Reconstructing the Grounds for Interdiction

Jeanne Louise Carriere
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INTRODUCTION

A. The Nature of Interdiction

Interdiction, in the civil law of persons, is used to denote two related things. It is, in Demolombe’s words, “la défense faite à une personne d’exercer elle-même ses droits civils,” a prohibition made against a person’s exercising his civil rights himself, achieved by a judgment of a civil court. But the term refers as well to the condition of one who has been stripped of the power to exercise those rights. Though an affinity exists with the common-law institutions of guardianship and, to a lesser extent, conservatorship, the lineage of the interdiction regime in Louisiana’s Civil Code is overwhelmingly French.

The effect of interdiction is a radical displacement of legal identity: it nullifies the interdict’s own actions, and transfers his decision-making powers to a surrogate.

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1. 8 C. Demolombe, Cours de Code Napoléon § 410 (1880).
3. 1 Marcel Planiol & Georges Ripert, Traité pratique de droit civil français § 659 (2d ed. 1952).
4. Traditionally, in common law, a finding of “non compos mentis or incompetence” led to the appointment of a guardian, and as a result “all personal and legal autonomy is stripped from the ward and vested in the appointing court or guardian.” See Prefatory Note, Unif. Guardianship and Protective Proceedings Act, 8A U.L.A. 441 (1982) [hereinafter “UGPPA”]. The impairments that can lead to ward status under the UGPPA (and the Uniform Probate Code, into which it can be integrated) can be physical as well as mental. See UGPPA § 1-201(7), 8A U.L.A. 453 (1982); Unif. Probate Code § 5-103(7), 8 U.L.A. 451 (1991) [hereinafter “UPC”].
6. For the sources of the articles on interdiction in Louisiana’s first comprehensive civil code, A Digest of the Civil Laws Now in Force in the Territory of Orleans arts. 1-30, at 78-82 (1808) [hereinafter “1808 Digest”], see Rodolfo Batiza, The Verbatim and Almost Verbatim Sources of the Louisiana Civil Codes of 1808, 1825, and 1870: The Original Texts 27-30 (1973). The source annotations of Moreau Lislet indicate that the thirty articles on interdiction in the 1808 Digest relied overwhelmingly on French sources; five articles contain material from Spanish sources. See L. Moreau Lislet, A Digest of the Civil Laws Now in Force in the Territory of Orleans 79, 83 (photo reprint 1968) (1808).
The 1804 Code Napoleon7 sweepingly proclaimed that after a judgment of interdiction, "all acts" of the interdict were "void in law."8 The Louisiana Civil Code extends the powerlessness of one under interdiction retroactively from the date of judgment, nullifying "all acts" of the interdict performed since the date of filing the petition for interdiction.9 According to the Louisiana Supreme Court, "[t]here is nothing which he is capable of doing legally."10

Though this statement exaggerates interdiction's effects,11 in the civic, the patrimonial and the personal realms, interdiction hedges the interdict about with restraints. The interdict cannot vote.12 He does not have legal capacity to contract.13 His curator decides for him whether or not he will accept a donation.14 Except in certain narrowly defined instances, the interdict lacks procedural capacity to sue.15 His spouse can appoint another person to be tutor of his children after her death;16 even regarding such intimate decisions as whether or not to remain married17 and where to live,18 the interdict cannot enforce his

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7. In this article, the 1804 Code civil des françois will be referred to as the Code Napoleon to distinguish it from the present French Civil Code.


9. La. Civ. Code art. 401. Planiol criticized retroactivity of the judgment of interdiction, believing it to be inconsistent with its purpose, which was the establishment of a new status. 1 Planiol & Ripert, supra note 3, at 231.


11. For example, an interdict can make a valid will during lucid intervals; see Succession of Lanata, 205 La. 915, 18 So. 2d 500, 506 (1944); but see Interdiction of Reeves, 187 So. 2d 546, 548 (La. App. 3d Cir.), writ denied, 249 La. 715, 190 So. 2d 234 (1966) (implying interdict cannot make a will). See also, La. Civ. Code art. 1482 for the shift in the burden of proof of his testamentary capacity if the interdiction was judicially declared to be mentally infirm. In addition, an interdict who is not insane is competent to witness a testament; and unless his insanity is shown, the interdicted witness is presumed not to be insane. Succession of Koerkel, 226 La. 560, 567, 76 So. 2d 730, 733 (1954).


17. One commentator has suggested that the curator has no power to initiate the interdict's divorce; see Paul M. Adkins, Note, Omnipotent or Impotent? The Curator's Role in Separation and Divorce, 43 La. L. Rev. 1019, 1039 (1983). If that is the case, then the interdict, who under Louisiana Code of Civil Procedure article 684 cannot himself file suit for divorce, is powerless to initiate the dissolution of his marriage.

choices. In the light of the limitations that interdiction places on its subject's actions, Louisiana courts have repeatedly, though not entirely accurately, described the judgment of interdiction as "a pronouncement of civil death."

B. The Importance of the Grounds

Thus, through interdiction, a civilian legal system selects some of its members and excludes them from important powers available to the rest. The initial question that the law must face is who should be made subject to these limits on their self-determination. The grounds for interdiction indicate determining characteristics that mark those persons as different and relegate them to a place among the disempowered. Roman civil law, for example, permitted interdiction of a prodigal and appointment of a curator to act for a lunatic. The Code Napoleon provided a type of interdiction by operation of law for the most serious criminal offenses: genuine civil death, which resulted in the opening of the condemned person's succession, dissolved his marriage, and deprived him of almost all civil rights. Civil interdiction, however, could be pronounced under that code only in cases of imbecility, insanity, and madness. The French civil law thus employed exclusion from its powers as the means to cope with what historian of ideas Michel Foucault has called the "disorder of hearts."

19. Doll v. Doll, 156 So. 2d 275, 278 (La. App. 4th Cir. 1963); see also, Pons v. Pons, 137 La. 25, 27, 68 So. 201, 202 (1914) (interdict is enrolled "as one civiliter mortuus"); Interdiction of Reeves, 187 So. 2d 546, 548 (La. App. 3d Cir.), writ denied, 249 La. 716, 190 So. 2d 234 (1966) (quoting Doll); Interdiction of Haggerty, 519 So. 2d 868, 869 (La. App. 4th Cir. 1988) ("[a] judgment of interdiction amounts to civil death"); Interdiction of F.T.E., 594 So. 2d 480, 485 (La. App. 2d Cir. 1992) (quoting Doll). The interdict is not, however, a non-person at law, as one who underwent civil death would be; his legal identity remains, but its active role is taken on by the curator. For the literal meaning of "civil death," see infra text accompanying notes 23-24.

20. Interdiction thus illustrates Martha Minow's theory that categorizing on the basis of difference is the hallmark of law. See Martha Minow, Making All the Difference: Inclusion, Exclusion, and American Law 1-4 and passim (1990).

21. Under the Roman law only prodigals were interdicted; lunatics, though under a curator, were not subjected to the formalities of interdiction, though while the madness lasted, the curatorship had the effect of interdiction. 8 Demolombe, supra note 1, §§ 416 and 431. See also Dig. 27.10.1 (Ulpian, Sabinus 1) (Alan Watson trans., 1985).

22. 8 Demolombe, supra note 1, § 416; Barry Nicholas, An Introduction to Roman Law 96 (1962).

23. C. Nap. arts. 22-33. These articles were abrogated by la loi du 31 mai 1854, and a more moderate form of legal interdiction was adopted. See 1 C. Demolombe, Cours de Code Napoléon Appendice §§ 2 and 4 (1860). It was in turn abrogated by loi no. 92-1336 du 16 decembre 1992, revising articles 1 to 477 of the Code penal. See Code pénal art. 29.


25. C. Nap. art. 489.

26. Michel Foucault, Madness and Civilization: A History of Insanity in the Age of Reason
The Louisiana Civil Code borrows the grounds for civil interdiction from the Napoleonic Code and provides that “[n]o person above the age of majority, who is subject to an habitual state of imbecility, insanity, or madness” shall retain control of his person and his estate. But the Louisiana regime throws its net far wider than that of the Code Napoleon. In a departure from its French ancestor, it adds, in Article 422, the expansive possibility that “[n]ot only lunatics and idiots are liable to be interdicted, but likewise all persons who, owing to any infirmity, are incapable of taking care of their persons and administering their estates.”

A more recent code article empowers the court to pronounce a “judgment of limited interdiction” for mental retardation, mental disability, imbecility, insanity, madness, or other infirmity, against persons incapacitated in either of the areas listed in Article 422. Moreover, an 1890 statute, reenacted in 1932, creates the opportunity to interdict “[a]ny person who is an inebriate or habitual drunkard and by reason thereof incapable of taking care of his person and of administering his estate.”

Side by side with the Louisiana regime’s expansive tendency is a counter-vailing streamlining. In jurisprudential interpretation, the apparent meanings of the grounds shift; they then coalesce or are pared away in a trend toward a single ground for interdiction: mental infirmity that incapacitates the person’s decision-making powers, whether with regard to his body, his property, or both. Both the expansion and the contraction of the grounds have their sources in a drive to bring them into conformity with their role in achieving the regime’s social purpose. But the court’s interpretive approaches have not succeeded in doing so.

In this article, I shall first examine the purpose underlying the regime of civil interdiction. It was conceived as a protective measure that supplied substitute decision-makers only for those who, in theory, were unable to make choices themselves. The grounds play a significant role in the regime’s protective scheme, for they were intended as a mechanism to distinguish those who needed this assistance from everybody else. Yet a glance at the jurisprudence reveals that they have not played their role well, but instead have allowed the regime to be diverted from its protective purpose as Louisiana courts struggle, not always successfully, to bring it back on course. To determine the reasons for the failure of the legislative grounds and of the jurisprudential interpretation of them, parts II and III examine two models on which they operate. Part II analyzes a model of the

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30. La. R.S. 9:1002 (1991). Additionally, the Veterans’ Guardianship Law provides for a curator to administer moneys paid to an incompetent veteran by the Veterans’ Administration and the Social Security Administration. See La. R.S. 29:351-374 (1989). It is akin to limited interdiction. See Francis v. Francis, 529 So. 2d 110, 111 (La. App. 4th Cir. 1988). But the ground for appointment is that the veteran “has been rated incompetent on examination by the veterans administration in accordance with laws and regulations governing the veterans administration.” La. R.S. 9:355 (1991). It is governed by federal regulations, rather than by the interdiction regime.
grounds that makes inclusion in the regime depend on membership in one of three categories of infirmities that in theory preclude autonomy; suspicion of the theory resulted in failure of this methodology. In part III, I examine the model of the grounds for interdiction that is based on the functional ability of the proposed interdict. The grounds used in this model appear to be explicitly correlated to the goals of the regime. However, the tests of functional ability are phrased in such broad language that their meaning is unclear. The conclusion suggests a revision of the grounds of interdiction to link them to the goal that the regime was designed to serve.

I. THE DUAL PROTECTIVE PURPOSE OF THE REGIME

A. The Interests Protected

Though interdiction can serve other goals, civil interdiction in civil-law systems has a protective purpose. It provides a means for the interdict and others to avoid negative consequences that would occur if he were permitted to perform legal acts. In the Roman law, interdiction of prodigals existed in order to protect both the family and the interdict himself by preventing dissipation of his property. In the Louisiana regime as well as in that of the Code Napoleon, interdiction was conceived as a form of benevolent paternalism. The French exegete Demolombe identified three interests that interdiction protects: That of the interdict, that of the family, and that of the state. Demolombe envisioned the state’s interest as protection of its citizens from the danger that insane persons presented. The Louisiana Supreme Court has also identified the “safety and welfare of society” as a protected interest. But interdiction also, it has stated, protects society by sparing it the “pitiable spectacle” of its courts enforcing contracts against the mentally infirm. Interdiction protects family members as well, “so that the acts of a demented person may not ruin in advance a succession,” according to Planiol. Family interests, though, do not appear particularly compelling to the Louisiana courts, which ignore them or chide family members for bringing interdiction suits for the sake of their own “convenience.”

