Contra Non Valentem

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Louisiana civilians can both lament and revere the power of their judges to
suspend prescription on the authority of an abbreviated Latin gloss. The contra
non valentem doctrine has become a codifier's nightmare, abrogated by Civil

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Bruce W. Frier of the University of Michigan, who in 1986 chose to teach an undergraduate course
on Cicero's de re Publica, although his students had registered for Imperial Prose.

Cicero's theory of a natural law beyond legislation, as contained in de Legibus, provides a
fortuitous backdrop for a discussion of Louisiana's extra legem doctrine of contra non valentem.
Therefore, all headings in this Article are fragments of de Legibus, which are expanded in the
accompanying footnotes. As an advocate outside the circle of controlling jurists, Cicero himself
might have argued in favor of a notion of contra non valentem derived from principles of natural
justice if he saw the need.

1. Edward Livingston himself vehemently opposed any grant of equity powers to Louisiana's
judges. See Vernon V. Palmer, The Many Guises of Equity in a Mixed Jurisdiction: A Functional
finally called for the recognition of the "inherent equity function" that had developed by judicial
accretion. See id. at 23-24. In the interim, the Louisiana judge has performed triple duty as praetor,
iedw, and jurist, responsible for preserving and developing, while applying, Louisiana's civilian
tradition.
Code article 3467, and affirmed by a nonauthoritative comment to the article.\(^2\) Unsure of neither its analytic place,\(^3\) nor of its proper extent, nor even of its origin,\(^4\) contra non valentem is used by Louisiana judges when they are overwhelmed by the injustice of an impossibly short prescriptive period to engage in a little judicial legislation.\(^5\)

2. **Compare** La. Civ. Code art. 3467 ("Prescription runs against all persons unless exception is established by legislation.") *with* La. Civ. Code art. 3467 cmt. d ("Despite the clear language of Article 3521 of the Louisiana Civil Code of 1870, courts have, in exceptional circumstances, resorted to the maxim contra non valentem non currit praescriptio. This jurisprudence continues to be relevant.") (citations omitted)). See Symeon C. Symeonides, *One Hundred Footnotes to the New Law of Possession and Acquisitive Prescription*, 44 La. L. Rev. 69, 139 n.109 (1983). Symeonides noted the "analytical problem" that comments are not part of the law. Professor Vernon V. Palmer described this analytical problem further:

In a Revision without repeal, the Comments are forced to play an expanded, almost "magical role." They must do more than explain the mechanics of the new provision, or state the underlying theory or intent behind the provision, or issue that often inaccurate assurance that the new article "does not change the law." The comments to this Revision are forced to arrogate to themselves the power to eliminate the provisions of the 1870 Code that are unnecessary and the power to indicate which line of jurisprudence is eliminated, preserved, or still "relevant." Comments possessing such powers should be regarded as magic wands. They defy every law in the juridical universe.


Despite this problem, according to Palmer, "[c]learly this comment can only mean that contra non valentem is retained regardless of what the Code says." *Id.* at 261. The Louisiana Supreme Court also reached this conclusion. See St. Charles Parish Sch. Bd. v. GAF Corp., 512 So. 2d 1165, 1168 n.4 (La. 1987).

3. Courts occasionally mistakenly refer to contra non valentem as interruptive rather than suspensive of prescription. See, e.g., Marion v. Pollingue, 524 So. 2d 25, 32-33 (La. App. 3d Cir. 1988); *see also* La Plaque Corp. v. Chevron USA Inc., 638 So. 2d 354, 358 (La. App. 4th Cir. 1994) (referring to both in the alternative). Analytical incongruity within the doctrine of contra non valentem itself has been noted. See Bennett v. General Motors Corp., 420 So. 2d 531, 536 (La. App. 2d Cir. 1982); *see also* E. Scott Hackenberg, *Puttering About in a Small Land: Louisiana Revised Statutes 9:5628 and Judicial Responses to the Plight of the Medical Malpractice Victim*, 50 La. L. Rev. 815, 824-25 (1990). It is difficult to conceive of the discovery category of contra non valentem as suspensive because the undiscovered action remains unborn. See *id.* at 824. However, civilians long ago discounted the distinction between an action suspended and an action unborn as of little practical importance. See Marcel Planiol & George Ripert, 2(1) Treatise on the Civil Law no. 680, at 368 (La. St. L. Inst. trans., 1939).

4. Courts have been unsure whether contra non valentem is a civilian or common-law hereditas. Compare Compeaux v. Plaisance Insp. & Ent., 639 So. 2d 434, 438 (La. App. 1st Cir. 1994) and Trujillo v. Boone, 539 So. 2d 894, 896 n.1 (La. App. 4th Cir. 1989) (Barry, J.; dissenting) (civil law) *with* Shortess v. Touro Infirmary, 508 So. 2d 938, 943 (La. App. 4th Cir. 1987) and Bennett, 420 So. 2d at 537 (common law). On one occasion, the Louisiana Supreme Court bizarrely used the abbreviated gloss to distinguish the Louisiana doctrine from a civilian ancestor, for which the court used the full maxim. See Crier v. Whitecloud, 496 So. 2d 305, 307 & n.4 (La. 1986). The first circuit once stated that the doctrine was Roman while quoting a prior decision that referred to its common-law origin. See Dagenhart v. Robertson Truck Lines, 230 So. 2d 916, 918-19 (La. App. 1st Cir. 1970) (quoting Keanard v. Yazoo & Miss. Valley R.R., 190 So. 188, 190-91 (La. App. 1st Cir. 1939)).

5. See, *e.g.*, Held v. State Farm Ins. Co., 610 So. 2d 1017, 1019 (La. App. 1st Cir. 1993)
Contra non valentem appears to have originated as a gloss. Medieval scholars, delighting in imposing harmony upon the dissonant chords of Roman law, inferred the principle "prescription does not run against one who is unable to act" from diverse Roman rules, which had governed, among others, the exceptio doli et malus, dies utiles, and the restitutio in integrum. During the evolution of our generic consensual contract, contra non valentem likewise became intertwined with expansive humanist notions of impossibility and will. Contra non valentem was saved by the French judiciary from the revolutionary guillotine of the Code Civil. By the time of its invocation in Louisiana, contra non valentem had been enshrined as a precept of natural law.

