.3d 175, 190 (Cal. 2001).

continuing violation doctrine itself, it will be elaborated upon below within the analysis of the plausible rationales for the doctrine.¹¹¹

In the described circumstances and in additional kinds of cases continuity is only one aspect (if at all) of the limitations analysis.¹¹² Alongside it lie important questions pertaining to the essence and objective of substantive-law liability, to its precise elements and especially to the significance of actual damage among them, to the timing in which each of them occurs or becomes substantial, to the practical ability of the plaintiff to file suit in various respects and in various points of time, and so forth.¹¹³ Many of these questions are inherently context-specific, either concerning any cause of action or concerning any individual case, and their overall assessment and application is, *a fortiori*, context-specific as well.¹¹⁴ It is therefore highly impractical to address in a single research all possible combinations of principles and circumstances.¹¹⁵ Instead, we shall try to isolate, to the extent possible, the element of continuity from all other elements, recognizing that the latter are sometimes as influential on the resolution of cases.¹¹⁶ This methodology would coincide with the underlying assumption of many judicial and academic references to the continuing violation doctrine (though they have not yielded a convincing construction of the doctrine), namely, that continuity is a general phenomenon shared by a large group of diverse scenarios, and that the policy considerations it entails are unique enough to merit independent examination.¹¹⁷

B. The Essence of and Rationale for the Continuing Violation Doctrine

Relatively little attention has been dedicated, especially by courts, to the theoretical questions concerning the rationale for the continuing violation doctrine and concerning its essence.¹¹⁸ The discourse that does take place does not yield much agreement and clarity.¹¹⁹ Various objectives and functions are ascribed to the doctrine—few are expressly mentioned by courts, others may be indirectly induced from courts' practical treatment of violations suspected as continuing, some are found in scholarly analysis of court rulings, and some are put forward by scholars themselves.¹²⁰ Each of those rationales is normally regarded

111. See *infra* Part II.B.1.ii.

112. See *Developments in the Law*, *supra* note 48, at 1205.

113. See *id.* at 1179-81.

114. See *id.* at 1241.

115. See *id.*

116. See *id.* at 1241-42.

117. See MacAyeal, *supra* note 7, at 616.

118. Cimpl-Wierner, *supra* note 5, at 359-60, 62.

119. *Berry v. Bd. of Supervisors of La. State Univ.*, 715 F.2d 971, 979 (5th Cir. 1983); Bailey, *supra* note 8, at 443.

120. Cimpl-Wierner, *supra* note 5, at 359-62.

as one of several rationales rather than the exclusive rationale for the doctrine, perhaps due to lack of confidence in the merits of each of them standing alone.¹²¹ Indeed, thorough examination reveals that neither of the said rationales are truly defensible.¹²²

The principal positions as to the essence and rationale of the continuing violation doctrine may be divided into two groups, though the line separating them can sometimes be ambiguous.¹²³ The most important group consists of rationales that try to focus directly on the distinctive element of continuing violations, namely, their chronological continuity.¹²⁴ The second group consists of equitable tolling rationales; though it has already been noted above that such rationales belong with other limitations doctrines, it is still necessary to cope with theories that explicitly relate them to the continuing violation doctrine.¹²⁵

1. Continuity-Related Rationales

i. Reduced Evidentiary Hardship

The first continuity-related rationale holds that the staleness concern, which constitutes one of the primary considerations favoring the limitation of actions, is of less strength in continuing violations than in the usual case.¹²⁶ According to courts and commentators, if the last part of an unlawful conduct occurred within the limitation period, such conduct is subject to ready investigation and confirmation since at least some of the evidence pertaining to it is presumably still fresh.¹²⁷

This argument raises several problems.¹²⁸ First, in quite a few violations that are intuitively continuing and have been widely recognized—at least in certain circumstances—the focal point of the dispute, on which it is most important to shed light through fresh evidence, is in the initial act which triggered it and not in subsequent events.¹²⁹ For instance, in trespass cases one of the crucial questions concerns the circumstances in which the defendant gained foothold on the plaintiff's land.¹³⁰ In copyright cases courts may have to examine how the allegedly infringing work was composed.¹³¹ In civil antitrust

121. *Id.* at 362-63.

122. *Id.* at 362-64.

123. See Graham, *supra* note 3, at 283-84; Cimpl-Wiemer, *supra* note 5, at 355-56 n.7.

124. Graham, *supra* note 3, at 284; see also Cimpl-Wiemer, *supra* note 5, 355-56 n.7.

125. See *supra* note 123 and accompanying text; see also *infra* Part III.B.2.

126. MacAyeal, *supra* note 7, at 590-91, 618.

127. Havens Realty Corp. v. Coleman, 455 U.S. 363, 380-81 (1982); Taylor, 712 F.2d at 1119; MacAyeal, *supra* note 7, at 617; Graham, *supra* note 3, at 292.

128. See *infra* notes 129-41 and accompanying text.

129. See MacAyeal, *supra* note 7, at 618, 632.

130. United States v. Hess, 194 F.3d 1164, 1176 n.12 (10th Cir. 1999).

131. JAMES BOYLE & JENNIFER JENKINS, INTELLECTUAL PROPERTY: LAW AND THE INFORMATION SOCIETY 404 (2014) available at <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCEQFjAA&url=http%3A%2F%2Fweb.law.duke.edu%2Fcsdp%2Fpdf%2FIPCasebook2014.pdf&ei=J7MNVfaPHs-xyASw4oGABg&usg=AFQjCNFFkXLFfKZwUTZo0NdMskjeI94tw&sig2=ndGPQVkkWQwlGB-1ueaUOA>.

cases the existence and terms of the binding agreement are often at issue, as well as the conditions prevailing in the relevant market prior to the agreement.¹³² In Title VII claims for employment discrimination the central question is whether the employer's decision on hiring, discharging, salary, and so forth stemmed from the plaintiff's race, color, religion, sex, or national origin, or was rather based on legitimate business considerations related to the position at hand.¹³³ Housing discrimination claims likewise revolve around the reasons for rejecting the plaintiff's housing application.¹³⁴ Hostile work environment claims might deal with discrete acts carried out outside the limitation period.¹³⁵ In addition, in claims for continuing medical malpractice a question might arise as to the initial medical diagnosis and its relation with the patient's actual condition at that time.¹³⁶

The same presumably applies to additional cases, in which the wrongful behavior is manifested in a one-time act followed by a continuing failure to undo its consequences.¹³⁷ Furthermore, in many cases, the parties' relations and the plaintiff's conduct prior to the commencement of the violation may form an important background for assessing the defendant's conduct.¹³⁸ Of no less significance is the plaintiff's initial response to the violation, which both reflects her genuine perception of the violation and can illuminate the defendant's subsequent state of mind.¹³⁹ Finally, determining the plaintiff's financial, commercial, or bodily condition prior to the continuing violation is sometimes necessary for computing the damages she is entitled to.¹⁴⁰

In sum, while there are surely cases in which the reduced staleness argument does hold, the least that can be said is that it cannot serve as a sweeping rationale for the continuing violation doctrine.¹⁴¹

Second, the reduced staleness rationale may not be said to underlie the continuing violation doctrine in existing law, since its practical application—which will be discussed below—is completely unrelated to this rationale and is clearly not derived from it.¹⁴² Courts seeking to determine whether a violation is continuing hardly ever bother to examine the degree of evidence deterioration in different categories of

132. MacAyeal, *supra* note 7, at 590-91, 620.

133. 42 U.S.C. § 2000e-2 (2014); *Wong v. Bd. of Educ.*, No. 11 C 7357, 2015 BL 64477, at *9 (N.D. Ill. Mar. 10, 2015).

134. *See Ueno v. Napolito*, No. 04 CV 1873 (SJ) (VVP), 2007 BL 20148, *20148 (E.D.N.Y. May 4, 2007).

135. *See infra* Parts III.B.1.ii, III.C.

136. MacAyeal, *supra* note 7, at 665.

137. *Phillips v. Alaska Hotel and Rest. Pension Fund*, 944 F.2d 509, 522-23 (9th Cir. 1991).

138. *Eli Lilly and Co. v. EPA*, 615 F. Supp. 811, 822-23 (S.D. Ind. 1985).

139. *See, e.g., United Cities Gas Co. v. Brock Exp. Co.*, 984 F.Supp. 1379, 1387-88 (D. Kan. 1997).

140. *See, e.g., Graham*, *supra* note 3, at 289-90.

141. *See supra* notes 137-40 and accompanying text.

142. *See infra* Part III B.1.ii.

cases or in the specific circumstances of the cases before them.¹⁴³ This is so even though the rate of deterioration of evidence is not unitary, and differs, for instance, between “documentary evidence, (which is relatively enduring), and eyewitness testimony, (which is relatively transient).”¹⁴⁴ The immense difficulty—which will also be demonstrated—to classify violations as continuing or non-continuing while relying only on their apparent physical-chronological aspects, makes it particularly crucial to conduct any inspection that might prove helpful; that courts do not inspect the level of staleness indicates that they do not truly believe in the viability of the said rationale.¹⁴⁵

Third, in modern times it may be questioned whether the evidence deterioration rationale is still of much significance among the general considerations favoring limitations.¹⁴⁶ Thus, contemporary research demonstrates that forgetting tends to occur very rapidly during the initial period of several hours and days after a given event, a time frame in which suing is generally unpractical anyway, and that the rate of forgetting declines significantly thereafter.¹⁴⁷ Consequently, the difference in what is recalled, for instance, between one year and four years or between five years and ten years, is comparatively slight.¹⁴⁸ In addition, the existing computerized methods for storing information, which are immeasurably cheaper and more efficient than before, facilitate record keeping in very large scales and for very long periods.¹⁴⁹ Potential witnesses may also be located rather easily in our networked world.¹⁵⁰ To conclude, since the staleness consideration is rather marginal to begin with, it should not be employed to decide the policy on continuing violations.¹⁵¹

ii. *Inseparability of the Violation or of its Harm*

The next rationale is based on the chronological inseparability of certain continuing violations or on the harm they generate.¹⁵² This rationale actually seems to refer to two distinct scenarios: a series of torts contributing indivisibly to a single harm, and a series of torts contributing incrementally to a single harm.¹⁵³ In the first situation, impossibility to attribute discrete items of damage to particular acts or periods of times is regarded as a justification for delaying the claim and

143. Ochoa & Wistrich, *supra* note 11, at 477.

144. *Id.*

145. Graham, *supra* note 3, at 283; *see infra* Part III.C.

146. Ochoa & Wistrich, *supra* note 11, at 474.

147. *Id.*

148. *Id.* at 474-75.

149. *Id.* at 475.

150. Sandra Hornberger, Comment, *Social Networking Websites: Impact on Litigation and the Legal Profession in Ethics, Discovery, and Evidence*, 27 *TOURO L. REV.* 279, 283-84 (2011).

151. *See supra* Part III.B.1.i.