31. Interdiction by operation of law under the Code Napoleon was punitive. See 1 Demolombe, supra note 23, § 191.
32. Nicholas, supra note 22, at 96.
34. 8 Demolombe, supra note 1, § 421.
35. Id. Judicial commitment was, however, available without interdiction. 1 Massip, supra note 8, at 20-21.
36. Interdiction of Gasquet, 136 La. 957, 967, 68 So. 89, 93 (1915).
38. 1 Planiol & Ripert, supra note 3, at 215 (all translations by the author).
39. Interdiction of Lemmons, 511 So. 2d 57, 59 (La. App. 3d Cir. 1987): Interdiction of
By far the most important purpose of the Napoleonic and the Louisiana regimes is protection of the interest of the interdict. Planiol describes the regime of interdiction as "judicial protection," for interdicts "may have dealings with dishonest persons who would take advantage of them and rob them."\(^4\) The Louisiana Supreme Court identified the purposes of the regime as both "the preservation of the proposed interdict’s rights of property" and "the safety of her person."\(^4\) So primary were the interdict’s interests in Louisiana that in one opinion the state supreme court identified them as the sole purpose of the regime: "The law has established measures of protection for the interdict only."

\**B. Bipolar Rhetoric**

The language in which Louisiana opinions characterize interdiction swings back and forth between two poles. On the one hand, they frequently stress the benevolent paternalism that motivates placing an interdict under the regime. It offers the interdict a "benefit"\(^43\) and manifests the law’s "solicitude"\(^44\) through the "kindly and proper offices on the part of the law’s agents";\(^45\) it operates, in modern parlance, in the "best interest" of the interdict.\(^46\) One member of the Louisiana Supreme Court offered a paean to the regime’s protective function: "[T]he books speak of the decree of interdiction as a merciful decree, as one guaranteeing to the sufferer every care and hope of cure, free from the danger which might otherwise flow from the selfishness, the depravity, the interested motives of individuals."

On the other hand, the same regime that drew these praises for its benevolence is also termed "harsh."\(^48\) Louisiana courts hyperbolically liken it to the Code Napoleon’s punitive and shameful "civil death"\(^49\) and, with equal

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4. Planiol & Ripert, supra note 3, at 211 (all translations by the author). See also, Watson, 31 La. Ann. at 764 (White, J., dissenting): "[T]he interdiction is ... required to protect the defendant from being defrauded by any misguided exercise of his now diseased will."


43. Pons v. Pons, 137 La. 25, 50, 68 So. 201, 210 (1914); Calderon, 50 La. Ann. at 1156, 23 So. at 910.

44. Calderon, 50 La. Ann. at 1156, 23 So. at 910.

45. Id.


48. See, e.g., Interdiction of Adams, 209 So. 2d 363, 364 (La. App. 4th Cir. 1968); Interdiction of Salzer, 482 So. 2d 166, 167 (La. App. 4th Cir. 1986); F.T.E., 594 So. 2d at 485; Interdiction of Denham, 554 So. 2d 836, 837 (La. App. 1st Cir. 1989), writ denied, 558 So. 2d 587 (1990).

49. See supra note 19 and text accompanying notes 23-24.
exaggeration, claim that the interdict "has no legal existence."\textsuperscript{50} In \textit{Francke v. His Wife}, the Louisiana Supreme Court characterized the petition for interdiction as a request "to destroy" and "to enslave."\textsuperscript{51} Slavery is an appropriate metaphor for the condition of the interdict because, like the slave, he cannot impose his will upon his own life; "[t]he effect of such a judgment [of interdiction] would be that, not only the property, but the very will, the body, the privileges and the liberty of [the proposed interdict] would be placed in the charge of a curator. His curator could tell him where to live, how to spend his money and where he could go."\textsuperscript{52} Like the dead man, the interdict himself is legally a cipher; he does not exist "except through his curator, in whom 'he lives, moves, and has his being.'"\textsuperscript{53} Like the slave and the dead man, the interdict is without autonomy.

The rhetoric of interdiction in Louisiana jurisprudence thus expresses a duality within the regime: the institution is benevolent and oppressive. Since it excludes persons from the exercise of civil powers, the second descriptive strain appears more appropriate than the first. The origin of the view of the interdiction regime as benevolent must be sought in the theory that underlies its creation, the theory that autonomy is the prerequisite of legal capacity. Legal theory that takes the autonomous individual as a prerequisite for legal empowerment has been under attack by feminists and by communitarians.\textsuperscript{54} But it is a theory that underlies much of the civil law,\textsuperscript{55} and has provided the justification for the existence of the regime of interdiction. Inconsistencies in the application of the grounds may be traced to a failure to remember its primacy, and correcting these within the framework of the Code requires taking this theory into account.

C. Interference with the Will

1. The Theory in the Code Napoleon

The Code Napoleon offered three forms of mental infirmity—imbecility, insanity, and madness\textsuperscript{56}—as grounds for interdiction, but Baudry-Lacantinerie declared, "In reality, there is only one cause of interdiction: mental alien-
To the French commentators on the code, the nature of mental alienation made all three infirmities appropriate bases for excluding from legal power the person who exhibited any one of them. Alienation deprived the afflicted person of the service of his intellect: the imbecile because he could not receive and retain perceptions and the insane and the mad because their perceptions were divorced from reality. The deprivation of intellectual faculties signalled a lack of freedom of will. Demolombe cited one school of contemporary medical opinion to the effect that "as soon as an intelligence has ceased to be healthy on a point, there are no more free and voluntary actions."

To the commentators on the Code Napoleon, intellectual faculties and the freedom of will that resulted from them gave "legal value" to acts. The very nature of the afflictions from which the imbecile, the insane, and the mad suffered excluded them from legal empowerment, and placed all their actions outside the civil realm. In the words of the Tribune Tarrible, "[the demented person] cannot bring to civil acts the discernment and the will that form their essence. Nature, in casting him in this deplorable state, has worked his interdiction before it were pronounced by a judgment." According to Baudry-Lacantinerie, because interdicts by their natures lacked "moral freedom sufficient for them to act and conduct themselves," the legislature established interdiction to protect them.

Thus the encroachment of the listed infirmities on the will legitimated the interdiction regime's paternalism; this is underscored by contrasting the grounds in Article 489 with potential grounds that were not included, prodigality and physical infirmity. Under the ancient laws of France, prodigals had been subject to interdiction.

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58. 1 [France, Conseil d'état] Motifs et discours prononcés lors de la publication du code civil, par les divers orateurs du conseil d'état et du tribunat 275 (1841) [hereinafter "Conseil d'Etat, Discours"] (all translations by the author); 8 Demolombe, supra note 1, § 419. Madness was considered merely a more intense form of insanity. See infra text accompanying note 89.
59. 8 Demolombe, supra note 1, § 418 (cause of interdiction is absence of reason and free will).
60. 8 Demolombe, supra note 1, at 290 (all translations by the author).
61. 1 Planiol & Ripert, supra note 3, at 211 (all translations by the author). According to Alison Barnes, the present-day English system of guardianship retains a similar traditional perspective that "[the mentally ill] are not free, so their liberty interests cannot be diminished. Theoretically and historically, an inquisition imposed guardianship only when its members believed that the person before it had already lost his or her autonomy." See Barnes, supra note 5, at 669.
62. Conseil d'état, Discours, supra note 58, at 273 (all translations by the author).
63. 4 Baudry-Lacantinerie, supra note 57, at 719 (all translations by the author). See also the remarks of Tarrible in Conseil d'état, Discours, supra note 58, at 275: "From the lack of this faculty derives, on the one hand, the powerlessness to administer, to act, to express an enlightened will on the things that interest them [the mentally impaired]; and on the other hand, the need to return to a tutor the governance of their person and their property." (all translations by the author).
64. 8 Demolombe, supra note 1, § 690; 1 Planiol & Ripert, supra note 3, at 250.
debated whether to permit continuation of that practice. Members of the Conseil "feared to undermine individual liberty (for the prodigal, they said, had all his intellectual faculties)." Prodigality did not, in the eyes of the Conseil, deprive prodigals of intellect and hence of free will. Rather, they had chosen a course of action that they could, led by the "torch of experience," change. Will trumped all; despite the deleterious effects of their conduct on themselves, on their families, and even on the state, the Code Napoleon did not include provisions to prohibit them from performing legally valid acts. The Tribune Bertrand de Greuille observed, when contrasting the remaining grounds for interdiction with the omitted ground of prodigality, "[I]f the prodigal exceeds all proportion in his expenditures, one can say at least that he acts thus because he has the right, and above all, a very constant will; whereas the demented person can will nothing by himself; because the will supposes a thought that precedes it and determines it, and the demented does not have thought, properly speaking: he has only the fleeting whims of an incandescent and disturbed imagination."

Using this theory of lack of autonomy to justify interdiction also meant excluding physical causes that did not implicate the mental faculties, and hence the will. The commentators rejected the suggestion that Article 489 could provide grounds for interdicting the elderly, deaf-mutes, or drunks unless their infirmities resulted in mental impairment interfering with their ability and their freedom to make decisions. Without the loss of the will, it was unnecessary to exclude them from legal power; if the physically infirm person had difficulty effecting his will, he could himself choose a mandatary.

2. Encroachment on the Will in the Louisiana Regime

The legislation and jurisprudence in Louisiana echoes the sentiments of the Conseil d'État and the French commentators: The judgment of interdiction recognizes in law a powerlessness that exists in fact, rather than effecting a removal of powers. The dissenting justice in Interdiction of Watson, who

65. See 2 [France, Conseil D'État] Discussion du conseil d'État et du tribunat sur le code civil, avant la redaction definitive de chacune des lois qui le composent 269-72 (1841) (hereinafter "Discussion").
66. 8 Demolombe, supra note 1, § 691 (all translations by the author).
67. Conseil d'État, Discours, supra note 58, at 271 (all translations by the author).
68. Id. at 271. See also, 1 Planiol & Ripert, supra note 3, at 250-51, and 8 Demolombe, supra note 1, § 691.
69. 1 Planiol & Ripert, supra note 3, at 253. The Code Napoleon permitted appointment of a judicial advisor to assist the prodigal, but his role under the law was "altogether passive," according to Planiol. Id. (all translations by the author).
70. Conseil d'État, Discours, supra note 58, at 271 (all translations by the author).
71. See 1 Charles C. Aubry & Charles C. Rau, Droit civil français 821 (7th ed. 1964); 8 Demolombe, supra note 1, § 436; 1 Planiol & Ripert, supra note 3, at 212-13. Judicial advisors could be appointed for these individuals; see id. at 249.
72. See 8 Demolombe, supra note 1, at 436; 1 Planiol & Ripert, supra note 3, at 213.
protested reversal of that interdiction because he considered its subject to be "bereft of reason," observed that in such cases the regime of the code "provide[s] the inflexible and disinterested will of the law, as a shield, as a protection where the natural will no longer exists."73 According to the supreme court of the state, "[t]he judgment decreeing interdiction does not create an incapacity to act; it is merely evidence of the existence of that incapacity."74

Article 426 of the Louisiana Civil Code, which prohibits "[i]nterdicting . . . on account of profligacy or prodigality,"75 further supports the theory that the regime's benevolent purpose limits its compass to those who, because of an intellectual infirmity, lack the will to avoid self-destructive conduct. Like the prodigal, the profligate wilfully behaves in self-destructive ways; he "is an abandoned, dissolute, vitiated, depraved, vicious, wicked person, ruined in morals, abandoned to vice, lost to virtue or decency, extremely vicious, shamelessly wicked . . . who has lost all regard for principles of virtue and all decency."76 Though profligacy was sometimes called "moral insanity,"77 it lacked the hallmark that made insanity a ground of interdiction, the crippled will.78

Thus, interdiction derives its characterization as benevolent not just from what it does, but from whether it does what it does for someone, or to him. If it fills a void where a person's will should be with a proxy decision-maker and the oversight of a court, it is empowering. If it imposes an outsider's will on the person's own, it is enslavement, for it deprives him of his most fundamental rights and liberties. For the benevolence of interdiction to be realized, the regime had to incorporate a means for distinguishing those who retained the will to make decisions regarding themselves and their patrimonies from those who did not.79 The duality of the language is the duality of the regime's protective purpose: it supplied autonomy where it was lacking by nature and shielded it where it existed, through the mechanism of the grounds. Thus, the grounds are the cornerstone of the regime, for they serve this differentiating function.

