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## The French Revision of Prescription: A Model for Louisiana?

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All translations, unless otherwise indicated, are our own. The original text is retained where appropriate.

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## I. INTRODUCTION

The Civil Codes of France and Louisiana employ a simple, yet eloquent, language that lend themselves to being easy to understand and adaptable.<sup>1</sup> Their artful construction—the division into books, chapters, and titles—creates a comprehensive and comprehensible legal framework.

Though the draftsmanship of the French and Louisiana Civil Codes is generally celebrated, prescription in both Codes is notoriously defective. Located at the end of both Codes as almost an afterthought, the titles of prescription do not share the same general, relative style contained elsewhere.<sup>2</sup> Part of the cause of the

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1. Paul Valéry, a French poet, described the French Civil Code as the greatest book of French literature. See SHAEL HERMAN, DAVID COMBE & THOMAS E. CARBONNEAU, *THE LOUISIANA CIVIL CODE: A HUMANISTIC APPRAISAL* 16 (Susan F. Matthews ed., 1981). French novelist Stendhal was known to read the Civil Code every day to refine his feeling for the French language. *Id.* Legal scholars note the Code’s style—simple, short, nontechnical, readable sentences (all much shorter than this one)—enhance its access to all citizens and ward off interference of verbose lawyers. See Olivier Moréteau, *The Future of Civil Codes in France and Louisiana*, 2 J. CIV. L. STUD. 39, 44 (2009). Upon the Bicentennial of the French Civil Code, the President of the *Cour de cassation* noted the lasting humanism of the French Civil Code in Louisiana and elsewhere. See Guy Canivet, *French Civil Law Between Past and Revival*, 51 LOY. L. REV. 39 (2005).

2. Gabriel Baudry-Lacantinerie & Albert-Anatole Tissier, *Prescription*, in 5 CIVIL LAW TRANSLATIONS § 14, at 8 (La. State Law Inst. trans., 1972).

prescription title's shortcoming is attributable to the content. The provisions that ring loudest are spelled out in numbers rather than letters. Numbers are blind, arbitrary, cold, and inanimate—and often at odds with equity. These restrictive qualities tie the hands of the judiciary. As the pace of society accelerates, prescription becomes anachronistic. It is worth questioning whether the very nature of prescription eludes the capacity for codification.

Prescription's inherent difficulties have created turmoil for both the French and Louisiana civilian systems.<sup>3</sup> Both have struggled with the arbitrariness of any one particular prescriptive period, attempting to balance objectivism against subjectivism, relativity against certainty, and generality against particularity. Though both France and Louisiana began with what might be considered excessively long general periods of prescription, the French and Louisiana legislatures either whittled down the general period or chiseled out particular actions from it. Over time, these piecemeal amendments eviscerated the core components of the doctrine, causing a desperate need for substantial revision.

In 2008, the French Legislature took the necessary step and drastically reformed prescription. The general period is now shorter and unified (five years), there are new grounds for suspension (including codified *contra non valentem*), and a long-stop period is introduced. Louisiana has yet to make any substantial reform to prescription, and revision is long overdue.<sup>4</sup>

This Article will outline the faults in Louisiana and France's original prescriptive regimes and identify the main innovative trends in the French revision. It then will offer a critical appraisal of the French revision, endorse it as a basis for a Louisiana revision, and discuss how Louisiana jurisprudence is uniquely positioned to integrate the revision in French law. We offer the following as a true dialogue from both the French and Louisiana perspectives about the

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3. Despite their seeming simplicity, statutes of limitation are inherently and notoriously difficult to apply and cause a number of problems in both common and civil law jurisdictions. See generally Paul D. Rheingold, *Solving Statutes of Limitation Problems*, 4 AM. JUR. TRIALS 441 (1966 & Supp. 2009).

4. Admittedly, acquisitive prescription in the Louisiana Civil Code was comprehensively reformed in 1982. See 1982 LA. ACTS 187 (repealing and replacing articles 3412-3527 of the Louisiana Civil Code of 1870); Symeon Symeonides, *One Hundred Footnotes to the New Law of Possession and Acquisitive Prescription*, 44 LA. L. REV. 69 (1983). Liberative prescription was also reformed the following year. See 1983 LA. ACTS 173 (repealing and replacing articles 3528-3554 of the Louisiana Civil Code of 1870). However, the changes to liberative prescriptive fell far short of what they could—and should—have been.

continuing influence of the French Civil Code in Louisiana,<sup>5</sup> the nature of prescription and its placement in a civil code, and the unique opportunity for the Louisiana experience to influence the interpretation of the French revision.

## II. REMARKABLE CONVERGENCE OF THE FAULTS OF THE FORMER LAW OF PRESCRIPTION IN FRANCE AND THE FAULTS OF LOUISIANA'S PRESENT LAW OF PRESCRIPTION

Usually, statutes or codes alter with the passage of time and adapt to new circumstances. This is not the case with the original title of prescription in the French *Code civil* of 1804. It can be said without exaggeration that this last title of the venerable Code was technically defective from the beginning—especially concerning the length of the various delays. This shortcoming initially resulted from the patchwork-like confection of these provisions: the thirty-year default prescriptive period<sup>6</sup> (*de droit commun*) was borrowed from the Roman law, and the special shorter prescriptive periods were borrowed from customs or royal ordinances of the *Ancien Droit*,<sup>7</sup> illustrating a frequent compromise between the drafters of the Code.

The diversity of these short periods and their partially incomprehensible and arbitrary differentiations increasingly created difficulties in delineation. In other arenas of the *Code civil*, judge-made case law successfully filled the gaps, but in the field of prescription, this method could not reach its goal. First, the hypertechnical and detailed nature of prescription does not lend much room for judicial inventiveness.<sup>8</sup> Second, there is a conflict between the general policy of extinctive prescription (*brevitatis causa*: to hinder “stale claims” from reaching the courtroom) and basic notions of justice that are compromised by denying an intrinsically meritorious claim on

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5. The dialogue between French and Louisiana lawyers gives rise to the rich legal traditions of both jurisdictions, and it is in this spirit that we seek to offer a meaningful contribution. See generally Claire M. Germain, *Louisiana, America, and France: Retracing Historical Milestones and Enhancing Legal Dialogue*, in ESSAYS IN HONOR OF SAÚL LITVINOFF 501 (Olivier Moréteau, Julio Romañach, Jr. & Alberto Luis Zuppi eds., 2008).

6. See CODE CIVIL [C. CIV.] art. 2262 (1804) (Fr.).

7. See JEAN-PHILIPPE LÉVY & ANDRÉ CASTALDO, HISTOIRE DU DROIT CIVIL no. 735 (2002). For the special case of the five-year period, see Delphine Porcheron, *Les implications de la loi du 17 juin 2008 sur la prescription en matière d'obligations alimentaires*, REVUE LAMY DROIT CIVIL (forthcoming Nov. 2010).

8. This rigidity is inherent in this kind of law, which requires a high degree of predictability and reliability. See Shael Herman, *Minor Risks and Major Rewards: Civilian Codification in North America on the Eve of the Twenty-First Century*, 8 TUL. EUR. & CIV. L.F. 63, 71-75 (1993).

“formal” grounds. Navigating between law and *équité*, the courts could hardly have been expected to build a coherent body of jurisprudence governing liberative prescription.<sup>9</sup>

The growing dissatisfaction towards the law of liberative prescription was denounced for more than a century. Scholars and practitioners regularly urged the French legislature to revise this part of the *Code civil*.<sup>10</sup> Until very recently, their criticisms fell on deaf ears.

Many of the faults that prompted revision of the French Civil Code’s title on prescription remain in Louisiana law. This parallel is hardly coincidental considering how the architecture of the Louisiana Civil Code is derived in large part from the French Civil Code.<sup>11</sup> With regard to prescription, the subject matter is “absolutely the same.”<sup>12</sup>

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9. Cf. Jean Carbonnier, *Les Obligations*, in 4 DROIT CIVIL no. 359 (22d ed. 2000) (“But the evolving jurisprudence, since 1804, has been a partial return to equity, even the arbitrariness of the *Ancien Droit*. Sometimes pressing in one direction, sometimes in another whenever an issue is controversial, the courts submit, retrospectively, the time the claims appear to deserve.”).

10. See 28 G. BAUDRY-LACANTINERIE & A. TISSIER, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL 435 n.1 (3d ed. 1905); Robert Cario, *Les modifications conventionnelles de la prescription extinctive*, no. 133 LES PETITES AFFICHES 9 & n.115 (1998); Pierre Souty, *La prescription trentenaire doit disparaître*, 1948 LA GAZETTE DU PALAIS 43. But see Jean Carbonnier, *Notes sur la prescription extinctive*, 50 REVUE TRIMESTRIELLE DE DROIT CIVIL 171 (1952), reprinted in 5 CIVIL LAW TRANSLATIONS § 3, at 461 (La. State Law Inst. trans., 1972) (noting arguments in favor of keeping the thirty-year period with convincing grounds).

11. CIVIL LAW SYSTEM: LOUISIANA AND COMPARATIVE LAW (2d ed. 1999), reprinted in A.N. YIANNPOULOS, THE CIVIL CODES OF LOUISIANA 5 (2000). James Brown and L. Moreau Lisset were responsible for the drafting of the Digest. *Id.* at 5. Approximately seventy-four percent of the articles (1516 of the 2160 articles) were borrowed from either France’s *projet du gouvernement* of 1800 or the *Code Napoléon* from which *le projet* evolved. *Id.* It is important to note that the 1808 Digest did not repeal all prior laws; rather, it abrogated all prior laws contrary to the Digest. *Id.* But see Robert A. Pascal, *Louisiana’s Mixed Legal System*, 15 REVUE GÉNÉRALE DE DROIT 341, 342, 352-53 (1984) (contending that Louisiana’s 1808 Digest maintained the Spanish *derecho civil* (private substantive noncommercial law) and that the rule and philosophy of the Louisiana codes were not wholly replaced by French law by either the 1808 Digest or the 1825 Civil Code). The debate of the sources of Louisiana law as predominately Spanish or French is a subject of continuing debate. Recently, Professor Alain Levasseur published a body of remarkable findings indicating that much of the source of law for the 1808 Digest was indeed Spanish. See ALAIN LEVASSEUR, MOREAU LISLET: THE MAN BEHIND THE DIGEST OF 1808 (2008). See generally Raphael J. Rabalais, *The Influence of Spanish Laws and Treatises on the Jurisprudence of Louisiana: 1762-1828*, 42 LA. L. REV. 1485 (1982). But concerning the law of possession and prescription, it is clearer that the Digest of 1808 was tightly patterned after French sources. For the law of possession, see generally Rodolfo Batiza, *Justinian’s Institute and the Louisiana Civil Code of 1808*, 69 TUL. L. REV. 1639 (1995). For the law of prescription, a mere comparison of the provisions of the Digest of 1808 and of the *Code Napoléon* should suffice to convince the observer. For a systematic approach supporting the same result, see Rodolfo Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 TUL. L. REV. 4, 133 (1971). The influence of the French Civil Code appears

Changes over time have outpaced the law's mechanism for managing rights and time. Piecemeal legislation, special interest lobbying, judicial misinterpretations, and false translations have all contributed to a prescription regime that is imprecise, anachronistic, and inadequate. Here, we will analyze the areas that caused the greatest concern in France before the revision and discuss how Louisiana law continues to share the same problems.

#### A. *Duration: Too Short, Too Long*

The first root of frustration was the duration of the default delay. A general thirty-year period had at once been the common delay for a number of civil law jurisdictions,<sup>13</sup> including Louisiana<sup>14</sup> and France.<sup>15</sup>

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more intense in the Louisiana Civil Code of 1825. See LA. CIV. CODE arts. §§ 3409-3508 (1825). Furthermore, one will note that the annotations by Wheelock S. Upton and Needler R. Jennings in their 1838 edition refer almost exclusively to French legal sources (for example, the *Code Napoléon*) and doctrinal authorities (Pothier, Toullier, etc.). This heavy influence of French law remains today. We do not seek to revive the age-old debate of the sources of Louisiana law (more Spanish, or more French). Indeed, we acknowledge that L. Moreau Lislet's source notes in the de la Vergne volume of the 1808 Digest reference as many Spanish sources (for example, *Las Siete Partidas*, *La Nueva Recopilación de Castilla*) and doctrine (such as Febrero) as French sources and doctrine (for example, Domat, Pothier). See A DIGEST OF THE CIVIL LAWS NOW IN FORCE IN THE TERRITORY OF ORLEANS (1808): L. MOREAU LISLET'S SOURCE NOTES (THE DE LA VERGNE VOLUME) (bicentennial ed. 2008) [hereinafter 1808 DIGEST]. We simply note that the provisions relative to prescription more closely match the French model. At a minimum, the organization of the articles on prescription more closely matches the French model.

12. In *Harang v. Golden Ranch Land & Drainage Co.*, 79 So. 768, 778 (La. 1918) (Provosty, J., dissenting), Justice Provosty noted the similarities and differences of the prescription articles in the Louisiana Civil Code and the *Code Napoléon*.

The arrangement, distribution, or classification, of the subject-matter of prescription in the Code Napoléon is not the same as in ours. The two prescriptions, *liberandi causa* and *acquirandi causa*, are there dealt with together, instead of separately, as in our Code. Basing himself upon this, the learned counsel for the defendant in this case contends that these French decisions and authorities are not applicable. The answer to that argument is that the principles of prescription embodied in the two Codes are absolutely the same. Both Codes are very largely, if not entirely, derived in the matter of prescription from the Pothier's treatises, *De la Propriété*; *De la Possession*; *De la Prescription*; *Introduction aux Coutumes d'Orléans*, at the part dealing with Prescription; and *Obligations*. The French Code is more condensed than ours, not expressing those things which follow as logical consequences; whereas ours expresses those consequences. That is the only difference. But what is thus expressed in our Code and not found in the Code Napoléon is found, mostly in the same words, in Pothier. Pothier in his treatise *De la Propriété* has a chapter headed "Comment se Perd le Domaine de Propriété," "How Ownership is Lost."

13. For example, Belgian Civil Code article 2262 provides for a thirty-year period for all actions, but after the introduction of article 2262*bis* in 1998, which provides for a ten-year period for all personal actions, and a five-year period for torts, article 2262 is no longer as significant. CODE CIVIL [C. CIV.] arts. 2262, 2262*bis* (Belg.).

Under Roman law, all actions were perpetual<sup>16</sup> until the Constitution of Theodosius introduced a general thirty-year period in 424 A.D.,<sup>17</sup> which applied universally to all actions.

The general thirty-year delay has grown old-fashioned. The overwhelming trend in a number of jurisdictions in the modern era has been a shortening of liberative prescription.<sup>18</sup> Over 200 years have passed since the *Code civil*, more time has passed following other early sources of Louisiana law,<sup>19</sup> and it has been 1500 years since the first general thirty-year period appeared in continental Europe.<sup>20</sup> All provided for a general thirty-year prescriptive period, but the justifications for allowing a creditor so much time to pursue his claim were losing strength.

If the law were to limit one's right of action at all, many of the ordinary impediments to taking cognizance of the right and assem-

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14. In Louisiana, before the 1808 Digest and under *Las Siete Partidas*, the general period was thirty years. See 1 THE LAWS OF LAS SIETE PARTIDAS, WHICH ARE STILL IN FORCE IN THE STATE OF LOUISIANA, partida third, tit. xxix, law 22 (L. Moreau Lislet & Henry Carleton trans., 1820) [hereinafter LAS SIETE PARTIDAS]. Under the 1808 Digest, the general period remained thirty years. See 1808 DIGEST, *supra* note 11, tit. XX, § III, art. 65 (1808). Under the 1825 Code, article 3508 specifically noted that the ten-year period was a general period. See LA. CIV. CODE ANN. art. 3508 (1825).

15. See C. CIV. art. 2262 (1804) (Fr.).

16. See generally Ewoud H. Hondius, Extinctive Prescription on the Limitation of Actions: Reports of the XIVth Congress, International Academy of Comparative Law 6 (1995) [hereinafter Extinctive Prescription]; Reinhard Zimmermann, Comparative Foundations of a European Law of Set-Off and Prescription 62 n.3 (2002) (noting how most actions at Roman law were not subject to a limitation period); Laura Solidoro Maruotti, *La perdita dell'azione civile per decorso del tempo nel diritto romano. Profili generali*, 3 Teoria e Storia del Diritto Privato 1 (2010), available at <http://www.teoriaestoriadeldirittoprivato.com>.

17. CODE THEOD. 4.14.1; see also Baudry-Lacantinerie & Tissier, *supra* note 2, § 13, at 8.

18. A general trend that has emerged among jurisdictions that have revised their laws of prescription has been a shortening of the prescriptive periods. See ZIMMERMANN, *supra* note 16, at 86; e.g., Belgium: C. CIV. art. 2262*bis*, (ten years for personal actions, five years for torts; article 2262*bis*, which was introduced into law in 1998, takes the bulk of all actions out from under the larger thirty-year umbrella); Egypt: CIVIL CODE art. 374 (fifteen years); Greece: ASTIKOS KODIKAS [A.K.] [CIVIL CODE] 10:249 (twenty years); Italy: CODICE CIVILE [C.C.] art. 2946 (ten years); Japan: MINPŌ (CIV. C.) § 167 (ten years); Mexico: CÓDIGO CIVIL FEDERAL [CC] [Federal Civil Code] art. 1159 (ten years); Québec: CIVIL CODE art. 2922 (ten years); Russia: GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII (GK RF) [CIVIL CODE] art. 196 (three-year general period), art. 197 (noting that legislation may designate a period that is longer or shorter than the general three-year period); Switzerland: OBLIGATIONENRECHT [OR] [CODE OF OBLIGATIONS] art. 127 (ten years); Turkmenistan: CIVIL CODE OF SAPARMURAT TURKMENBASHI art. 148 (three years for contractual demands and six years if demand connected with immovables), art. 1043 (three years for torts). See generally EXTINCTIVE PRESCRIPTION, *supra* note 16.

19. See, e.g., 1 LAS SIETE PARTIDAS, *supra* note 14, partida third, tit. xxix, law 22 (thirty years); 1808 DIGEST, *supra* note 11, tit. XX, § III, art. 65 (1808).

20. EXTINCTIVE PRESCRIPTION, *supra* note 16, at 24.

bling the resources necessary to pursue a legal remedy grew less onerous over time. Messages were no longer carried by horseback across land or by ship across sea.<sup>21</sup> People traveled with greater ease, speed, and frequency, and their communications became practically instantaneous. In France, there were arguments against the necessity for such long periods for personal actions, citing in part the modernization of communication<sup>22</sup> and the acceleration of society.<sup>23</sup>

Nevertheless, we must bear in mind that particular statutes progressively reduced the practical scope of the French default rule. First, according to the *Code de commerce*, actions between merchants (and later between merchants and nonmerchants) prescribed by ten years.<sup>24</sup> Some decades later (1985), the legislature created a regrettable bifurcation in the law of obligations by reducing only the prescription of extracontractual actions to ten years.<sup>25</sup> Adding to these two broad exceptions all the special contractual periods of prescription (especially in the field of insurance law),<sup>26</sup> we can say that the exceptions almost swallowed the rule. However, the occasions for

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21. *E.g.*, *Limitation of Actions*, p. 3, para. 1.8 (Law Comm'n Consultation Paper 270, 2001) (U.K.) [hereinafter *Limitation of Actions (Paper 270)*] ("The traditional limitation period of six years which applies to some actions founded on tort and actions founded on breach of (simple) contract originated in the Limitation Act 1623 when communication and gathering information was far more difficult than it is today."); *Limitation of Actions* (Law Comm'n Consultation Paper 151, 1998) (U.K.) [hereinafter *Limitation of Actions (Paper 151)*] *see also* EXTINGUISHING PRESCRIPTION, *supra* note 16, at 25 (noting how shortening prescription does not generally pose many problems because of advancements in transportation and communication).