152. Graham, *supra* note 3, at 283-84.

153. *See* MacAyeal, *supra* note 7, at 618.

as a ground for awarding damages for all the injuries caused by the violation, both within and outside the limitation period.¹⁵⁴ In the second situation, the wrongful activity is regarded as one unit since no single incident in it may be deemed an independent tort, or since no harm caused by such incident is significant enough in itself.¹⁵⁵ As the injuries inflicted upon the plaintiff within the limitation period could only be understood and evaluated by reference to activity occurring outside of the period, and vice versa, all parts of it are considered collectively.¹⁵⁶ This is the case, for instance, in claims for hostile work environment and for infliction of emotional distress.¹⁵⁷

The argument referring to the first category of situations is not without merit where it applies, but is restricted by its very nature and articulation to specific types of circumstances, and there is no reason to assume these are common.¹⁵⁸ In fact, it seems not to cover many typical cases of continuing violations.¹⁵⁹ Thus, the effects produced during a given period of time by continuing violations with salient financial dimensions, such as denial of employment benefits, copyright infringement, binding agreements and the like, may be calculated fairly accurately through the inspection of accounts, financial reports, market prices, and so forth.¹⁶⁰ Even easier are cases in which the harm is characterized, to a greater or lesser degree, by consistency and monotony, for instance, trespass, denied housing, or pollution stemming from the routine operation of a factory.¹⁶¹ There, the overall damage can be apportioned proportionally between different time periods based simply on their relative length.¹⁶² Furthermore, when a series of discrete events is concerned, the same evidence that establishes the existence of each event would normally indicate its approximate timing.¹⁶³ Separation of physical damage to body, property or the environment to specific components based on the time in which they occurred is undeniably harder, but improvements in scientific knowledge and detection technology arguably make it more feasible than before.¹⁶⁴ In either case, skepticism concerning the ability to reach maximal precision

154. *Heard v. Sheahan*, 253 F.3d 316, 319-20 (7th Cir. 2001); *CSC Holdings, Inc. v. Redisi*, 309 F.3d 988, 992 (7th Cir. 2002); *Graham*, *supra* note 3, at 292; *Laycock*, *supra* note 26, at 56; *Bailey*, *supra* note 7, at 445.

155. *Graham*, *supra* note 3, at 288.

156. *Id.* at 288-89.

157. *National R.R.*, 536 U.S. at 115-18; *Page*, 729 F.2d at 821-23; *Galloway*, 78 F.3d at 1167; *Rodrique v. Olin Emps. Credit Union*, 406 F.3d 434, 442 (7th Cir. 2005); *Limestone Dev. Corp. v. Vill. of Lemont*, 520 F.3d 797, 801 (7th Cir. 2008); *Graham*, *supra* note 3, at 301.

158. *Graham*, *supra* note 3, at 288-89.

159. *See id.* at 291.

160. *See generally* *MacAyeal*, *supra* note 7, at 618, 659; *Heard*, 253 F.3d at 320.

161. *See, e.g.*, *Ohio Edison Co. v. Wilkes*, 2012-Ohio-2718, ¶¶ 8, 50 (7th Dist. 2012); *Patton v. Hanassab*, No. 14cv1489 AJB (WVG), 2015 BL 38293, *8-9 (S.D. Cal. Feb. 12, 2015); *State ex rel. Smith v. Kermit Lumber & Pressure Treating Co.*, 488 S.E.2d 901, 920 (W. Va. App. Ct. 1997).

162. *MacAyeal*, *supra* note 7, at 618.

163. *Graham*, *supra* note 3, at 289-90.

164. *See Ochoa & Wistrich*, *supra* note 11, at 476.

in the apportionment should not rule it out, just like the same inevitable constraint does not foreclose the assessment of damages in general.¹⁶⁵ Therefore, this version of the inseparability rationale is inherently impaired from being the rationale for the continuing violation doctrine.¹⁶⁶

The second situation, apart from the fact that it also seems rare, raises another problem: its characterization as continuing may seriously be questioned.¹⁶⁷ If no single part of the unlawful activity can be regarded on its own as a violation of the plaintiff's right, then logically and linguistically it is difficult to assert that the violation is continuing, namely, that it exists in different points on the time continuum.¹⁶⁸ Since only the chain of events in its entirety effectuates the cause of action, it can be deemed instead a regular violation; the mere fact that its commission lasts a relatively long time arguably does not render it continuing.¹⁶⁹ Furthermore, since the limitation period by definition does not begin to run until the claim has completely accrued, no limitations doctrine is required to toll it.¹⁷⁰ Instead, the decisive factor in the adjudication of such scenarios is the constitutive elements of the claim as defined by the relevant statute or case law, which determine when the accumulated acts or injuries become substantial enough for the claim to accrue.¹⁷¹ This issue is unrelated to the element of continuity, and therefore exceeds the scope of the present research. Continuity does come into play where the wrongful conduct persists after the point in which it first supports a cause of action; in this case, however, the argument based on previous inability to sue cannot serve to save overly delayed claims, namely, claims that were filed after the expiry of the limitation period from the date of first accrual.¹⁷²

A rationale of broader applicability than the former two may be recognized if one takes the view that any continuing violation is by nature a single occurrence, for which the cause of action matures only upon its completion.¹⁷³ However, this view is impaired by a consensual approach, to be discussed below, which holds that all of the tort's elements must be satisfied in a constant or repetitive manner in order for it to be deemed continuous.¹⁷⁴ The said approach implies that different

165. *Id.*

166. Graham, *supra* note 3, at 287-88.

167. *See id.* at 286.

168. *See id.*

169. *See Limestone*, 520 F.3d at 801.

170. *See Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 195, 201 (1997).

171. *See O'Neill*, *supra* note 51, at 223. This issue is sometimes complemented by the question of when the plaintiff could have been aware of her cause of action and was practically capable of suing; for elaboration on the relevance of practical constraints preventing the plaintiff from suing, *see infra* Part III.B.2.

172. *See Carli McNeill*, Note, *Seeing the Forest: A Holistic View of the RICO Statute of Limitations*, 85 NOTRE DAME L. REV. 1231, 1253-55 (2010).

173. Graham, *supra* note 3, at 285.

174. *See Reid*, *supra* note 2, at 1336; Lin, *supra* note 60, at 746-47; *see infra* Part II.C.

chronological parts of a continuing violation have independent legal existence under substantive law, and that it is theoretically possible to sue for each of them separately.¹⁷⁵ This being the case, it is unclear, and has never been explained, what inherently makes a continuing violation a single event and forecloses its separation for limitations purposes.¹⁷⁶ Moreover, the rationale at hand does not coincide with a common practical approach, referred to above, which entitles the plaintiff only for compensation relating to the limitation period preceding the filing of the suit.¹⁷⁷

iii. The Existence of a Recent Tort

Lastly, it is plausible to induce a rationale for the continuing violation doctrine from its separate accrual version.¹⁷⁸ Under this rationale, a new cause of action accrues each time the defendant breaks the law, or—in case an ongoing unlawful omission is concerned—at any given point on the time continuum. Each of these causes of action, so it may be argued, starts a new limitation period, so that a claim may be filed as long as the limitation period for the last instance of violation has not lapsed.¹⁷⁹ In other words, the reason for entertaining the claim, though it was filed long after the violation had commenced, is that the plaintiff had also been exposed to recent violations, occurring within the limitation period preceding the filing of the suit.¹⁸⁰

On its face, this rationale seems very convincing.¹⁸¹ It is only logical to characterize a continuing violation as a series of independent violations, and if this is the case, there appears to be little reason to deny suit for any of these violations before its own limitation period has ended.¹⁸² However, like the inseparability rationale discussed above, the general validity of the present rationale is also impaired by the inconsistent application of the continuing violation doctrine in existing law; namely, this rationale does not coincide with the practice of many courts to award damages for the entire period of the violation, and not merely for the harm they suffered within the limitation period.¹⁸³ Additionally, a much more fundamental question arises, one that is relevant for all proposed rationales but is especially crucial with regard to the strong rationale under discussion: should the perspective of the continuing violation doctrine be backward-looking at all?¹⁸⁴ Analyzing this question will be at the center of my own articulation of the

175. Graham, *supra* note 3, at 289-90.

176. *Id.* at 285.

177. See Laycock, *supra* note 26, at 55.

178. Hereinafter separate accrual rationale. See *supra* Part III.A.1.

179. See *id.* at 55.

180. *Id.*; Wright, *supra* note 5, at 384-85.

181. See *infra* notes 183-86.

182. Graham, *supra* note 3, at 280-81.

183. See *supra* Part III.A.1 and accompanying text.

184. See *infra* Part IV.B.

continuing violation doctrine, to be presented in the next part of this article.¹⁸⁵ We shall leave it pending for now.

2. Equitable Tolling Rationales

The continuing violation doctrine is frequently associated with equitable tolling.¹⁸⁶ A set of judicial doctrines applicable where the plaintiff suffers from a practical or legal constraint that prevents her from bringing timely suit, equitable tolling mandates a temporary postponement or cessation of the running of the limitations period.¹⁸⁷ Certain objectives relating to particular sub-categories of equitable tolling are raised in the context of continuing violation scenarios.¹⁸⁸

One such objective, recognized by the discovery rule discussed above, is to prevent unfairness where a plaintiff could not have been aware of her cause of action.¹⁸⁹ Since many continuing violations are discovered or become discoverable months or years after their commencement, while they are still in progress or shortly after their conclusion, they are sometimes viewed through the lens of the discovery rule.¹⁹⁰ For instance, courts characterized situations of professional malpractice—mostly of physicians and attorneys—as continuing for limitations purposes, reasoning, *inter alia*, that the recipient of the service is at a disadvantage to question the tactics employed or the manner in which the tactics are executed so long as the professional treatment is underway.¹⁹¹ Commentators have added that the continuing violation doctrine should accommodate situations of sexual harassment, particularly of the sub-category of hostile work environment, by fully considering victims' difficulties in asserting their rights in due time.¹⁹² The alleged hardship in these cases is both to psychologically comprehend the harassment,¹⁹³ and to realize when a series of relatively minor events becomes sufficiently significant, taken as a whole, to satisfy the objective requirements that constitute the cause of action.¹⁹⁴ In addition, it has been argued that the continuing violation doctrine should apply to infliction of emotional distress, since it is difficult to

185. See *infra* Part IV.B.

186. Graham, *supra* note 3, at 278-79.

187. 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); Graham, *supra* note 3, at 278-79; see also Zimmermann & Kleinschmidt, *supra* note 54, at 32.

188. Lin, *supra* note 60, at 756-57; Topputo, *supra* note 103, at 473; Graham, *supra* note 3, at 307.

189. See *Kubrick*, 444 U.S. at 117; Cullen v. Margiotta, 811 F.2d 698, 725 (2d Cir. 1987), *cert. denied*, 483 U.S. 1021 (1987); Lin, *supra* note 60, at 757; MacAyeal, *supra* note 7, at 595; Graham, *supra* note 3, at 278.

190. Graham, *supra* note 3, at 287; Bailey, *supra* note 7, at 452.

191. Siegel v. Kranis, 29 A.D.2d 477, 479-80 (N.Y. App. Div. 1968); R.D.H. Comm'ns v. Winston, 700 A.2d 766, 769 (D.C. Cir. 1997); DeLeo v. Nusbaum, 821 A.2d 744, 749 (Conn. 2003); Graham, *supra* note 3, at 300.

192. Tsai, *supra* note 8, at 532.

193. *Id.* at 554-56.

194. Graham, *supra* note 3, at 303.

discern when a series of modest misdeeds generates sufficient aggregate injury for such legal claim to mature;¹⁹⁵ and that it should apply to environmental violations, since they are inherently hard to discover.¹⁹⁶

Inability or difficulty to file suit, justifying the postponement of the limitation period for the duration of its existence, is also recognized where the plaintiff suffers from inherent weakness in an ongoing relationship she has with the defendant.¹⁹⁷ This is the case, for example, in many claims for abusive spousal conduct, where plaintiffs suffering from the “battered woman’s syndrome” are mentally incapable of taking any action during the course of the relationship.¹⁹⁸

A related argument relies not necessarily on the plaintiff’s inferior position in her continuing relationship with the defendant, but on the very existence of such relationship.¹⁹⁹ Thus, it is posited that the relationship that produced the dispute may sometimes resolve the grievance as well, through voluntary termination of the violation or correction of its harm by the wrongdoer, so long as the parties are given an ample opportunity to address the matter outside of court.²⁰⁰ Extending the limitation period creates such an opportunity by assuring the potential plaintiff that her claim is still reserved in case reconciliation attempts fail.²⁰¹ Delaying the clash in hope for an agreed-upon resolution is particularly important—and also socially beneficial—with regard to continuing relationships marked by high levels of trust and commitment, for instance, between an employer and an employee, between a physician and his patient, and between an attorney and his client.²⁰² In the two latter cases an established approach, commonly termed the “continuous treatment” or “continuous representation” rule, is applied,²⁰³ often as a synonym or as a part of the continuing violation doctrine.²⁰⁴

195. *Retherford v. AT&T Commc’ns of Mountain States, Inc.*, 844 P.2d 949, 975 (Utah 1992); Graham, *supra* note 3, at 306-07.