They have not, however, served it well. The grounds did not prevent Justus Francke from obtaining at trial the interdiction of his wife in order to prevent her from securing control of half the community property by divorcing him after he

74. Succession of Lanata, 205 La. 915, 933, 18 So. 2d 500, 506 (1944)
76. Interdiction of Gasquet, 136 La. 957, 963, 68 So. 89, 91 (1915).
77. Gasquet, 136 La. at 964, 68 So. at 91 ("authorities on insanity and psychology call profligacy moral insanity").
78. The court rejected the contention that an "irresistible impulse" could coexist with sanity, as the doctrine of moral insanity claimed. Id. (citing State v. Lyons, 113 La. 959, 37 So. 890 (1904)).
79. According to Martha Minow, a similar theory governed the definition of the incompetent in common law: "The law grants rights of autonomy and self-determination to most but devises special rules for those whom the legal system deems incapable of exercising these qualities." Minow, supra note 20, at 126-27.
had installed his concubine in the bedroom next to hers. They did not prevent the interdiction of F.T.E., who had managed to live on his own and to turn a $185,000 inheritance into an estate worth $890,000, despite crippling multiple sclerosis; as a result, he was wrenched from his home involuntarily and for over two years deprived of control of his estate by his brother and his brother's lawyers, who were likened by one appellate judge to the sharks in Hemingway's *The Old Man and the Sea.* Nor did they protect Betty Jean Goldsmith, whose husband secured an interdiction judgment in order to force his aging, overweight, paraplegic, but intellectually competent wife of forty-two years from their community home by this means, thus sidestepping the risk and the expense of divorce. Any hope that these cases are exceptional is destroyed by regarding the sorry assortment of characters that parades through the jurisprudence: the jealous siblings, the domineering parents or spouse, the children who wish to forestall their co-owning father from demanding a partition of property, the collateral relations of an elderly childless wealthy bachelor who has turned spendthrift, the relatives looking for a way to warehouse the non-committable elderly in nursing homes against their will. Rather than furnishing a shield for the incompetent, the grounds of the interdiction regime often appear to provide a weapon for the self-interested.

In their efforts to keep the regime to its dual protective purpose, the appellate courts have found that they cannot rely on the grounds contained in the articles and statutes of the regime. Instead, they have relied on their own creativity in reinventing those grounds. But the jurisprudential modifications are not always clearly linked to the inability that justifies invoking the protection of interdiction, the inability to function autonomously. As a result, the modified grounds, like the original legislation, can produce results inconsistent with the purpose of the regime.

81. Interdiction of F.T.E., 622 So. 2d 667, 674-75 (La. App. 2d Cir. 1993) [hereinafter *F.T.E. II*].
82. *F.T.E. II*, 622 So. 2d at 674 (Brown, J., dissenting) ("I am reminded of Hemmingway (sic) . . . where Santiago lost his catch to sharks who tore off large chunks of meat, 'like a pig to a trough'").
84. See, e.g., Interdiction of Taliaferro, 231 La. 394, 402, 91 So. 2d 578, 581 (1956) (son's evidence for interdiction merely indicated that interdict preferred daughter to son); Interdiction of Ohanna, 230 La. 384, 387, 88 So. 2d 665, 667 (1956) (attempt to interdict spouse to prevent dissolution of community); Interdiction of Scuro, 188 La. 459, 463-67, 177 So. 573, 574-75 (1937) (father and brothers secured interdiction of woman after she transferred property to sister); Interdiction of Lepine, 160 La. 953, 107 So. 708 (1926) (suit to interdict 25-year-old daughter following her elopement); Jeanis v. Jeanis, 202 La. 717, 719-20, 12 So. 2d 691, 691-92 (1943) (suit by sons to interdict aged father to prevent partition of co-owned property inherited from their mother); Nalty v. Nalty, 222 La. 911, 918, 64 So. 2d 216, 219 (1953) (wealthy elderly childless spendthrift bachelor interdicted on brothers' petition); Interdiction of Lemmons, 511 So. 2d 57, 59 (La. App. 3d Cir. 1987) (elderly woman with multiple physical problems interdicted and placed in home against her will).
II. The Essentialist Grounds for Interdiction

A. Essentialism and Functionalism

The grounds for interdiction in Louisiana embody two approaches designed to achieve the purpose of the regime. The first, that of Article 389, is—to adapt Michel Foucault’s term—essentialist; that is, it postulates infirmity as an essence anterior to, and independent of, behavior. Like the French code article that served as its model, Article 389 lists three categories of mental infirmity: imbecility, insanity, and madness. It licenses interdiction of the person entirely by virtue of his falling into one of them. Existence of the infirmity itself, not any act of the person, signals the loss of volitional power that justifies interdiction.

The second approach, that of Articles 422 and 389.1, and of Louisiana Revised Statutes 9:1001-1004, does not ground interdiction on the existence of an infirmity per se. An infirmity must exist, but the test of the loss of volition that necessitates interdiction is, in this model, an inability to care for one’s person or to manage one’s property, or both, causally related to the infirmity. Because this approach relies on functional incapacity, it will be termed “functionalism.”

B. Imbecillite, Demence, Fureur: Mental Infirmity as Essence in the Code Napoleon

1. The Nature of the Grounds

Only essentialist grounds for interdiction appeared in the Code Napoleon. Article 489 described the conditions under which interdiction should take place: “The major who is in an habitual state of imbecility, insanity, or madness must be interdicted, even though the condition presents some lucid intervals.” The three words imbecillite, demence, and fureur denoted three species of mental illness distinguishable by their characteristics, according to the Tribune Tarrible’s explanation of the passage to the French legislature:

Imbecility is a feebleness of mind caused by the absence or the obliteration of ideas.

Insanity is an alienation that denies to him who is taken with it the use of his reason.

85. Michel Foucault, Mental Illness & Psychology 6 (1954; Alan Sheridan trans., 1976). I am indebted to Professor Ina Rae Hark for referring me to this work.
88. C. Nap. art. 489 (all translations by the author).
Madness is only insanity carried to a much higher degree, which pushes the insane person to actions dangerous to himself and to others.\textsuperscript{89}

According to Baudry-Lacantinerie, the legislators intended by this list a "complete table" and an "exact nomenclature" of mental alienations.\textsuperscript{90} Illnesses that fell outside of these three categories could not motivate a judgment of interdiction, as Dalloz' jurisprudential annotations to the Code Napoleon indicate.\textsuperscript{91}

2. \textit{Objections to the Essentialist Model}

As Tarrible described the essentialist categories, they supplied grounds for interdiction consonant with the protective purpose of the regime. Each was characterized by a lack of mental capacity, which theoretically disabled the will.\textsuperscript{92} Yet French jurists reacted to the tripartite provision in the Code Napoleon by repeating Tarrible's descriptions of the differing pathologies\textsuperscript{93} and then dismissing them. According to the commentators, essentialism failed because it divorced the grounds for interdiction from the goal of the legal regime. Two reasons existed for the failure: First, it tied the grounds for interdiction to an outmoded scheme for pigeonholing mental illnesses. Second, even if the scheme were modernized, the essentialist approach was offensive because medical considerations usurped legal ones.

At the end of the eighteenth century, medicine was undergoing a transformative revolution\textsuperscript{94} of the type described by Foucault: "Not only the names of diseases, not only the grouping of systems were not the same; but the fundamental perceptual codes that were applied to patients' bodies, the field of objects to which observation addressed itself, the surfaces and depths traversed by the doctor's gaze, the whole system of orientation of this gaze also varied."\textsuperscript{95} The transformed gaze was directed at mental infirmities as much as at physical ones; one of the influential nosographers of the period, Pinel,\textsuperscript{96} was a celebrated alienist, from 1793 the chief physician at the mental institution of Bicêtre.\textsuperscript{97}

\textsuperscript{89} 1 Conseil d'État, Discours, \textit{supra} note 5, at 275 (all translations by the author).
\textsuperscript{90} 4 Baudry-Lacantinerie, \textit{supra} note 57, at 719 (all translations by the author).
\textsuperscript{91} 1 Edouard Dalloz & Charles Verge, \textit{Les Codes Annotes: Code civil annoté et expliqué d'après la jurisprudence et la doctrine} 326, §§ 8-15 (1873).
\textsuperscript{92} For the relationship between mental infirmity and the will, see \textit{supra} notes 59-72 and accompanying text.
\textsuperscript{93} See, e.g., 8 Demolombe, \textit{supra} note 1, § 419; 4 Baudry-Lacantinerie, \textit{supra} note 57, at 718; 1 Planiol & Ripert, \textit{supra} note 3, at 211.
\textsuperscript{95} \textit{Id.} at 54.
\textsuperscript{96} \textit{Id.} at 176-77.
\textsuperscript{97} Foucault, \textit{supra} note 85, at 89.
But this new learning had not made its way into the code article, and Demolombe complained of the inexactitude and insufficiency of the divisions in Article 489 when compared with the classifications of Pinel. Article 489 omitted severe mental illnesses recognized in Demolombe's day, such as "la manie" and "la melancolie ou la monomanie," as grounds for interdiction.

Moreover, Demolombe concluded, after comparing Pinel's descriptions to those of his contemporary Georget, that even more modern psychiatric thought offered neither unanimity nor certitude in classifying mental illnesses; relying on such classifications risked ignoring the end for which the regime was created. To make medical diagnosis the basis of a judgment of interdiction thus would abdicate the judicial function to the uncertainties of medical science. The issue should be whether the goal of interdiction mandated the paternalistic intervention of the regime. "It is not a matter, for [the judiciary], to search more or less scientifically for the influence of this or that cerebral lesion on the faculties of man in general, but to know, in fact, if this person, that one asks to interdict, retains still a sufficient understanding of the matters of civil life, a suitable aptitude to provide for the ordinary and common method of administration of a patrimony."

Other commentators likewise adopted attitudes toward contemporary psychiatric thought ranging from respectful skepticism to outright disdain. Baudry-Lacantinerie argued against "giv[ing] to article 489 a strict interpretation based on the sense that the modern alienists attach to the words imbecility, insanity, madness." Planiol flatly refused to apply the definitions because of the poverty of scientific theory: "From the point of view of the law the classification of mental diseases, which is still badly defined, is a matter of indifference."

3. Reinventing the Grounds

Convinced that Article 489's essentialist theory could not be reconciled to the purpose of the regime, the commentators shifted the ground for interdiction to the functional capability of the individual. The test, as Planiol described it, was whether the deranged person's illness made him unable to care for his person and manage his patrimony. Interdiction should be possible for any mental infirmity that produced these effects, but only for those that produced

98. Demolombe, supra note 1, § 420.
99. Id.
100. Id. § 423.
101. Id. § 422 (all translations by the author).
102. Baudry-Lacantinerie, supra note 57, at 719 (all translations by the author). Baudry-Lacantinerie took issue, though, with Demolombe's criticism of the legislature for these flaws. See id. at n.1.
103. Planiol & Ripert, supra note 3, at 212 (all translations by the author).
104. 1 Planiol & Ripert, supra note 2, § 2039.
these effects.\textsuperscript{105} Planiol's summary of the findings of fact that cropped up in most of the judgments suggests the type of capacity that could block interdiction. Magistrates examined whether the defendant "understands the value of things; if he knows the meaning of that which he writes; if he remembers what he has done; if he is capable of putting up some resistance to his instincts or spontaneous impulse (l'impulsion du premier venu)."\textsuperscript{106} The French jurists brought the grounds for interdiction into conformity with its purpose by transforming them from essentialist to functionalist without the benefit of legislative action.