22. *See generally* Carbonnier, *supra* note 10, § 3, at 461. Carbonnier acknowledged attacks to the thirty-year period given the pace of modern society and noted how the reduction of the length could induce the creditor to act and instill more initiative and efficiency, but he also regarded the "indefinite acceleration of the rhythm of life [as] a myth." *Id.*

23. *See* Baudry-Lacantinerie & Tissier, *supra* note 2, § 587 *bis*, at 288 (noting that the thirty-year period (from a 1924 perspective) seemed too long and could be shortened to fifteen or twenty years).

24. CODE DE COMMERCE [C. COM.] art L110-4 (2008) (Fr.) (prerevision). At the time of the enactment of the French *Code de commerce* (1807-1808), this special prescriptive period did not exist. The ten-year period of prescription for obligations between merchants (commerçants) was introduced by a statute in 1948 and the extension of the scope of this provision to obligations between merchants and nonmerchants was introduced by a statute in 1977. This seemingly clear distinction between civil and commercial liberative prescription nevertheless caused growing questions of interpretation. *See* Claude Brenner, *La prescription commerciale*, in LE CODE DE COMMERCE 1807-2007: LIVRE DU BICENTENAIRE 501 (2007). This dichotomy has been repealed under the revision.

25. C. CIV. art. 2270-1 (2008) (Fr.) (prerevision), introduced by Loi no. 85-677 du 5 juillet 1985 [Law 85-677 of July 5, 1985].

26. *E.g.*, CODE DES ASSURANCES [INSURANCE CODE] arts. L114-1, L142-1 IV (Fr.).



applying the thirty-year default rule remained and were considered unsustainable in our modern era.

The choice of a long or short prescription period can rest on legitimate policies.<sup>27</sup> But if any rational policy can be detected in some provisions of the *Code civil*, it is hardly discernable—especially given the legislative interventions in the last decades of the twentieth century. For example, what could justify a two-year period of prescription in cases of hidden defects in goods<sup>28</sup> and a thirty- or ten-year delay for nonconformity with a contract of sale?<sup>29</sup> It seems to us that the length assigned to certain actions is founded in an illegitimate tribute to tradition, and to Roman law.<sup>30</sup>

Whereas most civil law jurisdictions did not seek to shorten the general periods of limitation until sometime in the twentieth century or shortly thereafter,<sup>31</sup> limitation periods in Louisiana were shortened as early as 1825 under the first true Louisiana Civil Code. Under the 1825 Code, “personal actions” prescribed by ten years, and delictual actions prescribed by only one year.<sup>32</sup> To this end, Louisiana law was at the forefront of the shift to shorter general delays by reducing the general delay for all personal actions from thirty to ten years in the

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27. For example, one of the purposes of the short prescriptions in the *Code Napoléon* (see discussion *infra* note 49) that remained until the revision was to avoid a dangerous accumulation of debts on the shoulders of the debtor. For a broader view on this subject, see Israel Gilead, *Economic Analysis of Prescription in Tort Law*, in TORT AND INSURANCE LAW YEARBOOK—EUROPEAN TORT LAW 2008, at 112, 123 (Helmut Koziol & Barbara C. Steininger eds., 2008).

28. C. CIV. art. 1648 (2010) (Fr.). Before 2000, the period was “un bref délai.”

29. *Id.* art. 2262 (1804) (thirty years unless it is a commercial matter, in which case it is ten years).

30. It echoes Oliver Wendell Holmes, Jr.:

[W]hen a lawyer sees a rule of law in force he is very apt to invent, if he does not find, some ground of policy for its base. But in fact some rules are mere survivals. Many might as well be different, and history is the means by which we measure the power which the past has had to govern the present in spite of ourselves, so to speak, by imposing traditions which no longer meet their original end.

Oliver Wendell Holmes, Jr., *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 452 (1899), reprinted in THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. 191 (Richard A. Posner ed., 1996).

31. See EXTINGTIVE PRESCRIPTION, *supra* note 16, at 7. *But cf.* Naoki Kanayama, *Japan*, in EXTINGTIVE PRESCRIPTION, *supra* note 16, at 233-34 (noting how prescription under the Japanese Revised Civil Code of 1896, which borrowed from numerous other civil codes, included a comparatively shorter ten-year general prescriptive period and a three-year prescriptive period for delictual actions).

32. LA. CIV. CODE ANN. art. 3508 (1825) (ten years for personal actions); *id.* art. 3501 (one-year period for “damages caused by slaves or animals, or resulting from offences or quasi offences.” (emphasis added)).

1825 Code.<sup>33</sup> This ten-year period for personal actions, which remains the law today,<sup>34</sup> is shorter than many European codes<sup>35</sup> but longer than almost any U.S. jurisdiction.<sup>36</sup>

As for the limitation period for delictual actions, Louisiana's general one-year limitation period is as short or shorter than any U.S. jurisdiction. The limitation period for personal injury actions in most U.S. jurisdictions is one,<sup>37</sup> two,<sup>38</sup> or three years.<sup>39</sup> Louisiana's general one-year tort limitation period is shorter than most civil law or other European jurisdictions,<sup>40</sup> including those jurisdictions that have recently revised their prescriptive regimes,<sup>41</sup> though a one-year period

33. *Id.* art. 3508.

34. *Id.* art. 3499 (2010).

35. *See, e.g.*, Luxembourg: C. CIV. art. 2262 (thirty years); Portugal: CÓDIGO CIVIL [C.C.] [CIVIL CODE] art. 309 (twenty years); Spain: CÓDIGO CIVIL [C.C.] [CIVIL CODE] art. 1964 (fifteen years); *see also* France (pre-2008 revision): C. CIV. art. 2262 (2008) (thirty-year general period), art. 2270-1 (ten-year prescription for "extracontractual" matters); Germany (pre-2002 revision): BÜRGERLICHES GESETZBUCH [BGB] § 195 (thirty years, with exceptions for various types of contracts), § 852 (providing for a three-year period for delictual actions).

36. *See, e.g.*, ALASKA STAT. § 09.10.053 (2007) (three-year limitation for action on contract); ARK. CODE ANN. § 16-56-105 (2007) (three-year limitation for oral contracts), § 16-56-111 (five-year limitation for written contracts); DEL. CODE ANN. tit. 10, § 8106 (2007) (three-year limitation for action on contract); FLA. STAT. § 95.11(2)(b) (2007) (five-year limitation for action on written contract), § 95.11(5)(a) (one-year limitation period for specific performance), § 95.11(3)(k) (four-year limitation for action on oral contract).

37. One year: ARK. CODE ANN. § 16-56-104 (2010); D.C. CODE § 12-301(4) (2010); KAN. STAT. ANN. § 60-514(b) (West 2010); KY. REV. STAT. ANN. § 413.140(1)(a) (West 2010); MD. CODE ANN., CTS. & JUD. PROC. § 5-105 (2010); MISS. CODE ANN. § 15-1-35 (2010); NEB. REV. STAT. § 25-208 (2010); OKLA. STAT. tit. 12, § 95(4) (2010); TENN. CODE ANN. § 28-3-104(a)(1) (2010); UTAH CODE ANN. § 78B-2-302 (2010); WYO. STAT. ANN. § 1-3-105(a)(v)(B) (2010).

38. Two years: ALASKA STAT. § 09.10.070 (2010); DEL. CODE ANN. tit. 10, § 8119 (2010); GA. CODE ANN. § 9-3-33 (2010); HAW. REV. STAT. § 657-7 (2010); IDAHO CODE ANN. § 5-219(4)-(5) (2010); 735 ILL. COMP. STAT. 5/13-202 (2010); IND. CODE § 34-11-2-4(1) (2010); IOWA CODE § 614.1(2) (2010).

39. Three years: CONN. GEN. STAT. § 52-577 (2010); MASS. GEN. LAWS ch. 260, § 4 (2010); N.H. REV. STAT. ANN. § 508:4 (2010); N.M. STAT. ANN. § 37-1-8 (2010); N.C. GEN. STAT. § 1-52 (2010); R.I. GEN. LAWS § 9-1-14 (2010); VT. STAT. ANN. tit. 12, § 512(1), (4) (2010).

40. *See, e.g.*, C.C. art. 2947 (It.) (five-year prescriptive period for torts, as outlined under articles 2043-2053); *see also* Limitation Act, 1980 c. 58, §§ 2, 11 (U.K.) (six years for tort, three years for personal injury). *But see* C.C. art. 1968(2) (Spain) (one year for obligations arising from fault or negligence).

41. *See, e.g.*, France: C. CIV. art. 2224 (2010) (general period for five years); *id.* art. 2226 (ten years for claims involving bodily injury); Germany: BGB § 195 (providing a three-year general period). In Québec, after the 1994 enactment of the Civil Code of Québec (replacing the Civil Code of Lower Canada), the general limitation period for torts actually increased from two years to three years. *Compare* CIVIL CODE OF LOWER CANADA [C.C.B.-C.] art. 2261.2 (1993) (two-year period for delictual actions) *and id.* art. 2262.2 (one-year period for bodily injuries) *with* C.C. art. 2925 (Que.) (three-year period for all personal actions, including actions on tort and on contract). On the other hand, the general

for personal injury actions is not unordinary from a global perspective.<sup>42</sup>

From some French perspectives, Louisiana's short limitation period on tort actions is seen as excessively short.<sup>43</sup> On this point, and noting how the duration of a limitation period is essentially relative,<sup>44</sup> we should consider the duration of the various prescriptive periods under Louisiana law against the prevailing duration among neighboring American jurisdictions. At the same time, we should consider the methodology of calculating the prescriptive period in the civil law fabric.<sup>45</sup>

### *B. Too Many Time Periods*

An often criticized component of many prescriptive regimes is the sheer volume of delays.<sup>46</sup> In the *Code civil*, there were only six "particular" prescriptive periods.<sup>47</sup> Over time, simplicity deteriorated. The main defect in extinctive prescription was surely the constant burgeoning of different prescription periods created by the legislature outside the *Code civil*.<sup>48</sup> Of course, differentiation in and of itself is

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prescriptive period had been reduced from thirty years to ten years, so the shortening of general prescriptive periods and the lengthening of prescriptive periods for delictual actions was something of a compromise. Compare C.C. B.-C. art. 2242 (thirty-year general period) with C.C. art. 2922 (Que.) (ten-year general period).

42. See, e.g., Turkey: CODE OF OBLIGATIONS (T.C.O.) art. 60 (2001) (one year for damages from the date the person knows of the damage and the identity of the person liable, but ten years from the date the tort occurred); see also Ergun Özsunay, *Turkey*, in EXTINCTIVE PRESCRIPTION, *supra* note 16, at 348; OR art. 60 (Switz.) (one year for damages from the date the person knows of the damage and the identity of the person liable, but ten years from the date the tort occurred).

43. Baudry-Lacantinerie and Tissier regarded the shorter prescriptions as characteristic of "primitive societies." See Baudry-Lacantinerie & Tissier, *supra* note 2, § 587 *bis*, at 288-89.

44. Carbonnier, *supra* note 10, § 7, at 464.

45. A meaningful comparative analysis of prescription cannot be limited to the length of various delays.

46. See, e.g., Patrice Deslauriers, *Québec*, in EXTINCTIVE PRESCRIPTION, *supra* note 16, at 292-95 (on the reduction of six different durations spread over thirty years to just three different durations and a standardization of the multiplicity of prescriptive periods after the 1994 enactment of the Civil Code of Québec (replacing the Civil Code of Lower Canada)); Reinhard Zimmermann, *Germany*, in EXTINCTIVE PRESCRIPTION, *supra* note 16, at 178 (on the various and clumsy categories of prescription before the 2002 revision).

47. See the title of Section IV, chapitre V, titre XX, livre III, in the *Code civil*. C. CIV. (1804) (Fr.). Near the thirty-year prescription (for all actions, in Section II), the twenty- or ten-year prescription (acquisitive prescription of a possessor in good faith of an immovable) (Section III), one could find four species of liberative prescription: six months, one year, two years, and five years. *Id.*

48. The first significant movement came from insurance law and its fundamental statute of 1930. But with the passage of time, almost all fields of private law were touched.

not unreasonable. But if one can justify why one action should have a longer delay relative to another, no one can seriously pretend that a difference between three, four, or five years has much significance; and no one can seriously defend the utility of *eleven* different legal periods from three months to thirty years.<sup>49</sup>

The variety of these delays led to abundant nests of litigation—often artificial, and always wasting time and money—concerning the classification of an action in one category or another.<sup>50</sup> The two “best” (or “worst”) examples are: (1) the notion of a debt “payable annually or at shorter fixed intervals,”<sup>51</sup> which always provoked a never-ending flow of decisions from the *Cour de cassation*,<sup>52</sup> and (2) the relatively recent bifurcation between the prescription of delictual liability (ten years) and contractual liability (thirty years).<sup>53</sup>

In Louisiana, the “several species”<sup>54</sup> of prescription range from the justifiable<sup>55</sup> to the bizarre,<sup>56</sup> and in many cases, they are shrouded

See Martine Behar-Touchais, *Foisonnement des délais*, in LES DÉSORDRES DE LA PRESCRIPTION 7 (Patrick Courbe ed., 2000).

49. For example, see the “short delay” (*bref délai*) for a redhibition action (C. CIV. art. 1648 (1804) (Fr.)); two months: prescription for proof of debt in a bankruptcy proceeding (C. COM. art. R622-21, R622-24 (2010) (Fr.)); three months: answerability for press delicts (*délits de presse*, Loi du 29 juillet 1881 [Law of July 29, 1881], art. 65); six months: the cause of action of masters and instructors of the sciences and the arts, for lessons given by them on a monthly basis; that of keepers of hotels and taverns, for lodging and boards furnished by them (C. CIV. art. 2271 (1804) (Fr.)); one year: the cause of actions of bailiffs (*huissiers de justice*) for fees for the documents served by them and the matters attended to by them; that for schoolmasters for the board of their pupils; and of other masters for apprenticeship fees (C. CIV. art. 2272), and the contract of carriage (C. COM. art. L133-6 (2010) (Fr.)); two years: the cause of actions of doctors, surgeons, dental surgeons, midwives, and pharmacists, for their visits, operations and medications; the cause of actions of merchants for merchandises sold to nonmerchants (C. CIV. art. 2272 (1804) (Fr.)); three years: bills of exchange (C. COM. art. L511-78 (2010) (Fr.)); four years: financial claims against public bodies (*personnes morales de droit public*) (Loi 68-1250 du 31 décembre 1968 [Law 68-1250 of December 31, 1968], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 3, 1969, modified by Décret 98-81 du 11 février 1998 [Decree 98-81 of February 11, 1998], J.O., Feb. 14, 1998, art. 1; five years: fees, arrears of perpetual or life annuities and of alimony; of rents; of interests and loans; generally of everything which is payable annually or at shorter fixed intervals (C. CIV. art. 2277 (1804) (Fr.)); ten years: actions for extracontractual liability (*id.* art. 2270-1 (2008)); ten or twenty years: action for those in good faith and having a just title when acquiring an immoveable (*id.* art. 2265 (1804)); thirty years: all causes of action, real as well as personal (*id.* art. 2262 (1804)).

50. MARCEL PLANIOL & GEORGES RIPERT, 7 TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS no. 1327 (1931).

51. C. CIV. art. 2277 (1804) (Fr.).

52. See Carbonnier, *supra* note 9, no. 362. For an analysis of the situation before and after the revision, see Porcheron, *supra* note 7.

53. See *infra* Part II.C.

54. 1808 DIGEST, *supra* note 11, ch. III, § III.

by suspicion and special interest.<sup>57</sup> The volume of special prescriptive periods carves out so much from the general delays that all remaining varieties of creditors are practically in the minority.<sup>58</sup> There are so many different prescriptive periods that a large Louisiana legal malpractice insurer publishes a “quick reference guide” to prescription.<sup>59</sup> The delays range from thirty days to thirty years with at least twelve increments in between.<sup>60</sup> The range of delays is even

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55. For example, Louisiana’s disavowal action, which prescribes by one year, is suspended for a husband who has lived separate and apart from the mother continuously during the 300 days immediately preceding the birth of the child until the time the husband is notified in writing that a party in interest has asserted that he is the father of the child. *See* LA. CIV. CODE ANN. art. 189 (2010). The father has less reason to know that he could be legally filiated to the child if he has not lived with the mother during the gestational period, and thus, the prescriptive period is rightly suspended.

56. Louisiana law formerly provided a different prescriptive period against retailers of liquors depending on the quantities of liquor sold. *Compare id.* art. 3534 (1870) (one year, if sold in quantities less than one quart), *with id.* art. 3538 (three years, if sold in quantities of more than one quart). Louisiana law also formerly provided a different prescriptive period for architects depending on the type of material used for the construction of a building. *Compare id.* art. 3545 (ten years, if the building was constructed of brick or stone), *with id.* art. 2762 (five years, if the building was constructed with wood or with frames filled with bricks).

57. There is no escaping the fact that lobbying will benefit certain groups of defendants. Carbonnier observed how certain reforms benefited various groups, and the applicable prescriptive period could change depending on who was in power. Carbonnier, *supra* note 10, § 5, at 463.

58. One can consider the ten-year period for personal actions under article 3499 and the one-year period for delictual actions under article 3492 as the “general periods” under the Louisiana Civil Code. There is no longer a single “general period” of thirty years as there was under the 1808 Digest. *See* 1808 DIGEST, *supra* note 11, tit. XX, ch. III, § III, art. 65; EXTINCTIVE PRESCRIPTION, *supra* note 16, at 7 (“What appear to be exceptions to the general rule are often so numerous as to virtually deprive the general period of its apparent significance.”); *id.* at 16-17 (“Legal certainty requires the law to provide for as few exceptions as possible.”).

59. *See* GILSBAR, LOUISIANA PRESCRIPTION: QUICK REFERENCE GUIDE (2006), available at <http://www.gilsbar.com/downloads/LouisianaStatuteofLimitations.pdf>; EXTINCTIVE PRESCRIPTION, *supra* note 16, at 17 (noting how attorneys in Germany (before the revision of the BGB’s title of prescription) were recommended to take out insurance for not taking account of the various limitation periods).

60. *See, e.g.*, LA. REV. STAT. ANN. § 9:3146 (2010) (enforcement of new home warranty: thirty days); LA. CODE CIV. PROC. art. 1067 (2010) (incidental demands: ninety days); LA. CHILD. CODE art. 1263 (2010) (action to annul an adoption: six months); LA. CIV. CODE ANN. art. 3492 (2010) (delictual actions: one year); *id.* art. 3493.10 (delictual actions arising from criminal act: two years); *id.* art. 3494(1) (recovery of compensation for services: three years); *id.* art. 2534 (redhibition action against good faith seller: four years); *id.* art. 3497 (action to annul a testament: five years); LA. REV. STAT. ANN. § 9:5661 (2010) (action to annul a land patent: six years); LA. CIV. CODE ANN. art. 3499 (personal action: ten years); *id.* art. 3502 (action for recognition of right of inheritance: thirty years).

wider in other jurisdictions, though the modern trend is to reduce the number and variety of prescriptive periods for the sake of simplicity.<sup>61</sup>

### C. *Contract/Delict Distinction*

Separately defining prescriptive periods for contracts and torts is subject to much debate in France, Louisiana, and elsewhere.<sup>62</sup> The effect of a prescriptive regime in which the delay for actions on contract is longer than the delay for actions on tort is that it incentivizes the debtor or the creditor to classify his action as a contract or a tort solely for the purposes of prescription without regard to the nature of the underlying obligation.