Contra non valentem was first invoked by name in a reported Louisiana appellate decision by Justice François-Xavier Martin to suspend prescription for a 120 day period during which the legislature had prohibited the commencement of civil suits. Interestingly, the revolutionary codifier Edward Livingston, as defendant's attorney, might have argued against the validity of contra non valentem in Louisiana. Unfortunately, Livingston's arguments, although often reported during this period, were not reprinted by Justice Martin in this case.

("Here, the completely unrebutted evidence paints a sad picture of an abused young woman struggling almost desperately to regain her human equilibrium while facing a most hostile family environment.")


7. See Baudry-Lacantinerie & Tissier, supra note 6, for a partial list of Roman rules linked by the contra non valentem gloss. Id. at no. 367 n.2. These also include suspension for minority, for public service as a physician, for absence on state business, for captivity, for active military duty, for fulfillment of a condition precedent, and others. See Dig. 44.3.1; Cod. 6.60.1, 7.35.2-.4, -.6, -.8, 7.39.7.4.


9. The redactors of the Code Civil intended that Article 2251 (Fr.), which parallels Louisiana's Civil Code article 3467, be the end of contra non valentem. See Baudry-Lacantinerie & Tissier, supra note 6, at no. 368. The French judiciary, however, preserved the doctrine by interpreting Article 2251 as not applying to external, objective incapacities. See id. at no. 369; see also Allain D. Favrot, The Scope of the Maxim Contra Non Valentem in Louisiana, 12 Tul. L. Rev. 244, 244 n.3 (1938).

10. See, e.g., Rabel v. Pourciau, 20 La. Ann. 131, 131 (1868): This Court has always considered the maxim, "Contra non valentem agere non currit praescriptio," an axiom or first principle of natural law, and notwithstanding the terms of limitation in prescription, contained in the old, as well as the new, Code, have [sic] interpreted these terms in such a manner as to harmonize with this maxim of universal justice.

11. See Quierry's Ex'r v. Faussier's Ex'rs, 4 Mart. (o.s.) 609, 610-11 (La. 1817).


13. According to the trial record, Livingston had asserted in the alternative that the debt had
From this time, the doctrine gradually grew in Louisiana until abruptly killed by the Civil War. Reconstructed, contra non valentem persisted despite benign neglect as a disfavored and ossified doctrine. Finally, equity’s jurist Justice Albert Tate reinvigorated the doctrine of contra non valentem by formally grafting upon it the discovery rule.

prescribed, it had been paid, or there had never been a debt. See Quierry’s Ex’r v. Faussier’s Ex’rs, 4 Mart. (o.s.) 609 (La. 1817) (Docket #190) (Rogers Collection, Archives and Manuscripts/Special Collection Department, Earl K. Long Library, University of New Orleans). Plaintiff’s reply to Livingston’s first defense does not appear in the record. The trial judge seemed unmoved by Livingston’s pleas:

In this case all the circumstances go very far to show that the debt claimed if it ever really existed, has been paid, yet they do not amount to such proof as ought to be required to destroy a written evidence of a debt signed and acknowledged by the testator before a Notary public. Wherefore it is ordered adjudged and decreed that the plaintiff recover of the Defendants the sum of three thousand four hundred and fifty five dollars, with interest thereon from the 20th June 1815 till paid together with costs of suit to be taxed.

Id. Based on this record, it appears that the appellate court may have suspended prescription via contra non valentem sua sponte.


15. Favrot speculated that changes in court personnel during the reconstruction era explains the quick abolishment and reinstatement of contra non valentem. See Favrot, supra note 9, at 250 n.37. Palmer challenges this traditional view. According to Palmer, the temporary disappearance of contra non valentem was a political expediency, saving the court the trouble of ruling on the legality of rebellious acts. See Palmer, supra note 1, at 67 n.250.

16. The courts, at least, perceived contra non valentem as disfavored. See, e.g., Israel v. Smith, 302 So. 2d 392, 393 (La. App. 3d Cir. 1974) (“On the contrary our study indicates that the doctrine of contra non valentem has been given very limited application in Louisiana.”). On disfavored doctrines, see Palmer, supra note 1, at 57-58.

17. Contra non valentem had become fixed in three categorical rules by the mid-nineteenth century:

Where there was some cause which prevented the courts or their officers from acting or taking cognizance of the plaintiff’s action. A class of cases recognized by the Roman law as proper for the allowance of the utile tempus . . . .

Where there was some condition or matter coupled with the contract or connected with the proceeding which prevented the creditor from suing or acting . . . .

Where the debtor himself has done some act effectually to prevent the creditor from availing himself of his cause of action.


18. For a tribute to Justice Tate, see generally George W. Pugh, Jr., A Civilian for Our Times: Justice Albert Tate, Jr., 47 La. L. Rev. 929 (1987).

19. Justice Tate enumerated and qualified a fourth category of contra non valentem:

Where the cause of action is not known or reasonably knowable by the plaintiff, even though his ignorance is not induced by the defendant. (This principle will not except the plaintiff’s claim from the running of prescription if his ignorance is attributable to his own willfulness or neglect; that is, a plaintiff will be deemed to know what he would by reasonable diligence have learned.)

Corsey v. State Through the Dep’t of Corrections, 375 So. 2d 1319, 1322 (La. 1979).
According to Cicero, Socrates rightly vilified him who first severed utilitas from ius, believing that reason linked the two, and that in severance both must perish.\(^{21}\) For both Cicero and Socrates, the reasonable rule was just and vice versa.\(^{22}\) In contrast, our doctrine of contra non valentem was secreted into a perceived gap\(^{23}\) between the reasonableness and fairness of prescriptive legislation.\(^{24}\) Despite Socratic protestations, this gap may be one aspect of law that has truly existed from time immemorial.\(^{25}\)
From the shadowy religious origins of Roman law, in the division of days into fasti and nefasti by pontiffs, the need for counting only those dies that were utiles must have taken root. To require that a person obtain a formula from a praetor tongue-tied on a dies nefasti was to require the legally impossible. By counting only those days on which it was possible to enlist the help of a magistrate toward the time available for performing certain legal acts, the praetor restored both reason and fairness to Roman rules. This is the contra non valentem envisioned by Justice Martin in 1817.