\section*{C. Essentialist Grounds in Louisiana}

In the Louisiana Civil Code, the Code Napoleon's essentialist model of the grounds for interdiction appears in Article 389: "No person above the age of majority, who is subject to an habitual state of imbecility, insanity or madness, shall be allowed to take care of his own person and administer his estate, although such person shall, at times, appear to have the possession of his reason."\textsuperscript{107} Though the English text of the Digest of 1808 and the Code of 1825 appeared to offer only habitual "madness or insanity" as grounds for interdiction,\textsuperscript{108} the controlling French texts of these code articles allowed it for those in "un état habituel d'imbécillité, de démence, ou de fureur,"\textsuperscript{109} mirroring the enumeration of impairments for which interdiction was recommended in Article 489 of the Code Napoleon.\textsuperscript{110}

\subsection*{1. Asking the Wrong Question}

The Louisiana jurisprudence interpreting Article 389 illustrates the justice of the French commentators' complaints concerning the essentialist model of the grounds for interdiction. To use Article 389, the judges had to struggle to reconcile contemporary medical diagnosis with the categories of derangement in the code, without regard for its relationship to the underlying question, the effect of the infirmity on the subject's decision-making capability. When Justus Francke petitioned to interdict his wife "for habitual imbecility and insanity," the court's first task after recounting the facts was to seek the medical definitions of the terms in handbooks of medical jurisprudence and in the writings of French alienist Esquirol.\textsuperscript{111} The cases brought under Article 389 feature protracted discussions of fine points of medical terminology, such as the distinction between

\begin{itemize}
  \item \textsuperscript{105} Id. \textit{See also} 1 Aubry & Rau, \textit{supra} note 71, at 821.
  \item \textsuperscript{106} 1 Planiol & Ripert, \textit{supra} note 2, at 712-13.
  \item \textsuperscript{107} La. Civ. Code art. 389.
  \item \textsuperscript{108} La. Civ. Code art. 389 (1808).
  \item \textsuperscript{109} La. Civ. Code art. 389 (1808).
  \item \textsuperscript{110} \textit{See} C. Nap. art. 489.
  \item \textsuperscript{111} Francke v. His Wife, 29 La. Ann. 302, 302-05 (1877).
\end{itemize}
"idiocy" and "imbecility," the precise characteristics of the latter, its difference from "weakness of mind," the definition of "insanity" and whether "senile dementia" qualified as one type.

The cases dealing with senile dementia illustrate the analytical difficulty that the essentialist model creates for the Louisiana courts. Senile dementia, also known as organic brain syndrome, is a condition usually caused by cerebral arteriosclerosis in persons of old age. Louisiana courts have recognized it as "one of the forms of insanity contemplated by Article 389." The effects of that impairment on capabilities vary, but reading Article 389 literally means that interdiction will inevitably result from the diagnosis.

That, the state supreme court maintained in Pons v. Pons, was how the article had to be read. The elderly defendant suffered from senile dementia yet sounded as though she would have passed Planiol's tests for capacity. The trial court had heard testimony that she was able to decide on purchases, bargain with tradesmen and mechanics, give orders to employees, and visit with friends in a manner that "seemed normal for one of her age and physical strength." It denied the interdiction as unnecessary. But the supreme court reversed; not the defendant's circumstances, but the law necessitated the interdiction. "If the defendant now before the court be insane, and was insane during the trial in the district court, how can the court escape the discharge of the duty, imposed by the lawmaker in mandatory terms, of so declaring [the interdiction]?"

Interdiction of Watson illustrates the other side of the analytical problem. According to both the majority and the dissent, Watson had suffered a mental condition that impaired his decision-making power; his mother looked

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115. Id. at 303-04.
117. Interdiction of Salzer, 482 So. 2d 166, 167 (La. App. 4th Cir. 1986).
119. Reeves, 187 So. 2d at 547. See also, Andrus, 136 La. at 825, 67 So. at 895 ("The various authorities on medical jurisprudence define 'senile dementia' as one of the forms of insanity").
120. Reeves, 187 So. 2d at 549. What had traditionally been termed "senile dementia" is recognized to include a variety of organic mental disorders that differ in the extent to which they affect intellectual functions, both among themselves and in the course of their development. See American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 107, 119-123, 162 (3d ed. 1987) [hereinafter "DSM-III-R"].
121. Id. at 35, 68 So. at 201, 205 (1914).
122. Id. at 35, 68 So. at 204.
123. Id. at 48, 58 So. at 205. The trial court appeared to rely on Article 422.
124. Id. at 48, 68 So. at 209.
125. Id. at 50, 68 So. at 210.
126. 31 La. Ann. 757 (1879) (reversing interdiction of man found to be feeble-minded rather than insane).
127. Id. at 758 and 762.
after him, while his stepfather administered Watson’s large estate. The supreme court reversed the interdiction; Watson, it found, was not “in that condition which requires the interposition of a court to pronounce his interdiction.” The Pons court later maintained that “the judgment [in Watson] was placed upon the ground that the evidence failed to make out a case of insanity, calling for interdiction.”

The Watson court was preoccupied with finding the appropriate psychiatric label for Watson’s condition, as its exploration of the difference between “idiocy” and “imbecility” makes clear. The supreme court rejected the trial court’s ground for interdicting Watson, imbecility, finding that he suffered from a lower order condition, weakness of mind. As to the other possibility, insanity, the court concluded, “[H]e is not labouring under insanity . . . but rather . . . is afflicted with a permanent feebleness of intellect,” which would not blossom into “dementia” if he received proper treatment. Watson’s diagnosis fell outside the categories of Article 389; hence, his interdiction was reversed.

Yet despite Watson’s failure to fit into one of the categories, the facts call for interdiction with unusual urgency. Watson had no autonomy that interdiction could curtail; he was already utterly controlled by his relatives. He required protection from possible neglect and exploitation by these unsupervised caretakers. The district judge of Tensas parish had moved ex officio for the interdiction because he had observed Watson in a state of apparent neglect.

Although the real property that Watson’s stepfather administered for him appeared to be flourishing, the expenditure of its substantial revenues, along with money that Watson had inherited from his father, had never been accounted for. Because Watson’s mother, sister, and half-brother were among his presumptive heirs, his person and his estate were in the hands of those whose financial interests ran counter to his interest in recovering, obtaining control of his wealth, marrying, and fathering children. If the court had affirmed the interdiction and had appointed his mother as curator, the judgment would have

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128. Id. at 760-61. Because of their activities, later cases interpreted the Watson decision to establish a requirement of actual necessity before interdiction could be pronounced. See Hargrave, supra note 87, at 182-84 (esp. n.47).
129. Watson, 31 La. Ann. at 760. The majority described him as unable to care for his person and to manage his property, but did not explicitly discuss the applicability of Article 422.
130. Pons v. Pons, 137 La. 25, 49-50, 68 So. 201, 210 (1914).
132. Id. The court found Watson’s malady to be the same as that of Mrs. Francke, in Francke. In that case, the court had rejected the suggestion that she was an imbecile and had found her to suffer from “weakness of mind.” Francke v. His Wife, 29 La. Ann. 302, 307 (1877).
133. Id. at 762 (White, J., dissenting). A judge may initiate interdiction proceedings on his own motion if the family fails to act. See La. Civ. Code art. 391.
134. Id. at 764 (White, J., dissenting).
imposed restraints on her authority, but would not have necessitated what she purported to fear, his removal. But whether Watson required the law’s protection was not, to the majority, the issue; the issue was only whether he could be labelled “imbecile” or “insane.”

Not only the outdated rigidity of the essentialist model, but also its abdication of judgment to medical science appears in the application of Article 389. In *Doll v. Doll*, the court of appeal, faced with an eighty-one-year-old victim of stroke and mild skull fracture, affirmed the lower court’s interdiction on the basis of medical testimony. A psychiatrist who had seen the defendant three times had diagnosed Doll as having irreversible organic brain syndrome (senile dementia) attributable to arteriosclerosis, possibly aggravated by the stroke. The psychiatrist had not considered that Doll’s mental confusion might be a temporary result of his head injury, for the doctor had not known of it, but when informed, he discounted it as a source, for confusion from an injury would not have persisted “over a period of weeks.” Doll, though, had appeared to improve; the doctor also discounted that circumstance as a “plateau” reached by patients with organic brain syndrome, who “appear to be better” for a period, then go into their inevitable decline.

The court, in upholding Doll’s interdiction, abandoned to the medical profession its decision-making function. Both the psychiatrist and a neurologist offered not only their medical diagnoses, but their conclusions that Doll’s illness had rendered him incompetent to manage his considerable wealth. Because his brother had instituted the suit for interdiction while Doll was hospitalized, Doll had not had the opportunity to prove them wrong by returning to the community and the court declined to test whether these predictions were true: “We do not think that a court should withhold pronouncing a judgment of interdiction merely because the defendant has not publicly manifested, to his detriment, his incapacity to manage his person or his estate.”

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137. See, e.g., La. Civ. Code art. 415 (1870) (applying rules respecting the tutorship of minors applied to curatorship of interdicted majors, and hence requiring such protections as security or a legal mortgage on the property of the curator, and an accounting); La. Civ. Code art. 418 (requiring that the interdict’s income be used to mitigate his infirmity); La. Civ. Code art. 423 (requiring court approval to remove interdict from state); La. Civ. Code art. 424 (continuing oversight of interdict’s care by court). Watson’s mother may have feared that she would not be selected as curator at the family meeting.


139. Id. at 763 (White, J., dissenting).

140. 156 So. 2d 275 (La. App. 4th Cir. 1963).

141. The court purported to perform a functionalist analysis, but see infra, text accompanying note 248.

142. *Doll*, 156 So. 2d at 277.

143. Id.

144. Id.

145. Doll had amassed a quarter-million dollar estate in his career as a loan shark. Id. at 276.

146. Id. at 278.

147. Id.
Demolombe had feared, medical opinion concerning the general effect of an illness was transmuted by the essentialist model into the holding of a court of law depriving a particular individual of his civil powers.