In France, there was no prescriptive bifurcation between contract and tort until the introduction of article 2270-1 in 1985. This new dichotomy was subject to much criticism when contemplating the grey zones and subtleties<sup>63</sup> of the boundaries between those two sources of obligation<sup>64</sup> and the ambiguous wording of the norm.<sup>65</sup> Furthermore, the policy of such a differentiation was not clear and at least disputable. As it was expected, it engendered “unjustifiable distortion” and unfairness based on subtle differences and qualifications in analogous situations.<sup>66</sup> Recent decisions of the *Cour de cassation* rightly illustrate such inequitable consequences, for example, in cases of notarial malpractice.<sup>67</sup>

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61. In New Zealand, prescriptive periods range from ninety days to sixty years. See Stephen Todd, *New Zealand*, in EXTINCTIVE PRESCRIPTION, *supra* note 16, at 261-62; EXTINCTIVE PRESCRIPTION, *supra* note 16, at 17 and accompanying text.

62. See ZIMMERMANN, *supra* note 16, at 79-85 (arguing for uniformity); cf. N.H. Andrews, *Reform of Limitation of Actions: The Quest for Sound Policy*, 57 CAMBRIDGE L.J. 589, 596 (1998) (disagreeing with British law commission reports and regarding strict uniformity as “undesirable”).

63. See, e.g., Georges Durry, *Responsabilité délictuelle et responsabilité contractuelle: dualité ou unité?*, 2001 RESPONSABILITÉ CIVILE ET ASSURANCE 20 (June 2001).

64. This is why the law should only recognize a distinction between contract and delict where there are fundamental differences in their nature. See MARC BRUSCHI, LA PRESCRIPTION EN DROIT DE LA RESPONSABILITÉ CIVILE no. 21 (1995); GENEVIÈVE VINEY, TRAITÉ DE DROIT CIVIL, INTRODUCTION À LA RESPONSABILITÉ no. 178 (3d ed. 2008). For a comparative perspective, see generally Benjamin West Janke, *The Failure of Louisiana's Bifurcated Liberative Prescription Regime*, 54 LOY. L. REV. 620 (2008).

65. It was unclear whether the commencement of this decennial prescription was of an objective (event-based accrual) or a subjective nature (discovery rule). The jurisprudence never clarified this point. See François-Xavier Licari, *Le nouveau droit français de la prescription extinctive à la lumière d'expériences étrangères récentes ou en gestation (Louisiane, Allemagne, Israël)*, 61 REVUE INTERNATIONALE DE DROIT COMPARÉ [R.I.D.C.] 739, 749 (2009).

66. Durry, *supra* note 63, at 23, no. 27.

67. Compare *Cour de cassation* [Cass.] [Supreme Court for judicial matters] 1e civ., Apr. 12, 2005, Bull. civ. I, No. 178 (Fr.), with *Cass.* 1e civ., Jan. 23, 2008, Bull. civ. I, No. 27

In Louisiana, the bifurcation problem is especially pronounced because the short one-year period for actions on tort necessarily generates more prescription litigation. The volume of creditors whose rights are prescribed is necessarily greatest within the first year of the right. Numerous Louisiana creditors assert that their action lies in contract and not in tort in order to avail themselves of the longer ten-year prescriptive period.<sup>68</sup> This argument is one that has been sharply criticized as a waste of judicial resources and, more importantly, the cause of a disingenuous distinction that unnecessarily threatens an otherwise useful classification of rights.<sup>69</sup> Considering that Louisiana was one of the first and only jurisdictions to provide for a general one-year prescriptive period on tort, it is highly likely that there are more cases in Louisiana than anywhere else in the world applying *contra non valentem* in order to extend the time within which one can assert

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(Fr.). In the first case, the notary's responsibility is contractual, so the delay is thirty years under French Civil Code article 2262. In the second case, the notary made a forgery. Because the obligation of a notary did not tend to "ensure the effectiveness of an act orchestrated by him and was only a continuation of his mission to notarize the act," his liability is in tort, so the prescription is ten years under French Civil Code article 2270-1. This is a Byzantine distinction that favors the dishonest notary. For a discussion of a similar distinction applied to other professions, see Patrice Jourdain, *La responsabilité professionnelle et les ordres de responsabilité civile*, 137 LES PETITES AFFICHES 63 (2001).

68. See, e.g., *Raymond v. Orleans Parish Sch. Bd.*, 2003-0560 (La. App. 4 Cir. 9/3/03); 856 So. 2d 27 (rejecting the claim of a student who sustained injuries in a physical education class and whose parents, on behalf of the minor child, argued that the applicable prescriptive period was ten years because a contract existed between the school board and the students to ensure their safety; the plaintiff unsuccessfully urged *contra non valentem*); *Dela Vergne v. Dela Vergne*, 1999-0364 (La. App. 4 Cir. 11/17/99); 745 So. 2d 1271 (noting that the breach of a fiduciary duty is usually treated as a personal action subject to a ten year prescriptive period under Civil Code article 3499, but holding that such a breach under Revised Statute 9:2005(3) was an "offense or quasi-offense" per the language of the statute, and thus, subject to a one-year prescriptive period under Civil Code article 3492); *Harrison v. Gore*, 27-254 (La. App. 2 Cir. 8/23/95); 660 So. 2d 563 (rejecting the claim of a sexual abuse victim, who was a child at the time of her alleged abuse and sued her basketball coach, the abuser, eight years after the abuse on a breach of contract theory based on a contract between the abuse victim's father and the private school that employed the basketball coach).

69. See also ZIMMERMANN, *supra* note 16, at 81. See generally Janke, *supra* note 64. For a discussion of the "unreasonable distinctions" between various prescription periods in Belgium and elsewhere, including a commentary of two Belgian cases noting the same, see Matthias E. Storme, *Constitutional Review of Disproportionately Different Periods of Limitation of Actions (Prescription)*, 5 EUR. REV. OF PRIVATE L. 79, 82-83, 86-88 (1997). For a discussion of how the distinction between contracts and torts has generated a lack of certainty with regard to the applicable prescriptive period in the Bailiwick of Jersey (a mixed jurisdiction), see Editorial Miscellany, *Prescription Problems*, 7 JERSEY & GUERNSEY L. REV. (2003), available at [http://www.jerseylaw.je/Publications/jerseylawreview/june03/JLR0306\\_Editorial\\_Miscellany.aspx](http://www.jerseylaw.je/Publications/jerseylawreview/june03/JLR0306_Editorial_Miscellany.aspx).

his rights.<sup>70</sup> Other civil law jurisdictions that have seen a shift towards shorter periods (five or ten years) have likewise witnessed a rise in judicial intervention with prescription.<sup>71</sup>

The bifurcation problem is further complicated in both Louisiana and France by the transplant of noncivilian concepts like promissory estoppel and the judicial creation of “new” sources of obligation. Here again, the significance of classifying an obligation has a profound effect on the applicable prescriptive period. Louisiana courts have struggled to determine whether “detrimental reliance” claims are subject to a one- or ten-year prescriptive period.<sup>72</sup> In

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70. Carbonnier noted that if the general thirty-year period were reduced to just ten years, courts would likely apply *contra non valentem* more frequently. See Carbonnier, *supra* note 10, § 3, at 462; cf. ZIMMERMANN, *supra* note 16, at 81 (“Every creditor against whom the shorter of the two periods has expired will thus be tempted to argue that his claim falls under the provision with the longer period, and the courts will then have to determine where exactly the line between these two provisions must be drawn.”). Notably, after the general thirty-year period in Louisiana was reduced to ten years, an annotation in the 1838 edition of the Louisiana Civil Code next to article 3508 (the general ten-year period) contained a discrete reference: *contra non valentem agere non currit praescriptio*. See LA. CIV. CODE ANN. art. 3508 (1838).

71. EXTINCTIVE PRESCRIPTION, *supra* note 16, at 18 (noting how there was traditionally no need for the courts to exercise discretionary powers to extend prescriptive periods because the general period was so long (thirty years), but that the modern, shorter periods have changed this landscape). This is confirmed by French doctrine. See Michel Buy, *Prescriptions de courte durée et suspension de la prescription*, 1977 LA SEMAINE JURIDIQUE [JCP], I, 2833, no. 23 (1977).

72. In Louisiana, the doctrine of “detrimental reliance” under Civil Code article 1967 raises additional concerns. While it is reasonable to consider detrimental reliance as a “personal action” subject to a ten-year prescriptive period, it is also reasonable to consider it a delictual obligation subject to a one-year prescriptive period. See *Simmons v. Sowela Technical Inst.*, 470 So. 2d 913, 923 (La. App. 3 Cir. 1985) (regarding detrimental reliance as both delictual and contractual in nature). Given the nature of the cause of detrimental reliance, some Louisiana courts have suggested that such a cause of action is imprescriptible. *Babkow v. Morris Bart, P.L.C.*, 1998-0256, p. 12 (La. App. 4 Cir. 12/16/98); 726 So. 2d 423, 429 (citing *Fontenot v. Houston Gen. Ins. Co.*, 467 So. 2d 77 (La. App. 3 Cir. 1985), wherein the court ruled that statements that lull the plaintiff into a “false sense of security” estopped the defendant from pleading prescription); see also Jon C. Adcock, *Detrimental Reliance*, 45 LA. L. REV. 753, 762 (1985) (discussing the nature of “detrimental reliance,” and how it “does not harmonize well with the civilian theory of contracts”); David V. Snyder, *Comparative Law in Action: Promissory Estoppel, the Civil Law, and the Mixed Jurisdiction*, in LOUISIANA: MICROCOSM OF A MIXED JURISDICTION 235, 273-76 (Vernon Valentine Palmer ed., 1999) (analyzing the cases rendered before and after the enactment of article 1967 and showing that the majority of the courts adhere to the contractual theory); David V. Snyder, *Hunting Promissory Estoppel*, in MIXED JURISDICTIONS COMPARED: PRIVATE LAW IN LOUISIANA AND SCOTLAND 281, 316-17 (Vernon Valentine Palmer & Elspeth Christie Reid eds., 2009) (sustaining that despite the location of article 1967, Louisiana promissory estoppel has solid delictual roots). The United States Court of Appeals for the Fifth Circuit recently acknowledged, “The question seems simple, but the answer is more complex.” *Keenan v. Donaldson, Lufkin & Jenrette, Inc.*, 575 F.3d 483, 487 (5th Cir. 2009). In adopting a dualistic approach, the court recounted prior cases in which it had applied both statutes to detrimental



France, the last decades have seen the emergence of new sources of obligation of a doubtful nature: letters of intent, gentlemen's agreements, "quasi-contracts of lottery," and "unilateral promises" without contract (*engagement unilatéral de volonté*).<sup>73</sup> These species of obligations raise perplexities as to the applicable prescriptive period. Here, we suggest that the result may unjustly influence the inquiry as the tail wags the dog.

*D. The Problems with Peremption and Other Modes of Extinctive Prescription*

While prescription is the most obvious mode of extinguishing rights through the passage of time, there are other institutions of an analogous nature that are often difficult to distinguish. At the beginning of the nineteenth century in French law, one could identify

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reliance claims based on the nature of the action, not its label. "In other words, '[w]hen evaluating which prescriptive period is applicable to a cause of action, courts first look to the character of the action disclosed in the pleadings.'" *Id.* (quoting *SS v. State*, 2002-0831, p. 7 (La. 2002); 831 So. 2d 926, 931). *Keenan* held that the applicable limitation period depends on the nature of the obligation, the breach of a general duty, or a promise. *Keenan*, 575 F.3d at 487-88.

73. These sources of obligation have strong connections with the concept of detrimental reliance (the long-term distribution relations being one of the oldest situations where legitimate expectations are protected without resorting to contract). See FRANÇOIS-XAVIER LICARI, LA PROTECTION DU DISTRIBUTEUR INTÉGRÉ EN DROIT FRANÇAIS ET ALLEMAND 513, 517 (2002). The concept of detrimental reliance or promissory estoppel is slowly growing in French Law from the fertile soil of the duty of good faith. See, e.g., C. CIV. art. 1134, ¶ 3 (2010) (Fr.). But see Christian Larroumet, *Detrimental Reliance and Promissory Estoppel as the Cause of Contracts in Louisiana and Comparative Law*, 60 TUL. L. REV. 1209, 1223-24 (1986) (illustrating the superfluity of promissory estoppel in a civil law system). The terminology itself lacks firmness (*principe de cohérence, estoppel, interdiction de se contredire au détriment d'autrui, protection de la confiance légitime*, etc.). Furthermore, its exact nature and scope need clarification. See Horatia Muir Watt, *Pour l'accueil de l'estoppel en droit privé français*, in MÉLANGES EN L'HONNEUR DE YVON LOUSSOUARN 303 (1994); BERTRAND FAGES, LE COMPORTEMENT DU CONTRACTANT no. 630 (1997); Jean Calais-Auloy, *L'attente légitime, une nouvelle source de droit subjectif?*, in MÉLANGES EN L'HONNEUR DE YVES GUYON 171 (2003); Sophie Alexane, *Le principe de protection de la confiance légitime peut-il se passer d'un préjudice?*, 2005 REVUE DE DROIT DES AFFAIRES DE L'UNIVERSITÉ PANTHÉON-ASSAS 249; Bénédicte Fauvarque-Cosson, *L'estoppel, concept étrange et pénétrant*, 2006 REVUE DES CONTRATS 1279; Denis Mazeaud, *La confiance légitime et l'estoppel—Rapport français*, in LA CONFIANCE LÉGITIME ET L'ESTOPPEL, SOCIÉTÉ DE LÉGISLATION COMPARÉE 247 (Bénédicte Fauvarque-Cosson ed., 2007); Pierre-Yves Gauthier, *Confiance légitime, obligation de loyauté et devoir de cohérence: identité ou lien de filiation?*, in V.-L. BÉNABOU & M. CHAGNY, LA CONFIANCE EN DROIT PRIVÉ DES CONTRATS 109 (2008). The qualification of these judicial creations raises, among others, the question of the prescription delay: ten or thirty years. For a complete panorama of these "paracontractual" situations, see VINEY, *supra* note 64.

four main grounds of extinction of rights or actions caused by time: prescription, *péremption*, *déchéance*, and *forclusion*.<sup>74</sup>

*Péremption*, a concept of civil procedure,<sup>75</sup> is named more precisely “*péremption d’instance*” (dismissal for lack of prosecution).<sup>76</sup> The *déchéance* (forfeiture) is the loss of a right, a quality, a function, or a benefice, which is incurred as a penalty. It is a wide notion, which cannot be reduced to a sanction for negligently allowing a delay to pass.<sup>77</sup> The *forclusion*<sup>78</sup> sanctions the negligent abstention of satisfying a statutory, contractual, or judicial formality

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74. See JEAN BOUSQUET, DICTIONNAIRE DES PRESCRIPTIONS EN MATIÈRE CIVILE, COMMERCIALE, CRIMINELLE, EN MATIÈRE DE DÉLITS ET DE CONTRAVENTIONS, EN MATIÈRE ADMINISTRATIVE ET FISCALE (1838) (identifying “*déchéance*,” “*péremption*,” and “*prescription*” in his dictionary); JEAN-BAPTISTE SOUQUET, DICTIONNAIRE DES TEMPS LÉGAUX, DE DROIT ET DE PROCÉDURE, OU RÉPERTOIRE DE LÉGISLATION, DE DOCTRINE ET DE JURISPRUDENCE (1844) (identifying “*déchéance*,” “*péremption*,” “*prescription*,” and “*forclusion*”).

75. CODE DE PROCÉDURE CIVILE [C.P.C.] art. 397 (1806) (Fr.) (“Toute instance, encore qu’il n’y ait pas eu constitution d’avoué, est éteinte par discontinuation de poursuite pendant trois ans.”). The *Cour de cassation* qualifies the *péremption* as “une espèce de prescription particulière aux instances.” Cass. civ., Nov. 23, 1831, 1832 Sirey, 1, 67, 73 (Fr.). There is a remarkable convergence with Louisiana law: “[H]istorically and theoretically, the rule on abandonment of actions is a species of liberative prescription.” *Melancon v. Cont’l Cas. Co.*, 307 So. 2d 308, 311 (La. 1975). More recently, the *Cour de cassation* stated, “[L]a *péremption* [d’instance] a pour objet de sanctionner le défaut de diligence des parties.” Cass. com., Nov. 9, 2004, Bull. civ. IV, No. 192 (Fr.). Here, there is a difference with its Louisiana counterpart: “Abandonment is not a punitive concept.” *Clark v. State Farm Mut. Auto. Ins. Co.*, 2000-3010, p. 10 (La. 2001); 785 So. 2d 779, 787.

76. More precisely, *péremption d’instance* is “[l]’anéantissement de l’instance par suite de l’inaction des plaideurs.” SERGE GUINCHARD, FRÉDÉRIQUE FERRAND & CÉCILE CHAINAIS, PROCÉDURE CIVILE no. 1351 (29th ed. 2008). The *péremption d’instance* traces back to Roman law, where it was named “*mors litis*.” See Maruotti, *supra* note 16, at 12. In 1806, the *péremption* period was three years (C.P.C. art. 397 (1806) (Fr.)), a length directly borrowed from Justinian. Today, in France, the delay is two years. NOUVEAU CODE DE PROCÉDURE CIVILE [N.C.P.C.] art. 386 (2010) (Fr.); cf. LA. CODE CIV. PROC. art. 561 (2010) (an action is abandoned by three years); Deborah J. Juneau & Gayla M. Moncla, *Abandonment: An Evolving Concept of Liberative Prescription*, 63 LA. L. REV. 341 (2003). The prior law of abandonment was found in Louisiana Civil Code article 3519 (1870). It was a five-year delay.

77. See M. Sallé de la Marnierre, *La déchéance comme mode d’extinction d’un droit (essai de terminologie juridique)*, 32 REVUE TRIMESTRIELLE DE DROIT CIVIL 1037 (1933). For a fundamental contribution to this concept, see the doctoral thesis of Fanny Luxembourg, *La déchéance des droits—Contribution à l’étude des sanctions civiles* (2008), available at [http://www.u-paris2.fr/47150500/0/fiche\\_document/&RH=1193151255101](http://www.u-paris2.fr/47150500/0/fiche_document/&RH=1193151255101).

78. See 32 FRANÇOIS LAURENT, PRINCIPES DE DROIT CIVIL FRANÇAISE 19, § 10 (1878); 1 RAYMOND-THÉODORE TROPLONG, LE DROIT CIVIL EXPLIQUÉ: DE LA PRESCRIPTION 32, § 27 (1835); cf. *Pounds v. Schori*, 377 So. 2d 1195, 1198 (La. 1979) (recognizing *péremption* as a Louisiana equivalent to civil law “*forfeiture*”); Baudry-Lacantinerie & Tissier, *supra* note 2, § 36, at 23 (translating “*déchéances*” as “*forefeiture*”).

within a fixed delay.<sup>79</sup> The *délai préfix*<sup>80</sup> is a fixed delay established by statute to bring an action before the court, which is sanctioned by *forclusion*. The last two notions (*forclusion* and *délai préfix*) are often used as synonyms. We will follow this usage.

The nature of the sanction attached to each notion has to be drawn carefully. The consequence attached to prescription is that the action is barred by effect of law, and thus the action is defeated. It is noteworthy that the *action* is extinguished, but not the substantive underlying legal right.<sup>81</sup> The *péremption d'instance* does not extinguish the right either, but it does not defeat the action. It extinguishes only the “instance,” that is, the particular legal proceeding (*l'instance*).<sup>82</sup> As a rule, the plaintiff is allowed to bring the action again, but as a consequence of the *péremption*, all the past acts of procedure are annulled.<sup>83</sup> The plaintiff has to start from scratch. It is similar to abandonment under Louisiana law.<sup>84</sup> The *déchéance*, more generally, impedes a person from enforcing a legal right but does not extinguish it. To the contrary, the *forclusion* extinguishes the right altogether. It has been described as “an infernal machine whose mechanical slice is like a hammer of a guillotine,”<sup>85</sup> and “morally neutral” in support of public utility.<sup>86</sup> It is analogous to peremption under Louisiana law,<sup>87</sup> which has likewise been criticized as an overly harsh remedy.<sup>88</sup>

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79. ASSOCIATION HENRI CAPITANT, VOCABULAIRE JURIDIQUE (Gérard Cornu ed., 6th ed. 2004) (defining “forclusion”).