196. Lin, *supra* note 60, at 758-60.

197. See Graham, *supra* note 3, at 297-99.

198. *Giovine v. Giovine*, 663 A.2d 109, 117 (N.J. Super. Ct. App. Div. 1995); Graham, *supra* note 3, at 299.

199. Graham, *supra* note 3, at 299.

200. See *id.*

201. See *DeLeo*, 821 A.2d at 749; *R.D.H. Comm’ns*, 700 A.2d at 769; *Langner v. Simpson*, 533 N.W.2d 511, 520 (Iowa 1995); *Bailey*, *supra* note 7, at 445.

202. *Wright*, *supra* note 5, at 396-97; Graham, *supra* note 3, at 307-09; *Bailey*, *supra* note 7, at 445; *Rosenfield v. Rogin, Nassau, Caplan, Lassman & Hirtle, LLC.*, 795 A.2d 572, 581 (Conn. App. Ct. 2002); See *DeLeo*, 821 A.2d at 748.

203. 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, 955 (2001); John D. Nichols, *Torts - Limitations on Actions - Arkansas Adopts Continuous Treatment Rule to Toll Statute of Limitations in Medical Malpractice Actions*. *Lane v. Lane*, 295 Ark. 671, 752 S.W.2d (1988), 11 U. ARK. LITTLE ROCK L. REV. 406 (1989); Graham, *supra* note 3, at 299-300.

204. Graham, *supra* note 3, at 299-300; *Bailey*, *supra* note 7, at 444, 448-49; *E.g.*, *Cusseaux v. Pickett*, 652 A.2d 789, 794 (N.J. Super. Ct. Law Div. 1994); *Carpenter v. Rohrer*, 714 N.W.2d 804, 813-14 (N.D. 2006); see also *Aristide v. Jackson Mem’l Hosp.*, 917 So. 2d 253, 255 (Fla. Dist. Ct. App. 2005).

The aforementioned equitable tolling considerations may indeed be relevant for certain—though surely not all—continuing violations, but even in these cases they cannot serve as the rationale for the continuing violation doctrine.²⁰⁵ The reason, simply, is that they are grounded in the continuation of the constraint preventing the plaintiff from suing, rather than the continuation of the violation itself.²⁰⁶ The two questions do not affect one another and do not necessarily overlap, nor is there any serious attempt to argue that they do.²⁰⁷ Thus, on the one hand, a person might be impaired from bringing action for a long period of time even though her injury was caused by an unquestionably non-continuing occurrence.²⁰⁸ For instance, a car accident could yield latent or gradually developing harm that becomes detectable years later.²⁰⁹ Likewise, a person suffering a one-time, uncorrectable injury as a result of a one-time wrongful act on the part of her spouse, physician, attorney, or employer could be practically prevented from suing them for it. Furthermore, even if she were not prevented, requiring her to bring an early suit would diminish the prospect of reaching a peaceful solution and preserving her relationship with them.²¹⁰ On the other hand, many unlawful behaviors continue long after the plaintiff becomes aware of the essential facts behind the grievance.²¹¹ Any alleged ground for equitable tolling must therefore be analyzed independently based on the specific considerations it entails, both on the general policy level—where established doctrines other than the continuing violation doctrine can often be relied on—and with regard to the facts of each case.²¹² Though such considerations, as noted above, may operate side by side or in competition with the continuing violation doctrine, to incorporate them into the doctrine itself only creates doctrinal and methodological confusion.²¹³

C. The Tests for Identifying Continuing Violations

Classifying violations as continuing sometimes necessitates little more than a common-sense examination of the pertinent facts.²¹⁴ For instance, when the routine operation of a factory causes nuisance by producing high volumes of smoke, when uncompetitive prices remain fixed for a long period of time, or when tortious conduct of additional

205. Bailey, *supra* note 7, at 445; MacAyeal, *supra* note 7, at 597.

206. Graham, *supra* note 3, at 279-81.

207. MacAyeal, *supra* note 7, at 597.

208. See Graham, *supra* note 3, at 287-88.

209. See MacAyeal, *supra* note 7, at 662.

210. Graham, *supra* note 3, at 299.

211. *Id.* at 287; see *Highland Indus. Park, Inc. v. BEI Def. Sys. Co.*, 357 F.3d 794, 797 (8th Cir. 2004).

212. See Graham, *supra* note 3, at 287; Bailey, *supra* note 8, at 444-45; Lane v. Lane, 752 S.W.2d 25, 27 (Ark. 1988).

213. See Bailey, *supra* note 7, at 452.

214. MacAyeal, *supra* note 7, at 637.

types is being repeated on a daily or semi-daily basis, few would question that a continuing violation is at stake.²¹⁵ In many other cases, however, intuition alone cannot determine whether a violation is physically continuing, let alone whether it is legally continuing.²¹⁶

Courts have developed a plethora of judicial tests in the context of continuing violations.²¹⁷ Many of those tests are derived from rationales that are unrelated to the tort's continuity, or mandate examinations that are unrelated to such continuity.²¹⁸ As explained above, while most of the said rationales and examinations constitute legitimate and even essential considerations within a limitations regime, they may not be associated with the continuing violation doctrine.²¹⁹ It will therefore be unnecessary to further elaborate on their practical aspects. Other tests deal with the relations between the continuing violation doctrine and other limitations doctrines and principles, which also exceed the scope of this research, or with the time frame for calculating the damages, which will be discussed below.²²⁰ The relevant tests for our present purposes are only the ones that aspire to classify violations as continuing and determine the period of their duration, while correctly focusing on the element of chronological continuity.²²¹ Yet, even this narrow category of tests raises serious controversy and difficulty.²²²

The most crucial test for distinguishing continuing from non-continuing violations holds that a violation is continuing when the unlawful conduct is of a continuous nature, whereas the lingering effects of past unlawful conduct are not a continuing violation and are thus not actionable in their own right.²²³ This has been the consistent position of the U.S. Supreme Court,²²⁴ which has been followed by lower courts,²²⁵ and is generally characterized by commentators as the law.²²⁶ The merit of the said approach seems indisputable.²²⁷ Nearly any tort produces some enduring harm, and recognizing such harm alone—for instance, a permanent disability resulting from a car accident—as an actionable continuing violation would completely bypass statutes of limitations and

215. *Id.* at 636-37; CORMAN, *supra* note 28, at 604-05.

216. Graham, *supra* note 3, at 273.

217. MacAyeal, *supra* note 7, at 636-40; Cimpl-Wiemer, *supra* note 5, at 359-69; Graham, *supra* note 3, at 273-74, 283-84.

218. *See* MacAyeal, *supra* note 7, at 637.

219. *See id.* at 636-38; *see supra* Part II.B.

220. *See infra* Part III.C.

221. *See* Del. State Coll. v. Ricks, 449 U.S. 250, 258 (1980); *see infra* pp. 21-23.

222. *See* Graham, *supra* note 3, at 272-73.

223. Del. State Coll., 449 U.S. at 258.

224. *E.g.*, Urie v. Thompson, 337 U.S. 163, 169-70 (1949); *United Air Lines*, 431 U.S. at 558; Del. State Coll., 449 U.S. at 258.

225. *E.g.*, Dasgupta v. Univ. of Wis. Bd. of Regents, 121 F.3d 1138, 1140 (7th Cir. 1997).

226. *E.g.*, CORMAN, *supra* note 28, at 600-01; Reid, *supra* note 2, at 1335; Lin, *supra* note 60, at 746-47; Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO. WASH. L. REV. 68, 88 (2005); Eve L. Hill & Peter Blanck, *Future of Disability Rights: Part Three Statutes of Limitations in Americans with Disabilities Act, "Design and Construct" Cases*, 60 SYRACUSE L. REV. 125, 150 (2009).

227. *See infra* note 424.

frustrate their goals.²²⁸ However, though the aforementioned distinction is probably the most basic one, in practice it can be extremely hard to implement.²²⁹

The main problem stems from the fact that unlawful conduct may manifest not only in commission, but also in omission.²³⁰ Most notably, a duty to ameliorate the consequences of a previous act could render an ongoing failure to do so unlawful; the question is when such a duty exists.²³¹ While it is fairly consensual, for instance, that a person who falsely imprisons another has an ongoing duty to release the captive, and that a nuisance entails a continuing responsibility to fix the offensive condition,²³² many other cases pose less clarity.²³³ Is there a continuing duty to remove from the Internet a publication that harms the reputation of an individual, invades her privacy, or infringes her copyright?²³⁴ Is there an ongoing responsibility to grant housing or employment to a person who was once denied them on discriminatory grounds, and has not applied for them ever since?²³⁵ Is the polluter of water or land automatically compelled to have them cleaned?²³⁶ Must an unlawfully merged firm be dissolved prior to an official order to do so?²³⁷ Is trespass actionable upon an act of construction in another person's land, or also upon its remaining there?²³⁸ Moreover, is a physician's or a lawyer's ongoing failure to undo the results of his professional mistake separable from that mistake itself, and independently actionable?²³⁹ These questions and more of their kind seem to have no decisive answer in substantive law that can guide the classification of violations for limitations purposes; the precise borderline between an unlawful conduct and its consequences is usually of little significance, since the plaintiff typically sues for the tortious occurrence as a whole.²⁴⁰

Furthermore, even where a series of active deeds is concerned, it is sometimes hard to determine whether those acts are the gist of the tortious event or merely the consequence of the initial decision to perform them, which constitutes the tort.²⁴¹ Thus, the question in *Ledbetter* was whether the violation involved in wage discrimination stemmed from each paycheck or from the preceding decision to pay the

228. See Laycock, *supra* note 26, at 57.

229. *Id.* at 58; Lin, *supra* note 60, at 747-49; MacAyeal, *supra* note 7, at 637-40.