Despite the undeserved Roman reputation for theoretical sterility, Ulpian recognized that dies utiles, because they rested on the plaintiff’s potestas, must also exclude days of vis major, wartime captivity, and political absence. However, dies utiles must include the day on which a plaintiff from his sickbed could have sent an agent before the praetor. Ulpian’s reliance on potestas not only expanded

26. First pontiffs, and later aediles, designated calendar days as nefasti, on which holidays no legislative or judicial operations could occur. See Adolf Berger, Encyclopedic Dictionary of Roman Law 435-36 (1953).

27. See id. at 436.

28. See Quierry’s Ex’r v. Faussier’s Ex’rs, 4 Mart. (o.s.) 609, 610-11 (La. 1817). Dies utiles persist in codified form in Louisiana’s procedural law. See, e.g., La. Code Civ. P. art. 5059. Dies utiles are also the solution of the modern canonist, who divides time into continuous and available: “§ 1. Tempus continuum intellegitur quod nullam patitur interruptionem. § 2. Tempus utile intellegitur quod ius suum exercenti aut persequenti competit, ut ignorantii aut agere non valenti non currat.” Canon Law Society of America, Codex Iuris Canonici c. 201 (1983). Reverend Ramstein explains:

Tempus utile is that which does not transpire for one who is ignorant of his rights, or is unable to exercise or prosecute his rights; tempus continuum is that which suffers no interruption for any cause.

In a case of doubt time must be presumed continuous; if tempus utile is intended the law must expressly state that such is the case. The reason is that it is more in the nature of time that it should run on without interruption.

Reverend Matthew Ramstein, A Manual of Canon Law 107-08 (1948). In canon law, available time most often runs for a few days. See Canon Law Society of America, The Code of Canon Law: A Text and Commentary 113 (1985); see also Codex Iuris Canonici, supra at Canons 179, 1630, & 1734 (allowing available time to run in limitations periods of eight to fifteen days).

The notion of tempus utiles, like full-fledged contra non valentem, is prone to needless analytical subdivision. See Anton F.J. Thibaut, An Introduction to the Study of Jurisprudence 82 (Nathaniel Lindley trans., 1885) (dividing tempus utiles into tempus utile ratione initiit et continuum ratione cursus, tempus continuum ratione initiit et utile ratione cursus, and tempus utile ratione initiit et cursus).

29. Compare Dig. 44.3.1 (Ulpian) (emphasis added):

Quia tractatus de utilibus diebus frequentis est, videamus, quid sit experiri potestatem habere. Et quidem in primis exigendum est, ut sit facultas agendi. Neque sufficit rex experiri secum facere potestatem, vel habere eum qui se idonee defendat, nisi actor quoque nulla idonea causa impediatur experiri. Prome se sit sive rei publicae causa abit sit sive in vinculis sit aut si tempestate in loco aliquo vel in regione detineratur, ut neque experiri neque mandare possit, experiri potestatem non habet. Plan is, que valudine impeditur, ut mandare possit, in ea causa est, ut experiri habeat potestatem. Illud utique neminem fugit experiri potestatem non habere eum, qui praetorius copiam non habui: proinde his dies cedunt, quibus ius praetor reddat.

with Ayres v. New York Life Ins. Co., 54 So. 2d 409, 411 (La. 1951) (“There is no merit in the contention. To begin with, it is manifest that insured’s illness afforded no excuse for the failure to
dies utiles into something closer to medieval contra non valentem but also reminds us of another Roman maxim, impossibilium nulla obligatio est. In Roman law, objective impossibility resulting from impedimentum naturale might also invalidate a stipulatio or an emptio-venditio.  

Even before liberative prescription became the Roman-law rule rather than the exception, the Imperator must have found Roman limitations inconvenient. When his soldiers returned from campaign only to find their rights and property evaporated, the Imperator must have felt the temptation to wield his waning power to restore them. We know that the Republican praetor, relying on his own imperium rather than on his iurisdiction, could grant the restitutio in integrum to restore property lost not only by honorable soldiers but also minors, those absent, and the victims of fraud and duress. In fact, the praetor reserved the right to grant the restitutio for any cause that satisfied his sense of justice and was not prohibited by law. Later, the Emperor, as the ultimate source of imperium, took it upon himself to dispense with prescription as needed in the pursuit of justice.

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30. Zimmermann, supra note 21, at 687-88.

31. On Roman limitations, see Roscoe Pound, I Readings in Roman Law § 27 (1914); see also William L. Burdick, Principles of Roman Law 662 (1938). Emperor Theodosius II limited the life of the residuary category of personal actions, which had previously been immortal, to thirty years. Code Th. 4.14.1-.6 (Clyde Pharr trans., 1952). Theodosius suspended this prescription for minority. Code Th. 4.14.3. The emperor explained the policy of his prescriptive period to a praetorian prefect as follows:

For who can endure that suits shall be instituted which grandfathers and great-grandfathers did not know about?... What other so valid a defense will defeat a wicked litigant if unlimited periods of time which have passed do not protect the defendant?

Code Th. 27.1. Theodosius was warning his prefect to make no exceptions. Code Th. 27.3. Theodosius himself, however, proceeded to make another exception for Roman captives of the Vandals. Code Th. 35.12.

32. See Andrew Borkowski, Textbook on Roman Law 71, 139-40 (1994); see also Berger, supra note 26, at 682.

33. Sheldon Amos, The History and Principles of the Civil Law of Rome 363 (1883). Ulpian provides the language of the edict:

Si cuius quid de bonis, cum is metus aut sine dolo malo rei publicae causa abesset, inve vinculis servitate hostiumque potestate esset: sive cuius actionis eorum cui dies exisse dicetur: item si quis quid usum fecisset, aut qua quod utendo amisit, consecutus, actione qua solutus ob id, quod dies eius exerit, cum absens non defendetur, inve vinculis esset, secumve agendi potestatem non faceret, aut cum eum invitant in ius vocari non licent neque defendenter: cumve magistratus de ea re appellatus esset sive cui pro magistratus sine dolo ipsius action exempta esse dicetur: earun renum actionem intra annum, quo primum de ea re experiundi potestas erit, item si qua alia mihi iusta causa esse videbatur, in integrum restituam, quod eius per leges plebis scita senatus consulta edicta decreta principii licebit.

Dig. 4.6.1 (Ulpian) (emphasis added).

34. It must be remembered that the restitutio in integrum itself had a prescriptive period, which varied with the cause for restitution. See Amos, supra note 33, at 363-64; see also Borkowski, supra note 32, at 71.
A. *Stultissimum: Existimare omnia iusta esse* 

Although he may have believed all rational laws to be just, Cicero was not so foolish as to expect all enacted legislation to be rational. When given the choice, the British Chancellor also preferred justice to its imperfect technical execution in statutory form. As a result, Equity has had a convoluted and uneasy relationship with statutes of limitations.