80. The adjective “préfix” has signified since 1360: “prescrit par la loi pour accomplir un acte et au-delà duquel on est forclos.” See LE ROBERT, DICTIONNAIRE HISTORIQUE DE LA LANGUE FRANÇAISE (Alain Rey ed., 1998) (defining “préfix”); CHARLES AUBRY & FRÉDÉRIC CHARLES RAU, *Droit Civil Français*, in 5 CIVIL LAW TRANSLATIONS § 771, at 421 (La. State Law Inst. trans., 1972); Michel Vasseur, *Délais Préfix, Délais de Prescription, Délais de Procédure*, 48 REVUE TRIMESTRIELLE DE DROIT CIVIL 29 (1950). The Louisiana State Law Institute translated *délais préfix* as “strict limitations.”

81. As a consequence, a prescribed claim may serve as the object of a natural obligation. This solution was well established in the pre-revision jurisprudence. It has been codified by the revision. See C. CIV. art. 2249 (2010) (Fr.) (“Performance rendered to extinguish a debt may not be reclaimed to the sole motive that the delay of prescription was expired.”).

82. 1 Raymond-Théodore Troplong, *Le droit civil expliqué selon l'ordre des articles du Code: De la prescription* 59 (Charles Hingray ed., 2d ed. 1836).

83. N.C.P.C. art. 389 (2010) (Fr.).

84. See discussion *infra* note 89.

85. See Anne Trescases, *Les délais préfix*, 22 LES PETITES AFFICHES 3, 6 n.35 (2008) (citing LOUIS JOSSERAND, COURS DE DROIT CIVIL POSITIF FRANÇAIS 478 n.1006 (3d ed. 1939)).

86. See Trescases, *supra* note 85, at 6.

87. LA. CIV. CODE ANN. art. 3458 (2010) (“Peremption is a period of time fixed by law for the existence of a right. Unless timely exercised, the right is extinguished upon the

If these modes of extinction through the passage of time have a relatively precise scope today, the boundaries between the four notions were not always clear; this uncertainty was surely inherited from the *Ancien Droit*, where all these notions were present but not systematized.<sup>89</sup> Adding to the difficulties, some authors use their own terminology like *prescriptions-préfixes*.<sup>90</sup> Some of these terms consider other elusive varieties of time limits such as court delays or “judicial prescriptions.”<sup>91</sup>

Slowly, all these species of “strict limitations” established a similarity in their regimes;<sup>92</sup> they could not be suspended<sup>93</sup> or interrupted,<sup>94</sup> and the maxim “*quæ temporalia ad agendum, perpetua ad excipiendum*” did not apply to them either.<sup>95</sup> Nevertheless, the courts seem to have always held the maxim “*contra non valentem agere*” applicable to the *déchéance*<sup>96</sup> and the *péremption d’instance*,<sup>97</sup> but, theoretically, not to the *délais préfix*.<sup>98</sup>

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expiration of the peremptive period.”); Sally Brown Richardson, *Buried by the Sands of Time: The Problem with Peremption*, 70 LA. L. REV. 1179, 1184 (2010).

88. See LA. CIV. CODE ANN. 3458; Richardson, *supra* note 87.

89. Let us explore the doctrine of Merlin de Douai, a famous jurist of the *Ancien Régime* and judge with the *Cour de cassation*. In his Répertoire (Philippe-Antoine Merlin de Douai, *Prescription*, in 12 RÉPERTOIRE UNIVERSEL ET RAISONNÉ DE JURISPRUDENCE 674-76 (1827)), one may see that the *péremption d’instance* is the equivalent of “dismissal for lack of prosecution” or “abandonment” in Louisiana law terminology. See Juneau & Moncla, *supra* note 76 (noting abandonment as a Roman and customary institution). But *péremption* or *déchéance* (forfeiture) also appeared in French law and concerned *substantive rights*. Merlin, *supra*, at 674-75 (“Du reste, les jurisconsultes s’accordent unanimement à qualifier de prescriptions, les déchéances que les lois font résulter du laps de certains délais en matière de procédure, soit relativement *au fond du droit*.” (emphasis added)). Merlin is of the opinion that prescription and *déchéance* must basically be governed by the same rules. But the modern doctrine did not follow him. See *id.*

90. See Baudry-Lacantinerie & Tissier, *supra* note 2, § 36, at 23.

91. See *id.* § 37, at 24.

92. In principle, because of their different natures and the policies behind them, the rules applicable to prescription do not apply to *déchéances* and *délais préfix*. But when a question is common to both institutions, the rules applicable to prescription are applicable to *déchéance* by analogy (for example, rules of computation of the delay). See 1 LOUIS GUILLOUARD, *TRAITÉ DE LA PRESCRIPTION* no. 45 (2d ed. 1901); cf. LA. CIV. CODE ANN. art. 3459 (2010) (“The provisions on prescription governing computation of time apply to peremption.”).

93. See Trencases, *supra* note 85, at 6 (noting that, in principal, the period should not be subject to suspension or interruption); see also AUBRY & RAU, *supra* note 80, § 771, at 421.

94. See Trencases, *supra* note 85, at 6. While the revision acknowledges that even “*les délais de forclusion*” are subject to interruption (C. CIV. arts. 2241, 2244 (2010) (Fr.)), interruption is inherent in any action. The real difficulty is how to address suspension. See AUBRY & RAU, *supra* note 80, § 771, at 421.

95. GUILLOUARD, *supra* note 92, nos. 45-46.

96. See, e.g., Cour d’appel [CA] [regional court of appeal] Bastia, Mar. 14, 1854, 1855 JOURNAL DU PALAIS 153, 154.

The differences in these regimes are theoretically clear. For example, prescription must be pled because the court may not raise it *sua sponte*.<sup>99</sup> To the contrary, *forclusion* and its avatars may be supplied by a court on its own motion.<sup>100</sup> Prescription may be interrupted or suspended, but a *délai préfix* may not. Prescription may be renounced, but a *délai préfix* or a delay of *forclusion* may not.<sup>101</sup> But a closer look at the jurisprudence reveals a number of decisions that do not follow these distinctions.<sup>102</sup> And when one asks *how* to distinguish a prescriptive period from a peremptive one, he will receive as many answers as scholars he consults.<sup>103</sup> The jurisprudence offers no firm guideline in this regard but rather a flood of confused policy decisions and *revirements de jurisprudence*.

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97. See TROPLONG, *supra* note 82, at 59-60. It is a logical consequence of the assertion that *péremption d'instance* is a species of extinctive prescription. Louisiana law has followed the same path. Only two categories of causes outside the record can prevent accrual of the delay required for abandonment: "Those two exceptions are: (1) a plaintiff-oriented exception, based on *contra non valentem*, that applies when failure to prosecute is caused by circumstances beyond the plaintiff's control; and (2) a defense-oriented exception, based on acknowledgement." Clark v. State Farm Mut. Auto. Ins., 2000-3010, p. 7 (La. 5/15/01); 785 So. 2d 779, 784-85. For another consequence of this qualification, see *Dendy v. City National Bank*, 2006-2436 (La. App. 1 Cir. 10/17/07); 977 So. 2d 8 (holding that the three-year time period for abandonment was suspended by executive orders that suspended the peremption and prescription periods during the time of Hurricanes Katrina and Rita). For the general application of *contra non valentem* in procedural matters outside abandonment, see *State v. Louisiana Debenture Co.*, 27 So. 88 (La. 1899), and *Mogan Hall v. Beggs*, 17 La. Ann. 288 (5th Dist. Ct. 1865). The oldest case in this arena seems to be one of the Superior Court of the Territory of Orleans: *Emerson v. Lozano*, 1 Mart. (o.s.) 265 (La. 1811) (*contra non valentem* is not mentioned *expressis verbis* but is obviously the *ratio decidendi*). In *Flint v. Cuny*, 6 La. 67 (1833), Justice Martin relies *expressis verbis* on *contra non valentem* in a question concerning appeal and error under the Code of Practice.

98. See *Trescases*, *supra* note 85, at 6. *But see* Req. Nov. 25, 1946, 1948 RECUEIL DALLOZ 321 (Fr.) (comment Dominique Holleaux); Cass. civ., Jan. 22, 1963, JCP II, No. 13087 (comment Jean Mazeaud); Jean Carbonnier, *La Règle Contra Non Valentem Agere Non Currit Praescriptio*, 77 REVUE CRITIQUE DE LÉGISLATION ET DE JURISPRUDENCE 155, 188 (1937); Vasseur, *supra* note 80, at 29 n.23; Dimitri Houtcieff, *Vers une application de la règle contra non valentem agere non currit praescriptio au délai de l'article 340-4 du code civil?*, 2000 RECUEIL DALLOZ 846; Pierre Cagnoli, *in* Cass. com., Dec. 18, 2001, No. 99-12108, No. 240 LES PETITES AFFICHES 16 (2002) (Fr.) (illustrating that courts generally do not hesitate to apply *contra non valentem*, even if the delay period is a *délai préfix*).

99. See C. CIV. art. 2223 (1804) (Fr.).

100. However, the *péremption d'instance* may not be raised by the court *sua sponte*. N.C.P.C. art. 388 (2010) (Fr.).

101. See, e.g., FRANÇOIS TERRÉ, PHILIPPE SIMLER, & YVES LEQUETTE, LES OBLIGATIONS no. 1473 (9th ed. 2005) (though the authors admit that some "hybrid situations" exist).

102. See Alain Bénabent, *Le chaos du droit de la prescription extinctive*, *in* MÉLANGES DÉDIÉS À LOUIS BOYER 123, 131 (1996).

103. See *Trescases*, *supra* note 85, at 6; Vasseur, *supra* note 80, at 439; Buy, *supra* note 71, at 245.

According to Alain Bénabent, a famous scholar and attorney with the *Cour de cassation*, the *délai préfix* is an “enigma.”<sup>104</sup> Considering this judicial and doctrinal failure to draw a line between these modes of limitation, he recently advocated the complete eradication of *déchéance*.<sup>105</sup> The legislature did not grant his wish; to the contrary, article 2220 formally consecrates the notion of the *délai de forclusion*, urging a stricter separation between prescription and other modes of extinctive prescription.<sup>106</sup> But we doubt that such a concise provision will suffice to put the matter to rest. A codification of the peremption regime, comparable to what took place in Louisiana some decades ago, would have brought more legal certainty.

Despite its faults, the notion of *déchéance* enjoyed a broad diffusion. It is certainly not one of the best French articles of exportation, but nonetheless, it crossed the borders with ease. For example, in Italy, where the *Codice civile* of 1865 was a mere duplication of the *Code Napoléon*,<sup>107</sup> the transplant of the *déchéance* (the *decadenza*) caused the same problems of delineation and the same despaired doctrinal and judicial quest for operative criteria.<sup>108</sup> Another famous example is the introduction of peremption in Louisiana law.

Peremption, under the Louisiana Civil Code, is ostensibly a clear body of law. Article 3458 defines peremption as “a period of time fixed by law for the existence of a right. Unless timely exercised, the right is extinguished upon the expiration of the preemptive period.”<sup>109</sup> Whereas “[l]iberative prescription merely prevents the enforcement of a right of action . . . peremption destroys the right itself.”<sup>110</sup>

In practice, however, peremption is a notoriously difficult and defective concept in Louisiana law.<sup>111</sup> Peremption was not written into

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104. Bénabent, *supra* note 102, at 130. For a similar suggestion in Louisiana law, see Richardson, *supra* note 87.

105. Alain Bénabent, *Sept clefs pour une réforme de la prescription extinctive*, 2007 RECUEIL DALLOZ 1800, 1802.

106. *See* C. CIV. art. 2220 (2010) (Fr.) (“Les délais de forclusion ne sont pas, sauf dispositions contraires prévues par la loi, régis par le présent titre.”).

107. For the first comparative study on the subject, see Théophile Huc, *Le Code civil italien et le Code Napoléon, Études de législation comparée* (1866).

108. *See* Maruotti, *supra* note 16.

109. *See* LA. CIV. CODE ANN. art. 3458 (2010).

110. *See id.* at 3458, cmt. (b). “Peremption” derives from the Latin word “*perimere*,” which means, “to destroy.” *New Orleans Warehouse Co. v. Marrero*, 24 So. 800, 801 (La. 1899).

111. Professor Dainow observed: “When the lack of clarity between prescription and peremption is added to the indistinctness in the use of the terms interruption and suspension, the resulting forms of expression are difficult to reconcile and they play havoc with the

the Civil Code until 1982, and it is based on Louisiana jurisprudence.<sup>112</sup> Its roots, while elusive,<sup>113</sup> are largely French. French law does not know an exact parallel to peremption as that term is used in Louisiana law, though it is analogous to *forclusion* or the *délai préfix*.<sup>114</sup>

The Louisiana Supreme Court was incorrect when it announced that “peremption is a common law term which has crept into our jurisprudence.”<sup>115</sup> To the contrary, the term “peremption” appears nowhere in the American jurisprudence other than in Louisiana.<sup>116</sup>

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doctrinal basis of the law.” Joseph Dainow, *Liberative Prescription: Juridical Nature of the Loss of the Right of Action*, 29 LA. L. REV. 230, 231-32 (1969); see also Richardson, *supra* note 87. But one can notice that such confusion does not rest solely in the civil law. See Daniel J. La Fave, *Remedying the Confusion Between Statutes of Limitations and Statutes of Repose in Wisconsin—A Conceptual Guide*, 88 MARQ. L. REV. 927 (2005).

112. See 1982 La. Acts 187, § 1; LA. CIV. CODE ANN. art. 3461 cmt. (a).

113. See Jennifer Thornton, Comment, *Louisiana Revised Statute Section 9:5605: A Louisiana Lawyer’s Best Friend*, 74 TUL. L. REV. 659, 665 (1999) (noting that the first Louisiana case to discuss peremption in any depth (*Guillory v. Avoyelles Ry. Co.*, 28 So. 899, 900 (La. 1900)), cited no legislative or civil law authority, but rather, common law doctrine). In *Ashbey v. Ashbey*, 5 So. 539, 544-45 (La. 1889), the Louisiana Supreme Court cited Aubry and Rau’s *Droit Civil Français* to help illustrate the difference between “the rules which govern prescription, strictly speaking, and those which prescribe the lapse of time which limits the exercise of the right,” which “same distinction is recognized in French jurisprudence.” *Id.* More recently, the Louisiana Supreme Court commented on the roots of peremption. See *Flowers, Inc. v. Rausch*, 364 So. 2d 928, 931 n.1 (La. 1978) (where the Louisiana Supreme Court noted that peremption is akin to “forfeiture” (as that term was translated by Baudry-Lacantinerie and Tissier)); cf. Baudry-Lacantinerie & Tissier, *supra* note 2, § 36, at 23. See generally *Hebert v. Doctors Mem’l Hosp.*, 486 So. 2d 717, 722-23 (La. 1986) (acknowledging various doctrinal approaches to the distinction between prescription and “forfeiture,” and how Louisiana courts have adopted elements of the same); *Harris v. Estate of Fuller*, 521 So. 2d 736 (La. App. 2 Cir. 1988) (same).

114. See Donald Baron Wiener, Note, *Hebert v. Doctors Memorial Hospital: Three-Year Limit on Exercising Medical Malpractice Claims Held To Be Prescriptive*, 61 TUL. L. REV. 941, 947 (1987); Richardson, *supra* note 87, at 1182-88; *Chevron Oil Co. v. Traigle*, 436 So. 2d 530, 535 n.4 (La. 1983) (referring to “délais préfix” and “forefeiture”).

115. *Flowers*, 364 So. 2d at 931 n.1. The court explained: “[P]eremption is a common law term which has crept into our jurisprudence.” We disagree. Indeed, *péremption* and *déchéance* existed in France under the *Ancien Régime* and penetrated the *Code civil*. Of course, the age of this concept in French law is not proof of the influence of French law on Louisiana law. However, we agree with the court’s analysis that “peremption” under Louisiana law is a counterpart to “forfeiture” (*déchéance*). *Id.* The common law equivalent is a “statute of repose.” See *Wooley v. Lucksinger*, 2006-1140 to 2006-1145, 2006-1157 to 2006-1163, p. 196 n.83 (La. App. 1 Cir. 12/30/08); 14 So. 3d 311, 449 n.83 (equating “peremption” with “statutes of repose”).

116. Moreover, the definition of “peremption” in *Black’s Law Dictionary* changed to reflect the definition under Louisiana Civil Code article 3458. Compare BLACK’S LAW DICTIONARY 1136 (6th ed. 1990) (“A nonsuit; also a quashing or killing.”) with *id.* 1157 (7th ed. 1999) (“The period during which a legal right exists. If the right is not exercised during this period, it is destroyed. Whereas prescription simply bars a specific remedy, peremption bars the action itself.”).

Rather, “péremption” first appeared in the Louisiana jurisprudence in 1845, when the Louisiana Supreme Court cited French law.<sup>117</sup> While early Louisiana cases applying peremption made reference to certain statutes of repose in common law jurisdictions (for example, North Carolina and Tennessee),<sup>118</sup> the discussion was a basis for illustrating the difference between periods of prescription, which “simply bar the remedy,” and peremption, which “destroy the cause of action itself.”

The Louisiana Civil Code offers clarity to the distinction between the effects of peremption and prescription (which is lacking in French law),<sup>119</sup> but Louisiana courts continue to struggle with it. An inquiry into the intent of the legislature is still required to determine whether a period is prescriptive or preemptive.<sup>120</sup> Moreover, it is not necessary for the legislature to articulate a law as preemptive in order for it to be interpreted as such.<sup>121</sup> Rather, the inquiry turns on the nature and character of the law, and the intent of the legislature.<sup>122</sup> The back and forth interpretations of the limitation periods in Louisiana medical malpractice cases are illustrative of the defects.<sup>123</sup> It is clear that peremption remains defective in Louisiana.

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117. See *Driggs v. Morgan*, 10 Rob. 119 (La. 1845). Most early Louisiana cases applying peremption concerned the inscription of judgments in the mortgage records. See, e.g., *Smith v. Lewis*, 14 So. 221 (La. 1891); *Brady v. His Creditors*, 9 So. 59 (La. 1891); *Factors & Traders’ Ins. Co. v. Warren*, 37 La. Ann. 85 (La. 1885).

118. See *Guillory v. Avoyelles Ry. Co.*, 28 So. 899, 900 (La. 1900) (quoting *Taylor v. Coal Co.*, 94 N.C. 525 (N.C. 1886)) (“[N.C. Code § 1498 (1881)] is not strictly a statute of limitation. It gives a right of action that would not otherwise exist, and the action to enforce it, must be brought within one year after the death of the testator or intestate, else the right of action will be lost.”); *id.* (citing *Cooper v. Lyons*, 9 Lea. 596 (Tenn. 1882) (“The statute (Code, sec. 2786) is a positive prescription, which not only affects the remedy, but extinguishes the right.”)).

119. See *supra* notes 89-105 and accompanying text.

120. See LA. CIV. CODE art. 3458 cmt. (c) (2010).

121. For example, in *Succession of Pizzillo*, 65 So. 2d 783 (La. 1953), the court interpreted a statute as “preemptive” even though the legislature used the term “prescribe.” The court noted, “While it is true that the Legislature, in providing the time within which suits may be brought, labelled the period as one of prescription, this was inaccurate for, actually, the time provided for the filing of suits was not a period of prescription but one of peremption.” *Id.* at 786.

122. See LA. CIV. CODE art. 3458 cmt.(c); see also James F. Shuey, Comment, *Legal Rights and the Passage of Time*, 41 LA. L. REV. 220 (1980); *Hebert v. Doctors Mem’l Hosp.*, 486 So. 2d 717, 722 (La. 1986) (“The pertinent question remaining, of course, is whether the Legislature intended to enact a prescriptive or preemptive statute.”).