230. Lin, *supra* note 60, at 734; Hill & Blanck, *supra* note 226, at 150.

231. Lin, *supra* note 60, at 734.

232. CORMAN, *supra* note 28, at 604-05; Graham, *supra* note 3, at 285.

233. See *Pitts v. City of Kankakee*, 267 F.3d 592, 595 (7th Cir. 2001); Graham, *supra* note 3, at 285-86.

234. See Graham, *supra* note 3, at 273-74, 285.

235. *See id.*

236. *See id.*

237. Lin, *supra* note 60, at 753 n.167.

238. See Graham, *supra* note 3, at 273-74, 285.

239. Bailey, *supra* note 7, at 445.

240. Lin, *supra* note 60, at 746-47.

241. See Cimpl-Wiemer, *supra* note 5, at 355-57.

plaintiff less because of her gender.²⁴² The U.S. Supreme Court adopted the latter view, but in a sharply divided 5-4 decision.²⁴³ The harsh criticism drawn by this decision²⁴⁴ and its subsequent overturning by Congress²⁴⁵ further indicate the issue's complexity.²⁴⁶ A similar question might arise in additional contexts, for instance, with regard to antitrust violations that are the automatic outcome of a previously signed binding agreement.²⁴⁷

Additional tests utilized by courts seem even less useful.²⁴⁸ For example, the test that regards continuing violation as a series of unlawful acts²⁴⁹ addresses neither the issue of unlawful omissions, as well as its implication on the distinction between conduct and its effects, nor the definition of the required relation between discrete unlawful acts.²⁵⁰

In sum, a great deal of uncertainty and unpredictability surrounds the question of when a violation is deemed continuing.²⁵¹ To a large extent, this state of affairs undermines the very objectives of the limitation of actions, especially the social interest in providing repose to potential defendants.²⁵²

D. The Remedy for Continuing Violations

In current discourse it is deemed axiomatic, and is not subject to any debate, that the remedy for continuing violations should be the same remedy employed in most tort claims, namely, monetary compensation.²⁵³ As aforementioned, the compensation may relate to one of two time periods: either the entire period of the violation, or the limitation period preceding the filing of the suit.²⁵⁴

Apart from cases where the recognition of a continuing violation is based on the alleged inseparability of the violation, in which it is natural to opt for the former method for computing damages, there seems to be no reasoned, coherent policy with regard to remedies.²⁵⁵ Thus, damages are awarded for the entire period of the violation also where the violation is chronologically separable, although this results in large

242. *Ledbetter*, 550 U.S. at 623.

243. *See id.* at 620-21.

244. *See, e.g.,* Crivens, *supra* note 8, at 1176; Cimpl-Wiemer, *supra* note 5, at 355-57.

245. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, §2, 123 Stat. 5 (2009).

246. *See supra* notes 243-45.

247. Graham, *supra* note 3, at 286-87.

248. *See* Bailey, *supra* note 7, at 452.

249. *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); Graham, *supra* note 3, at 284.

250. Graham, *supra* note 3, at 285-86.

251. *See supra* Part III.C.

252. *See* Graham, *supra* note 3, at 272-75.

253. *See* *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S.481, 489 (1968).

254. *See supra* Part III.B.1.ii.

255. *See* MacAyeal, *supra* note 7, at 618.

amounts of compensation and imposes a great burden on defendants.²⁵⁶ Such practice also ignores plaintiffs' lack of diligence in bringing suit, as well as the disincentive thereby provided to future plaintiffs—especially those whose suffering from the tort is not too significant, and who are mostly interested in obtaining money—to act diligently.²⁵⁷ Furthermore, an overall examination of the court rulings does not clarify in which cases each method should apply, and why.²⁵⁸ Commentators generally assume that judicial restriction of damages to the limitation period is designed to avoid excessive awards,²⁵⁹ mainly when the tort spreads across a particularly long period of time.²⁶⁰ This test (to the extent that it is a test at all) does not facilitate distinction between different kinds of torts based on their intrinsic features or on any other analytical ground.²⁶¹ Rather, it is predicated on the highly subjective determination of which awards are large enough to merit their reduction.²⁶² Its cumbersome nature might also yield inconsistent outcomes that counter the basic sense of justice; the longest, gravest violations could result in lower compensation than certain intermediately long and grave violations, since the former would be subject to the reduction whereas the latter would not.²⁶³

IV. A NEW PERSPECTIVE OF THE CONTINUING VIOLATION DOCTRINE

A. The Essence and Rationale of the Continuing Violation Doctrine

The implied, unquestioned premise that underlies the current judicial and academic discourse of the continuing violation doctrine—sweepingly covering all theoretical and practical references to it—is that a plaintiff subject to a continuing violation is entitled, for whatever reason, to retroactive compensation for the harm the violation inflicted on her or for a part of it.²⁶⁴ Any mention of the termination of the actual violation is rare and concise, and even then, it is regarded mainly as a byproduct of the retroactive relief.²⁶⁵ This intuitive premise, as we have seen, has not led to the formation of any coherent construction of the doctrine's essence and rationale.²⁶⁶ In the following section I will seek to challenge the aforementioned premise by putting forward a twofold argument: First, the continuation of a tort does not immunize it, in

256. *See id.*

257. *See Klehr*, 521 U.S. at 187; *Galloway*, 78 F.3d at 1167; *Laycock*, *supra* note 26, at 55; *O'Neill*, *supra* note 51, at 223-24.

258. *See MacAyeal*, *supra* note 7, at 619.

259. *Id.* at 620-21; *PATRY*, *supra* note 21, at § 20:23; *Graham*, *supra* note 3, at 315.

260. *Laycock*, *supra* note 26, at 55-56.

261. *Bailey*, *supra* note 7, at 452.

262. *See, e.g., MacAyeal*, *supra* note 7, at 620-21.

263. *See id.* at 659-60.

264. *See Laycock*, *supra* note 26, at 55-56.

265. *See generally* *United States v. Lindsey*, 346 U.S. 568, 569-70 (1954).

266. *See supra* notes 98-99.

principle, from the effect of statutes of limitations.²⁶⁷ Second, as an exception to the first rule and to the more general operation of statutes of limitations, a motion to halt an ongoing tort prospectively should not be barred by statutes of limitations.²⁶⁸ In other words, while providing redress for any past injury cannot be considered the purpose of the continuing violation doctrine, its legitimate objective is preventing future injuries.²⁶⁹

*1. Repudiating the General Justification for Extending the
Limitation Period*

Assessment of the general policy considerations underlying statutes of limitations leads to the conclusion that the mere continuation of a tort is normally not a sufficient ground for tolling the limitation period.²⁷⁰ Thus, contrary to existing law, claims for continuing violations should ordinarily be barred if they are filed after the expiry of the limitation period from the date in which the violation first becomes actionable.²⁷¹

The obvious but often neglected starting point for the discussion is that any delay in the commencement of the limitation period, from the day in which all elements of the tort are satisfied, impairs at least some of the rationales of the limitation of actions.²⁷² This proposition is no less true when continuing violations are concerned.²⁷³ First and foremost, the unchallenged persistence of the violation entails reliance on the engendered status quo.²⁷⁴ Potential defendants and third parties have a legitimate interest to manage their practical and financial affairs based on the assumption that the existing state of affairs will endure and will not lead to the imposition of pecuniary liability.²⁷⁵ Thus, the longer time passes, the more reasonable it is to continue operating an allegedly polluting factory, using a construction that is allegedly placed in another person's land, displaying online contents that allegedly constitute defamation, invasion of privacy or copyright infringement, engaging in a business practice that allegedly violates antitrust laws or in a professional course of action that is allegedly negligent, employing an allegedly discriminatory policy, and so forth.²⁷⁶ It is therefore unfair to subject the defendant to liability in such cases, especially since the scope of liability is likely to be high as a consequence of the long time span to which it relates, and since it is likely to deter him from

267. See *infra* Part IV.A.1.

268. See *infra* Part IV.A.2.

269. See Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 697-98 (1990) [hereinafter *The Death of the Irreparable Rule*].

270. See MacAyeal, *supra* note 7, at 597.

271. See *id.* at 593-94, 695.

272. See *id.* at 590-92.

273. See *id.*

274. *Eli Lilly*, 615 F. Supp. at 822.

275. Graham, *supra* note 3, at 273-74.

276. See generally MacAyeal, *supra* note 7, at 590-92.

continuing his activity and thus to thwart decisions, investments, and agreements he made in relation to it.²⁷⁷ There is also a strong societal interest grounded in economic efficiency to nurture expectations for stability and to ensure they are not disrupted.²⁷⁸

The fact that the portrayed status quo manifests not only in the remaining of the unremedied consequences of the tort, as it is in usual cases of untimely claims, but also in the continuance of the tort itself, does not impede its characterization as a status quo, nor does it diminish the individual and social interests to rely on it.²⁷⁹ The difference from ordinary cases is especially slight in claims accusing the defendant of an ongoing failure to undo the harm he had previously generated, in which reliance is mostly passive and inertial and does not entail aggravation of the injury.²⁸⁰ One must also remember that defendants frequently do not recognize the unlawfulness of their behavior, or are at least unsure about its lawfulness, before a court determines it to be a tort.²⁸¹ The plaintiff's failure to legally attack the conduct for a long period of time thus intensifies the defendant's assumption of lawfulness, whose late refutation is especially detrimental for him, or worse prolongs the state of uncertainty.²⁸²

Postponing the limitation period in continuing violation scenarios frustrates another rationale of limitations, namely, urging plaintiffs to act diligently.²⁸³ Thus, where the separate accrual rule applies, the continuing violation doctrine provides plaintiffs with no incentive to act diligently, since they retain a claim for a violation period of the same length so long as the violation continues.²⁸⁴ In addition, where the separate accrual rule does not apply it actually incentivizes plaintiffs to postpone suits, since they can thereby increase their damages awards.²⁸⁵ As explained above, this reality impairs not only the specific rationale at hand but also the other objectives of limitations it is designed to promote, as well as the more general economic interest in preventing a waste of social resources.²⁸⁶

Furthermore, the procrastinating plaintiff's presumed indifference for her rights, which is generally held to diminish their magnitude from a social point of view, is particularly salient in continuing violations.²⁸⁷ In such cases, the hypothetical filing of an early claim could have unique implications: rather than merely hurrying the award of

277. Ochoa & Wistrich, *supra* note 11, at 493-95.

278. MacAyeal, *supra* note 7, at 590-91.

279. *See id.* at 677-79.

280. *See id.* at 670 n.442.

281. *See generally* Ochoa & Wistrich, *supra* note 11, at 484.

282. *See* MacAyeal, *supra* note 7, at 590-92, 618-21 n.219.

283. Ochoa & Wistrich, *supra* note 11, at 457.

284. *See* MacAyeal, *supra* note 7, at 620-21, 624-25.

285. *See* Kichline v. Consol. Rail Corp., 800 F.2d 356, 360 (3rd Cir. 1986); MacAyeal, *supra* note 7, at 624-25.

286. *See supra* Part III.B.1.i.

287. *See, e.g.,* PATRY, *supra* note 21, at § 20:33.50.

retroactive compensation, it may enable the plaintiff to avoid future harm and realize her substantive rights in fact, especially given the courts' ever greater willingness to issue injunctive relief.²⁸⁸ The limitation period that starts at the beginning of the violation provides the plaintiff with sufficient time to do that.²⁸⁹ It must be assumed, as statutes of limitations generally do, that the limitation period is long enough for the plaintiff to comprehend the factual state of affairs, evaluate its legal implications, and take legal measures based on it where required.²⁹⁰ We may further suppose that this process does not relate separately to any instance of violation but rather takes into account the fact of their recurrence, especially since the very first unlawful act alerts or should alert the plaintiff of the risk her rights are exposed to.²⁹¹ That the plaintiff allowed the violation to proceed arguably indicates that she did not deem her actual rights important enough to enforce, and her actual injuries painful enough to prevent, during most of the violation's long duration.²⁹² The justification for granting retroactive relief for this very same avoidable harm is therefore limited.²⁹³

Significantly, even the separate accrual rationale, which seems the most convincing rationale of general applicability for the continuing violation doctrine, cannot trump the aforementioned limitations considerations.²⁹⁴ From the perspective of those considerations, the contention that the latest part of the violation bears the same normative implications as its earliest part cannot stand.²⁹⁵ First, this is so because the commission of the late violation rests on individual and social expectations created by the early violation, and second, since the existence of the early violation renders the late violation avoidable.²⁹⁶

The rationales of preventing stale claims and of promoting efficient judicial administration appear to be rather neutral on the question at hand, since the focus of the litigation can be on either recent or remote events, and since the resulting evidentiary hardship—whose significance

288. RESTATEMENT (SECOND) OF TORTS § 933 cmt. a; Doug R. Rendleman, *The Inadequate Remedy at Law Prerequisite for an Injunction*, 33 U. FLA. L. REV. 346, 347 (1981); *The Death of the Irreparable Injury Rule*, *supra* note 269, at 688; DAN B. DOBBS, *LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION* 6, 51 (2nd ed. 1993); Jeffrey Standen, *The Fallacy of Full Compensation*, 73 WASH. U. L.Q. 145, 155-56 (1995).