2. Avoiding the Essentialist Model

Faced with the lack of fit between the protective purposes of the interdiction regime and the categories of mental impairments in Article 389, Louisiana courts have devised two strategies for avoiding the effects of essentialism. The first is to discredit the medical diagnosis on which it relies without discarding the essentialist premise. The second, revolting against the approach in *Pons*, departs from the essentialist model altogether by requiring that a need for the interdiction exist before it can be pronounced.

a. Discrediting the Medical Evidence

Like the French treatise writers confronting the science of psychology, Louisiana courts are sometimes doubtful about the value of medical evidence of mental impairment. In *Francke v. His Wife*,\(^\text{148}\) the concurring opinion in the first hearing scorned psychology as a "fallible" or "deceitful science" that offered only a "flickering light" as guidance to the court.\(^\text{149}\) Less skeptical judges have doubted the reliability of medical testimony because of the circumstances under which the opinion was formed, and the possibility of prejudice on the part of the physician. Psychiatric opinion, the court pointed out in *Francke*, may be based on a single interview.\(^\text{150}\) The prospective interdict may be nervous and confused, not only because of "a consciousness on the part of the sufferer that she is undergoing a test of her sanity,'', but also because of physical stress. The trial court judge in *Pons* rejected the physicians' testimony as a reflection of the elderly defendant's usual condition. They had examined her only while she was being held prisoner by one faction of her children, of whom she appeared to be afraid, after her grandson had kidnapped her at gunpoint in front of her home.\(^\text{152}\)

Prejudices that diminish the value of expert testimony may result from a philosophical viewpoint, such as the doctor's opinion, cited in the first hearing of *Interdiction of Reeves*,\(^\text{153}\) that "courts should be very liberal, instead of very strict, in pronouncing interdiction of the aged."\(^\text{154}\) It could also be caused by

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149. Id. at 309-10 (DeBlanc, J., concurring).
150. Id. at 305.
151. Id.
152. Pons v. Pons, 137 La. 25, 32, 58 So. 201, 204 (1914) (quoting opinion of trial court).
153. Interdiction of Reeves, 187 So. 2d 546 (La. App. 3d Cir.), writ denied, 244 La. 716, 190 So. 2d 234 (1966).
154. Id. at 551.
familiarity with the proposed interdict's history. In the rehearing of Francke, the state supreme court discredited one physician's diagnosis of the wife's imbecility by suggesting that his recollection of treating her for "eclampsie puerperale" seven years earlier had played a role in it: "He went to, and left her, with the unremoved conviction that she was insane."\textsuperscript{155}

Demolombe urges resistance to medical encroachment on the role of the law in interdiction, and the Francke court agreed.\textsuperscript{156} But its decision did hinge on medical opinion. Faced with evaluations from four physicians who stated that Mrs. Francke was an imbecile, four who said she was nearly one, and strong motivations for avoiding interdiction,\textsuperscript{157} the Francke court performed its own diagnosis: "[The circumstances of Mrs. Francke's life] have been reviewed with care to show that her affliction can not be classified as the imbecility defined by the alienists from whose works we have quoted. It cannot therefore be assigned a higher grade in the category of mental diseases than weakness of mind—faiblesse d'esprit."\textsuperscript{158} Substituting the court's medical opinion for that of the physicians may have brought about justice in the Francke case, but it did not reconcile the grounds for interdiction with the purpose of the regime.\textsuperscript{159} If it were appropriate for a medical diagnosis to provide the grounds for interdiction, then medical professionals would be the best qualified to determine whether the grounds exist; the fact that a court can "count votes" on the issue demonstrates the folly of using it this way.\textsuperscript{160} A court that takes the essentialist grounds seriously cannot avoid substituting medical judgments for legal ones, for essentialism's premise is that the diagnosis \textit{vel non} of a particular medical condition should have legal results. It is that premise that divorces the grounds of Article 389 from the purpose of the regime.

\textit{b. Requiring a Showing of Incapacity}

A second, more radical technique for bringing the grounds of Article 389 into line with the goals of the regime was to abandon essentialism and to look for evidence that the proposed interdict required the regime's protection. The

\textsuperscript{155} Francke, 29 La. Ann. at 314.
\textsuperscript{156} Id. at 305.
\textsuperscript{157} Mr. Francke, who had taken a concubine into his home and left his wife in her mother's care, sought the interdiction in order to be appointed curator and prevent his wife from securing a divorce that would necessitate the payout of $20,000 in community property.
\textsuperscript{158} Francke, 29 La. Ann. at 307. See also id. at 314 (on rehearing), where the court flatly contradicts the medical experts' interpretation of their conversation with Mrs. Francke.
\textsuperscript{159} The supreme court's dabbling in medical diagnostics is one reason for the result in Interdiction of Watson, 31 La. Ann. 757 (La. App. 1879): "[t]he case is almost a complete parallel to that of Mrs. Francke. The malady of both is the same." Id. at 760.
\textsuperscript{160} Compare the first hearing in Interdiction of Reeves, 187 So. 2d 546 (La. App. 3d Cir.), writ denied, 249 La. 716, 190 So. 2d 234 (1966), in which the court's first count of the medical opinions came out against interdiction, with the rehearing, in which a recount produced a preponderance in favor. Id. at 553.
Louisiana Supreme Court employed this modification in denying a rehearing in Francke, an interdiction sought for "habitual imbecility and insanity".\(^{161}\)

Under our law, to justify such a sentence, three causes are indispensable:

- First—The indisputable incapacity to administer one's estate.
- Second—The absolute inability to take care of one's person.
- Third—An actual and unavoidable necessity to interdict.\(^{162}\)

The first two causes are found in the writing of the French commentators, where they transformed the only grounds for interdiction under the Code Napoleon from essentialist to functionalist; they occur in Article 422 as well. The test of actual necessity had appeared in the concurrence to the first opinion in Francke.\(^{163}\) Subsequently, the supreme court, in Pons,\(^{164}\) attacked it as a departure from the plain requirements of the code.\(^{165}\) Later jurisprudence ignored Pons and imposed the three-part test as a requirement for interdiction on Article 389 grounds.\(^{166}\)

Despite its instrumentalist design, the three-part test does not eradicate the discrepancy between grounds and purpose of the interdiction regime.\(^{167}\) Aside from that, adding the test as a requirement to the grounds of Article 389 made them superfluous by assimilating them in the infirmities of Article 422. The first two elements of the test restate the grounds for interdiction under the literal language of Article 422. The jurisprudence under that article has made the third element a requirement as well.\(^{168}\) Thus, the grounds in Article 422 have


\(^{162}\) Id. at 315. However, the court at this time recharacterized the Article 389 grounds of Francke's petition as Article 422 grounds. Id. at 313.

\(^{163}\) Id. at 309 (DeBlanc, J., concurring).

\(^{164}\) Pons v. Pons, 137 La. 25, 68 So. 201 (1914).

\(^{165}\) See supra text accompanying notes 251-252.

\(^{166}\) See, e.g., Interdiction of Giaccona, 158 La. 148, 154, 103 So. 721, 723 (1925) ("[T]he evidence is overwhelming that Giaccona is insane, and satisfies us that there is a necessity for his interdiction. He is clearly incapable of caring for his person and property."); Landry v. Landry, 171 La. 280, 130 So. 866 (1930) (suit brought under Article 389, but incapacities and actual necessity must be shown as prerequisites to judgment of interdiction); Jeanis v. Jeanis, 202 La. 717, 719, 12 So. 2d 691 (1943) (allegation of "habitual state of imbecility and insanity"); evidence "falls short of showing that the defendant was so senile he was incapable of managing his estate"); Calderon v. Martin, 50 La. Ann. 1153, 1155, 23 So. 909, 910 (1898) (the law "authorizes the interdiction of one who, because of mental incapacity, is unable to properly protect himself and manage his estate"); Doll v. Doll, 156 So. 2d 275, 276-77 (La. App. 4th Cir. 1963) ("In interpreting Article 389, our appellate courts have asserted that three factors must concur before a judgment of interdiction will be pronounced"); lists Francke factors); Interdiction of Reeves, 187 So. 2d 546 (La. App. 3d Cir.), writ denied, 249 La. 716, 190 So. 2d 234 (1966) (listing Francke factors). The supreme court did not discuss this test in Watson, in either the majority or the dissent, though the management of his property by others was at issue.

\(^{167}\) See infra text accompanying notes 195-263.

\(^{168}\) See, e.g., In re Corbin, 187 La. 968, 175 So. 636 (1937); Interdiction of Adams, 209 So.
overtaken those of Article 389, which differ only in that the latter require that the proposed interdict’s infirmity not only incapacitates him, but fits into an archaic medical category as well. When Article 389 appears in recent jurisprudence, it is invariably accompanied by Article 422, under which the analysis is performed.169 Encountering its essentialism in the Code is like finding a fossil in a living forest.

3. Divertissement: Interdiction of Inebriates—Essentialist Wine in Functionalist Bottles

The Louisiana statute providing for interdiction of inebriates or habitual drunkards originally represented a departure from the rest of the interdiction regime.170 At first glance, the present version of the statute and its ancestor both appear to operate on a functionalist model. Act 100 of 1890, which created this class of interdicts, required that the interdict had to be “unable to support himself or his family.”171 Under the present statute, the inebriate must be “incapable of taking care of his person and of administering his estate”172 to sustain interdiction. But in two cases involving Fernand Gasquet, a drunkard and morphine addict, the supreme court gave an essentialist interpretation to the 1890 act.173 In using a functional test, the court presented a roadblock to interdicting Gasquet, who had no dependents and a large inheritance.174 His interdiction was pronounced nonetheless, on the grounds that it was required for “the safety and the welfare of society.”175 The court’s refusal to lift Gasquet’s interdiction in Gasquet II suggests its reasons for giving an essentialist spin to a functional test. The interdiction of inebriates did not rest its protections on the theory that the interdict’s ability to act willfully had been eroded; on the contrary, the court interpreted the statute to apply to a person who was able “to exercise some self-control” and was capable of controlling his property.176 It deprived the inebriate of power, rather than recognizing a powerlessness that already existed in fact. Because the statute

2d 363 (La. App. 4th Cir. 1968); Interdiction of White, 463 So. 2d 53 (La. App. 3d Cir. 1985); Interdiction of Haggerty, 519 So. 2d 868 (La. App. 4th Cir. 1988).
169. Interdiction of Fabre, 371 So. 2d 1322 (La. 1979); Interdiction of Lemmons, 511 So. 2d 57 (La. App. 3d Cir. 1987).
171. 1890 La. Acts No. 100, §1.
173. Interdiction of Gasquet (Gasquet I), 136 La. 957, 68 So. 89, cert. denied, 242 U.S. 367 (1915) (pronouncing interdiction under Act 100 of 1890); Interdiction of Gasquet (Gasquet II), 147 La. 722, 85 So. 884, cert. denied, 254 U.S. 648 (1920) (refusing to lift judgment of interdiction on basis of judgment of Tennessee state court that the interdict, who had moved to Tennessee, was neither insane nor incapable of controlling his property).
174. Gasquet I, 136 La. 957, 68 So. 89.
175. Id. at 968, 68 So. at 93.
176. Gasquet II, 147 La. at 733, 85 So. at 888.
was not aimed at preserving the proposed interdict's extant autonomy, his capabilities were irrelevant.\textsuperscript{177}

Considering the frequency of interdictions in Louisiana, it's surprising that \textit{Gasquet I} and \textit{Gasquet II} are the only cases interpreting Act 100 of 1890. The essentialist reading of the inebriation ground may account for the unpopularity of the statute. The revision of Act 100 of 1890 in 1932 did not increase its usefulness; though it incorporated the functionalist language of Article 422 into both its definition of "inebriate,"\textsuperscript{178} and its test of whether grounds for interdiction exist,\textsuperscript{179} no case has been reported under the statute. It has, like Article 389, become unnecessary. Because habitual drunkenness is now recognized as an infirmity,\textsuperscript{180} the present statute offers grounds indistinguishable from those of Article 422.