Common law, like Roman law, had tolerated some immortal actions. The earliest English statute of limitations was simply the designation of a noteworthy cut-off date, such as a coronation, that would bar all claims arising under the prior regime. King Henry VIII created England's first true statute of limitations with a fixed interval between the birth and death of a legal action. However, when statutes of limitations were legislatively extended to Equity, Lord Redesdale had already conceded that they were to be applied by analogy.

Lord Redesdale, however, had allowed for one exception. When a defendant was guilty of fraud, and a plaintiff free from laches, a statute of limitations would not bar an equitable claim. When the administration of Equity and Law were merged, the equitable exception was retained in those situations that would have previously been within Equity's sole or concurrent jurisdiction.

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35. *Iam vero illud stultissimum, existimare omnia iusta esse, quae sita sint populorum institutis aut legibus.* Cicero, *de Legibus* I.xv.42.
   *Now Equity is nothing else but a Mitigation made of some Written Law, whereby we follow and execute the Intention, Reason, and Will of the Law, upon a Discovery thereof, by laying aside the stricter Letter of it, and having recourse to Natural Justice only: For we do hereby remit the literal and grammatical Sense of it, and either restrain or extend the same, as the Cause and different Circumstances thereof require.* John Ayliffe, *A New Pandect of Roman Civil Law* 37 (1734).
38. *Id.* at 4.
39. *Id.* at 4-5.
40. *Id.* at 110-12. According to Lord Redesdale:
   *But it is said that courts of equity are not within the statutes of limitations. This is true in one respect; they are not within the words of the statutes, because the words apply to particular legal remedies: but they are within the spirit and meaning of the statutes, and have been always so considered.*
   I think, therefore, courts of equity are bound to yield obedience to the statute of limitations upon all legal titles and legal demands, and cannot act contrary to the spirit of its provisions.
42. *See Earl of Halsbury, 19 The Laws of England* 49 n.a (1911); *see also* Gibbs v. Guild, 51 L.J.R. 313, 316 (1882). According to Master Porter:
   I quite agree that the same rules of law are now to be applied in all the Divisions of the
Equity's jurisdiction over the exception stemmed from fraudulent concealment of the cause of action. According to Lord Coleridge, Equity was simply doing what it always had: restraining a particular defendant from exercising his legal right while leaving the law intact.

By 1877, the equitable exception of fraudulent concealment was considered settled for more than a century. Several other exceptions to the statute of limitations, based on plaintiff's impeded potestas, had already been codified in England by 1623. Ultimately, the fraudulent concealment rule was codified in common-law jurisdictions as well. Equity's fraudulent concealment rule, with all of its concomitant common-law impedimenta, remains the third category of Louisiana's contra non valentem doctrine.

High Court, and that this action is to be dealt with in the Exchequer Division as it would have been in the Chancery Division. But that is only another way of saying that if it had been brought in the Chancery Division it must be dealt with as in the Exchequer Division. Barber v. Houston, 18 L.R. Ir. 475, 477 (1885).

43. See, e.g., Blair v. Bromley, 16 L.J.R. 105, 111 (1846); see also Henry Ballow, A Treatise of Equity 322 (John Fonblanque ed., 1979):

But though courts of equity will interpose, in order to prevent those mischiefs which would probably result from persons being allowed, at any distance of time, to disturb the possession of another, or to bring forward stale demands; yet, as its interference in such cases proceeds upon principles of conscience, it will not encourage, nor in any manner protect, the abuse of confidence; and therefore no length of time shall bar a fraud.

British judges were reminded to distinguish garden-variety fraud from fraudulent concealment of the cause of action, both of which may occur in the same case. See Barber, 18 L.R. Ir. at 481-82. Equity disregarded the statute of limitations only if the latter occurred. Id. There were three rationales given for Equity's involvement: (1) the damage was not sustained until the defendant's fraudulent plan to conceal the cause of action actually succeeded, (2) the fraudulent concealment “de die in diem” gave rise to a fresh “terminus a quo” for the statute of limitation to begin daily anew, and (3) personal estoppel. Id. at 479-81. Louisiana judges have also remarked on the similarity of contra non valentem to estoppel. See Tassin v. Allstate Ins. Co., 310 So. 2d 680, 685-86 (La. App. 4th Cir. 1975).

44. See Gibbs, 51 L.J.R. at 316.


46. Halsbury, supra note 42, at 56 n.g. These included minority, insanity, coverture, imprisonment, and maritime absence. Id.

47. See George V. Keeton & L.A. Sheridan, Equity 107-09 (3d ed. 1987). The equitable exception has also been codified by civilians. See, e.g., 2 Codice civile art. 2941(8) (Italy); see also Greek Civil Code art. 255.

48. See, e.g., Green v. Grain Dealers Mut. Ins. Co., 144 So. 2d 685, 687 (La. App. 4th Cir. 1962); see also Stanbrough v. M’Call, 4 La. Ann. 322, 324 (1849) (“The rule that, he who thus paralyzes the right of another shall not benefit by his own act to prescribe against that right, is not peculiar to our own jurisprudence; but, as it has its foundation in reason and justice, we find it adopted as a principle of equity in England and in the United States.”); Johnson Controls, Inc. v. Lynch, 633 So. 2d 212, 216 (La. App. 1st Cir. 1993) (“The use of contra non valentem, based on the factual situation envisioned by the third category, requires a finding of fraudulent or intentional concealment or misrepresentation.”). Most often today courts make no real distinction between the third and fourth varieties of contra non valentem, see, e.g., Doskey v. Hebert, 645 So. 2d 674, 680 (La. App. 4th Cir. 1994), or apply a hybrid of the two. See, e.g., Wimberly v. Gatch, 635 So. 2d 206, 218 (La. 1994) (Kimbball, J., concurring) (criticizing the court for using the hybrid when the third variety alone would have sufficed).
Civilians attempted to reign in their own contra non valentem through codification. 49 Civilian legislators excused several plaintiff impotencies just as the praetor had: the action must have been born (e.g. rent must be due or a suspensive condition fulfilled), 50 potestas must have been impeded by law (e.g. in minority, coverture, or insanity), 51 or potestas must have been impeded by a legally excused fact (e.g. by absence). 52 Civilian judges, however, would not leave legislation to their legislators, preferring to preserve the uncodified judicial contra non valentem as a way to suspend prescription when an unanticipated need arose. 53

The common-law fraudulent concealment variant of contra non valentem was similarly opposed from its inception. Foremost among the common-law objections was the civilian fear of the equitable exception’s threat to the statute’s well being. 54 While civilians tried to confine contra non valentem to their

49. A stricter fraudulent concealment variant of contra non valentem was also codified in England by 1833. See Denis Browne, Ashburner’s Principles of Equity 507 (1933).