289. See Wright, *supra* note 5, at 384.

290. See Graham, *supra* note 3, at 278.

291. See, e.g., MacAyeal, *supra* note 7, at 645-46, n.311.

292. See Ochoa & Wistrich, *supra* note 11, at 483-84.

293. See Graham, *supra* note 3, at 277, 279-80. While the said indifference must practically cease to exist a certain time before the suit is actually filed, it may be assumed to be a very short time in comparison with the entire duration of the tort, and also with the limitation period. Thus, this factor alone does not merit an exception to statutes of limitations, especially since the plaintiff's indifference is only one of the several limitations rationales, and since it is not practicable to require courts to inspect plaintiffs' actual levels of indifference at different points of time. See *id.*

294. See generally MacAyeal, *supra* note 7, at 620-21.

295. See, e.g., Graham, *supra* note 3, at 314-15.

296. See, e.g., Ochoa & Wistrich, *supra* note 11, at 461.

should not be overestimated anyway—can be of varying degrees.²⁹⁷ However, given the implications of prolonging the limitation period on the former rationales, it must be counterbalanced by weighty arguments in order to be justified.²⁹⁸ One therefore has to pinpoint a particularly strong interest to vindicate meritorious claims and enforce substantive law—transcending the ordinary interest that is normally outweighed upon the expiry of the limitation period—or other significant fairness or efficiency considerations.²⁹⁹ Yet, as the foregoing analysis indicates, the plaintiff's interest in recovery is not particularly strong, while the harm of untimely suits to defendants and to the social interest is rather substantial.³⁰⁰ Moreover, this is unlike equitable tolling doctrines, since in the present case the plaintiff's ability to sue upon the commencement of the tort precludes a contention that fairness mandates an extension of the limitation period.³⁰¹ As we have further seen, none of the other rationales attributed to the continuing violation doctrine are powerful enough to outweigh the considerations favoring limitations.³⁰²

In spite of the aforementioned observations, it must be conceded that in particular circumstances a delay in filing claim for a continuing violation may be, at least to a certain extent, understandable.³⁰³ The plausible reasons for such delay, however, do not affect our present analysis. A first possible reason for delay is that the injury caused by the violation becomes substantial enough to merit a claim only due to its accumulation during a long period of time.³⁰⁴ Yet, this can serve as an independent ground for postponing the limitation period, regardless of the continuing violation doctrine or at most under a narrow sub-category of this doctrine.³⁰⁵ Second, the gravity of the violation might increase considerably in comparison with the time of its commencement so that only the latest part of the violation is painful enough to be suit-worthy.³⁰⁶ But if the uniformity of the violation is so impaired, it arguably ceases to be a single continuing violation.³⁰⁷ Holding the defendant liable for the recent, aggravated harm also would not upset his settled expectations, since in such a case he does not rely on the status quo but rather alters it.³⁰⁸ Third, discrete acts of a violation may be separated by significant time gaps that, at the time those acts commence, render their recurrence unclear and diminish the perceived necessity of

297. See *supra* Part III.B.1.i.
 298. See, e.g., Graham, *supra* note 3, at 278-79.
 299. See MacAyeal, *supra* note 7, at 591.
 300. See, e.g., Graham, *supra* note 3, at 293-94.
 301. See *id.* at 326.
 302. See *id.* at 281-83; see *supra* notes 297-301; see *infra* notes 303-312.
 303. See, e.g., Graham, *supra* note 3, at 297-99.
 304. See, e.g., *id.* at 287.
 305. See *supra* Parts III.A.2, III.B.1.ii.
 306. See, e.g., Graham, *supra* note 3, at 297-98.
 307. See, e.g., *id.* at 285-86.
 308. See, e.g., MacAyeal, *supra* note 7, at 630.

suing for them.³⁰⁹ However, this may also mean that the violation is not legally continuing.³¹⁰ In any case, it may not be assumed that the last two situations are too common.³¹¹ In many typical cases of continuing violations, especially those that manifest in ongoing omissions, there is considerable similarity and chronological proximity between all parts of the violation, which are apparent from its very beginning.³¹²

Other plausible grounds for delay are even weaker.³¹³ Thus, if the change is merely in the plaintiff's perception of the violation or in her financial or mental ability to act upon it, it is insufficient to trump the opposing considerations of limitations.³¹⁴ Subjecting statutes of limitations to the subjective condition of the plaintiff—whose recognition in our context could theoretically expand to claims for old, non-continuing injuries—would completely thwart the purposes of limitations, particularly with regard to defendants' repose.³¹⁵ Moreover, while it may be posited that the very existence of older violations renders the psychological effect of the later violations more severe, such a change is also too subtle, subjective, unpredictable, and hard to prove or disprove, to justify an exception to statutes of limitations.³¹⁶

2. *The Prevention of Future Harm Exception*

The aforementioned considerations for barring untimely claims apply, in principle, across the board.³¹⁷ Most importantly, they inherently cover the most common category of tort lawsuits, those that pertain to past injuries.³¹⁸ Where the claim refers only to such injuries—namely, where the tort complained of has already ended and there is no reason to assume it would resume—this should end the discussion and lead to the complete dismissal of the claim, regardless of how long the tort had continued in the past.³¹⁹ However, one factor, where present, merits an exception to the rule portrayed above: it is the need to redress a continuing tort prospectively.³²⁰ Notably, it has been uttered by several courts and commentators that an injunctive relief ordering the cessation of a continuing violation is not subject to statutes

309. See Graham, *supra* note 3, at 299 (discussing giving time to couples in order to see if they can work things out and thus getting rid of the need for a law suit).

310. See *supra* Part III.B. (for further discussion).

311. See Graham, *supra* note 3, at 280-81, 297-98.

312. See, e.g., *id.* at 281, 292-93.

313. See generally Ochoa & Wistrich, *supra* note 11, at 484.

314. See, e.g., Graham, *supra* note 3, at 278-79, 316.

315. See *id.* at 273-74.

316. See, e.g., Graham, *supra* note 3, at 299.

317. See *supra* Part IV.A.1.

318. See Richard A. Nagareda, *In the Aftermath of the Mass Tort Class Action*, 85 GEO. L.J. 295, 313-14 (1996).

319. See, e.g., Gutierrez v. Mofid, 705 P.2d 886, 890, 892-93 (Cal. 1985); see also MacAyeal, *supra* note 7, at 591.

320. See MacAyeal, *supra* note 7, at 616-17.

of limitations, but that stance was not supported by extensive analysis;³²¹ the following section shall try to provide such analysis.³²²

Granting any person the option to assert her rights, and enabling society to enforce substantive law, are powerful interests that always have to be balanced against the rationales, which support the limitation of actions.³²³ While those interests are normally outweighed by the rationales for limitations upon the expiry of the limitation period,³²⁴ the scales are arguably tipped to their side when they are forward-looking in nature.³²⁵ The reason is that they are more acutely implicated by the limitations question in that case.³²⁶

In the typical case, the infringement of the plaintiff's substantive rights is a solid historical fact; no remedy can undo the reality of such infringement's occurrence.³²⁷ Furthermore, the only plausible remedy for a past infringement is usually pecuniary compensation, which serves merely as a conceptual substitute for the violated right.³²⁸ Thus, without prejudice to the importance of the retroactive relief, it has its limits; hence, the cost of barring the claim on limitations grounds has its limits as well.³²⁹ Conversely, when a future infringement is at stake, the decision of whether to bar the claim or not has far more dramatic consequences.³³⁰ On the one hand, barring the claim means consciously exposing the plaintiff to an actual violation of her substantive rights, not just to the denial of their monetary substitute.³³¹ What is even more crucial is that, absent legal intervention, that violation may persist uninterrupted potentially indefinitely,³³² resulting in the absolute loss of

321. *Sova v. Glasier*, 596 N.Y.S.2d 228, 229 (N.Y. App. Div. 1993); *Millender v. Fla. Dep't of Transp.*, 774 So. 2d 767, 768-771 (Fla. Dist. Ct. App. 2000); *Hill & Blanck*, *supra* note 226, at 150. A rule which conditions the entertainment of a claim upon the plaintiff's forward-looking interest to stop the violation has also been recognized by the U.S. Supreme Court in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57-61 (1987). *Gwaltney*, however, concerned a very specific context: a provision in the Clean Water Act which authorizes the enforcement of the Act against persons "alleged to be in violation" of it through private citizen suits (33 U.S.C. § 1365(a)). *Id.* at 53. As such, it is inapplicable to our present context for several reasons. First, the Court's decision was predicated on the present-tense language of the specific provision at hand, and on the position that private actions were only designed to serve a supplementary role to government enforcement under the Clean Water Act. *See id.* at 54-58. Second, the question addressed by the Court was not whether a cause of action was barred by a statute of limitations, but whether the elements of the cause of action were met at all. *See id.* And third, the present-future violation requirement is unrelated to the question of when the violation commenced, therefore it does not implicate the rationales of statutes of limitations pertaining to repose, staleness and the like. *See Lin*, *supra* note 60, at 727-28, 766.

322. *See infra* Part IV.A.2; *see MacAyeal*, *supra* note 7, at 605 n.100.

323. *See supra* Part II.

324. *See MacAyeal*, *supra* note 7, at 590-92.

325. *See id.* at 631-32, 636, 645 n.311.

326. *See id.* at 631-32.

327. *See The Death of the Irreparable Injury Rule*, *supra* note 269, at 691, 694.

328. *See id.* at 724.

329. *See Graham*, *supra* note 3, at 291-92.

330. *The Death of the Irreparable Injury Rule*, *supra* note 269, at 701-02.

331. *See id.* at 728.

332. For incidental references to the interest in terminating potentially infinite violations through the continuing violation doctrine, *see Fletcher v. Union Pac. R.R.*, 621 F.2d 902, 907-08

the right.³³³ On the other hand, if the claim is entertained, an injunctive relief can often guarantee the enjoyment of the right in fact, which is thought to be the most complete and accurate realization of it.³³⁴ At the conclusion of the trial, the court ultimately choose a judicial remedy that involves additional considerations besides the plaintiff's good, which generally exceed this article's discussion of the limitation of actions but will be touched upon shortly below.³³⁵ Suffice it to say, for now, that theoretically, an injunctive relief is indeed highly available for plaintiffs in the described circumstances.³³⁶

The unique cost of statutes of limitations in our context—which must be balanced against their utilities—is, then, foregoing an opportunity to materialize the plaintiff's actual rights and genuinely upholding the duties and prohibitions of substantive law, in favor of issuing essentially unrestricted permission to violate those rights and that law indefinitely.³³⁷ Viewed this way, the individual and social interests not to bar claims appear to be of a decisive normative weight.³³⁸

Another difference from retroactive claims lies at the opposite side of the normative equation.³³⁹ Although an order to stop an ongoing activity might disrupt the defendant's expectation that it would endure for the long term, and impede the viability of business decisions, transactions and investments he made relying on it,³⁴⁰ such harm seems more moderate and speculative than that of retroactive relief.³⁴¹ While

(8th Cir. 1980), *cert. denied*, 449 U.S. 1110 (1981); *Page*, 729 F.2d at 821-22; Laycock, *supra* note 26, at 55, 60-61.