\section*{III. THE FUNCTIONAL MODEL OF THE INTERDICTION GROUNDS}

Interdiction under Articles 422 and 389.1 of the Louisiana Civil Code, like that under the jurisprudential interpolations to Article 389, theoretically does not follow from categorization, but from incapability. For the protective intervention of the state to be consistent with the purpose of the regime, the incapability must reflect an incapacity of the decision-making powers—the power to receive information and to process it. Article 422 provides, "Not only idiots and lunatics are liable to be interdicted, but likewise all persons who, owing to any infirmity, are incapable of taking care of their persons and administering their estates."\textsuperscript{181} Until 1981, Article 422 was subject to the criticism that its requirement of incapacity in two fields left outside of the protection of the regime individuals who required limits on their activities and the care of a curator in one area of life.\textsuperscript{182} The adoption of Article 389.1 was intended to remedy this problem.

\begin{itemize}
\item \textsuperscript{177} See \textit{id.} at 733, 85 So. at 888 ("[A] judgment absolving of insanity (as that term is ordinarily understood), and recognizing ability to control self and property, does not absolve of the cause of the interdiction . . . ").
\item \textsuperscript{178} The statute defines an inebriate or habitual drunkard as "a person who has formed the inveterate habit or custom of getting drunk by the constant and confirmed use of spirituous, malt, or fermented liquors, whereby intoxication is produced and continued to such an extent as to deprive him of self control, and causing such a state of mental confusion as to render him incapable of taking care of his person and of administering his estate." La. R.S. 9:1001 (1989) (emphasis added).
\item \textsuperscript{179} "Any person who is an inebriate or habitual drunkard and \textit{by reason thereof is incapable of taking care of his person and of administering his estate,} shall be liable to be interdicted." La. R.S. 9:1002 (1989) (emphasis added).
\item \textsuperscript{181} La. Civ. Code art. 422.
\end{itemize}
Article 389.1 provides, "When a person is declared incapable by reason of mental retardation, mental disability, or other infirmity under the provisions of Article 389 or 422 . . . of caring for his own person or of administering his estate, a court of competent jurisdiction may appoint a limited curator to such person or his estate." Article 389.1 does not create new grounds for this new type of interdiction, called "limited interdiction." Though the categories "mental retardation" and "mental disability" give it an essentialist flavor, interdiction for these impairments had in fact been possible under Article 422, provided they produced incapacity to care for the person and the estate. Instead, Article 389.1 incorporates by reference the grounds in the earlier code articles.

The functionalist analysis of the grounds for interdiction that has emerged under these articles may include four elements: (1) whether the subject of the interdiction suffers from an infirmity causally related to incapability; (2) whether he can care for his person; (3) whether he can care for his estate; and, in an element invented by the jurisprudence, (4) whether an actual necessity for the interdiction exists. While interdiction under Article 422 demands that all four elements exist simultaneously, limited interdiction under Article 389.1 requires only (1), (4), and either (2) or (3).

Though functionalism appears to provide a more purposeful method of determining whether interdiction is warranted, both the language of the elements in the code articles and their interpretation in the jurisprudence undermine its potential to do so. The elements are phrased very broadly; they do not explicitly limit either the infirmities to those that affect the will or the resulting dysfunctions to those of the decision-making powers. Judicial attempts to bring the elements in the code into line with the regime's purpose have reduced their possible meanings, but not always in a manner consistent with the theory of the disabled will that underlies that purpose.

A. "Infirmity"

The sweeping language of Article 422 and Article 389.1 includes a wide range of infirmities that can serve as an element in the grounds for interdiction. Article 422 explicitly authorizes interdiction for any infirmity, provided that it is causally related to incapacity. Article 389.1 permits limited interdiction for the infirmities of Article 422, as well as for the two that it specifically names. The rubric of Article 422 indicates that it was intended to allow interdiction for physical infirmity, and it has been the basis for judgments of interdiction in cases.

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183. La. Civ. Code art. 389.1. The second paragraph refers to the judgment as a "limited interdiction." Shortly before the article was adopted, a number of common-law states had devised limited guardianships, principally for the mentally retarded. See Wilkinson, supra note 182, at 185-90.
of paralysis; strokes; the combined effects of high blood pressure, congestive heart failure, kidney failure and strokes; and multiple sclerosis.

Under the theory that underlies the interdiction regime, the infirmities that can result in interdiction should be confined to those that cripple the infirm person’s decision-making powers—his intellect and will—with regard to his person and his property. The sources of Article 422 indicate that it was conceived with such a limitation in mind.

1. The Sources of Article 422

The French commentators had rejected the suggestion that physical infirmity could provide a ground for interdiction under the Code Napoleon, but in pre-code France, deaf-mutes had been subject to interdiction. In the Digest of 1808, the precursor to Article 422 limited the grounds to “certain infirmities” that prevented individuals from caring for their persons and estates, “as is the case with those who are deaf and dumb.” The wording of the article derives from Domat’s 1756 compilation, Les lois civiles dans leur ordre naturel.

The ancient French law permitted interdiction of deaf-mutes in the belief that deafness could result in complete lack of knowledge and atrophy of the intelligence, a perception that may have arisen because, before the era of universal education, few deaf-mutes would have had means by which to communicate what they did know and what their will was. Changes in educational techniques revealed that interdiction for this condition was inappropriate; after the Code Napoleon, deaf-mutes, like everyone else, were only interdictable for mental impairments. An early Louisiana case, consonant with the older French theory, linked the physical condition with a mental one: the family meeting had pronounced an informal interdiction of a deaf-mute because he was “incapable of managing his estate or person, with ordinary judgment and discretion, in consequence of the want of hearing and speech.”

Thus, the grounds for interdiction under the precursor to Article 422 were those physical impairments that, on the analogy to deafness, were believed to

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185. In re Corbin, 187 La. 968, 175 So. 636 (1937); Interdiction of Badalamenti, 529 So. 2d 1376 (La. App. 4th Cir. 1988); Interdiction of Polmer, 141 So. 2d 696 (La. App. 1st Cir. 1961).
186. Interdiction of Lemmons, 511 So. 2d 57 (La. App. 3d Cir. 1987).
188. 1 Jean Domat, Les lois civiles dans leur ordre naturel, pt. 1, liv. 2, tit. 2, § 1 n.13 (1756).
189. 1808 Digest, supra note 6, art. 29, at 82.
190. Batiza, supra note 6, at 29.
191. 1 Planiol & Ripert, supra note 3, at 212.
192. Id. According to Planiol, judicial advisors were frequently appointed for the deaf. See id. at 249. See also, 8 Demolombe, supra note 1, at § 437.
193. Babineau v. Bendy, 7 La. 248, 252 (1834). The informal interdiction was insufficient to create a legal mortgage on the curator’s estate in favor of Babineau. Apparently because the events sued on had taken place in 1821, the case was decided under the Digest.
damage the individual's judgment. Without any explanation in its Projet, the Code of 1825 dropped the illustrative example, but retained the term "certain infirmities." It was not until the Code of 1870 that the all-inclusive adjective "any" appeared. Though Demolombe had strenuously argued against the theory that any mental affliction provided grounds for interdiction on the basis that the purpose of the law was not served by such an absolute position, the Louisiana Supreme Court has expanded the word's coverage to include mental infirmities, as well as physical ones.

2. The Scope of Infirmity

a. An Expanding Universe

The broad phrasing of the first element in the functionalist model and the Louisiana Supreme Court's interpretation suggests that the universe of infirmities is available to fulfill it. Moreover, that universe is expanding, owing to the empire-building tendency of the psychiatric profession. Demolombe expressed a concern that, even given the limited choice of mental infirmities that provided grounds in Article 489 of the Code Napoleon, interdiction could be used against those who could choose, but whose choices were out of the ordinary. He warned against "see[ing] too easily a mental alienation characterized in certain opinions or habits more or less bizarre and eccentric.—Helas! Reason pure and perfect, where is it?"

Unfortunately, Demolombe's warning could serve as a description of the methodology of psychiatric medicine since the nineteenth century. Historians of the field have recognized that mental illness is a socially constructed phenomenon. Through the "medicalization of behavior," aberrant conduct that
had been regarded as the product of choice has become symptomatic of a pathology. Such a process lends itself to the categorization of nonconformity as illness. An example, though hardly the only one, is provided by homosexuality, which moved from the category of a choice to that of a medical problem at the end of the nineteenth century. There it remained until recently; the second edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, a handbook of diagnostic criteria published in 1968, placed homosexuality first on the list of "Sexual Deviations," from which it has been dropped in later editions.

Though the American Psychiatric Association has dropped homosexuality as a diagnostic category, the revised third edition of the Diagnostic and Statistical Manual, or DSM-III-R, is no more insulated from social bias; the inclusion of behavior in its list of over two hundred possible infirmities—a substantial increase over the sixty in the first edition, published forty years ago—may be the result of scientific discovery, of the prejudices of mental health professionals, or of political action. Reliance on criteria produced by such an unstable and inexact field as the mental health profession presents a danger to the correspondence between the functionalist grounds for interdiction and its purpose, for it invites essentialism to return in a more virulent form. "[I]f the social, institutional, and professional canons ... are not checked by the principle of self-determination, competency can come to mean little more than the obedience to the value system of caregiving institutions and professions," and the proposed interdict risks "being judged decisionally incapacitated simply by being sharply and singularly individual, by being decisionally irregular." Interdiction of F.T.E. exemplifies the discrepancy between grounds and ends that can result from giving weight to mental health professionals' findings that idiosyncratic conduct amounts to infirmity. F.T.E. had been diagnosed with multiple sclerosis, but the infirmity for which the court of appeal affirmed a limited interdiction of his person was not physical, but mental. Various physicians gave it various labels—"organic personality disorder" or "mild dementia"—but it came

200. See, e.g., Szasz, supra note 198, 180-206, for the psychiatric profession's long-held theory that masturbation was a type of insanity; and Hansen, supra note 199, at 93.
201. Hansen, supra note 199, at 94-97.
204. DSM-III-R, supra note 120, at 3-10.
205. Brown, supra note 203, at 402-03.
207. 594 So. 2d 480 (La. App. 2d Cir. 1992).
208. Id. at 482. But see DSM-III-R, supra note 120, at 115, 107; there is little correspondence between the criteria listed and the description of F.T.E. in the opinion.
down to this: "F.T.E. denies that he suffers from multiple sclerosis. . . . Expert medical testimony established that this denial, while not unusual, was sufficient to constitute a mental disorder."209

The facts suggest that F.T.E. was capable of understanding the elements that went into the diagnosis of multiple sclerosis. His intellect was in no way impaired by his disease; he managed a substantial stock portfolio profitably.210 Nor did he fail to appreciate the fact that he was incapacitated, for he had developed his own theories about the cause.211 Nor did he have difficulty acting on his determinations: "It is likely, given his history, that F.T.E. would refuse at times to follow his physicians' treatment plan for his physical problems if left unsupervised or attended only by sitters dependent on him for employment."212 The opinion does not supply a basis for concluding that an infirmity had impaired F.T.E.'s decision-making ability, but only for concluding that his decision—which he may have considered confirmed by the fact that failing to follow doctor's orders for ten years had produced no appreciable harm213—did not comport with conventional medical perceptions.

b. **Constraints on "Any Infirmit"**

The Civil Code articles place some constraints on the possible infirmities of the two articles. First, both require a causal nexus between them and the proposed interdict's failure to care for his estate or his person—a nexus that leads to the conclusion that these are motivated by inability, rather than, for example, fiscal irresponsibility or slovenliness. But a court may take causality to have been established by the medical diagnosis itself, which may be based on the behavior. As one psychiatrist has commented, medical models are "deterministic": "From the perspective of the medical model, the 'cause' of disturbing behavior is mental illness rather than the failure or the refusal of the individual to conform to conventional goals and means for achieving them."214

_Nalty v. Nalty_215 illustrates the transformation that behavior undergoes when it is viewed through the veil of a medical diagnosis. Louis Nalty, a childless bachelor and respectable business man of Hammond, amassed "a large fortune" in the first sixty-three years of his life, during which he lived with his mother.216 In a two-year period following her death, to the alarm of his

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210. Id.
211. Id.
212. Id. at 486.
213. Id. at 483.
215. 222 La. 911, 64 So. 2d 216 (1953) (action by nightclub owner to recover on checks written by man who was interdicted after writing them).
216. Id. at 219.
brothers, he spent $150,000 of it in New Orleans' French Quarter. The court's description of the "stupendous escapade" that preceded his brothers' petition for his interdiction makes it appear likely that Nalty was being cheated by two nightclub owners with whom he had become friendly; he parted with almost $8,000 in checks in two days, allegedly to purchase enormous quantities of food and liquor not only for himself, but for anyone who walked into the club, including entire tour groups.