50. See Jean Domat, 1 The Civil Law no. 2215 at 880 (Luther S. Cushing ed., William Strahan trans., 1861); see also Planiol & Ripert, supra note 3, no. 650, at 358; M. Pothier, 1 Law of Obligations no. 645, at 351-52 (William D. Evans trans., 1839).

51. Domat, supra note 50, no. 2220, at 882-83.

52. Id. no. 2222, at 883-84.

53. See Planiol & Ripert, supra note 3, no. 678, at 368. Interestingly, once contra non valentem was thoroughly codified in common-law jurisdictions, there was less tolerance of the judicial precursor than in civil-law jurisdictions. “The general rule is, that whatever the courts may think the legislature would have done if it had foreseen a certain contingency, nevertheless, a case coming fairly within the limitation imposed by the statute cannot be excepted from its operation, unless it also comes fairly within the exceptions named therein.” Wood, supra note 37, at 9-10.

54. See, e.g., Imperial Gas Co. v. London Gas Co., 23 L.J.R. 303, 304 (1854) ("How can we engraft an exception on the statute?"); see also Gibbs v. Guild, 51 L.J.R. 313, 320 (1882) (Holker, L.J.). Presumably, the legislature believed, “[t]he Statute of Limitations was intended for the relief and quiet of defendants, and to prevent persons from being harassed at a distant period of time after the committing of the injury complained of.” Id. at 391.

Compare Battley v. Faulker, 22 Rev. Rep. 390, 392 (1820) (Abbott, C.J.), “It would be extremely dangerous to enquire in every particular case, the precise period of time when the damage first came to the knowledge of the plaintiff, and in many instances it would deprive the party of the benefit which the Legislature intended to confer upon him” with Lassere v. Lassere, 255 So. 2d 794, 797 (La. App. 4th Cir. 1971) (Regan, J.):

If we could limit our responsibility to achieving substantial justice in the instant case, we would agree that equity requires relief for the plaintiff-in-rule. However, we can only resort to equity if our conclusion thereunder does not conflict with and ultimately do violence to established jurisprudence.

and with Jaquet v. Webb Levert & Co., 22 La. Ann. 111, 111 (1870) (Wyly, J.): This court has decided that the doctrine “contra non valentem agere non currit praescriptio” is merely a rule of equity . . . . But a rule of equity must yield to express law, however great the hardship. If the judges were permitted to disregard the law, under pretext of applying a rule of equity, there would be no certainty either in the law or the jurisprudence of the State. What would appear to be equity to one set of judges might not appear to be so to their successors; there would be no fixed rule for the administration of justice; there would be no certain standard to ascertain the rights of persons. The rights of individuals would not be measured by the law, but merely by the discretion, the
codes, common-law judges limited their rule with another: once time begins to run under a statute of limitations, it does not stop. In both systems, however, the breach between reason and justice only widened.

B. Legem: Vitiorum emendatricem commendatricemque virtutum

Civilians and common-law scholars alike concede that prescription and limitations are as arbitrary as they are necessary. Some have found it difficult to overstate both the necessity that drives the legislator to prescribe and the harsh consequences of the legislator’s limitations:

Though “praescriptio” was referred to in harsh terms, e.g., its subject matter was called prejudicial, most odious, most inequitable, and contrary to justice and equity, and was compared by some authors to catching eels, it was, nevertheless, adopted for public utility lest ownership be always uncertain, and was as a result called by Cassidorus (ca. 490-583) the patroness of the human race.

A law, according to Cicero, should reward virtue and punish vice. Cicero believed, therefore, that doctrina vivendi could be derived from law. What principles of living would Cicero see behind civilian prescriptive legislation, common-law limitations statutes, and our shared desire to evade them?
Cicero might first ask how the time of death of an action is appointed. Civilians reply that their legislators engage in a careful balancing of a potential plaintiff's need for sufficient time to exercise his right against every member of society's need for security. Civilians then justify liberative prescription on three grounds: presuming payment from the dormancy of the creditor, protecting the long unsuspecting debtor, and punishing the negligent creditor. The presumption of payment, however, has been heavily criticized and finally dismissed. Instead, the creditor's long delay has persisted as the primary civilian concern. Common-law judges, achieving the same result with common sense as that obtained by civilian analysis and tradition, also justify statutes of limitations by the creditor's long neglect.

In contrast to the moral tone of this justification, contra non valentem is usually justified with the cold, analytical notion of potestas. According to Pufendorf, "[i]f any impossibility is found in a law, . . . it is to be treated as not

61. See Domat, supra note 50, no. 2192, at 870-71; see also Planiol & Ripert, supra note 3, no. 630, at 346. It is interesting that when this issue is framed in these terms by the common law, society always prevails against the individual. See, e.g., Benyon, 124 Eng. Rep. at 634.

Because civilians recognize that the same policies drive liberative and acquisitive prescription, works relating to both will be used interchangeably throughout this article. See Domat, supra note 50, no. 2186, at 868.

62. Pothier, supra note 50, no. 644, at 351. Domat justifies prescription by both a presumption that the long dormant debt must have been paid and by the creditor's negligence. Domat, supra note 50, no. 2187, at 868, no. 2196, at 872.

63. See Planiol & Ripert, supra note 3, no. 691, at 373.

64. See id. no. 632, at 346; see also id. no. 683, at 369 (limiting the presumption of payment justification to only the shortest prescriptive periods, which are those for which no creditor would ordinarily delay in collecting). That is not to say, however, that the need to protect the debtor was similarly discounted. The need to protect the debtor is really inseparable from the creditor's delay because the debtor is protected from the creditor's delay.