333. See Laycock, *supra* note 26, at 56.

334. See, e.g., *Development in the Law-Injunctions: II. The Changing Limits of Injunctive Relief*, 78 HARV. L. REV. 997, 1020 (1965) [hereinafter *Developments-Injunctions*]; Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1105, 1127 (1972); *The Death of the Irreparable Injury Rule*, *supra* note 269, at 691-92; Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56, 60-61 (1993); Rendleman, *supra* note 288, at 352; Heidi Wendel, Note, *Restoration as the Economically Efficient Remedy for Damage to Publicly Owned Natural Resources*, 91 COLUM. L. REV. 430, 434 (1991). Arguably, it may be said that the cessation of the tortious activity could also flow indirectly, in many cases, from the deterrent force of retroactive damages. See Ochoa & Wistrich, *supra* note 11, at 493-94. However, this possibility should not guide the shaping of the continuing violation doctrine for three reasons. First, such outcome is not certain but depends on the defendant's discretion. See *id.* at 493-94. Second, allowing a claim for retroactive damages is an undesirable method for achieving the said objective (as well as the objective of deterring future tortfeasors) since, as explained above, it entails that statutes of limitations seek to prevent. See *id.* And third, the deterrent force of damages has no significance in the instant case where the claim refers to a continuing tort, which has already ended voluntarily. See *id.*

335. See *supra* Part III.D.

336. See *supra* Part III.D.; see *The Death of the Irreparable Injury Rule*, *supra* note 269, at 691-92.

337. MacAyeal, *supra* note 7, at 605 n.100.

338. See Ochoa & Wistrich, *supra* note 11, at 500.

339. See *infra* notes 340-346 and accompanying text.

340. For these reasons, it seems wrong to assert that the prospective nature of injunctive relief is sufficient in itself to exempt it from statutes of limitations. See, e.g., *cf. Sova*, 192 A.D.2d at 1069-70.

341. For the proposition that merely ceasing the violation is a relatively small burden for the defendant, even when it has been ongoing for years, see, e.g., *Frame v. City of Arlington*, 657 F.3d

damages for a continuing tort almost inevitably inflict a substantial financial harm upon the defendant, it may be assumed that, in quite a few cases, compliance with an injunction involves little costs, and does not frustrate any substantial decision, transaction or investment.³⁴² This usually appears to be the case, for instance, when the defendant is ordered to remove a publication from the Internet, to abandon a discriminatory policy, to cease a practice of sexual harassment, infliction of emotional distress or alienation of affection, or to fix a leaking pipeline.³⁴³ It is true that in other cases, like in certain claims for nuisance and trespass, stopping the tort might require the removal of constructions or even the termination of businesses, thereby seriously disrupting the defendant's reliance interest.³⁴⁴ However, as will be explained below, prospective remedies entail mechanisms that take the defendant's interests into account and ensure they are not overly harmed.³⁴⁵ Thus, concurrent with the increase in the weight of the considerations, which oppose the limitation of actions, the magnitude of the considerations favoring limitations slightly decreases in the present context.³⁴⁶

The combination of the general rule that the mere continuation of a tort may not toll the limitation period, with its exception which allows an untimely claim only for future injuries, yields the most just and efficient balance between the rights and interests at issue.³⁴⁷ From the potential defendants' perspective, the expiry of the limitation period would terminate the risk of considerable financial liability.³⁴⁸ Thus, they would be able to carry on their relevant activities with little fear of their past and present consequences, and the social interest in uninhibited market operation and efficient use of resources would thereby be promoted.³⁴⁹ On the other hand, tortfeasors would not be given a privilege to proceed with their unlawful conduct indefinitely, at least not without bearing its costs, and although individual and social expectations would thereby be disrupted, that harm would frequently not be severe.³⁵⁰ From the plaintiff's perspective, delay in filing a claim—which interferes with the defendant's expectations, implies indifference

215, 239 (5th Cir. 2011); *Frame*, 575 F.3d at 448-49 (Prado, J., dissenting); Justin M. Woodard, Recent Development, *Frame v. City of Arlington: The Fifth Circuit Starts the Limitations Clock for Title II Claims upon a Municipality's Non-ADA-Compliant Construction or Alteration*, 84 TUL. L. REV. 1373, 1383 (2010).

342. See *The Death of the Irreparable Injury Rule*, *supra* note 269, at 694 n.29.

343. See, e.g., *Galloway*, 78 F.3d at 1167.

344. See Ochoa & Wistrich, *supra* note 11, at 465 n.49 (quoting *Cholmondeley v. Clinton*, 37 Eng. Rep. 527, 577 (K.B. 1820)).

345. See *infra* Part IV.C.

346. See *The Death of the Irreparable Injury Rule*, *supra* note 269, at 688-89.

347. See Graham, *supra* note 3, at 277, 290-92.

348. See Ochoa & Wistrich, *supra* note 11, at 462, 484; see also MacAyeal, *supra* note 7, at 591.

349. See Ochoa & Wistrich, *supra* note 11, at 462, 466-67; see also MacAyeal, *supra* note 7, at 591.

350. See Graham, *supra* note 3, at 310-11.

for her own rights, and generates avoidable harm—would result in a sanction, namely, the denial of compensation for past injuries.³⁵¹ On the other hand, the sanction would not be disproportionate to the misconduct.³⁵² Since the very act of bringing suit indicates the plaintiff's concern for her rights and is aimed at stopping their violation in fact, and since barring the claim would expose her to a potentially permanent tort, permitting her to prevent that harm is justifiable.³⁵³

Significantly, the line drawn by the portrayed balancing between injuries that are actionable and injuries that are not is not arbitrary.³⁵⁴ Rather, it is based on a clear distinction between two time periods, one preceding the court's judgment and the other following it, consistently with statutes of limitations' preoccupation with chronology, and with their inherent tendency to be more favorable to plaintiffs the later the occurrence they sue for.³⁵⁵ It also reflects the notions that the uniqueness of continuing violations lies in their potential infinity, and that the primary social interest they entail is to redress such infinity.³⁵⁶

To the extent that one wonders whether the proposed approach represents a doctrine of accrual or a doctrine of tolling—a question of doubtful significance, as that approach is predicated upon a detailed analysis of policy considerations—the answer could be both.³⁵⁷ Since causes of action in continuing violation scenarios accrue both within and outside the limitation period, it is suitable to apply a rule that partly accepts and partly rejects the statute of limitations defense.³⁵⁸ At the same time, since an all-or-nothing solution would be unfair in certain respects to either the plaintiff or the defendant, and since equitable doctrines are by nature balancing, seeking a middle ground position is most appropriate.³⁵⁹

351. See Andrew J. Wistrich, *Procrastination, Deadlines, and Statutes of Limitations*, 50 WM. & MARY L. REV. 607, 611-12 (2008).

352. See Ochoa & Wistrich, *supra* note 11, at 472-73.

353. MacAyeal, *supra* note 7, at 696.

354. Hemmings v. Banan, 822 F.2d 688, 689-90 (7th Cir. 1987).

355. For the general notion that the all-or-nothing approach of statutes of limitations should be abandoned, and that their objectives support the partial barring of claims, see Guttel & Novick, *supra* note 99, at 169-70. Guttel and Novick's practical proposal is to deduct a certain percentage of the plaintiff's award based on the extent of harm actually caused by her delay in any given case. See *id.* at 153-54 n.35-36. By the same logic, a claim may be barred with regard to a certain component of the occurrence underlying it but not with regard to another, based on the argument that it has different implications on the rationales for limitations in each of these cases. See *id.* at 131. Notably, the main critiques of Guttel and Novick's position (see Wistrich, *supra* note 351, at 646-48) are of little relevance in our context. Thus, the critique pertaining to unpredictability does not hold, since the present proposal, unlike Guttel and Novick's, employs a non-discretionary bright-line rule. See *id.* at 647-48. Furthermore, the critiques pertaining to the defendant's reduced repose and to the plaintiff's reduced incentive to act diligently are also hardly applicable to the present proposal, since its complete elimination of pecuniary damages significantly diminishes both concerns.

356. See Ochoa & Wistrich, *supra* note 11, at 462, 466-67.

357. See Graham, *supra* note 3, at 277.

358. See *id.* at 276, 282-83.

359. See Guttel & Novick, *supra* note 99, at 169-70.

B. The Tests for Identifying Continuing Violations

Having delineated the purpose that may be ascribed to the continuing violation doctrine, it is now necessary to determine when the doctrine applies.³⁶⁰ The test for defining continuing violations is best instructed by the doctrine's aspiration to protect plaintiffs from prospectively continuing torts.³⁶¹ The test's underlying assumption should be that the basic conditions pertaining to the existence of a tort—namely, an unlawful behavior, an injury, and a causal link between them, or an occurrence, which inseparably combines the three—were satisfied, at least, at a certain point in the past.³⁶² The function of the test, then, is relatively simple: infusing the principled question concerning the commission of a tort with relevant forward-looking dimensions.³⁶³

The aforementioned considerations lead to the formation of a three-pronged test for defining continuing violations.³⁶⁴ The first prong of the test inquires whether the harm suffered by the plaintiff is likely to proceed in the near future.³⁶⁵ Focusing on the future existence of this particular element of the tort is justifiable since it manifests the actual infringement of the plaintiff's rights, redressing which is the gist of the proposed theory and of tort law in general.³⁶⁶ Furthermore, since the harm element is much more tangible than the often abstract elements of wrongfulness and causation, applying this requirement poses the least problems to courts.³⁶⁷ Notably, trying to assess future occurrences is among the routine judicial assignments.³⁶⁸ In particular, finding at least a reasonable probability for serious future harm is generally a precondition for any prospective relief.³⁶⁹ This task is even easier than usual in continuous situations, since the fact that an occurrence persisted during a substantial amount of time in the past provides a very strong

360. See *infra* Part IV.B.

361. See MacAyeal, *supra* note 7, at 617-19.

362. Where the limitations analysis is intertwined with the judicial discussion of the merits of the case, the former has significance only if the cause of action is valid. See *Sterlin v. Biomune Sys.*, 154 F.3d 1191, 1195 (1998). And where the limitations issue arises within a preliminary motion to dismiss, the general rule holds that the court should accept as true the well-pleaded allegations of the claim (except those which directly impinge upon the alleged ground for dismissal) and construe them favorably to the plaintiff. See *Abdul-Alim Amin v. Universal Life Ins. Co.*, 706 F.2d 638, 640 (5th Cir. 1983); *Sterlin*, 154 F.3d at 1195 (both referring specifically to statutes of limitations); *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) (referring generally to motions to dismiss).

363. See MacAyeal, *supra* note 7, at 617-19.

364. See Graham, *supra* note 3, at 286; see also MacAyeal, *supra* note 7, at 636-37.

365. See Graham, *supra* note 3, at 283-84, 286.

366. The latter proposition seems applicable under both dominant theories of tort law, that of corrective justice (see Robert J. Rhee, *A Principled Solution for Negligent Infliction of Emotional Distress Claims*, 36 ARIZ. ST. L.J. 805, 878 (2004)) and that of economic efficiency (see Ronen Perry, *Re-Torts*, 59 ALA. L. REV. 987, 989-90 (2008); Adam J. Kolber, *The Experiential Future of the Law*, 60 EMORY L.J. 585, 590 (2011)).