Nalty undoubtedly failed to manage his property in a manner that most people would consider responsible, but the evidence that an infirmity produced in him an incapability to do so was confined to a medical diagnosis: Nalty suffered from "cerebellum arteriosclerosis, or hardening of the arteries of the brain." However, a middle-aged bachelor could be sane and still prefer New Orleans' French Quarter to Hammond and a lifestyle that put him on a first-name basis with nightclub owners and prostitutes to life alone in his late mother's house. Behavior that could have been interpreted as uninterdictable prodigality had become infirmity by virtue of a diagnosis. If the infirmity causes the incapacity by virtue of its coexistence with the incapacity, then causality provides only a slight check on the broad scope of "any infirmity."

Though causality is difficult to prove, the requirement that one or two functional incapacities exist does produce a second, more effective constraint on the infirmities in Articles 422 and 389.1. Their level of success in bringing the grounds into conformity with the goal of the regime depends, however, on whether the generalized dysfunctions in the Articles are limited to those arising out of an impaired ability to make decisions. If they are not, essentialism, freed

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217. Id. at 220. Nalty habitually cashed large checks in bars belonging to two men with whom he had become friendly; the money was untraceable. Id. at 219.
218. Id. at 219.
219. Id. One night club billed Nalty for almost 800 highballs and 100-plus quarts of champagne for the night of September 4, 1949.
220. Id. at 218.
221. Id. at 219. When Nalty's brothers came in search of him, a streetwalker told them that "Mr. Louis" was at a "camp" in Slidell. Id.
222. The virtual uselessness of causality as a limitation on the grounds for interdiction is also illustrated by Interdiction of Taliaferro, 231 La. 394, 91 So. 2d 578 (1956). The interdiction below had been granted when the 83-year-old defendant, who had been converting all her property to cash, withdrawing it from her bank, and placing it in an unnamed location, gave one-word, evasive and incoherent answers below. But what had been the result of infirmity to the trial court was, to the appeals court, the result of her canniness to avoid leaving any money to her estranged son. Id. at 399, 91 So. 2d at 580-81.
from the shackles of Article 389's short list, can creep into the functionalist analysis.

B. The Functional Incapacities Defined

1. Care for the Person

The first incapacity required for interdiction under the functional model of the grounds is that the proposed interdict be incapable of caring for his person. Because the issue is the decision-making capacity of the proposed interdict, the jurisprudence tests for more than just the physical ability of the interdict to feed, clothe, and bathe himself, and maintain hygienic living quarters. The Louisiana Supreme Court held in Landry v. Landry that one "whose capacity is limited to the mere dressing and undressing of herself, to making up beds and sweeping floors, is not, in legal intent, such a person as may be held capable of caring for her person," for "the inmates of insane asylums perform acts of that character daily." A line of cases to the same effect have followed. The court looks to see if the acts of the subject are "those of an automaton," or if they show instead "initiative... mental suggestion and direction."

It is appropriate for courts to evaluate acts of self-care by looking for an intelligence behind them. When the situation is reversed, and lack of physical self-sufficiency is accompanied by intelligence, the courts of appeal appropriately deny interdiction. Thus, in F.T.E. I, the court of appeal did not pronounce the limited interdiction of the defendant on the basis of his "conceded physical incapacity"; though it was virtually complete, "appropriate staff can meet his physical needs." In Interdiction of Goldsmith, the lower court had pronounced limited interdiction of the person "on the single finding of fact that [the interdict] was unable to care for her own person because of a physical infirmity"; her husband, the petitioner, had stipulated to medical findings that she

223. 171 La. 279, 130 So. 866 (1930).
224. Id. at 283, 130 So. 867.
225. See, e.g., In re Corbin, 187 La. 968, 974, 175 So. 636, 637 (1937) (defendant's manual labor does not defeat evidence of incapacity; "[i]t is common knowledge that inmates of insane asylums work on farms and do many chores..."); Interdiction of Adams, 209 So. 2d 363, 367 (La. App. 4th Cir. 1968) (ability to perform household duties, clothe self, and conduct self to table was insufficient to overcome evidence of incapacity; "[a] normal seven year old child is capable of doing those things").
226. Landry, 171 La. at 283, 130 So. at 867.
228. Id. at 486. The limited interdiction of the person was pronounced for his "mental disorder."
229. 456 So. 2d 198 (La. App. 3d Cir. 1984).
was "mentally competent." The appeals court reversed, demanding "something more."

Considering the purpose of the interdiction regime, that "something more" should have been a relationship between the physical limits on Ms. Goldsmith's care for her person and an impairment of her decision-making abilities. Lack of a capacity for self-governance, rather than mere lack of personal self-sufficiency, should be the test for the first element of incapacity. Without it, courts may be tempted to permit paternalistic interference into an area so intertwined with human dignity—the governance of one's body—that it demands the greatest respect for individual choice; "beneficent intentions can breed unchecked authority over those who are served or helped." Unfortunately, the jurisprudence has not phrased the test for personal incapacity under the functional model to demand incapacity of the decision-making powers. It requires only that the proposed interdict be "unable to take care of his or her person."

The temptation to forget the purpose of the regime can prove irresistible, as the lower court's decision and the dissent on appeal in Goldsmith illustrate. Though the dissenting judge admitted to Ms. Goldsmith's mental competence, limited interdiction, he repeated three times, was in the defendant's "best interest," because of the content of her decisions. The discomfiting image of the overweight Ms. Goldsmith, with her enemas and catheters, her wheelchair and hydraulic lift, made her determination not to move to a rest home, in his eyes, a "refus[al of] treatment" that was "proper and dignified."

The fact

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230. Id. at 199-200. Betty Jean Goldsmith's husband had obtained a limited interdiction of her person under Article 389.1, with the intention of moving her to a nursing home against her will. Ms. Goldsmith was confined to a wheelchair, permanently paralyzed from the waist down by transverse myelitis, and required substantial and strenuous care by her sitters.

231. Id. at 200.

232. Cf. Joel Feinberg's distinction: "There is a sense of 'competent' . . . which is simply 'capable of performing a task,' and another sense, the technical legal one." Joel Feinberg, Harm to Self 319 (1986).


234. Collopy, supra note 206, at 10.

235. See, e.g., In re Corbin, 187 La. 968, 175 So. 2d 636 (1937); Interdiction of Lemmons, 511 So. 2d 57 (La. App. 3d Cir. 1987); Interdiction of White, 463 So. 2d 53 (La. App. 5th Cir. 1985).


237. Id. at 202-04. The dissent exhibited a fascination with Ms. Goldsmith's body size, mentioning it on three occasions. Id. at 204-05.

238. Id. at 205 (Laborde, J., dissenting). There was no evidence that any "treatment" was offered that would better Goldsmith's condition, or that her condition would worsen as a result of home care. Id. at 201.
that Ms. Goldsmith had evaluated the information herself and did not agree did not mean that she should have her way; the dissent saw no "manifest error" in the lower court's decision to interdict her.\textsuperscript{239}

The dissent read the functional-capacity grounds in Article 389.1 as providing a means to impose a choice concerning personal care on the mentally unimpaired physically infirm. The majority had passed up the opportunity to tie the incapacity to the regime's purpose; instead, it maintained that the jurisprudentially created fourth element, "actual necessity for the interdiction," was lacking.\textsuperscript{240} What the functional model of the grounds for interdiction needed, however, was not another vaguely worded requirement,\textsuperscript{241} but a more purposeful definition of the functional incapacity.

2. Administration of the Estate

The second incapacity required by the functional model is the inability to administer one's estate. According to the jurisprudence, mere physical incapacity is insufficient to fulfill this requirement. In \textit{Interdiction of Badalamenti},\textsuperscript{242} the court of appeal refused limited interdiction of the defendant, who was physically incapacitated by a stroke and, in addition, had difficulty speaking.\textsuperscript{243} The benchmark of functional capacity was Badalamenti's intellect and ability to decide. Because he "understood what was communicated to him" and "understood what he wanted,"\textsuperscript{244} the ground for interdiction was not present. Similarly, the court of appeal in \textit{F.T.E.} overturned the lower court's interdiction of his management of his property, despite his near-total physical dysfunction.\textsuperscript{245} "A person need not be physically capable of attending to business matters to avoid interdiction if he is mentally able to manage his affairs with the assistance of agents, family members, or friends."\textsuperscript{246} The functional test in Articles 422 and 389.1 has become in the jurisprudence "mentally incapable of administering his estate."\textsuperscript{247}

\begin{footnotes}
\footnotetext[239]{Id. at 205.}
\footnotetext[240]{Id.}
\footnotetext[241]{The meaning of "actual necessity" is discussed \textit{infra} at text accompanying notes 252-268.}
\footnotetext[242]{529 So. 2d 1376 (La. App. 4th Cir. 1988).}
\footnotetext[243]{Id. at 1377.}
\footnotetext[244]{Id.}
\footnotetext[245]{Interdiction of F.T.E., 594 So. 2d 480, 482 (La. App. 2d Cir. 1992). F.T.E. was completely bedridden, incontinent, and had difficulty reading and handling a telephone.}
\footnotetext[246]{Id. at 485-86.}
\footnotetext[247]{The language was employed by the supreme court in \textit{Interdiction of Fabre}, 371 So. 2d 1322, 1324 (La. 1979); however, in that case, the defendant was not physically impaired. It has since been used to deny interdiction in cases of physical incapability. \textit{See\textsuperscript{248} Interdiction of Lemmons, 511 So. 2d 57 (La. App. 3d Cir. 1987); Interdiction of Dobbins, 535 So. 2d 1079 (La. App. 2d Cir. 1988); \textit{F.T.E. I}, 594 So. 2d at 485. \textit{See also\textsuperscript{249} Interdiction of Denham, 554 So. 2d 836 (La. App. 1st Cir. 1989) (language used, but nature of dysfunction left unclear).}}
\end{footnotes}
In these cases, the courts relied on the proposed interdict’s statements and actions, among other evidence, to evaluate the condition of his mind and will. When the proposed interdict is the victim of a stroke or other infirmity that interferes with speech, it may be impossible to determine whether he retains the mental ability to manage his affairs. The Louisiana Supreme Court suggested that inability to communicate could provide the basis for interdiction in *Stokes v. Kemp.* The victim of sudden, almost total paralysis, who was the defendant in a lawsuit, was “utterly helpless—unable to talk or to use his hands... physically unable to communicate with his attorneys, or to render any assistance in the defense of the suit, or to inform the attorneys whether he has a defense to the suit.” The court analogized the defendant’s situation to that of one who had become insane and considered that an action under Article 422 could be brought in his situation. One whose mind and will cannot be perceived by observers in effect lacks the powers of both.

Though the Article 422 does not literally require it, the jurisprudence tests functional incapacity to administer one’s property by looking for mental dysfunction. If, however, the finding that the interdict suffers from mental infirmity is considered conclusive evidence that he is mentally dysfunctional with respect to his estate, then the court has not truly made functional capacity the test. The court in *Doll v. Doll* purported to apply the functional test, yet accepted the speculation of physicians about the general progress of the illness from which the proposed interdict suffered in concluding that he could not manage his business affairs. Such an interpretation abandons the functional model for a creeping essentialism, and permits interdiction on medical rather than legal criteria.