65. A judge may attribute his opinion to common sense. See, e.g., Ecclesiastical Comm'rs v. North E. Ry., 47 L.J.R. 20, 25 (1877) ("With regard to the Statute of Limitations, independently of my decision, I should desire to look at it in a common sense point of view, in a view in which such things ought to be dealt with."). The similarity to civilian doctrine, however, did not escape common-law treatise writers. See Herbert Broom, A Selection of Legal Maxims 608-09 (1864); see also Wood, supra note 37, at 7 (citing Pothier).

66. See Granger v. George, 29 Rev. Rep. 196, 198 (1826) (Abbott, C.J.) ("The plaintiff was certainly guilty of laches in not making inquiries respecting the property at an earlier period, and has no ground of complaint that he is not now entitled to recover."); see also Drewry v. Barnes, 27 Rev. Rep. 20, 23 (1826) ("For, if a party, having a remedy at law, loses it by his own laches, he cannot come into a court of equity on the ground of his having, by his negligence, lost his legal remedy."). Of course, common-law judges were also moved by the debtor's difficult burden in proving his defense against such a stale claim in addition to their concern over the plaintiff's possible laches. Compare Barber v. Houston, 18 L.R. Ir. 475, 480 (1885) and Battley v. Faulker, 22 Rev. Rep. 390, 394 (1820) with Brookstone v. Smith, 6 L.J.R. 34, 35 (1836) and Hovenden v. Lord Annesley, 9 Rev. Rep. 119, 120 (1806) ("vigilantibus non dormientibus inservit lex"). Although civilians prefer the language of impossibility, proof problems were also dear to their hearts. See Planiol & Ripert, supra note 3, no. 630, at 345.
binding, or else as warranting a more suitable interpretation." What drives civil-law and common-law legislators and judges to respond with contra non valentem to an impossible prescriptive law? According to Zimmermann, the response may be unwarranted, at least by reason alone:

Neither logic nor policy compels a legal system to declare contracts, the performance of which is impossible, as void. It is obvious, of course, that the impossible performance as such cannot be rendered; but there is nothing inherently illogical in making a person pay damages for failure to do what he has undertaken to do.

Reason failing, there must also be a moral undercurrent to potestas to account for its universal appeal.

Two scholars, Bracton and Gratian, clarify and unify the common and civil laws of contra non valentem. According to Bracton, liberative prescription is justified by concern for both defendant’s defectum probationis and plaintiff’s negligentiam. In Bracton, however, we see the two linked by the implication that the plaintiff may be more devious than careless, deliberately allowing the defendant’s evidence to erode. No doubt that Bracton’s view was based upon Roman rules but must a court scrutinize the motives of every plaintiff who

67. Pufendorf, supra note 57, § 8, at 73.
68. Zimmermann, supra note 21, at 695-96.
70. According to Bracton:

Item per exceptionem præscriptionis propter defectum probationis, quia sicut tempus est modus inducendae obligationis, ita et tollendae per dissimulationem et negligentiam, et per consequens actionis quae sub certis temporibus limitatur. (C]urrit enim tempus contra desides et sui iuris contemtores.

Id. At the least, this seems tantamount to a charge of insincerity. Lord Stowell’s doctrine of insincerity required that suits for nullity of marriage not have any secondary motivation. Lord Stowell’s doctrine was criticized by a Chancellor who upheld a wife’s defense of nullity to her husband’s charge of adultery:

She has the most cogent motives for asking a competent court to declare the truth—motive of an innocent, and to some extent laudable kind. I do not of course mean to say that it was innocent to place herself as the mother of that child; but being in that position, it is perfectly innocent to desire that the true character of the relation to the appellant should be ascertained by law, which depends upon the question whether she is the appellant’s wife or not.

71. Bracton probably had in mind such Roman rules as, “Non enim neglegentibus subuenitur, sed necessitate rerum impeditis. [T]otumque istud arbitrio praetoris temperabitur, id est ut uta etea renum restituat, si non neglegentia, sed temporis angustia non potuerunt item contestate.” Dig. 4.6.16 (Paul). “Marcellus sit aduersus doli exceptionem non dari replicationem doli. Labeo quoque in eadem opinione est: ait enim iniquum esse communem malitiam petitori quidem praemio esse, ei uero, cum quod agereur, poenae esse, cum longe aequum sit ex eo, quod perfide gestum est, actorem nihil consequi.” Dig. 44.4.4.13 (Ulpian). “Sed et ad eos pertinet, qui conventi frustrantur et qualibet tergiversatione et solertia efficient, ne cum ipsis agi possit.” Dig. 4.6.24 (Paul).
invokes contra non valentem? How is a judge to evaluate a plaintiff's moral standing?

Pothier loosened the link between contra non valentem and impossibility. He noted that if potestas were the issue, the French legislator would have chosen to suspend prescription against only those minors who were without tutors. Instead, Pothier concluded that all minors must be the recipients of a special indulgence granted by society. This link between contra non valentem and special dispensation had first been recognized by Gratian, who had provided two rationales for clerical contra non valentem. First, according to Gratian, "temporalis praescriptio non obviatur, ubi hostilitatis metus intervenit." Gratian justified his rule for clerics by analogy to the dispensation of imperium granted to returning Roman soldiers. Gratian's second variety of clerical contra non valentem applied ubi furor hostilitatis incumbit. He needed no Roman authority for this rule, instead relying on the redemptive powers of his God. Gratian's redemptive justification for contra non valentem, although noticed by Pothier, has been largely ignored by civilians. By what mechanism should civilians grasp the process of redemption?

To answer these two questions that lie at the heart of contra non valentem—to determine the proper measure of a plaintiff's moral standing, and to find a model for the special dispensation granted by both legislator and

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Bracton has been depicted "an able man, but . . . a poor, an uninstructed Romanist. Let us make every reasonable concession to [Bracton]. We must judge him by a medieval standard. He did not live in the age of Savigny; he did not live in the age of Cujas." Select Passages, supra note 69, at xviii. The author hopes for similar tolerance.

72. See Pothier, supra note 50, nos. 647-50. Although Pothier loosened this link, he did not break it. He believed that dispensation should be limited to minors because their incapacity lasted for a relatively short and predictable period of time. Id. no. 648, at 352-53. He argued against extending special dispensation to persons who were insane or absent. Id. no. 648, at 352-53.

73. Id. no. 647, at 352.

74. Id.

75. Gratian, Decretem Gratiiani Emendatum et Annotationibus Secunda pars, Causa XVI, Quaestio III, c. xiii & xiii (iussu ed. 1601).