367. See MacAyeal, *supra* note 7, at 637.

368. See *id.*

369. RESTATEMENT (SECOND) OF TORTS § 933 cmt. b; 42 AM. JUR. 2D *Injunctions* § 34.

indication as to its persistence in the future.³⁷⁰ Thus, if an active damage-causing conduct is consistently repeated by the defendant on a daily or periodic basis, or if he consistently fails to terminate an injurious state of affairs, in spite of being asked at least once to stop the conduct or the harm, there is sufficient probability that they will continue prospectively and bear the same magnitude.³⁷¹

The second prong of the test examines whether the defendant's liability for past injuries under the pertinent substantive law—which, as aforementioned, is assumed to exist—extends also to the expected future injuries, so that he may be held accountable for them.³⁷² Such liability includes, apart from the injury element, which has already been discussed, an unlawful conduct and a causal link between that conduct and the injury.³⁷³ The element of unlawfulness should not raise any difficulty.³⁷⁴ Where recurring conduct of a uniform nature is at issue, the presumption of its past unlawfulness projects upon its future unlawfulness.³⁷⁵ In addition, where the claim concerns a one-time act, which allegedly generated a lingering situation, its presumed characterization as unlawful ends the inquiry.³⁷⁶ Verifying a causal link between such behavior and the future harm is only a bit harder.³⁷⁷ Where recurring conduct of a uniform nature is at issue, both its factual and its legal link with the future harm follow from the presumed presence of such links in the past.³⁷⁸ Where the claim concerns a one-time act, which allegedly generated a lingering situation, the assumption that that situation initially resulted from the conduct, combined with the defendant's failure to subsequently ameliorate it, establish the factual connection between the conduct and the future persistence of the same situation.³⁷⁹ As to legal causation, the requirements that apply in principle to any type of tort should be examined with regard to the future harm.³⁸⁰ Take, for instance, the most prevalent test for determining legal causation, the test of foreseeability: assuming that the initial harm was foreseeable at the time of the conduct, the judicial inquiry should be whether the long-term persistence of that harm was also foreseeable at the same time.³⁸¹

370. See RESTATEMENT (SECOND) OF TORTS § 933 cmt. b.

371. See Graham, *supra* note 3, at 284-85, 290-91.

372. See MacAyeal, *supra* note 7, at 636-37.

373. See MCI Commc'ns Corp. v. Am. Tel. & Tel. Co., 708 F.2d 1081, 1161, 1187 (7th Cir. 1983).

374. *Contra* Graham, *supra* note 3, at 285-86.

375. See Cimpl-Weiner, *supra* note 5, at 373-74.

376. See Graham, *supra* note 3, at 282, 286.

377. See Ochoa & Wistrich, *supra* note 11, at 476.

378. See Wessmann v. Gittens, 160 F.3d 790, 818 (1st Cir. 1998).

379. See Graham, *supra* note 3, at 282-83, 286.

380. See Hartley v. State, 698 P.2d 77, 83 (Wash. 1985).

381. See Dillon v. Legg, 441 P.2d 912, 920-21 (Cal. 1968).

The third prong of the test investigates whether the defendant is practically capable of bringing the injurious state of affairs to an end,³⁸² for example, by terminating a discriminatory policy, evacuating his assets from the plaintiff's land, ceasing a nuisance, removing an offensive publication from the Internet, and so forth.³⁸³ This condition fortifies the defendant's moral responsibility for the plaintiff's future harm by ascribing the perpetuation of the harm to his present and future decisions, not just his past behavior, especially since such decisions are presumed to be taken with full awareness of their injurious consequences.³⁸⁴ It also coincides with the fundamental observation that tort liability is contingent upon the existence of a conduct attributable to the tortfeasor's voluntary choice, or, in other words, upon his having a minimal level of control over the occurrences, and a physical ability to evade them in one way or another (if only by abstaining altogether from a dangerous activity).³⁸⁵ During a time in which the defendant cannot possibly avoid or correct the harm—for example, when a bodily injury stemming from medical malpractice is incurable or when a previously created pollution is irreparable—he may not reasonably be held to commit a tort; at most, such state of affairs is the result of his past conduct.³⁸⁶ When that conduct lies outside the limitation period, as the present discussion assumes, it completely bars the claim.³⁸⁷

The third prong of the test appears to be the most practicable method for addressing the hardest definitional problem of continuing violations—distinguishing between an ongoing tort and the ongoing effects of a past tort (theoretically, it could also be employed to determine whether a claim for retroactive damages should be barred, but as was explained in length, the very notion of a backward-looking continuing violation doctrine is incompatible with the rationales for limitations.)³⁸⁸ While this prong is rather easy to establish and seems to resolve most difficult cases in favor of plaintiffs, it would not unduly widen the scope of the continuing violation doctrine, since at the same

382. This requirement has occasionally been introduced into the continuing violation doctrine. See *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 231 (1975); *Miller v. Cudahy Co.*, 858 F.2d 1449, 1454 (10th Cir. 1988), *cert. denied*, 492 U.S. 926 (1989); *MacAyeal*, *supra* note 7, at 619.

383. See Anthony Ciolli, *Chilling Effects: The Communications Decency Act and the Online Marketplace of Ideas*, 63 U. MIAMI L. REV. 137, 234 (2008).

384. See *Ochoa & Wistrich*, *supra* note 11, at 489-90.

385. See RESTATEMENT (SECOND) OF TORTS § 2 cmt. a; W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 162-63, 178 (W. Page Keeton ed., 5th ed. 1984); Martin A. Kotler, *Utility, Autonomy and Motive: A Descriptive Model of the Development of Tort Doctrine*, 58 U. CIN. L. REV. 1231, 1268 (1990); Michael I. Krauss, *Tort law and Private Ordering*, 35 ST. LOUIS U. L.J. 623, 626 (1991); Darren S. Rimer, Note and Comment, *Secondhand Smoke Damages: Extending a Cause of Action for Battery Against a Tobacco Manufacturer*, 24 SW. U. L. REV. 1237, 1256-57 (1995); Ernest J. Weinrib, *Correlativity, Personality, and the Emerging Consensus on Corrective Justice*, 2 THEORETICAL INQUIRIES L. 107, 121 (2001).

386. See *Bailey*, *supra* note 7, at 457-58.

387. See *Gregoire*, 81 N.E.2d at 48.

388. See *Graham*, *supra* note 3, at 283-86.

time the doctrine's applicability is significantly restricted by the first prong.³⁸⁹

If the cumulative conditions of the described test are met, the plaintiff will be able to obtain a prospective relief based on the tort's prospective continuance, in spite of the fact that the tort commenced outside the limitation period.³⁹⁰

A further question arises with regard to compensation for past injuries.³⁹¹ Though the proposed doctrine denies such compensation, certain plaintiffs might try to bypass this aspect of the doctrine by proving that what occurred outside the limitation period did not start a continuing violation.³⁹² Thus, if discrete tortious acts performed by the defendant are not similar enough in their subject matter or magnitude, or are not proximate enough in time, it may be argued that each of them is truly independent and that its legal evaluation should not be affected by the others.³⁹³ In such a case, the regular rule would apply: the plaintiff would be entitled to relief—both backward-looking and forward-looking, if relevant—for any tort committed within the limitation period preceding the filing of the suit.³⁹⁴ Determining when the subject-matter connection and the frequency of the acts reach a sufficient level for recognizing a continuing violation is not always an easy task, and it might necessitate the employment of some intuition.³⁹⁵ Nevertheless, it may be guided by the principal rationales of the negative side of the continuing violation doctrine as defined above, namely, respecting settled expectations and encouraging the early filing of claims.³⁹⁶ Hence, the question to ask—much like the aforementioned prospective test—is whether there existed, for at least one limitation period, a pattern of tortious conduct whose further continuation was probable.³⁹⁷ If the answer is in the positive, then the defendant's reasonable reliance on the plaintiff's toleration of his conduct should be weighed in his favor, and concurrently, the plaintiff may be punished for failing to take timely measures to stop the conduct.³⁹⁸ If, on the other hand, there was no such pattern, then both grounds for denying damages do not apply.³⁹⁹ Notably, in this distinct category of circumstances it will often be

389. *See id.* at 282.

390. *See id.*

391. *See* RESTATEMENT (SECOND) OF TORTS § 910, cmt. a.

392. *See Berry*, 715 F.2d at 979-82.

393. *See id.* at 981-82; *See also* *Cowell v. Palmer Twp.*, 263 F.3d 286, 292 (3d Cir. 2001); *see also* *Tinner v. United Ins. Co. of Am.*, 308 F.3d 697, 708-09 (7th Cir. 2002) (citing *Selan v. Kiley*, 969 F.2d 560, 567 (7th Cir. 1992)).

394. *See* RESTATEMENT (SECOND) OF TORTS § 910.

395. *See Berry*, 715 F.2d at 979.

396. *See supra* Part III.A.1.

397. *See MacAyeal, supra* note 7, at 589.

398. *See Berry*, 715 F.2d at 981; *Ochoa & Wistrich, supra* note 11, at 454-55.

399. *See MacAyeal, supra* note 7, at 589.

inevitable to take into account questions of discoverability,⁴⁰⁰ which exceed the scope of the present research.

Disputes of the said kind, it should be clarified, are not expected to be frequent.⁴⁰¹ In the broad category of violations characterized by a high degree of unity or monotony, it would be very hard for the plaintiff to allege that the recent torts are not the continuance of identical, older torts, and that her claim for them was not filed too late so as to bar her entitlement for damages.⁴⁰²

C. *The Remedy for Continuing Violations*

Where a prospectively continuing violation of the plaintiff's rights is recognized, and the court determines on the merits that the defendant is indeed liable for it, the continuing violation doctrine's goal of preventing such violation may best be achieved through the systematic employment of injunctive relief.⁴⁰³ Within that relief the court would order the defendant to put an end to the injurious state of affairs by ceasing his conduct, *e.g.*, terminating a binding agreement, modifying it, *e.g.*, instituting non-discriminatory policies, taking safeguards to prevent its ill-effects, *e.g.*, installing pollution-reducing devices, undoing its consequences, *e.g.*, demolishing a construction built on another person's land or removing a publication from the Internet, and so forth.⁴⁰⁴

Notably, the historic position, which attributed equitable remedies decisive inferiority *vis-à-vis* pecuniary compensation, is no longer adhered to.⁴⁰⁵ As commentators commonly assert, courts today make liberal use of injunctions to assure effective protection of plaintiffs' rights.⁴⁰⁶ Courts' tendency to issue injunctive relief is said to be particularly high where it is required to enforce property rights,⁴⁰⁷ civil rights and other fundamental personal rights,⁴⁰⁸ or rights that are incommensurable with money,⁴⁰⁹ and more specifically, in claims for intellectual property infringement, discharge from employment, nuisance, and trespass.⁴¹⁰ Even more importantly for our purposes,

400. See *Berry*, 715 F.2d at 981-82.

401. See *MacAyeal*, *supra* note 7, at 645-46.

402. See *Ochoa & Wistrich*, *supra* note 11, at 507.

403. RESTATEMENT (SECOND) OF TORTS § 933 cmt. a.

404. BLACK'S LAW DICTIONARY 904 (10th ed. 2014).

405. *The Death of the Irreparable Injury Rule*, *supra* note 269, at 699.

406. See RESTATEMENT (SECOND) OF TORTS § 933 cmt. a; *Rendleman*, *supra* note 288, at 347; *The Death of the Irreparable Injury Rule*, *supra* note 269, at 691; *DOBBS*, *supra* note 288, at 6, 51; *Standen*, *supra* note 288, at 153-54.

407. See *Developments-Injunctions*, *supra* note 334, at 998-99; see also *DOBBS*, *supra* note 288, at 168.

408. See *Developments-Injunctions*, *supra* note 334, at 1020; see also *Rendleman*, *supra* note 288, at 352.

409. See *The Death of the Irreparable Injury Rule*, *supra* note 269, at 707-09; see also *Rendleman*, *supra* note 288, at 350; see also 27A AM. JUR. 2D *Equity* § 45.