123. In *Hebert*, 486 So. 2d at 722-23, the Louisiana Supreme Court regarded Louisiana Revised Statute section 9:5628 (on prescription for actions against doctors) as “a prescription statute with a qualification, that is, the *contra non valentem* type exception to prescription embodied in the discovery rule is expressly made inapplicable after three years from the act, omission or neglect.” *Id.* at 724-25. Recently, the Louisiana Supreme Court indicated that the three-year medical malpractice period is indeed preemptive. *Borel v.*



*E. Modification by Agreement and Increased Contractual Freedom*

At first glance, contractual freedom should be excluded from liberative prescription because the parties should not be able to modify the rules of the Civil Code. We have to remember some of the main policies of liberative prescription: to prevent stale claims and to free citizens from keeping eternal records. Thus, it appears that prescription is a matter of public order *par excellence*. However, matters of public order are equally removed from contractual freedom in French and Louisiana law.<sup>124</sup> As a result, one could expect that any derogation of these laws would be absolutely null.<sup>125</sup> In practice, both systems have followed a more nuanced approach, nevertheless faithful to the aforementioned policies: an agreement that accelerates prescription for the benefit of the debtor has generally been regarded as valid, but an agreement that defers the extinction of the obligation is invalid in both systems.

In France, the jurisprudence and doctrine have long defined the scope of contractual freedom in the matter of liberative prescription.<sup>126</sup> First, an agreement to lengthen a prescriptive period has always been invalid as a manner of circumventing the express prohibition to anticipatorily renounce prescription and may indirectly lead to the rebirth of imprescriptible rights.<sup>127</sup> This prohibition is absolute. But, astonishingly, the *Cour de cassation*, following the trend of inferior courts, rapidly modified, if not erased, this juridical impediment when accepting the validity of clauses modifying the rules of suspension

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Young, 2007-0419 (La. 11/29/07); 989 So. 2d 42. However, the Louisiana Supreme Court changed its mind on rehearing, holding that the medical malpractice statute is prescriptive in nature. *Id.* The basis of its prior determination (that the statute was peremptive) was the change of a single word in the legislation (replacing “must” with “shall”). *Id.* at 58. Such indecisiveness confirms a comment to the Civil Code article on peremption: “It is not always easy to determine whether a period of time fixed by law is peremptive or prescriptive.” See discussion *supra* note 122.

124. Compare C. CIV. art. 6 (2010) (Fr.) with LA. CIV. CODE ANN. art. 7 (2010). On this parenthood between French sources and former Louisiana Civil Code article 6 (now article 7), see Robert A. Pascal, *The Sources of Civil Order According to the Louisiana Civil Code*, 54 TUL. L. REV. 916 (1980).

125. See Baudry-Lacantinerie & Tissier, *supra* note 2, § 100 *quinquies*, at 62; see also LA. CIV. CODE ANN. art. 2030 (contracts are absolutely null if they violate a rule of public order).

126. Cario, *supra* note 10, at 9; Denis Mazeaud, *Ordre public et aménagements de la prescription*, in LES DÉSDORDRES DE LA PRESCRIPTION 85 (Patrick Courbe ed., 2000).

127. C. CIV. art. 2220 (1804) (Fr.); see also Baudry-Lacantinerie & Tissier, *supra* note 2, § 65, at 42.

and interruption—even those adding new grounds of suspension or facilitating the interruption.<sup>128</sup>

To the contrary, agreements to abbreviate a legal delay in France have generally been held lawful because they are congruent with the goals of prescription, and the debtor can sooner rest easier without the sword of Damocles hanging over his head.<sup>129</sup> But when the dazzling light of the theory of autonomy of will (*théorie de l'autonomie de la volonté*) began to decline, it became apparent that some excessively short prescriptive delays spoiled the claims of an unacceptable number of innocent creditors. Eminent scholars openly criticized this anachronistic homage to contractual freedom, maintaining that the courts should have at least distinguished between contracts of adhesion, where the freedom is anything but theoretical, and authentically bargained contracts.<sup>130</sup> Indeed, in the former, several abuses by insurance companies led to a legislative intervention banning restrictive clauses in insurance contracts.<sup>131</sup> Where no legislative rule existed, restrictive clauses could be annulled as unconscionable if they led to a de facto suppression of the creditor's right.<sup>132</sup> However, nullity for unconscionability remained an exceptional means left to the discretion of judges so that abuses were not all cured.<sup>133</sup> That is why Louis Josserand, a famous scholar of the

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128. Cass. req. June 22, 1853, 1853 DALLOZ PÉRIODIQUE 1, 302 (Fr.); Cass. 1e civ., Mar. 13, 1968, 1968 RECUEIL DALLOZ 626 (comment Michel Prieur) (Fr.); Cass. 1e civ., June 25, 2002, 2003 RECUEIL DALLOZ 155 (critical comment Philippe Stoffel-Munck) (Fr.); Cass. com., Mar. 30, 2005, Bull. civ. IV, No. 75 (Fr.).

129. See *Arrêt de principe*, Cass. civ., Dec. 4, 1895, 1896 DALLOZ PÉRIODIQUE I, 241 (comment Louis Sarrut) (Fr.); Sirey 1896, I, 113 (comment Charles Lyon-Caen) (Fr.) (“[F]reedom of contract should be only exceptionally restricted by formal statute or on grounds of public policy.”). This case is remarkable. The *Cour de cassation* confirms the validity of the contractual reduction of a four-year delay to a three-month delay. The fact that this clause was inserted in an adhesion contract (contractual conditions of a railway company) played no role. The commentators approved the decision without any reticence. Labbé expressed the same favor in his comment under Cour d’appel [CA] [regional court of appeal] Paris, Oct. 30, 1885, Sirey 1886, II, 49 (Fr.), but underlines that conventions have to be performed in good faith. See also Baudry-Lacantinerie & Tissier, *supra* note 2, §§ 96-100, at 43, 56-63.

130. PLANIOL & RIPERT, *supra* note 50, no. 1349.

131. Loi du 13 juillet 1930 [Law of July 13, 1930], art. 26 (Fr.). Today, see article L. 111-2 (2010) and L. 114-3 (2010) in the *Code des assurances*. For a discussion of the abuses of shortening prescription in the context of insurance, see Baudry-Lacantinerie & Tissier, *supra* note 2, § 96, at 57.

132. Cass. com. Dec. 17, 1973, Bull. civ. IV, 567 (eight days); CA, Aix-en-Provence, Jan. 4, 1996, BULLETIN D’AIX, 1996-1, 25 (comment Philippe Stoffel-Munck) (forty-eight hours).

133. On the long way to a general ground for the correction of unconscionable clauses, especially in contracts between merchants in French law and for possible solutions in the light

beginning of the twentieth century, wrote that if the distinction between lengthening and abbreviating clauses seemed

legal and rational, it unfortunately leads to results that are almost diametrically opposed to the idea that inspired it: it is in the interest of the weakest that it has been introduced; yet, in fact, it is against that interest that abbreviated clauses are designed and how they most often work.<sup>134</sup>

In Louisiana, while it is clear that agreements to lengthen prescription beyond the period established by law have never been valid, it is less clear whether prescription can be shortened by contract.<sup>135</sup> Louisiana Civil Code article 3471 states: “A juridical act purporting to exclude prescription, to specify a longer period than that established by law, or to make the requirements of prescription more onerous, is null.”<sup>136</sup> But what does “more onerous” mean?

Before the 1982 revision, which purported not to change the law,<sup>137</sup> article 3460 stated: “One can not renounce a prescription not yet acquired, but it is lawful to renounce prescription when once acquired.”<sup>138</sup> On the basis of the former law, the validity of agreements to shorten prescription “ha[d] been upheld consistently because a person may renounce what the law has established in his favor when the renunciation is not contrary to the public good.”<sup>139</sup> Recently, Louisiana courts have considered shortening prescription as

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of comparative law, see François-Xavier Licari, *Quelques réflexions et propositions au sujet des clauses “déraisonnables” ou “abusives” dans les contrats conclus entre professionnels, à la lueur du droit comparé et des propositions savantes*, in *LIBRE DROIT, MÉLANGES EN L'HONNEUR DE PHILIPPE LE TOURNEAU* 655 (2008). The French legislature adopted in August 2008 a provision similar to section 2-302 of the U.C.C.: C. COM. art. L442-6, pt. I, ¶ 4 (Fr.). See also W.T. Tête, *Contractual Balance: A Comparative Perspective*, in *ESSAYS IN HONOR OF SAÚL LITVINOFF*, *supra* note 5, at 761, 771.

134. JOSSERAND, *supra* note 85, no. 991.

135. See LA. CIV. CODE ANN. art. 3471 cmt. (b) (2010) (“In Louisiana, the jurisprudence is well-settled that parties may not extend a period of prescription that is established by law.” (citing *E.L. Burns Co. v. Anthony Cashio*, 302 So. 2d 297 (La. 1974); *Nabors Oil & Gas Co. v. La. Oil Ref. Co.*, 91 So. 765 (La. 1922))).

136. *Id.* art. 3471.

137. See *id.* art. 3471 cmt. (a).

138. *Id.* art. 3460 (1870).

139. See Note, *Insurance—Validity of Contractual Limitations of Prescription Period Article 3460, Louisiana Civil Code of 1870*, 16 TUL. L. REV. 625, 626 (1942) (citing *Caraway v. Ins. Co.*, 26 La. Ann. 298 (1874); *Landis & Young v. Gossett & Winn*, 178 So. 760 (La. App. 2 Cir. 1937)); *id.* at 625 (“[I]n Louisiana the parties may contract to shorten the prescriptive period.” (citing *Green v. Peoples Benevolent Indus. Life Ins. Co. of La.*, 5 So. 2d 916 (La. App. 2 Cir. 1941); *Edson v. Merchants Mut. Ins. Co.*, 35 La. Ann. 353 (1883))).

making it “more onerous”<sup>140</sup> and thus invalid under article 3471. However, in looking at the correlative Greek Civil Code provision to which the Louisiana Civil Code article 3471 comments refer, it is clear that “more onerous” likely means something other than, and in addition to, shortening prescription.<sup>141</sup> When one considers the public policy issues of permitting parties to shorten prescription in advance, especially considerations of unsophisticated parties, the freedom of contract with regard to prescription is a significant issue that remains unclear in Louisiana law.

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140. See, e.g., *Prestridge v. Bank of Jena*, 2005-545, p. 22 (La. App. 3 Cir. 3/8/06); 924 So. 2d 1266, 1280 (holding that a sixty-day preclusion period set forth in an agreement “attempt[ed] to shorten the legal prescriptive period, making it more onerous; therefore, it is null as set forth in LA. CIV. CODE art. 3471” (footnote omitted)); *Cameron v. Bruce*, 42-873, 42-983 p. 3 (La. App. 2 Cir. 4/23/08); 981 So. 2d 204, 207 (where agreement reduced ten-year prescriptive period to one year was “more onerous” and therefore invalid under Louisiana Civil Code Annotated article 3471).

141. Louisiana Civil Code article 3471 can be considered against article 275 of the Greek Civil Code, but that article *specifically* excludes extending *or shortening* prescription, *in addition to* making the conditions of prescription “more onerous.” See LA. CIV. CODE ANN. art. 3471 cmts. (a), (d) (“[Greek Civil Code Article 275] reads as follows: ‘A juridical act purporting to exclude prescription, or fixing a shorter or longer period than that provided by law, or making the conditions or prescription more or less onerous, is null.’”). The words “or fixing a shorter . . . period” are conspicuously missing from Louisiana Civil Code article 3471, suggesting that shortening prescription by agreement was *not* precluded by article 3471. Regarding this point, the 1808 Louisiana Digest and the French Civil Code provisions on suretyship may offer some insights into what “more onerous” must mean under Louisiana Civil Code article 3471. Both provisions regard suretyship as an accessory contract, and both provisions prevent contracting for suretyship under more onerous conditions. See 1808 DIGEST, *supra* note 11, tit. XIV (Of Suretyship), ch. 1 (Of the Nature and Extent of Suretyship) art. 3 (1808) (“The suretyship cannot exceed what may be due by the debtor, nor be contracted *under more onerous conditions*. It may be contracted for a part of the debt only, or under more favorable conditions. The suretyship which exceeds the debt, or which is contracted under *more onerous conditions*, shall not be void, but shall be reduced to the conditions of the principal obligation.” (emphasis added)); C. CIV. art. 2290 (2010) (Fr.) (“Le cautionnement ne peut excéder ce qui est dû par le débiteur, ni être contracté sous des conditions *plus onéreuses*. Il peut être contracté pour une partie de la dette seulement, et sous des conditions moins onéreuses. Le cautionnement qui excède la dette, ou qui est contracté sous des conditions *plus onéreuses*, n’est point nul: il est seulement réductible à la mesure de l’obligation principale.” (emphasis added)). Clearly, “more onerous” means exactly what it says—but it does *not* specifically prohibit the shortening or lengthening of prescription. One can consider that both the French Civil Code and the Louisiana Civil Code rejected, at least in one regard, the spirit of the Canon law, which made the invocation of prescription more difficult for the defendant. See 1808 DIGEST, *supra* note 11, tit. XX, § III, art. 65 (noting that a party who pleads prescription cannot be alleged to have acted “knavishly”); C. CIV. art. 2262 (2008) (Fr.) (“Toutes les actions, tant réelles que personnelles, sont prescrites par trente ans, sans que celui qui allègue cette prescription soit obligé d’en rapporter un titre, *ou qu’on puisse lui opposer l’exception déduite de la mauvaise foi*.” (emphasis added)). Of course, “more onerous” could be an “indirect” lengthening of the prescription by the contractual multiplication of suspension and interruption grounds.

### E. *The Uncodified Law of Contra Non Valentem*

*Contra non valentem* enjoys a long and toilsome history in both French and Louisiana law, where it is recognized but not codified.<sup>142</sup> As an equity maxim, it is seemingly incongruent with the systematic organization of a civil code. But is that necessarily true? Judge-made law has developed a number of systematic formulations of the maxim in both France in Louisiana, where it plays an important role in both prescriptive regimes.<sup>143</sup> To us, it seems that if the law recognizes something as pervasive as *contra non valentem*, it ought to do so in the civil code. There is no reason to give it second-class status.

### III. THE CALL FOR REVISION

Considering these defects and some others,<sup>144</sup> a private group of French scholars and judges under the direction of Professor Pierre Catala<sup>145</sup> took the initiative to propose a revision of the French law of obligations and of the law of prescription,<sup>146</sup> wanting to follow the recent success of the German model.<sup>147</sup> They offered a preliminary draft of reform, which was presented to the Minister of Justice in 2005 as the *Avant-projet de réforme du droit des obligations et de la*

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142. The Louisiana Civil Code references *contra non valentem* in a faint comment to article 3467, but it has no force of codified law. See LA. CIV. CODE ANN. art. 3467 cmt. (d).

143. See *infra* note 201 and accompanying text.

144. For a complete picture of the grievances, see Bénabent, *supra* note 102. See also Denis Mazeaud, *Prescription et contrat au XXIème siècle: florilège positif et prospectif*, 2007 JUSTICE & CASSATION 83.

145. This commission was led by Professor Pierre Catala. It was composed of thirty-four university professors and two retired judges. See *Avant-projet de réforme du droit des obligations (Articles 1101 à 1386 du Code civil) et du droit de la prescription (Articles 2234 à 2281 du Code civil): Rapport à Monsieur Pascal Clément, Garde des Sceaux, Ministre de la Justice, 22 Septembre 2005*, at 1 (2006), <http://www.lexisnexis.fr/pdf/DO/RAPPORTCATALA.pdf> [hereinafter *Avant-projet*].

146. The proposed revision of obligations included contracts, delictual liability, and quasi-contracts (but not particular types of contracts). For a general comment of the draft, see Olivier Moréteau, *France*, in TORT AND INSURANCE LAW YEARBOOK—EUROPEAN TORT LAW 2008, *supra* note 27, no. 1.

147. CLAUDE WITZ & FILIPPO RANIERI, LA RÉFORME DU DROIT ALLEMAND DES OBLIGATIONS—COLLOQUE DU 31 MAI 2002 ET NOUVEAUX ASPECTS (2004); REINHARD ZIMMERMANN, THE NEW GERMAN LAW OF OBLIGATIONS: HISTORICAL AND COMPARATIVE PERSPECTIVES (2005); Mathias Reimann, *The Good, the Bad and the Ugly: The Reform of the German Law of Obligations*, 83 TUL. L. REV. 877 (2009). For a more detailed view on the new German law of extinctive prescription, see Jochen Bauerreis, *Le nouveau droit de la prescription*, 54 R.I.D.C. 1023 (2002); Yves Levano, *La prescription extinctive en droit allemand après la réforme du droit des obligations*, 56 R.I.D.C. 947 (2004); Claude Witz, *Les nouveaux délais de prescription du droit allemand applicables aux ventes internationales de marchandises régies par la Convention de Vienne*, 2002 RECUEIL DALLOZ 2860; Francis Limbach, *La prescription extinctive en droit allemand*, 2008 RECUEIL DALLOZ 2535.

*prescription* (the “*Avant-projet*,” or sometimes, the “Catala draft”).<sup>148</sup> Within that reform was a revision of the law of prescription, under the direction of Professor Philippe Malaurie.<sup>149</sup> The purpose of the work was not only to revise the *Code civil*, but to have an influence on the process of codification of European private law.<sup>150</sup> The reception of the draft among scholars and practitioners was globally positive. But commentators paid more attention to the law of obligations than to the law of prescription, and the proposed provisions on prescription encountered a mixed welcome.<sup>151</sup> Sometime later, the French Senate took the initiative to propose the adoption of a revision of prescription partially inspired from the proposals of the “*Catala commission*,” but the Senate’s proposal deviated from the *Avant-projet* on many points.<sup>152</sup> The Senate’s proposal was more inspired by German law, UNIDROIT principles,<sup>153</sup> and the Principles of European Contract Law (PECL).<sup>154</sup> Finally, the French law of liberative prescription was

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148. See *Avant-projet*, *supra* note 145.

149. See Philippe Malaurie, *Exposé des motifs*, in *Avant-projet*, *supra* note 145, at 171.

150. Xavier Blanc-Jouvan, *Towards the Reform of the Law of Obligations in France: The Reasons for the Reform*, 83 TUL. L. REV. 853 (2009).

151. Bénabent, *supra* note 105, at 1802; Reinhard Zimmermann, ‘*Extinctive Prescription Under the Avant-projet*’, 15 EUR. REV. PRIVATE L. 805 (2007); Robert Wintgen, *La mise en œuvre de la technique du double délai de prescription extinctive*, 2007 REVUE DES CONTRATS 907 (2007); REFORMING THE FRENCH LAW OF OBLIGATIONS: COMPARATIVE REFLECTIONS ON THE AVANT-PROJET DE RÉFORME DU DROIT DES OBLIGATIONS ET DE LA PRESCRIPTION (‘THE AVANT-PROJET CATALA’) 347 (John Cartwright, Stefan Vogenauer & Simon Whittaker eds., 2009) [hereinafter REFORMING THE FRENCH LAW OF OBLIGATIONS]. This book provides an English translation of the draft at page 445 and an English perspective on the French Revision at page 359. For a prior translation of the *Avant-projet* by Alain Levasseur and David Gruning, see [http://www.henricapitant.org/sites/default/files/Traduction\\_definitive\\_Alain\\_Levasseur.pdf](http://www.henricapitant.org/sites/default/files/Traduction_definitive_Alain_Levasseur.pdf) (Alain Levasseur & David Gruning trans.). Both translations were requested by the chief drafter of the project, Pierre Catala. The translation of Vogenauer and Whittaker appears now as the official translation. According to Olivier Moréteau, the translation of the Louisiana professors is preferable because it uses English civilian terminology and not common law terminology. See Olivier Moréteau, *France*, in TORT AND INSURANCE LAW YEARBOOK—EUROPEAN TORT LAW 2008, *supra* note 27, no. 1; Alain A. Levasseur, *Les maux des mots en droit comparé: L’avant-projet de réforme du droit des obligations en anglais*, 60 R.I.D.C. 819 (2008); Alain Levasseur & Vicenç Feliú, *The English Fox in the Louisiana Civil Law Chausse-Trappe: Civil Law Concepts in the English Language; Comparativists Beware!*, 69 LA. L. REV. 715 (2009).