C. Actual Necessity

The fourth element incorporated into the functional model of the grounds, actual necessity for the interdiction, is a child of the jurisprudence. It first appeared in the opinion denying the motion for rehearing in *Francke* as dictum, for since Mrs. Francke could care for her person, her case did not meet the functional test for interdiction. *Interdiction of Watson* held that interdiction could not be granted despite Watson’s inability to care for his person and property where, in the court’s opinion, no need for it existed, but that is dictum as well. The case appears to have been brought under Article 389 only, and

248. *Stokes v. Kemp,* 186 La. 754, 173 So. 305 (1937). The case is not an interdiction, but a request for continuance of the lawsuit in which the paralyzed man was defendant.
249. *Id.*
250. *Id.* Whether the condition of the defendant justified interdiction was not before the court.
251. See supra notes 140-143 and accompanying text.
254. *Id.* at 760-61.
the analysis, finding that Watson did not fit into its categories, is pure essentialism.\textsuperscript{255} In \textit{Pons v. Pons},\textsuperscript{256} the court explicitly ruled that no necessity beyond the grounds in the code articles needed to be shown: “The necessity arises . . . from the obligation, imposed upon the courts, to obey the mandates of the law . . . .”\textsuperscript{257}

Subsequent interdiction cases have ignored \textit{Pons}, and continue to list actual necessity as a requirement for interdiction.\textsuperscript{258} For many years the phrase was meaningless, for the requirement was fulfilled by the functional incapabilities found in the first two elements of these grounds.\textsuperscript{259}

More recently, actual necessity has been revived. In \textit{Interdiction of Goldsmith},\textsuperscript{260} the court of appeal maintained that Article 389.1 “has unquestionably installed into [limited] interdiction the requirement that there be proof that an actual necessity for the interdiction exists” and overturned the limited interdiction of the person for lack of actual necessity.\textsuperscript{261} It based its holding on the provision that, “[S]uch curator shall have only those powers necessary to provide for the demonstrated needs of the incapacitated person.”\textsuperscript{262} The analysis is dubious, for the statement deals not with the grounds for interdiction, but with the powers of the curator once the grounds have been found to exist. Actual necessity is still jurisprudential; it reconciles the way the grounds are expressed and the purpose of the regime.

In cases in which the prospective interdict is physically unable to care for the person but still capable of making decisions, no actual necessity for interdiction exists, either because the needs (determined and communicated by the proposed interdict) are being met by others, or because they can be so met. In \textit{Goldsmith}, the former situation existed; there was “no showing . . . that she has needs which are not being presently satisfied” by her sitters and, in a minimalist fashion, by her husband.\textsuperscript{263} In \textit{Interdiction of Lemmons},\textsuperscript{264} the court reversed the interdiction of the elderly subject, who had multiple physical problems, because her limitations could be overcome by the “gracious assistance” of her niece and the very daughter who had sought the interdiction.\textsuperscript{265} Though interdiction in \textit{Goldsmith}’s and \textit{Lemmons}’ circumstances is inappropriate, relying

255. See supra text accompanying notes 122-129. But see Hargrave, supra note 87, at 182-83.
256. 137 La. 25, 68 So. 201 (1914).
257. Id. at 209.
258. Hargrave, supra note 87, at 183-84.
259. Id.
261. Id. at 201.
263. Goldsmith, 456 So. 2d at 201. For a description of the demands on Cecil Goldsmith, see id. at 200.
264. 511 So. 2d 57 (La. App. 3d Cir. 1987).
265. Id. at 59. Ms. Lemmons’ niece had engineered Lemmons’ escape from the nursing home to which she had been involuntarily removed by her son and daughter. Id. at 58. The responsibility of Lemmons’ son to likewise furnish gracious assistance is not mentioned.
on "actual necessity" to avoid it is equally so; it has, despite the Goldsmith majority's tortuous reading of Article 389.1, no basis in the Civil Code and a shaky history in the jurisprudence.

Moreover, the term is so vague that it does not provide a genuine criterion for evaluating the need for interdiction. The dissent in Goldsmith, like the majority, believed actual necessity to be a requirement, but meant by the term "a necessity for daily and special attention from others for her physical welfare." This interpretation is consistent with the jurisprudential tradition that found an actual necessity for interdiction in the existence of an incapability. Because of its shifting meanings, "actual necessity" cannot ensure that the functional model will not be used to force the decisions of the curator on competent persons who are capable of making their own decisions but need practical assistance in carrying them out.

Reading "actual necessity" to forestall interdiction from administration of the estate because the proposed interdict has assistance is even more problematic. That incapacity, according to the jurisprudence, a mental one. As the dissent in Watson pointed out, control of such a person's estate by another creates the danger of victimization of the mentally incapable that, in the French tradition of civil law, demands imposition of the regime with its safeguard of judicial oversight.

**IV. CONCLUSION: A PROPOSED REVISION OF THE GROUNDS**

The antecedents of the Civil Code justified the decision to protect a major through the interdiction regime on the theory that it took nothing from him, but supplied what he lacked: the combination of the intelligence to take in and evaluate information, and the will to determine a result from it, that constitutes decision-making capability. To remain true to this theory, the codal and statutory grounds for interdiction should make the incapability the gateway to the regime. The grounds that presently exist do not do so. The ground of habitual drunkenness never operated on this premise. Other grounds that operate on an essentialist model, contained in Article 389, are premised on an outmoded medical conception of both the categories of mental illness and their global effects on the mind and will. The functionalist model of the grounds has also

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266. Goldsmith, 456 So. 2d at 203 (Laborde, J., dissenting).

267. See Interdiction of Adams, 209 So. 2d 363 (La. App. 4th Cir. 1968), in which "all of the medical testimony . . . is that Miss Adams could reside outside of a sanatorium in a nursing home or in her own home provided she had constant competent help from a nurse or companion," yet interdiction was upheld. Id. at 367. Adams had a large house, an estate of almost a quarter of a million 1968-value dollars, and a pension; she had lived with a close friend until the latter's death, when she had, first, a succession of maids, and then, live-in companions. Id. at 364. She had been victimized by a confidence man representing himself as an employee of the New Orleans Sewerage and Water Board. Id. at 365. Actual necessity was found despite the fact that she was able to afford assistance, and had had it in the past. Id. at 368.

failed, for the functional incapacities on which it relies are not confined to those of the decision-making powers. For the Louisiana regime of interdiction to operate within its own theory, revision of the grounds is required.

A. Ridding the Regime of Anachronisms

The first step in the revision process should be the repeal of Louisiana Revised Statutes 9:1001-1004, which has produced no interpretative decisions and are worded so as to constitute merely a narrower version of Article 422. Article 389 should also be repealed. The only thing that has made the interpretive scheme contained in its grounds tolerable is the fact that the courts no longer use them. Since they have coalesced with the functional grounds in Article 422, their appearance in the Code, like their appearance in the cases, serves only a decorative purpose.

B. Repairing the Functionalist Model

Articles 389.1 and 422 provide grounds that properly treat the inquiry as an inquiry into the functional incapacities of the proposed interdict. They must, however, be revised to limit the incapacities to those of the intellect and will. I propose substitution of the following language:

(1) One who is unable to care for his person and to express his decisions with regard to its care shall be interdicted from such care.

(2) One who manifests by his conduct toward his property an inability to administer it, and to make or to express his decisions with regard to the details of its management, shall be interdicted from its administration.

If full interdiction is required, the two articles would both be applied; application of one article would produce limited interdiction. As is the case under the present functional model, these proposals do not limit the types of disorders or disabilities that can lead to interdiction; in fact, they eliminate such nosographical categories as exist at present, for these are relevant to medical decisions, not legal ones. In view of the expansive tendencies of psychiatric diagnostics, adding language to require that “infirmity” or “disorder or disability” be established does not protect the proposed interdict; in fact, by creating the danger of a return to essentialism, it may make inappropriate interdiction easier. Whatever the conclusions of medical science, inability to function should be the sole test in law. To combat the problem of chimerical infirmities creating

269. It may be difficult, though, for the law to forego the reassurance of identifying the interdict as different, however meaningless the requirement of an identified infirmity before the pronunciation of interdiction may be. As Martha Minow has pointed out, labelling others as different, and basing decisions on that label, is not only part and parcel of our legal thinking, but also of our psychic
the grounds for interdiction, along with that of determining whether the causal relationship between dysfunction and infirmity exists, the proposed revisions tie the tests of functional incapacity to the inability to make or to communicate decisions.

When the interdiction sought is that of the person, proposed article (1) would require not only that the proposed interdict be unable to care for his person, but also that he be unable to express decisions \(^{270}\) with regard to that care. The latter requirement introduces a test of decision-making power, thus obviating the equivalence of lack of self-sufficiency with incapacity that motivated the dissenting opinion in *Goldsmith*. By testing the intellect and will through the ability to communicate, such an article would forestall interdiction in cases such as *F.T.E.*, in which the refusal to abide by a program of personal care was translated, via medical diagnosis, into an inability to make decisions concerning it. Like the revised French Code, which removes the methods of medical treatment and the choice of living arrangements from the regime of protection of civil interests, \(^{271}\) the proposed article leaves the protection of those who, like *F.T.E.*, make and express choices with regard to personal care that are believed to stem from mental disorders to the laws of judicial commitment. These require that the person be "suffering from mental illness which contributes or causes that person to be a danger to himself or others or to be gravely disabled." \(^{272}\) Such a limitation places a high barrier against interference in the name of beneficence with individual values and choice in the area of care for the person. \(^{273}\)

When a petitioner seeks interdiction of a person's administration of his property, article (2) would require that the functional incapacity again derive from decision-making incapacity. But an inability to make decisions, as well as an inability to express them, would satisfy the grounds for interdiction. Two reasons justify this difference. First, the high level of protection against interference with individual choice that personal care demands is not warranted for property decisions. Second, no state protection of property equivalent to the

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270. The requirement of an inability to express his wishes is modelled on the regimes of protection for physical incapacity in the revised French Code, which authorizes protection only if the change in the physical faculties "prevents the expression of the will." Code civ. art. 490 (author's translation).

271. Code civ. arts. 490-491. The French Code removes the care of the person from the regime completely because it "apparently was considered to be too dependent on imprecise medical considerations." See Audit, *supra* note 8, at 768.


273. See *supra* note 221 and accompanying text, for the need to accord respect to idiosyncratic decisions in this area.

Presently, two standards exist under which unwanted care of the person can be imposed: those of judicial commitment and those of interdiction. *See Coon, supra* note 182, at 227-28. Reliance on the standards for judicial commitment would end the discrepancy.
state's protection of personal welfare through judicial commitment exists. The interdiction regime is the only option for preserving the estate of those who lack an understanding of the consequences of their actions.

To guard against the essentialist approach of the court of appeal in Doll, which concluded that the subject of interdiction could not manage his estate on speculative medical testimony about the effects of a disease, proposed article (2) requires objective evidence of the individual's failure in this regard. It mandates interdiction if the proposed interdict is incapable of making decisions concerning the details of the management of his estate. This addition is not intended to require that the individual actively engage in such management decisions, but that he be able, like Badalamenti, to understand them if they are explained to him. The intent of the passage is to counter those cases, such as Watson and the lower court decision in Corbin, in which interdiction was denied solely because the incapable individual's property was being managed by another. Such a fact pattern demands interdiction, rather than arguing against it.

Both proposed articles permit interdiction for infirmity-caused functional incapacity accompanied by an inability to express decisions, rather than to make them, in order to provide a ground to interdict those whose incapacity forecloses testing their decision-making power, like the defendant in Stokes. From a functional viewpoint, the intellect and will do not exist without the ability to communicate them.

The proposed articles contain sufficient safeguards against the temptations of essentialism to make superfluous the jurisprudentially created element of the functional model, actual necessity. Under the explicit criteria of article (1), one who, like Ms. Goldsmith or Ms. Lemmons, is physically incapacitated from caring for her person, but is able to communicate her needs to those who can, would not be subject to interdiction. Nor, under the criteria of article (2), would those like Mr. Badalamenti and F.T.E., who could not physically manage their property, but who could oversee agents to carry out its management. However, under that same article, one who is incapable of managing his estate because of a failure of his decision-making powers must be interdicted, regardless of the activities of those who purport to be his agents.

Nothing can insulate the civil-law regime of interdiction from attempts at manipulation by the self-interested. But the law does not have to be their accomplice. By revising the grounds of interdiction in the Civil Code to comport with the theory that justifies the existence of the regime, we would increase the likelihood that it would be implemented only to serve its purpose: protecting the disabled mind and will.