410. See *DOBBS*, *supra* note 288, at 52-53; see also Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 710-11 (2003); see also Doug Rendleman, *The Trial*

courts often opt for injunctive relief when the offensive behavior is likely to continue and necessitates repetitive lawsuits unless it is foreclosed in advance.⁴¹¹ Furthermore, some of the major principled objections to injunctive relief are inapplicable to continuing violation scenarios.⁴¹² According to those objections, the inherently speculative nature of future occurrences renders a remedy designed to address them problematic in several respects: it is prone to being overbroad so as to prohibit lawful activities alongside unlawful ones;⁴¹³ its delineation is complicated and thus burdens the judicial system;⁴¹⁴ and it deprives society of the ability to conduct informed cost-benefit calculations based on an evaluation of the actual consequences of activities.⁴¹⁵ However, predicting the endurance of an unlawful state of affairs based on its persistence in the past and present, especially where the person responsible refuses to terminate it even after being sued, is hardly a speculative endeavor.⁴¹⁶ Establishing the remedy for the future tort on a comprehensive ex-post analysis of the presumably similar past tort, therefore, largely avoids the said problems.⁴¹⁷

Nevertheless, the common perception still holds that injunctive relief is subject to special conditions and restrictions, which normally do not apply to damages.⁴¹⁸ The principled position stated above, which favors the use of injunctive relief and concurrently denies the award of damages in continuing violation cases, did not express repudiation of the said perception, but was mostly based on the distinction between past violations and future violations.⁴¹⁹ Now that we focus exclusively on the remedy for the future violation, the plaintiff's entitlement to injunction should not be greater than in other cases simply because of the tort's continuation, let alone because of her delay in filing the claim.⁴²⁰

Most significantly, where the negative impact of the injunction on the defendant or on the social interest is expected to be disproportional to its benefit for the plaintiff, it may be denied.⁴²¹ This could be the case, for instance, where stopping the violation entails the complete cessation of production activities, which are essential for the defendant's

Judge's Equitable Discretion Following eBay v. MercExchange, 27 REV. LITIG. 63, 86 (2007) [hereinafter *eBay v. MercExchange*].

411. See *The Death of the Irreparable Injury Rule*, *supra* note 269, at 714-15.

412. See Gene R. Shreve, *Federal Injunctions and the Public Interest*, 51 GEO. WASH. L. REV. 382, 389 (1983).

413. See *Developments-Injunctions*, *supra* note 334, at 1005; see also Shreve, *supra* note 412, at 389.

414. See Standen, *supra* note 288, at 158-59; see also Shreve, *supra* note 412, at 389-90.

415. See Standen, *supra* note 288, at 191.

416. See *id.* at 159.

417. See *id.* at 158-59.

418. RESTATEMENT (SECOND) OF TORTS §§ 933 cmt. a, 938 cmt. b.

419. See Standen, *supra* note 288, at 155, 158.

420. See Shreve, *supra* note 412, at 388-89.

421. See RESTATEMENT (SECOND) OF TORTS § 936.

financial stability or are socially desirable,⁴²² or where it encroaches upon weighty social values such as the freedom of speech.⁴²³

In addition, the plaintiff's delay may deprive her of an injunctive relief under the doctrine of laches.⁴²⁴ This is so where the defendant proves to have made investments, transactions or business decisions based on the expectation—generated by the plaintiff's delay—that the existing state of affairs will endure, and where the court is convinced that they are sufficiently substantial to outweigh the plaintiff's interest in recovery.⁴²⁵ While laches shares its basic policy concerns with statutes of limitations, it is not superfluous or contradictory to apply it alongside them.⁴²⁶ The reason is that that doctrine entails much greater discretion, and is based on an evaluation of the interests of the actual parties rather than on generalized assumptions.⁴²⁷ Thus, refusal to issue an injunctive relief due to laches does not contrast the general competence to grant a prospective remedy recognized by the continuing violation doctrine, but—as will be further clarified shortly—reflects an adjustment of the remedy to the particular circumstances of the case in hope of reaching a more just solution.⁴²⁸

Further reasons for refusing to issue an injunction could be the extraordinary difficulty in judicially supervising its execution,⁴²⁹ the need for a high level of confidence and trust required by the corrective activity, which does not coincide with compelling it, or the plaintiff's ability to ameliorate her own condition more effectively or more cheaply than the defendant.⁴³⁰

Where a court holds that an injunction is an improper method for protecting the plaintiff against the proven future violation of her rights, pecuniary damages should normally be awarded as a conceptual substitute for the actual enjoyment of those rights.⁴³¹ The damages, similar to the injunction they replace, must be prospective in nature; for

422. See RESTATEMENT (SECOND) OF TORTS §§ 933 cmt. a, 936, 944; see also *The Death of the Irreparable Injury Rule*, *supra* note 269, at 749-50; see also DOBBS, *supra* note 289, at 29; See also 27A AM. JUR. 2D *Equity* § 102.

423. See *The Death of the Irreparable Injury Rule*, *supra* note 269, at 742-44. The freedom of speech is relevant where the injunction sought prohibits the future publication of offensive materials. See *id.* at 743-44. It should be noted, however, that an injunction of that kind is not necessarily unconstitutional *per se* under the doctrine of prior restraint. See *id.* at 743. The reason is that the restraint of speech in the discussed case is not 'prior'; it takes place after the publication had been distributed or displayed for a time at least as long the limitation period, and only following a full-fledged judicial proceeding on the merits in which it is found to be unlawful. See *Balboa Island Vill. Inn, Inc. v. Lemen*, 156 P.3d 339, 352-53 (Cal. 2007); see also 2 RODNEY A. SMOLLA, *LAW OF DEFAMATION* § 9:88 (2d ed. 2005).

424. See RESTATEMENT (SECOND) OF TORTS § 939 cmt. a.

425. See *id.*

426. See *id.* at § 939 cmt. d.

427. See *id.* at § 939 cmt. c.

428. See *id.*

429. See *The Death of the Irreparable Injury Rule*, *supra* note 269, at 762; see generally 27A AM. JUR. 2D *Equity* § 101.

430. See *The Death of the Irreparable Injury Rule*, *supra* note 269, at 749.

431. See *id.* at 696.

the same policy reasons portrayed above, they ought to relate to the future harm and not to the past harm.⁴³² The practical assessment of the amount of damages due for future injuries is harder than in the case of past injuries, but it is frequently performed by courts.⁴³³ Notably, the nature of continuing violations attenuates the difficulty of this task, since examining the extent of harm suffered by the plaintiff, during a long time period in the past, may assist considerably in estimating the extent of harm expected to flow from the same tort in the future.⁴³⁴ All of the considerations, which regularly influence the computation of damages, would be taken into account in this context, including the plaintiff's ability to mitigate her harm as well as the financial costs she would thereby incur.⁴³⁵

V. CONCLUSION

This article has tried to inject theoretical and practical coherence into the chaotic and controversial continuing violation doctrine applied to statutes of limitations.⁴³⁶ After discounting the present positions as to the doctrine's essence, rationale, and proper operation, it has offered a novel construction of the doctrine.⁴³⁷ That construction recognizes, based on an integrated analysis of the policy considerations pertaining to the limitation of actions, a watershed that separates past continuing torts from future continuing torts.⁴³⁸ In the former case, so it was asserted, the balance of interests weighs in favor of barring suits, whereas in the latter case, with which the continuing violation doctrine should deal exclusively, the aspiration to protect plaintiffs' substantive rights prevails.⁴³⁹ Thus, where a claim is filed for a tortious conduct, which had begun outside the limitation period and continued into that period, the plaintiff generally may not recover damages for any part of it.⁴⁴⁰ On the other hand, where it is established—based on tests derived from the rationale of the continuing violation doctrine so defined—that the tort is likely to continue prospectively, the plaintiff is entitled to apply for a remedy that would protect her from the tort's continuance.⁴⁴¹

In an overall view, the proposed doctrine possesses several advantages compared with its current versions.⁴⁴² First, instead of employing solutions that sharply disfavor one of the parties, it simultaneously protects what seems to be the most significant interests

432. See RESTATEMENT (SECOND) OF TORTS § 910 cmt. a.

433. See *id.*; see also *Zenith*, 401 U.S. at 339.

434. See Ochoa & Wistrich, *supra* note 11, at 476.

435. See RESTATEMENT (SECOND) OF TORTS § 918.

436. See generally *supra* Part III.A.1.

437. See generally *supra* Part IV.A.

438. See *supra* Part IV.A.2.

439. See *supra* Part IV.A.2.

440. See *supra* Part IV.A.2.

441. See *supra* Part IV.A.2.

442. See *supra* Part IV.A.2.

of both: the interest of plaintiffs not to be exposed to an indefinite violation of their substantive rights, and the interest of actual and potential defendants. This also projects the social interest, to avoid the risk of substantial pecuniary liability.⁴⁴³ Second, it replaces a large degree of arbitrariness with a coherent analytical framework that draws a bright line between actions that are time-barred and actions that are not.⁴⁴⁴ Third, it promotes certainty and predictability, which are crucial for statutes of limitations, and might further prevent litigation and spare its associated costs in many cases in which one of the parties can expect a certain defeat.⁴⁴⁵ Fourth, it incentivizes persons who become aware of infringement of their rights to act promptly, by denying their entitlement for compensation when they do not so act.⁴⁴⁶ At the same time, it does not urge them to unnecessarily file early claims, as they are assured they will be able to stop the harm if it turns out to be intolerable.⁴⁴⁷

This article's proposal is seemingly disadvantageous in that it does not allow plaintiffs to recoup their litigation expenses from any financial award, and does not enable them to find legal representation on a contingency fee basis.⁴⁴⁸ However, it must be recalled that the denial of damages is essentially a sanction for failure to act diligently.⁴⁴⁹ It may further be assumed that tort victims who sincerely fear significant, long-term harm would invest any effort and eventually succeed in mobilizing the resources required for filing suit.⁴⁵⁰ While wealthy plaintiffs are better positioned to do so than the less wealthy ones, such reality is in no way unique to continuing violation scenarios.⁴⁵¹

The portrayed continuing violation doctrine can be applied, first and foremost, judicially.⁴⁵² The inherently complex questions raised by statutes of limitations have generally left a significant role for court-made law in their application.⁴⁵³ Thus, it would not be a far-fetched interpretation of many limitations provisions, especially those that concisely prescribe the length of the limitation period, to bar untimely claims for damages but allow untimely motions for injunctive relief in continuing violation scenarios, while employing the accompanying tests and principles detailed above.⁴⁵⁴ Alternatively, the doctrine may be

443. See *supra* Part IV.A.2.

444. See *supra* Part IV.A.2.

445. See Ochoa & Wistrich, *supra* note 11, at 466.

446. See *id.* at 488.

447. This is true unless a statute of repose completely bars the action after the lapse of a certain time from the tortious conduct, irrespective of any consideration of the plaintiff's circumstances. See Josephine Herring Hicks, Note, *The Constitutionality of Statutes of Repose: Federalism Reigns*, 38 VAND. L. REV. 627, 628, 647 (1985). Statutes of repose exceed the scope of this research.

448. See Ochoa & Wistrich, *supra* note 11, at 496.

449. See *id.* at 489.

450. See *id.* at 496.

451. See Standen, *supra* note 288, at 220.

452. See Graham, *supra* note 3, at 276.

453. See Ochoa & Wistrich, *supra* note 11, at 454-55, 476, 510.

454. See *supra* Section IV.B.

anchored statutorily, particularly in statutes of limitations that cover torts prone to continue over a long time period.⁴⁵⁵

455. See Ochoa & Wistrich, *supra* note 11, at 493-94.