152. See Sénateur M. Laurent Bêteille, Rapport du Sénat No. 358, Session Ordinaire de 2007-2008, available at <http://www.senat.fr/rap/107-358/107-3581.pdf> (last visited Oct. 20, 2010).

153. For a discussion of UNIDROIT principles, see, among others, Reinhard Zimmermann, *The UNIDROIT Principles of International Commercial Contracts 2004 in Comparative Perspective*, 21 TUL. EUR. & CIV. L.F. 2 (2006).

154. See PRINCIPLES OF EUROPEAN CONTRACT LAW—PART III (Ole Lando et al. eds., 2003). On the influence of this sort of “restatement of European contract law,” see Reinhard

substantially revised in 2008 by the *loi 2008-561 du 17 juin 2008 portant réforme de la prescription en matière civile*.

In Louisiana, liberative prescription has stridently departed from its simple and clear roots such that it has become one of the greatest sources of confusion and ambiguity in the Code. Just as other jurisdictions struggled with the awkward effects of piecemeal revision,<sup>155</sup> prescription could no longer provide certainty in rights.<sup>156</sup> Louisiana's liberative prescription regime has grown so unclear that patchwork repair is unlikely to cure it. Comprehensive reform is now necessary.

#### IV. THE MAIN INNOVATIVE TRENDS OF THE FRENCH REVISION

The French revision advances the law of prescription in new ways and codifies rules that the jurisprudence recognized for years. Contemplating the UNIDROIT Principles of International and Commercial Contracts (PICC), the Principles of European Contract Law (PECL), and the renewed German law of prescription, the French Legislature's will is consistent with their common trends.

The first is to favor a general period of prescription that is as wide in scope as possible. Second, this general period should be reasonably short. Third, the shortening of this period is only acceptable when prescription does not run unless the creditor knows (or should reasonably know) about his action. A fourth characteristic is gaining ground: an upper limit (a "long-stop period" or *délai butoir*), after which the action is barred regardless of the creditor's knowledge. This mechanism appears to be necessary to restore some degree of certainty in prescription.

##### A. Organization

The first observation is a change in the manner of organizing prescription in the Code. Formerly, prescription was in one Title

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Zimmermann, *The Principles of European Contract Law: Contemporary Manifestation of the Old, and Possible Foundation for a New, European Scholarship of Private Law*, in BEYOND BORDERS: PERSPECTIVES ON INTERNATIONAL AND COMPARATIVE LAW: SYMPOSIUM IN HONOUR OF HEIN KÖTZ 111 (Florian Faust & Gregor Thüsing eds., 2006). On the convergences and divergences between the new French law and the PICC and the PECL, see Denis Mazeaud & Robert Wintgen, *La prescription extinctive dans les codifications savantes*, 2008 RECUEIL DALLOZ 2523; Claude Witz, *La prescription extinctive dans les instruments d'uniformisation du droit*, 42 REVUE LAMY DROIT DES AFFAIRES 97 (2009).

155. See *Limitation of Actions (Paper 151)*, supra note 21 ("A range of different regimes apply depending on the claim in question. This incoherence reflects the piecemeal development of the law since the seventeenth century.")

156. See *Limitation of Actions (Paper 270)*, supra note 21, at 3, para. 1.7.

(Title XX—Of Prescription) and it had been organized as such since the *Code Napoléon*.<sup>157</sup> Title XX encompassed both liberative (extinctive) prescription as well as acquisitive prescription, and it was defined generally as “a manner of acquiring or of discharging oneself at the end of a certain time and subject to the conditions determined by law.”<sup>158</sup> Now, under the revision, Title XX covers extinctive prescription (*De la prescription extinctive*), and new Title XXI separately governs acquisitive prescription (*De la possession et de la prescription acquisitive*).

For the first time, both modes of prescription are specifically defined. Extinctive prescription is now defined as “a manner of discharging a right resulting from the inaction of its owner during a certain period of time,” and acquisitive prescription is defined as “a manner of acquiring an asset or a right by virtue of possession without the person who alleges to be obliged to bring a title or to be the exception to it deduced from the bad faith.”<sup>159</sup>

This division, if nothing else, sets a tone regarding the nature of the right of prescription. The redactors of the original *Code civil* regarded “that the two prescriptions have many points of contact,” including general provisions governing persons who can plead prescription, those against whom it can be pleaded, rules governing renunciation, the method for calculating prescription, the method for interpreting suspension and interruption, and the notion that a right is not “vested” (*droit acquis*) until the delay is completed, in the context of article 2 (on retroactivity).<sup>160</sup> In Louisiana, prescription remains under the same single title,<sup>161</sup> just as it did in the Digest of 1808<sup>162</sup> and the 1825 Civil Code.<sup>163</sup> In prior Spanish law in effect in Louisiana, prescription was also in a single title.<sup>164</sup>

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157. See C. CIV. (1804) (Fr.); *id.* (2008).

158. See *id.* art. 2219 (2008).

159. See *id.* art. 2219 (2010); *id.* art. 2258.

160. See Baudry-Lacantinerie & Tissier, *supra* note 2, § 34, at 22 (citing C. CIV. arts. 2, 2220-27, 2243-59, 2260-61 (1804) (Fr.) (“The law ordains for the future only; it has no retroactive effect.”)). The *Cour de cassation* stated that “until consummated, prescription does not create any vested right; until then the legislator is always in a position to change the statute.” Cass., Jan. 25, 1858, Sirey 1858, 1, 351; Cass., Dec. 24, 1867, Sirey 1868, 1, 110; see also Cass., 1e civ., Sept. 27, 1983, no. 82-13035, Bull. civ. I, No. 215 (Fr.).

161. LA. CIV. CODE bk. 3, tit. XXIV.

162. Both the Louisiana Digest of 1808 and the *Code civil* organized prescription in Book III, Title XX.

163. The 1825 Code organized prescription in Title 23.

164. See 1 LAS SIETE PARTIDAS, *supra* note 14.



At a basic level, both acquisitive and liberative prescriptions concern the acquisition and loss of rights. Jean Domat observed:

All types of prescription which cause a right to be acquired or lost are based on the presumption that the person who enjoys a right must have some just title, without which he would not have been allowed to enjoy it for such a long period; that he who ceases to exercise some right has been deprived of it for some just cause; and that he who has failed to claim his debt for a long time has either been paid or has recognized that nothing is owed to him.<sup>165</sup>

But early French commentators observed the benefits of approaching liberative and acquisitive prescription separately. Pothier authored a treatise on acquisitive prescription entitled “Prescription based on possession” and addressed liberative prescription separately in his treatise on obligations.<sup>166</sup> Aubry and Rau were likely the first modern commentators to treat the two modes separately.<sup>167</sup> Baudry-Lacantinerie and Tissier observed the “inconvenience of generating various difficulties when it comes to making distinctions between the rules common to both prescriptions and the special rules which are peculiar to each of them.”<sup>168</sup> Contemporary observations are mixed.<sup>169</sup>

### B. *The Shortened and Unified Delays*

A hallmark of the revision is the shortening of the delays—both in number and, for the most part, duration. The relatively simple

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165. Baudry-Lacantinerie & Tissier, *supra* note 2, § 27, at 17 (citing 3 JEAN DOMAT, LES LOIX CIVILES DANS LEUR ORDRE NATUREL (1689)).

166. *See id.* § 34, at 22.

167. *See* Naoki Kanayama, *Les civilistes français et le droit naturel au XIX<sup>ème</sup> Siècle: A propos de la prescription*, 8 REVUE D’HISTOIRE DES FACULTÉS DE DROIT ET DE LA SCIENCE JURIDIQUE 129, 146 (1989). Kanayama noted that Aubry and Rau “traitent de la prescription comme deux institutions distinctes, la prescription acquisitive et la prescription extinctive, et de cette conception dualiste naîtra d’ailleurs la notion de prescription d’aujourd’hui.” *Id.*

168. *See* Baudry-Lacantinerie & Tissier, *supra* note 2, § 34, at 22.

169. Some authors support a unitary approach of prescription centered on the notion of possession. *See* Frédéric Zenati & Stéphanie Fournier, *Essai d’une théorie unitaire de la prescription*, 1996 REVUE TRIMESTRIELLE DE DROIT CIVIL 339. Commentators of the Civil Code of Japan (MINPO), who saw former article 2219 as “sacred,” and a part of the overall approach of prescription taken under Japanese law, indicate that the dual requirement is merely “platonic” and without meaning unless the French Civil Code were to ascribe different substantial effects on the law itself (such as under the German Civil Code (Bürgerliches Gesetzbuch, or “BGB”). *See* Naoki Kanayama, *Regards d’un civiliste étranger sur le nouveau droit français de la prescription*, 2008 REVUE DES CONTRATS 1445. Notably, former article 2219 appeared verbatim in the preliminary draft of the revision (the “Catala” draft, named after Pierre Catala), in article 2234: “La prescription est un moyen d’acquérir ou de se libérer par un certain laps de temps, et sous les conditions déterminées par la loi.” *See Avant-projet*, *supra* note 145, at 179.

institution under the *Code civil* had grown out of control, extending into numerous other codes. This balkanization of time had spawned more than two hundred fifty different prescription delays (the duration of which varied from one month to thirty years), which was a source of uncertainty and incoherence.<sup>170</sup> Prescription was no longer an autonomous institution, but rather, an extracodal patchwork of haphazard legislation.<sup>171</sup> The need for some reform in this regard was generally undisputed.<sup>172</sup>

Formerly, a general thirty-year period governed all personal actions,<sup>173</sup> a ten-year period governed most delictual actions,<sup>174</sup> and all other periods were exceptions to these two general periods. Now, under article 2224, “Personal or movable actions prescribe in five years from the date on which the holder of a right knew or should have known of the facts to enable him to exercise it.”<sup>175</sup> The “general period” of five years is a drastic reduction in time under a uniform period of general applicability. There is no longer a distinction between the prescriptive period for contracts and torts. One can rejoice in the repealing of this distinction in the revision,<sup>176</sup> even if the legislature introduced another one (this time based on the nature of the damage).<sup>177</sup> The *Code de commerce* special period of ten years

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170. See Bételle, *supra* note 152, at 8 (recounting more than 200 different prescription delays ranging from a month to twenty years).

171. See Bénédicte Fauvarque-Cosson, *Variations sur le processus d’harmonisation du droit à travers l’exemple du droit de la prescription extinctive*, 2004 REVUE DES CONTRATS 801.

172. See Marc Mignot, *La proposition de loi portant réforme de la prescription en matière civile: une nouvelle application du droit de ne pas payer ses dettes?*, 41 LES PETITES AFFICHES 6 (2008); Philippe Malaurie, *Avant-projet de réforme de la prescription en droit civil*, 2006 RÉPERTOIRE DU NOTARIAT DEFRENOIS 230 (observing how the multiplicity of time ranging from three months to thirty years, in increments of six months, one, two, three, four, five, ten, and twenty years, caused chaos, disorder, ignorance of law, and endless discourse).

173. C. CIV. art. 2262 (2008) (Fr.).

174. *Id.* art. 2270-1. In France, the ten-year period for delictual actions was not introduced until 1985. See *supra* note 25 and accompanying text. Also, just as the Louisiana Civil Code doubles the one-year period to two years for acts resulting from crimes of violence (see LA. CIV. CODE art. 3493.10 (2010)), so too did the French Civil Code for an injury “caused by torture and acts of cruelty, assault or sexual aggressions committed against a minor,” where the period was twenty years. C. CIV. art. 2270-1 (2008) (Fr.). The latter principal and twenty-year period hold force under the revision. *Id.* art. 2226 (2010).

175. *Id.* art. 2224 (2010).

176. The distinction between commercial and civil prescription (see *supra* note 24 and accompanying text) has also been suppressed. See C. COM. art. L110-4 (2010) (Fr.). For a comment of this new provision, see Michel Storck, *La prescription commerciale et la réforme du 17 juin 2008*, 66 LES PETITES AFFICHES 37 (2009).

177. The new distinction is between nonbodily and bodily damages. C. CIV. art. 2226 (2010) (Fr.). For the latter, the delay is doubled, and for exceptional injuries, quadrupled. It is a new illustration of the trend of French Law to build a special status for bodily damages. See

was of course swept along by this shortening, and without a shorter period for commercial obligations, one of the fundamental differences between civil law and commercial law has disappeared.<sup>178</sup> This contributes to a great unification of the periods.

The revision helps to recapture the bulk of prescription in the *Code civil*, though article 2223 acknowledges that Title XX does not preclude the application of special rules laid down by other laws.<sup>179</sup> In addition to the reduction of the number of delay periods, the revision significantly reduces the duration of most prescriptive periods.<sup>180</sup> Early redactors of the revision observed that the “excessively lengthy” delay had caused “stagnation in human activity,”<sup>181</sup> and some commentators had observed that the shorter delays had the effect of inducing the creditor to act.<sup>182</sup> More, France had grown isolated from many other civil law jurisdictions, which had moved to shorten the delay periods.<sup>183</sup>

The “good” length of the general period is more a question of feeling than of rational thought. The period originally introduced under the *Avant-projet* was only three years,<sup>184</sup> which was chosen to harmonize French law with other European jurisdictions in addition to

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David Corbé-Chalon & Martin A. Rogroff, *Tort Reform à la Française: Jurisprudential and Policy Perspectives for Bodily Injury in France*, 13 COLUM. J. EUR. L. 231 (2007). But one regrets a certain inconsistency: why on the one hand suppress the discovery rule and on the other lengthen the delays? See Sophie Hocquet-Berg, *La réparation des dommages dans le nouveau droit de la prescription*, 42 REVUE LAMY DROIT DES AFFAIRES 110 (2009).

178. See *supra* note 24 and accompanying text.

179. See C. CIV. art. 2223 (2010) (Fr.) (“The provisions of this title shall not preclude the application of special rules laid down by other laws.”).

180. Unification had the effect of *lengthening* certain shorter periods, such as the periods applicable for actions against teachers, hotels, caterers, bailiffs, doctors, and lawyers for their fees and expenses. See *generally* C. CIV. arts. 2271-2276 (2010) (Fr.). A number of actions escape the umbrella of the general period; for example, actions against contractors and subcontractors prescribe by ten years. See *id.* art. 1792-4-1.

181. See Malaurie, *supra* note 149, at 171.

182. See *generally* François Jacob, *L'unification des délais*, 66 LES PETITES AFFICHES 7 (2009).

183. See *generally* Fauvarque-Cosson, *supra* note 171, at 801. In Belgium, the reform of June 10, 1998, reduced the general period to ten years. See C. CIV. art. 2262 *bis* § 1 (Belg.). The same general ten-year period applies in Italy, Japan, Mexico, and Switzerland. See *supra* note 18 and accompanying text. The “general period” in Egypt is fifteen years. C. CIV. art. 2934 (Egypt). The “general period” in Germany was thirty years until the 2002 reform. See BGB § 195 (Ger.) (providing a three-year general period). See *generally* Francis Limbach, *Droit français et allemand de la prescription: zones de lumière et zones d’ombre*, 42 REVUE LAMY DROIT DES AFFAIRES 105 (2009).

184. See *Avant-projet*, *supra* note 145, at 182, art. 2274 (“All actions become prescribed after three years. A person who claims the benefit of such a prescription does not have to adduce any legal basis for it nor can he be faced with a defense alleging his bad faith.”); REFORMING THE FRENCH LAW OF OBLIGATIONS, *supra* note 151, at 911.

adapting to PECL.<sup>185</sup> A three-year period is increasingly accepted internationally, as it is the period consecrated by the PECL, the PICC, the majority of EC law sources, and the German law's revision.<sup>186</sup> The delay of five years that was ultimately chosen appears to be a compromise of competing interests<sup>187</sup> and sets the law of France in line with the average of European and international periods.<sup>188</sup> The original proposal included only three different delay periods (three years, ten years, and thirty years), fewer than the number of delays eventually enacted under the revision.<sup>189</sup>

Unification under the revision is not as simple as setting a general period for both contractual and delictual responsibility. The law must also reign in the multitude of extracodal prescriptive periods. The revision is indeed largely comprehensive in its reform of various modes of prescription in other codes such as the Commercial Code and the Labor Code.<sup>190</sup> However, "unification" is lacking in a number of respects.<sup>191</sup> In particular, the revision failed to account for the remaining profusion of special delays less than five years (especially in insurance law).<sup>192</sup>

One of the most significant shortcomings in the revision's unification efforts is that the new law still provides for a ten-year prescriptive period for delictual actions that cause "bodily injury"—a regrettable exception that removes a large portion of delictual actions out from under the umbrella of the five-year period of uniformity.<sup>193</sup>

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185. See generally Fauvarque-Cosson, *supra* note 171. The general period recommended under the *Principes du droit européen du contrat* (PDEC/PECL) is three years.

186. *Id.*

187. See Jacob, *supra* note 182.

188. See *supra* note 49 and accompanying text (illustrating the various periods). See generally François Ancel, *La loi n° 2008-561 du 17 juin 2008 portant réforme de la prescription en matière civile*, 194 GAZETTE DU PALAIS 2 (2008).

189. See Malaurie, *supra* note 149, at 171, 174.

190. See Loi 2008-561 du 17 juin 2008 portant réforme de la prescription en matière civile [Law 2008-561 of June 17, 2008 on the reform of prescription in civil matters], J.O., June 18, 2008, p. 9856 ("Chapter 2: Miscellaneous and Coordination," which modified periods of prescription in various Codes); Code du travail [C. TRAV.] art. L1134-5 (2008) (Fr.) (adding a five-year prescriptive period for action for damages resulting from discrimination) (created by article 16 of Loi 2008-561, *supra*, art. 16). Compare, e.g., C. COM. art. L110-4 (2008) (Fr.) (ten-year prescriptive period for actions between merchants and nonmerchants) with *id.* art. L110-4 (five-year prescriptive period for actions between merchants and nonmerchants) (modified by Loi No. 2008-561, *supra*, art. 15).

191. See Jacob, *supra* note 182 (noting that the reform has largely missed complete unification, but that in many respects, the reform constitutes an improvement).

192. See CODE DES ASSURANCES art. L114-1, L142-1 IV (Fr.).

193. See C. CIV. art. 2226 (2010) (Fr.). For a criticism of the "bodily injury" exception under article 2226, see Licari, *supra* note 65, at 776 n.172. Criminal limitation periods under the revision remain unchanged, but the revision clarifies the limitation period for civil actions

The creation of a special rule for such actions is an illustration of the trend of French law to create a special corpus of protective legal rules for bodily injuries.<sup>194</sup> Personal injuries enjoy an exceptional status not only regarding the length of prescription (ten years or twenty years), but they are also exempt from the long-stop period.<sup>195</sup>

While it is understandable that such actions deserve a more protective regime, there does not appear to be a valid reason why the creditor should benefit from a more favorable time of accrual than the discovery rule. Indeed, the Legislature, faithful to the jurisprudence of the *Cour de cassation* on the basis of the former French Civil Code article 2270-1, chose “*consolidation*” as the criterion for the commencement of prescription; that is, the point at which the victim’s situation no longer develops detrimentally (which is always after the discovery of the damage). This combination of overprotective rules can be criticized for unreasonably delaying the running of prescription. And for illnesses that never stabilize (like asbestosis or HIV), the action becomes practically imprescriptible. Interestingly, the *Avant-projet* proposed to abandon the *Cour de cassation*’s doctrine by excluding *expressis verbis* the *consolidation* (stabilization) as the starting point.<sup>196</sup>

Some of the exceptions to the five-year period appear justified, but others seem to be vestiges of privilege of some professions, or, expressed in a more politically correct way, the result of intense lobbying. Some are founded on a more dubious policy. Among the justified exceptions, we can mention the ten-year period for claims to execute a final judgment, unless the claim (*créance*) recognized by the judgment underlies a longer period.<sup>197</sup> As the merit of such a claim is no longer controversial and the alteration of evidence can no longer be feared, such a claim deserves a longer life. On the other hand, one

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for damages caused by criminal offenses. Juliette Lelieur, *L’impact de la réforme de la prescription civile sur l’action des victimes d’infractions pénales*, 66 LES PETITES AFFICHES 50 (2009).