76. Id. at c. xiii.

77. According to Gratian: Sicut enim per lege mundialem iis, quos barbarica feritas captitas necessitate transuexit, postliminio reuerentibus redditur antiqua possessio; non aliter & ecclesia receptura est parochiam, quam ante tenuit cum rebus suis: siue ab aliis ecclesiis possideatur, siue in cuiuslibet possessionem trasfusa sit. Non enim erit obicienda praescriptio temporis, ubi necessitas interest hostilitatis. Id. Those who glossed Gratian related this passage to the many instances in which Roman law dispensed with prescription because of a plaintiff's impeded potestas. Id. at n.f. Thus, in the medieval eyes of Gratian's glossors, impossibility and dispensation had become intertwined.

78. Temporis non currit praescriptio, ubi furor hostilitatis incumbit. Id. at c. xiii.

79. According to Gratian, "[v]erum si annorum proximitas in talibus impediat, Deus ipse reprehendendus est: qui post quadringetos, & triginta annos filios Israel de durissima fenuitute Pharonis, & formae ferrea liberuit: sed ipse per se noster redemptor fuit, qui humanum genus post tot annorum millia de inferni claustris eripuit." Id.
judge—it is necessary to follow Cicero’s exhortation to look beyond the praetor’s edict and into the depths of moral philosophy.

II. NON A PRAETORIS EDICTO, SED INTIMA PHILOSOPHIA

Moral philosophers dispensed with the plaintiff’s neglect as a justification for prescription altogether. Instead, they recognized that the true value of a prescriptive statute is its benefit to the public: “For it is of value to the public peace that disputes which would run on forever should be finally closed, and that the dominions of things should not be in continued uncertainty.” Despite their emphasis on the common weal, these were not Marxists; the notion of individual will reigned supreme in their theories. According to Zimmermann, they bound impossibility to will with the belief that “ought implies can.”

In Humanist philosophy, this growing belief in the all important will engulfed contra non valentem. The presumption of payment became presumed consent. Impossibility prevented prescription by vitiating presumed consent. Just as had occurred in the law of obligations, legal consequences began to depend on whether impossibility could be characterized as moral or physical. According to moral philosophers, the law that requires the performance of a physically impossible act is easily dispensed with as an absurdity or no law at all.

In contrast, the morally impossible, although it may be as equally unattainable as the physically impossible, may be validly enacted into law without absurdity. An act is morally impossible when impossibility stems from the will. By legislating moral impossibilities, a legislator codifies society’s moral aspirations. Morally impossible laws, however, give rise to the need for dispensing occasional forgiveness. The common-law fraudulent concealment rule has led an open life as a dispensation; Equity’s discretion to prevent the injustice

80. Non ergo a praetoris edicto, ut plerique nunc, neque a duodecim tabulis, ut superiores, sed penitus ex intima philosophia hauriendam iuris disciplinam putas? Cicero, de Legibus I.v.17.
81. Pufendorf, supra note 57, § 2, at 647, § 8, at 653-55.
82. Id.; see also id. § 6, at 651.
83. Zimmermann, supra note 21, at 687. Zimmermann describes how impossibility sufficient to nullify a contract expanded in scope with the expanding role of the will in moral philosophy. See, e.g., id. at 693 (“the free will of the promisor can be directed only towards an act or a performance which is within his (personal) potestas”).
85. Id. § 144, at 158.
86. On moral and physical impossibility in the context of obligations, see Zimmermann, supra note 21, at 686-97.
87. See Pufendorf, supra note 57, § 8, at 73-74.
88. Id. Pufendorf gives as an entertaining example of moral impossibility living a life so innocuous that it offends no one. Id.
89. Id.
90. Id.
of law has long been described as the ruler's "prerogative of grace." In fact, it has been said that Justice had two children, Equity and his sister Grace. To fathom a mechanism for grace, by which Louisiana's own doctrine of contra non valentem can be understood, it is necessary to probe the ultimate mind of God.

A. *Ultimam mentem dei*

A necessary prerequisite for prescription is the lapse of time. Civilians promote the principle that prescription does not extinguish a right, but merely prevents its enforcement. But civilian dogma seems sophistry and illusion when viewed through moral eyes. For the theologian, time is not simply the product of a count; time transforms. Prescription resembles a mystical transformation by which a right ceases to be. Transformation, according to Aquinas, requires incremental movements through time, which, once completed, cannot be altered even through God's omnipotence. Moreover, each movement, for Aquinas, is preceded by another and another, ultimately

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93. *Ita principem legem illam et ultimam mentem esse dicebant omnia ratione aut cogentis aut vetantis dei.* Cicero, de Legibus II.iv.8.
94. See, e.g., Code Civil art. 2219 (Fr.). On one occasion in which this lapse may be presumed, see Douglas Nichols, *The Publician Action*, 69 Tul. L. Rev. 217, 222-24, 232-34 (1994).
95. See, e.g., Frederick J. Tomkins & Henry D. Jenckin, *A Compendium of the Modern Roman Law* 76 (1870). Hence, the persistence of a moral right after prescription has accrued. This reasoning seems eerily comparable to (and as unsatisfying as) Equity's claim that it could restrain an individual while leaving a law intact.
96. In the eyes of Aquinas:

 Certain things are taken for granted by St. Thomas and the Scholastics in connection with this problem: time is not something that exists only in our minds (Plotinus), it is not of the second intention, that is, merely a mode of thought (Descartes and Spinoza), it is not a subjective form of observation (Kant), but it is something that exists outside the mind. It is not indeed an independent entity like a river bed in which all other things flow, but it is a mode of being that modifies changeable things. With Aristotle the concept of time presupposed the concept of space and the concept of movement. . . . Time is an accident of movement.

97. Therefore, the canonist, concerned with the sin of bad faith, requires good faith to invoke liberative prescription, just as he requires it in the context of acquisitive prescription. See Martin, *supra* note 59, at 40. This is a lesser variety of good faith, a negative good faith to match the negative liberative prescription: freedom from responsibility for the accrual of prescription. *Id.* at 93. This freedom from responsibility is simply another incarnation of the principle of contra non valentem.
99. Dictionary, *supra* note 96, at 392. God's inability to reverse what time has accomplished reminds us of the common-law refusal to suspend a period of limitation once it has begun to run.
originating with his unmoved God. Contra non valentem, as an impediment to prescriptive transformation, must be understood as breaking a link somewhere within that divine chain. For the theologian, just as for the civilian or the

common-law lawyer, prescription's weak link is the human will.