194. See Corbé-Chalon & Rogroff, *supra* note 177.

195. See C. CIV. art. 2232 (2010) (Fr.).

196. See *Avant-projet*, *supra* note 145, art. 1384; REFORMING THE FRENCH LAW OF OBLIGATIONS, *supra* note 151, at 873 (“Actions claiming civil liability become prescribed after ten years commencing from the manifestation of the harm or its getting worse, though in the case of personal injuries without having regard to whether their effects have stabilized.”).

197. See Loi 91-650 du 9 juillet 1991 portant réforme des procédures civiles d’exécution [Law 91-650 of July 9, 1991 reforming the civil procedures of execution] art. 3-1 (“L’exécution des titres exécutoires mentionnés aux 1° à 3° de l’article 3 ne peut être poursuivie que pendant dix ans, sauf si les actions en recouvrement des créances qui y sont constatées se prescrivent par un délai plus long. Le délai mentionné à l’article 2232 du code civil n’est pas applicable dans le cas prévu au premier alinéa.”).

example of a statute unjustly favoring one profession can be seen in the new article concerning the answerability of the *huissier de justice*<sup>198</sup> for the loss or destruction of legal documents (two years).<sup>199</sup>

One of the most regrettable reforms is new article L152-1 of the *Code de l'environnement*. At first glance, the new statute is favorable to the protection of the environment, a policy that encounters broad approval in France considering the thirty-year period it creates. But a closer look at this provision reveals a major defect: the day of accrual is not the damage, but the date of the wrongful conduct.<sup>200</sup> This legislative choice is highly dubious considering the latency of certain environmental damages.

Notwithstanding the foregoing problems, the revision brings more clarity and simplicity to the field of prescription. What we can draw as a consequence from the French revision for a possible Louisiana reform is the necessity of choosing a default rule with a large scope, but not an absolute one because it is undeniable that some exceptions are indeed justifiable. The nature of these exceptions has to be determined after an evaluation of objective policies—that is, without the pressure of lobbyists.

### C. *Codified Contra Non Valentem*

One of the most prominent changes in the new revision concerns a veritable codification of *contra non valentem*. The codification takes shape broadly in article 2234, which copies almost verbatim the judicial gloss that the *Cour de cassation* had since coined: “Prescription does not run or is suspended against the person who is unable to act because an impediment resulting from the law, agreement, or force majeure.”<sup>201</sup> In broad strokes, article 2234 codifies, as a rule, a maxim that had evolved first from an

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198. A French legal professional that shares some of the qualities of a bailiff, and some of the qualities of a civil sheriff. For a comprehensive study, see Robert W. Emerson, *The French Huissier as a Model for U.S. Civil Procedure Reform*, 43 U. MICH. J.L. REFORM 1043 (2010).

199. Ordonnance 45-2592 du 2 novembre 1945 relative au statut des huissiers [Ordonnance 45-2592 of November 2, 1945 on the status of *huissiers*], art. 2 *bis*.

200. CODE DE L'ENVIRONNEMENT [C. ENV.] art. L152-1 (2010) (Fr.).

201. See C. CIV. art. 2234 (2010) (Fr.) (“La prescription ne court pas ou est suspendue contre celui qui est dans l'impossibilité d'agir par suite d'un empêchement résultant de la loi, de la convention ou de la force majeure.”); see also Philippe Malaurie, *La Réforme de la prescription civile*, 2008 RÉPERTOIRE DU NOTARIAT DEFRÉNOIS 2029, no. 11 (noting how judicial formulations are near identical transcriptions of *contra non valentem* in new article 2234); cf., e.g., Cass. civ. 1e, Dec. 22, 1959, JCP II, No. 11494 (1960) (comment E.P.).

embodiment of special statutes and praetorian edicts<sup>202</sup> and second into a general principle of private law. In the latter embodiment, *contra non valentem* lacked the firmness of codified law, but even as a general principle, civilian tendencies of both French and Louisiana jurists subclassified “categories” of *contra non valentem*.

The second and more particular codification of *contra non valentem* can be seen in articles 2224 and 2227, which harbor the “discovery rule.” The second “category” of *contra non valentem* under the French gloss includes, in part, what can be termed the discovery rule “à la française”—the cognizance of vital facts for the accrual of prescription. It is the correlative to the discovery rule “à la louisianaise,” the fourth category under the Louisiana rubric— “[w]here the cause of action is not known or reasonably knowable by the plaintiff, even though his ignorance is not induced by the defendant.”<sup>203</sup>

Similarly, articles 2224 and 2227 speak of delays that are counted “from the date the holder of the right knew or should have known the facts to enable it to exercise it.”<sup>204</sup> The “discovery rule,” as codified, is rightly organized separately from article 2234. The discovery rule lies in Title XX (Of Extinctive Prescription), Chapter II (Of Delays and of Point of Departure from Extinctive Prescription), Section I (Of a Common Delay and Its Point of Departure). Here, it is clear that the discovery rule under articles 2224 and 2227 is not a particular cause for *suspension*, for it can be said that prescription has not begun to run at all. Separately, article 2234 lies in Title XX, Chapter II, Section II (Of Causes of Postponement of the Point of Departure or of the Suspension of Prescription). Here, it is clear that the invocation of article 2234 causes the postponement of the start of prescription, the setting aside of an already running period of prescription, or the suspension of an already running period of prescription.

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202. HENRI GONDARD, DE LA SUSPENSION DE LA PRESCRIPTION ET DE LA RÈGLE “CONTRA NON VALENTIEM PRAESCRIPTIO” 11 (1904); Karl Spiro, *Zur neueren Geschichte des Satzes “Agere non valenti non currit praescriptio,”* in Festschrift für Hans Lewald 585, 587 (1953).

203. *Corsey v. State Dep’t of Corr.*, 375 So. 2d 1319, 1322 (La. 1979).

204. C. CIV. art. 2224 (2010) (Fr.) (“Personal or movable actions prescribe in five years from the date on which the holder of a right knew or should have known of the facts to enable it to exercise it.”); *id.* art. 2227 (“Real property rights are imprescriptible. Subject to this, real property rights prescribe thirty years from the date the holder of the right knew or should have known the facts to enable the holder to exercise it.”).

For the growing number of jurisdictions subscribing to the subjective system over the objective starting point, the discoverability criterion can play one of two roles: it can have the function of a starting point, or it can serve as a ground for suspension. Germany and France chose the first path. The draft Civil Code for Israel chose the second one.<sup>205</sup> And indeed, one of the major novelties of the French revision is the introduction of the discovery rule as a general criterion of accrual, bringing more clarity to a system where the objective and the subjective system coexisted with no apparent logic.<sup>206</sup>

According to new article 2224, the general prescription of five years does not begin to run until the creditor knows or should know the facts that constitute his action. But the new rule does not specify which facts are relevant for the purpose of the discovery rule. Some partial codifications of the discovery rule in the *Code civil*, in addition to observations of foreign solutions, can be very useful to understand the functioning of the new French provision. Among these sources is the abundant Louisiana jurisprudence, which is undoubtedly the most fruitful.<sup>207</sup> From these sources, we can say that the relevant facts include: the identity of the defendant, the act or omission of the defendant that is subject to action, the damage to the defendant that is subject to the claim, and the existence of a causal relationship between the act or omission and the damage.<sup>208</sup>

Article 2224 takes as a criterion the cognizance of the “facts” that constitute the legal action, but not the “legal rule” (*règle de droit*) (of statutory or praetorian nature) that is the basis of the action. This means that when a claimant does not know that the facts he

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205. Draft Civil Code for Israel art. 818, reprinted in *THE DRAFT CIVIL CODE FOR ISRAEL IN COMPARATIVE PERSPECTIVE* 359 (Kurt Siehr & Reinhard Zimmermann eds., 2008). Under the heading “Grounds for Tolling of the Running of the Period of Limitations,” article 818 provides:

The running of the period of limitation of a claim shall be tolled when the parties to the claim are the original parties, as long as one of grounds for tolling as set forth below pertains: (1) The plaintiff did not now, and did not need to know, a fact that constituted part of the cause of action . . . .

*Id.*

206. See Licari, *supra* note 65, at 745-51.

207. One of the coauthors foresees Louisiana case law as a sort of anticipatory comment of the new French discovery rule. *Id.* at 756-72.

208. See Paragon Dev. Grp., Inc. v. Skeins, 96-2125, pp. 3-5 (La. App. 1 Cir. 9/19/97); 700 So. 2d 1279, 1281; Argonaut Great Cent. Ins. Co. v. Hammett, 44-308, p. 3 (La. App. 2 Cir. 6/3/09); 13 So. 3d 1209, 1211; Anderson v. Beauregard Mem'l Hosp., 97-1222, p. 10 (La. App. 3 Cir. 3/6/98); 709 So. 2d 283, 287.



discovered constitute a cause of action, this nondiscovery does not cause an obstacle to the starting of prescription. This legislative solution is consistent with the judicial solutions that were elaborated by the *Cour de cassation* on the basis of *contra non valentem*, and it is consistent with a great principle of French law: no one is deemed to ignore the law (*nemo censetur ignorare legem*).<sup>209</sup> This exclusion is justified because the ignorance of the law, even a reasonable one, should lie in the sphere of risks of the claimant and not on the shoulders of the defendant. This solution is in accordance with the values and spirit of the *Code civil*, in which the ideal man was “the responsible *paterfamilias* who had sound judgment and knowledge of business affairs and law.”<sup>210</sup>

#### D. The Délai butoir—A “Long-Stop” Peremption Period?

The commencement of a certain period of prescription under the new law is a subjective “floating point”—that is, “from the date the holder of the right knew or should have known the facts to enable the holder to exercise it.”<sup>211</sup> However, an action is also subject to a second objective period beginning “from the birth of the right”—which period is a much longer twenty years. Under article 2232, “Postponement of the starting point, suspension or interruption of prescription may not cause the period of prescription to extend beyond twenty years from the birth of the right.”<sup>212</sup> This period—a *délai butoir*—ostensibly sets out a maximum period of prescription (subject to a few exceptions).<sup>213</sup>

The new law affords something of a “double delay,” whereby it would *seem* that the general period of five years begins at a subjective starting point (invoking the “discovery rule”), but in no event can the period of prescription last longer than twenty years. This notion of a

209. Raymond Guillien, *Nul n'est censé ignorer la loi*, in 1 MÉLANGES EN L'HONNEUR DE PAUL ROUBIER 253 (1961); Jean Carbonnier, *La maxime “Nul n'est censé ignorer la loi” en droit français: Journées de la Société de législation comparée*, R.I.D.C. 321 (1984); see also Vera Bolgár, *The Present Function of the Maxim Ignorantia Iuris Neminem Excusat—A Comparative Study*, 52 IOWA L. REV. 626, 639-55 (1967).

210. See HERMAN, COMBE & CARBONNEAU, *supra* note 1, at 31.

211. C. CIV. arts. 2224, 2227 (2010) (Fr.).

212. *Id.* art. 2232 ¶ 1 (“Le report du point de départ, la suspension ou l'interruption de la prescription ne peut avoir pour effet de porter le délai de la prescription extinctive au-delà de vingt ans à compter du jour de la naissance du droit.”).

213. *Id.* art. 2232 ¶ 2. Of notable significance, the twenty-year *délai butoir* is inapplicable to actions for bodily injuries under article 2226, which prescribe ten years from the consolidation of the initial injury or aggravation. The notion of “consolidation” is discussed *supra* notes 193-196 and accompanying text.

“double delay” is not new to French law, as the concept had been used in cases of products liability. Under article 1386-16, products liability claims were prescribed by ten years; but under article 1386-17 claims prescribed three years from the date the claimant knew or should have known of the damage, the defect, and the identity of the producer of the product.<sup>214</sup> Under the revision, this “double delay” applies broadly (with some exceptions); just as article 2224 outlines the “general” period of five years, the twenty-year period under article 2232 is of general applicability.<sup>215</sup>

A similar system is known in other civil law systems.<sup>216</sup> It is sometimes called a “long-stop” period, and some have regarded it as the only “balanced” solution.<sup>217</sup> Similarly, Louisiana courts apply Louisiana Revised Statute section 9:5628 as a limitation on the discovery rule in the context of medical malpractice actions. Such claims are subject to a one-year prescriptive period, capable of extension by the rule of *contra non valentem*, and limited by a three-year discovery period.<sup>218</sup> Thus, it shares some characteristics of peremption in Louisiana, and some characteristics of analogous modes of extinction in French law, but it is ultimately distinguishable.<sup>219</sup>

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214. *Id.* art. 1386-16 (“Except for fault of the producer, the answerability of the latter, based on the provisions of this Title, shall be extinguished on the expiry of a period of ten years after the actual product which caused the damage was put into circulation, unless the injured person has in the meantime instituted proceedings.”); *id.* art. 1386-17 (“An action for the recovery of damages based on the provisions of this Title is prescribed after a period of three years from the date on which the plaintiff knew or ought to have known the damage, the defect and the identity of the producer.”).

215. *See* Ancel, *supra* note 188.

216. *See, e.g.*, BGB § 852 (2010) (Ger.) (prescribing claim for restitution in delictual matter ten years after the claim arose, but notwithstanding the date on which it arose, thirty years after the date on which the act causing the injury was committed, or after the other event that triggered the loss); *id.* § 1378(4) (three-year limitation period on equalization claims for property among spouses, commencing on the date which the spouses discover that the property regime has ended, but in no event longer than thirty years after the property regime has ceased). In the Czech Republic, for example, the right to recover “damages” is barred by three years (ten years if caused deliberately). OBČANSKÝ ZÁKONÍK [CIVIL CODE] § 106(2) (Czech) (Trade Links trans., 1993). But the right is also limited by two years “after the day on which the injured party became aware of the damage and discovered who was responsible for it.” *Id.* § 106(1).

217. *See* ZIMMERMANN, *supra* note 16, at 100; *id.* (citing Matthias E. Storme, *Belgium*, in *EXTINCTIVE PRESCRIPTION*, *supra* note 16, at 58).

218. *See supra* note 123 and accompanying text.

219. *See generally* Frédéric Rouvière, *La distinction des délais de prescription, butoir et de forclusion*, 152 LES PETITES AFFICHES 7 (2009) (noting similarities and distinctions between the various delay periods (préfix, prescription, butoir, forclusion, procédure, délai probatoire), and proposing a new classification based on what he suggests are clear and consistent criteria).

But a closer inspection of the revision reveals something of a blunder. While it is clear that the legislature intended for the revision to apply a twenty-year *délai butoir* on all actions as an objective compromise to the subjective starting point under article 2224, the letter of the law fails to accomplish this goal. Rather, the *délai-butoir* of twenty years begins from the date of the *birth* of the right—which *right does not accrue until the holder of the right “knew or should have known of the facts to enable the holder to exercise it.”*<sup>220</sup> While other modes of suspension or interruption cannot extend the prescriptive period beyond twenty years—the point of accrual remains unchanged. Thus, the right is theoretically of infinite duration *until* the actor knew or should have known of his right—which point announces the “birth” of the right. Given the general hostility to a period of absolute *forclusion* absent a clear legislative direction to the contrary (a sentiment shared among both French and Louisiana courts, in addition to the numerous situations that could be regarded as unjust to the victims), we believe that French courts will interpret this provision to the letter.<sup>221</sup> Of course, the legislature could have offered clearer direction in article 2232 by specifically referencing article 2224 and clarifying that a right accrues regardless of the subjective knowledge of the right holder.

#### *E. Modernization of the Grounds for Interruption and Suspension*

Commentators have long recognized that the various periods of prescription are rather arbitrary.<sup>222</sup> Why should the general period be five years? Why not ten, or three? The revision shortens the general period to suit the needs of a modern society, and it is a compromise of a number of competing interests.<sup>223</sup> Likewise, commentators have long recognized that “time does not have the same value for everyone,” and thus, interruption and suspension serve to temper the blind and objective periods of prescription.<sup>224</sup> It follows that these features of prescription were in need of revision as well.<sup>225</sup>

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220. C. CIV. art. 2224 (2010) (Fr.).

221. See Marc Mignot, *Le délai butoir*, 57 GAZETTE DU PALAIS 2 (2009) (identifying certain unjust applications of a twenty-year delay, such as an employee’s action against his employer for failure to contribute to his pension; or a victim of fraud, error, or duress).

222. Carbonnier, *supra* note 10, § 3, at 461.

223. See *supra* note 182 and accompanying text.

224. See Carbonnier, *supra* note 98, at 155 (“Prescription, an institution based on time, it [i.e. the law] strove to give a course not uniform, but variable according to the diversity of concrete situations, and for those for whom time has passed too quickly, it wants prescription

The grounds for suspension and interruption in the Code were largely untouched since the *Code Napoléon*. Instead of simply modernizing the former causes of suspension and interruption, the revision is comprehensive.<sup>226</sup> For one, the revision specifically defines the effects of interruption and suspension;<sup>227</sup> they are essentially the same as in the Louisiana Civil Code, which effects were not clearly defined until the 1983 Obligations revision.<sup>228</sup>

While it would seem that the definitions of suspension and interruption simply confirm what is already known to jurists, the definition of interruption is particularly important. Formerly, if an especially short prescription was interrupted, the court would replace the previous delay with a delay of thirty years.<sup>229</sup> The revision confirms that, after interruption, the new delay is of the same duration as the former delay.<sup>230</sup>

The traditional causes for interruption survived the revision with few remarkable changes,<sup>231</sup> though some additional grounds have been added to account for contemporary practice.<sup>232</sup> A number of traditional causes for suspension were retained, including prescription

to last longer. From there the causes of suspension of prescription, are established by the Civil Code.”).

225. Joël Cisterne, *Les désordres de la prescription: suspension et interruption*, in LES DÉSDORDRES DE LA PRESCRIPTION 35 (Patrick Courbe ed., 2000).

226. See Estelle Naudin & Jérôme Lasserre Capdeville, *Causes d’interruption et de suspension*, 66 LES PETITES AFFICHES 12 (2009).

227. C. CIV. art. 2231 (2010) (Fr.) (“Interruption erases the delay of prescription acquired. It begins a new delay of the same duration as the former.”); *id.* art. 2230 (“The suspension of prescription temporarily stops the running without erasing the delay that has already run.”).

228. See LA. CIV. CODE art. 3466 (2010) (“If prescription is interrupted, the time that has run is not counted. Prescription commences to run anew from the last day of interruption.”). Article 3466 was enacted by 1982 Louisiana Acts No. 187, section 1. The article is based on article 270 of the Greek Civil Code, which declares: “When prescription is interrupted, the time that has run is not counted, and, from the end of the interruption, a new prescription commences to run.” *Id.* art. 3466 cmts. (a), (c); see also *id.* art. 3472 (“The period of suspension is not counted toward accrual of prescription. Prescription commences to run again upon the termination of the period of suspension.”). Article 3472 was enacted by 1982 Louisiana Acts No. 187, section 1.

229. This complex mechanism was called “*intersion de la prescription*.” See Naudin & Capdeville, *supra* note 226 (citing, inter alia, Cass. ass. plén., June 10, 2005, Bull. Ass. plén., no. 6; 2005 Dalloz inf. rap., p. 1733 (comment Yves Rouquet); Defrénois 2005, art. 38251, p. 1607 (comment Jacques Massip), and art. 38254, p. 1642 (comment Alain Bénabent), REVUE TRIMESTRIELLE DE DROIT CIVIL civ. 2006, p. 320 (comment J. Mestre & B. Fages).

230. See C. CIV. art. 2231 (2010) (Fr.).

231. Compare *id.* arts. 2242-2250 (2007), with *id.* arts. 2240-2246 (2010).

232. See, e.g., *id.* art. 2241 (2010) (acknowledging that summary proceedings have the effect of interruption just as any other action).

against minors,<sup>233</sup> between spouses,<sup>234</sup> and heirs to a succession with respect to the heirs' claims against the estate.<sup>235</sup>

The revision also introduces two new innovative causes of suspension. First, an agreement to mediate or arbitrate suspends the running of prescription under article 2238.<sup>236</sup> An interesting component of article 2238 is the way it suspends prescription, as it deviates from the general definition under article 2230. Under article 2238, when prescription recommences, it begins to run for a period of not less than six months from the date the mediation is complete.<sup>237</sup>

A second new cause of suspension takes cognizance of a mode of civil procedure whereby any interested party may move for the judge to require an evidentiary hearing before proceeding with the litigation in order to determine whether there are facts that support the

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233. *Compare id.* art. 2235 (“It does not run or is suspended against unemancipated minors and adults in guardianship, unless for shares in payment or recovery of wages, arrears of pension, alimony, rent, tenant farming, lease expenses, interest on money lent and, generally, actions for payment of all that is payable annually or at shorter periodic terms.”) *with id.* art. 2252 (2007) (“Prescription does not run against unemancipated minors and adults in guardianship, except for what is stated in Article 2278 and with the exception of the other cases determined by law.”) *and* LA. CIV. CODE art. 3469 (2010) (“Prescription is suspended as between: the spouses during marriage, parents and children during minority, tutors and minors during tutorship, and curators and interdicts during interdiction, and caretakers and minors during minority.”).

234. *Compare* C. CIV. art. 2236 (2010) (Fr.) (“It does not run or is suspended between spouses and between partners bound by a civil union.”) *with id.* art. 2253 (2007) (“It does not run between spouses.”) *and* LA. CIV. CODE art. 3469 (2010) (“Prescription is suspended as between: the spouses during marriage . . .”).

235. *Compare* C. CIV. art. 2237 (2010) (Fr.) (“It does not run or is suspended against the heirs accepting net assets, with respect to claims he has against the estate.”) *with id.* art. 2258 (2007) (“Prescription does not run against an heir under benefit of inventory, with regard to claims which he has against the succession. It runs against a succession which is vacant, although not provided with a curator.”) *and* LA. CIV. CODE art. 3470 (2010) (“Prescription runs during the delay the law grants to a successor for making an inventory and for deliberating. Nevertheless, it does not run against a beneficiary successor with respect to his rights against the succession. Prescription runs against a vacant succession even if an administrator has not been appointed.”).

236. C. CIV. art. 2238 (2010) (Fr.); *see also* Nathalie Fricero, *Ô temps, suspends ton vol. . . Procédure judiciaire ou amiable et prescription extinctive*, in DE CODE EN CODE—MÉLANGES EN L'HONNEUR DU DOYEN GEORGES WIEDERKEHR 327 (2009); *cf.* LA. CIV. CODE art. 3105 (2010) (“Prescription is *interrupted* as to any matter submitted to arbitration . . .” (emphasis added)).

237. C. CIV. art. 2238 (2010) (Fr.) (“Prescription is suspended from the day after the occurrence of a dispute, the parties agree to mediation or conciliation or, if no written agreement, effective from the day of the first meeting of mediation or conciliation. The limitation period begins to run for a period of not less than six months, from the date on which either one or both parties or the mediator or conciliator declares that the mediation or conciliation is completed.”).

claim.<sup>238</sup> Under Civil Code article 2239, “[p]rescription is also suspended when the judge has granted a request for taking evidence before trial.”<sup>239</sup> Likewise, the term is suspended from the day of the “preparatory inquiry,” but not for less than a period of six months.<sup>240</sup> Given the variable time required to present evidence for such a hearing (an expert report, for example), some have questioned whether this cause for suspension should have been a cause for interruption.<sup>241</sup>

A most significant addition to the causes of suspension, though it is not new to French law, is a codal recognition of a jurisprudential rule: *force majeure*. French jurisprudence has firmly established and continues to hold that “prescription does not run against a person who can not act as a result of any impediment, whether its source is law, contract or act of God.”<sup>242</sup> Article 2234 adopts this provision nearly to the letter.<sup>243</sup> It is, in essence, a codification of the first “category” of *contra non valentem* under the Louisiana model.<sup>244</sup> French law had formerly provided that “[p]rescription runs against all persons, unless they come within some exception established by law.”<sup>245</sup> Even though there was no mention of “absolute impossibility” in the Code, French courts regarded *force majeure*, a principal of equity, as an “absolute impossibility.”<sup>246</sup>

Article 2234 is lacking in at least two respects. Even though it announces a well-established articulation of *contra non valentem*, it

238. See N.C.P.C. art. 145 (2010) (Fr.) (“If there is a legitimate reason to preserve or to establish, before any legal process, the evidence of the facts upon which the resolution of the dispute depends, legally permissible preparatory inquiries may be ordered at the request of any interested party, by way of a petition or by way of a summary procedure.”).

239. See C. CIV. art. 2239 (2010) (Fr.).

240. *Id.*

241. See Naudin & Capdeville, *supra* note 226.

242. Baudry-Lacantinerie & Tissier, *supra* note 2, § 369, at 193; see also Cass., June 28, 1870, 1871 Sirey 1, 137–38, 1870 Dalloz 1, 310–11 (“La prescription ne court point contre celui qui est dans l’impossibilité absolue d’agir, par suite d’un empêchement quelconque résultant soit de la loi, de la convention ou de la force majeure.”). Accord Cass. 1e civ., Feb. 18, 2003, Bull. civ. I, No. 99-21199 (Fr.); Cass. soc., May 6, 1999, Bull. civ. V, No. 97-15453 (Fr.); Cass. 1e civ., Feb. 2, 1994, Bull. civ. I, No. 90-18796 (Fr.); Cass. com., Jan. 4, 1994, Bull. civ. IV, No. 92-10249 (Fr.); Cass. 1e civ., Oct. 7, 1992, Bull. civ. I, No. 89-13461 (Fr.).

243. See C. CIV. art. 2234 (2010) (Fr.) (“Prescription does not run or is suspended against one who is unable to act owing to an incapacity resulting from the law of the agreement or force majeure.”).

244. See Benjamin West Janke, *Revisiting Contra Non Valentem in Light of Hurricanes Katrina and Rita*, 68 LA. L. REV. 497 (2008).

245. C. CIV. art. 2251 (2007) (Fr.).

246. See *supra* note 242 and accompanying text.

does not clarify how and when it is invoked. To this end, the jurisprudence is illuminating. As noted by the *Cour de cassation* (*chambre commerciale*), *contra non valentem* does not apply “where the holder of the action had yet, when the impediment had ended, time to act before the expiration of the delay of prescription.”<sup>247</sup>

A second point of deficiency with article 2234 is the duration of the suspension and how long the obligee has to act following the cessation of the impediment. Thus, the question that remains unclear is how long the obligee has to act after the cessation of the impediment. Is it the duration of the suspension-causing impediment? For example, if the courts were closed for a period of six days due to civil unrest, and the obligee’s right would have prescribed on the first of the six days of closure, would the obligee thereby have six additional days to file suit? This is indeed the result under the German revision. Under BGB article 206, “Limitation is suspended *for as long as*, within the last six months of the limitation period, the obligee is prevented by force majeure from prosecuting his rights.”<sup>248</sup> Similarly, the original proposal under the *Avant-projet* would recognize “*force majeure*” only if it occurred within six months preceding the expiration of prescription.<sup>249</sup> But the *Avant-projet* did clarify the effective length of duration as the German revision had clarified—“as long as . . . the obligee is prevented by force majeure from prosecuting his rights.”<sup>250</sup> The duration of the suspension remains unclear under the revision, just as it is unclear under Louisiana law.

#### *F. Consecration (and Clarification) of the Freedom of Contract*

The revision is clear, explicit, and detailed with respect to the freedom of contract and prescription. Article 2254 permits the

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247. See Naudin & Capdeville, *supra* note 226.

248. See BGB § 206 (2010) (Ger.) (“Die Verjährung ist gehemmt, solange der Gläubiger innerhalb der letzten sechs Monate der Verjährungsfrist durch höhere Gewalt an der Rechtsverfolgung gehindert ist.”).

249. See article 2266, *in Avant-projet*, *supra* note 145, at 182, art. 2266 (“Prescription runs against all persons who are unable to act owing to an impediment resulting from the law of the agreement or force majeure. The force majeure if it is temporary is a cause of the suspension if it occurred within six months preceding the expiration of the limitation period.”).

250. See BGB § 206 (2010) (Ger.). Similar clarification was provided under Argentina law, which formerly required the obligee to act immediately following the cessation of the impediment, but which now provides three additional months to act following the cessation of the impediment. Compare CÓDIGO CIVIL [CÓD. CIV.] [CIVIL CODE] art. 3980 (1871) (Arg.) with *id.* art. 3980 (2007) (Arg.).

shortening or extending of prescription by agreement of the parties.<sup>251</sup> The degree to which the delay can be reduced or extended, however, is tempered; it cannot be reduced to less than one year or extended more than ten additional years.<sup>252</sup> A novel addition is that the parties can, by mutual agreement, add to the causes of suspension or interruption.<sup>253</sup> The freedom of contract principles in article 2254 do not apply to actions “for shares in payment or recovery of wages, arrears of pension, alimony, rent, tenant farming, lease expenses, interest on money lent and, generally, actions for payment of all that is payable annually or at shorter periodic terms.”<sup>254</sup> Other restrictions apply as well; such agreements are prohibited in contracts of insurance as well as contracts between professionals and consumers, though these restrictions are found in the *Code des assurances* and the *Code de la consommation*.<sup>255</sup>

G. *On the Way to a Stricter Distinction Between Prescription and the délai préfix (forclusion)*

It is regrettable that the revision did not seek to define the *délai préfix*, or even to describe its effects. However, *les délais de forclusion* are acknowledged by four separate articles in the revised Title XX (articles 2220, 2222, 2241, and 2244). Article 2220 announces that such delays are not governed by Title XX unless otherwise provided, but this article announces more than it seems.<sup>256</sup> The revised Title XX includes various ways of either suspending prescription or else delaying its accrual; thus, by stating that *les délais de forclusion* are *not* governed by Title XX, it would seem that the French legislature has acknowledged at least some of the effects that courts assign to such delays. On the other hand, the revision states

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251. See C. CIV. art. 2254 (2010) (Fr.).

252. At first, the “consecration” of the freedom of contract under the revision was celebrated, but upon closer inspection, the freedom is a limited one. See Denis Mazeaud, *Liberté contractuelle et pouvoirs du juge dans le nouveau droit de la prescription extinctive*, 42 REVUE LAMY DROIT DES AFFAIRES 92 (2009).

253. *Id.*

254. *Id.* Conspicuously, these are the same actions to which the suspension of minority or interdiction do not have any effect. See C. CIV. art. 2235 (2010) (Fr.).

255. See CODE DES ASSURANCES art. L114-3 (2010) (Fr.); CODE DE LA CONSOMMATION art. L137-1 (2010) (Fr.).

256. See C. CIV. art. 2220 (2010) (Fr.) (“The ‘délais de forclusion’ are not, except as otherwise provided by law, governed by this title.”).



that the filing of a lawsuit or the execution of a right interrupts both the running of prescription as well as “*les délais de forclusion*.”<sup>257</sup>

#### H. *The Codification of Established Rules and Formal Changes*

From these main innovative trends, we can see that the French revision has engraved many instances of *jurisprudence constante* into the new title of prescription. For example, *contra non valentem* rears its head in articles 2234, 2224, and 2227, and the freedom of contract is more clearly delineated in 2254 than it was under the jurisprudence interpreting *Code civil* articles 2220-2221.

Other changes are more formal, such as the various grounds for suspension (new articles 2233-2239) and interruption (2240-2246), and a definition of each. These articles replace in some respects and add additional mechanisms to the former grounds for suspension (former articles 2251-2259) and interruption (former articles 2242-2250). The splitting of the formal title on prescription into two titles presents a formal change that sets a tone regarding the nature of the two modes of prescription and the extent of the general rules applying to each.

Some changes are new to French law, though they reflect an emerging trend in the law and are built upon UNIDROIT principles as well as PECL. Among these, we can mention the shortened and unified delays and the introduction of a long-stop period to balance against the subjective (or “floating”) starting point of accrual. Some changes are necessary to integrate the revision without running afoul of intertemporal conflicts of law, such as article 2222 (which states, among other things, that if the new law extends the duration of a delay, it can have no effect on actions which have already prescribed).<sup>258</sup> The revision also accounts for international private law, stating that the prescriptive period is subject to the law governing the right it affects.<sup>259</sup>

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257. See *id.* art. 2241 (“Judicial demand, even in a summary proceeding, interrupts prescription and the ‘délai de forclusion.’ It is the same when it is brought before a court without jurisdiction or where submission to the court’s jurisdiction is cancelled by a procedural defect.”); *id.* art. 2244 (“Le délai de prescription ou le délai de forclusion est également interrompu par un acte d’exécution forcée.” [“Prescription or the ‘délai de forclusion’ is also interrupted by the execution of an act.”]).

258. *Id.* art. 2222; see also Georges Wiederkehr, *Conflits de lois dans le temps et dans l’espace en matière de prescription*, 42 REVUE LAMY DROIT DES AFFAIRES 89 (2009).

259. C. CIV. art. 2221.

## V. TOWARDS A CROSS-BORDER FERTILIZATION

A. *Shared Foundations*

A realistic appraisal of the French and Louisiana experiences reveals the rich complexity of prescription. It is doubtful that the original titles could have been written any better without the benefit of 200 years of experimentation. These experiences have challenged us to reflect on the foundations and goals of prescription and to question whether those goals are compatible at all. But through challenge and hindsight, we have witnessed innovation.

The French revision is a remarkable achievement. It provides a relative generality without compromising the certainty desired in any prescription regime, breeding longevity and earning its place in the Civil Code. It is a delicate blend of seemingly incompatible tenets: an objectively certain end coexists with a subjective starting point, balancing equity against certainty and objectivity; the proliferation of the various delays are reduced and recaptured in the Code with little friction against their related extracodal provisions; the bifurcation of actions on tort and contract is unified, but the “double delay” and other causes for suspension negate the need for a single, excessively long “general” prescriptive period; and the freedom to shorten or lengthen prescription is available, but not in those situations where it is most prone to abuse.

The revision is not without fault, but just as the original redactors of the Louisiana Civil Code benefited from the French experience following the promulgation of the *Code civil* in 1804 before introducing the 1808 Digest and the 1825 Code, so too can Louisiana benefit from the nascent life of the French revision.

But before we celebrate the particular components of the French revision that we suggest for a Louisiana revision, let us first settle those issues that are counterproductive to this discourse. Acknowledging the following precepts will facilitate a richer revision.

First, one must accept a certain degree of inherent arbitrariness in any particular delay. While there are indeed sound justifications for selecting a shorter delay for a certain action relative to another, it is impossible to normalize the “ideal” delay for every action relative to another.

Second, and in the same vein, striving towards unification will cause certain actions to be longer or shorter than their perceived ideal. Unification is necessarily a compromise, and while it is tempered by various mechanisms that either suspend, delay, or foreclose the action,

we suggest that unification offers a solution to the disingenuous distinction that both French and Louisiana courts have given to contract and tort for the purposes of matching the desired prescriptive period.

Third, special interest and lobbying should be acknowledged, but controlled. There may be a social benefit to shortening the length of claims against doctors, and the will of the legislature for or against such a special prescriptive period is too powerful and volatile to restrain. On the other hand, preferential delays lacking justification should be avoided. The law should indeed permit exceptions to the general delay, but the exceptions should not swallow the rules.

Fourth, the “general” period should be just that: a delay that applies to most actions, not simply the longest delay available. The excessively long general period of thirty years probably explains the proliferation of so many prescriptive periods in both Louisiana and France. While there is likewise a need to define the outer-bound of prescription (that is, the longest prescriptive period available), it serves little function as the “general rule” when it applies to so few actions.

The French legislature was undoubtedly sensitive to these four considerations. It is easy to see how the revision process would have been otherwise misguided and doomed to fail. As we suggest a few of the most novel innovations for consideration in a possible Louisiana revision, the aforementioned precepts should be considered as enabling a greater consensus.

### *B. Hallmark Innovations*

The greatest innovations of the French revision can be summarized in a trinity of countervailing parts: a shortened and unified delay, tempered on one end by a variety of methods for suspending or delaying the running of prescription, and balanced at the other end by a long-stop period. It is in this delicate balance that the French revision was able to blend certainty in rights with equitable considerations.

The unified general delay period, without regard for a distinction between actions on tort and actions on contract, is a welcome solution to the bifurcation that both authors have criticized in Louisiana and in France.<sup>260</sup> It greatly enhances the judicial economy by negating the need to argue (disingenuously) whether an action is founded in

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260. See *supra* Part II.C.

contract or tort solely for the purposes of prescription. At the same time, a general period (three or five years) would enlarge the delay for actions on tort by nearly the same degree as it would reduce the delay for actions on contract. At the height of compromise, it takes away from contract plaintiffs and tort defendants just as much as it benefits contract defendants and tort plaintiffs.

The virtual codification of *contra non valentem* under articles 2224, 2227, and 2234 both softens the shock of reducing the duration of personal actions by five years and helps to instill the longevity and endurance that was absent from the title of prescription. However, a possible Louisiana revision should take cognizance of the deficiencies we have noted in article 2234: first, by clarifying whether it is possible to invoke the suspension of prescription if the impediment causing the impossibility to act ceases to exist prior to the expiration of the delay; and second, by clarifying how long the suspension lasts and how long the creditor has to act following the cessation of the impediment. Louisiana's abundant jurisprudence applying the discovery rule should facilitate the integration of principles found in articles 2224 and 2227, under which prescription's accrual is delayed (not suspended). On the other hand, one of the complications under the French revision that is unlikely to arise in a possible Louisiana revision is the issue of "consolidation." While the *Avant-projet* dispensed with consolidation (that is, the point of commencement of prescription, at which the victim's situation no longer develops detrimentally), the French legislature chose otherwise.<sup>261</sup> Louisiana law has never recognized "consolidation," and it is unlikely to do so in the future.

The subjective starting point compromises the debtor's need for certainty, but the objective "long-stop" quells the concern and instills a definite end to the delay. Under the French revision, the objective end (the *délai-butoir*) is twenty years.<sup>262</sup> However, we propose that a possible Louisiana revision should avoid the blunder that was made under the French revision by clarifying that a right accrues regardless of the subjective knowledge of the rightholder. Otherwise, by invoking the discovery rule, an action can exist for an indefinite duration because prescription has not begun to run. The aim of the *délai-butoir* is to provide balance to the various modes of suspending or delaying the running of prescription, and without a meaningful

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261. See *supra* notes 193-196 and accompanying text.

262. C. CIV. art. 2232 (2010) (Fr.).

long-stop period, the balance is tipped significantly to the creditor. The harshness of this rule must be considered against the various compromises made in favor of the creditors.

## VI. CONCLUSION

The parallel faults of prescription in Louisiana and France encountered wide criticism for over 200 years. Our considered reflection of the French revision of prescription is that it is a remarkable achievement and solution to these faults. The titles of prescription now share many of the best qualities of their neighboring titles, and it is proof that prescription is indeed capable of civilian codification. We acknowledge some faults, but just as Louisiana borrowed from the *Code civil* and the French experience as the basis for its early codification, so too can Louisiana borrow from the French revision of prescription. We propose it as a foundation for an overdue revision of prescription in Louisiana, though our recommendation is not for a one-way adoption. The Louisiana experience can facilitate the integration of the revision in France, as the new law is likely to generate issues that are familiar to Louisiana lawyers. The revision is evidence not only of the lasting impact of the *Code civil* in Louisiana, but also the potential for a cross-border fertilization of solutions to parallel problems.