For the theologian, the concurrence of intellect, which presents objects to the will upon which man can act, and will, which moves man to act, is necessary for an act to be considered voluntary. Prescription's transformation will be broken when a plaintiff's inaction is involuntary. For example, violence can cause involuntary inaction. Aquinas, however, is less charitable toward the meek, finding that a will that refrains from acting because of fear contains a mixture of voluntary and involuntariness, which mixture he calls the relatively involuntary. For Aquinas, however, only the absolutely involuntary will suffice to vitiate volition. Thus, we see that Gratian's division of contra non valentem in two, in which Gratian's furor hostilitas incumbit corresponds to Aquinas' relative involuntariness, persists in Aquinas' theology. For both Aquinas and Gratian, this sort of prescriptive chain cannot be broken absent the grace of God.

Aquinas' absolutely involuntary inaction corresponds to Gratian's metus hostilitatis intervenerit and to the civilian's impossibility. Clearly, inaction caused by pure ignorance can be considered absolutely involuntary. Aquinas, however, is less forgiving of the deliberately ignorant, whose ignorance he attributed to neglect. Presumably Aquinas would concur with the common-law judge who requires a plaintiff to have exercised reasonable

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100. Meyer, supra note 96, at 255, 268.

101. See 1 Thomas Aquinas, Summa Theologica q. vi, art. i, in 19 Great Books of the Western World 644 (Fathers of the English Dominican Province trans., 1952); see also Meyer, supra note 96, at 193-94. According to Aquinas, this judgment requires knowledge of the end, knowledge that it is an end, and an understanding of the relationship between means and end. Aquinas, supra, q. vi, art. 2, at 646. In Aquinas's view, other animals are only capable of an imperfectly voluntary act because they lack either the second or third form of understanding. Id.

102. According to Aquinas, inaction is as voluntary as action when it is accompanied by the will not to act. Aquinas, supra note 101, q. vi, art. 3, at 647.

103. In a fit of twisted stoicism, Aquinas concluded that violence, although it could not prevent the will from forming the intent to act, suffices to cause inaction to be classified as involuntary because violence can prevent execution of that intent. Id. q. vi, art. 2, at 647; see also id. q. vi., art. 5, at 648. Cf. Hyman v. Hibernia Bank & Trust Co., 71 So. 598, 600 (La. 1915) ("A defendant, who has kept a plaintiff in close confinement during the prescriptive period so as to preclude his bringing suit, could certainly not be allowed to invoke prescription against plaintiff's suit, and thereby reap the fruit of his own wrong.").

104. Aquinas, supra note 101, q. vi., art. 6, at 649. Thus, according to Aquinas, there is at least a little of the necessary concurrence between will and intellect in the act of not acting from fear. Id. q. vi, art. 6, at 649.

105. Id. q. vi, art. 8, at 651. This type of involuntary inaction, as opposed to that inspired by fear, is absolute. Id. But cf. Hyman, 71 So. at 601 ("at most, [Cox v. Van Ahlefeldt] is authority only for the proposition that mere ignorance, not brought about or fostered by the machinations of the party opposing prescription, is no good ground for invoking the maxim, 'contra non valentem'").

106. Aquinas, supra note 101, q. vi, art. 8, at 651.
diligence before allowing Equity's fraudulent concealment exception to break the statute of limitations' transformative spell. But whether by furor, duress, fear, violence, or ignorance, the theologian would encourage us to believe that time will transform a right absent God's grace. To see the mechanism by which contra non valentem impedes prescription, we must look further into this act of grace.

1. Homo in tenebris

Cicero wondered what evils men might do in the darkness if they did not share in some portion of the divine spark. Aquinas less optimistically noted that even man at his most perfect must be transformed by the grace of God. Since no man is free from sin, and death is sin's punishment, a divine death sentence is in the nature of man. Likewise, no cause of action is so well made that the legislator's prescription does not await it.

Laws, according to Aquinas, seek the common good, which is why they are drafted in general language by the community rather than made specifically for and by the individual. Aquinas, however, also believed that injury to an individual was injurious to the commonwealth. He relied on the sovereign to protect the community when individual injustice might result from applying a law of the common good:

[I]t happens that a law that is for the common good in the majority of cases will work injustice in some cases. That law should not be observed when it is harmful to the general welfare. The executive branch is the appropriate decider of what the common good is and when dispensation is appropriate.

According to Augustine, transformation through grace is the manifestation of God's love. What motivates the sovereign? In contrast with God's grace, which is creative of good, man's grace presupposes some existing good. In fact, the Louisiana judge appears to closely scrutinize the plaintiff's moral standing when he dispenses grace in the form of contra non valentem.

108. Cicero doubted that laws would be effective based on their punitive aspects alone without humanity's natural tendency toward goodness. See id.
111. 2 Thomas Aquinas, Treatise on Law q. 90, art. 3, in 20 Great Books of the Western World 207 (Fathers of the English Dominican Province trans., 1952).
112. Aquinas, supra note 101, q. 21, art. 3, at 719.
113. Aquinas, supra note 111, q. 96, art. 6, at 235.
If love motivates the dispensation of grace, then how can a plaintiff appear more attractive to the judge? Aquinas, ever concerned with causes, concluded that the cause of love is the object of love, which must be the good. Likewise in Louisiana, the judge describes his favored plaintiff as an innocent child. The Louisiana plaintiff who falls short in the judge's eyes finds that prescription has run regardless of actual potestas.

In the final judgment, God, according to Augustine, will sort the good from the wicked, assuring each of his appropriate reward or punishment. Augustine claimed that this sorting process requires a greater light than that provided by our sun, a light no less than the sun of righteousness.

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115. Aquinas, supra note 101, q. 27, art. 2, at 737-38. In contrast, evil can only be loved for any gain that may accrue as a consequence. Id.

116. See, e.g., Williams v. Red Barn Chem. Inc., 188 So. 2d 78, 80 (La. App. 1st Cir. 1966) ("Plaintiff concludes, evidently from those facts, for no others are alleged, that she was lulled into a false sense of security, kept in ignorance of her rights and that, thereby, the running of prescription was suspended under the doctrine of contra non valentem agere non currit praescriptio."). Lulling of an innocent is often a part of the third category of contra non valentem. This language was most common during the disfavored period of the doctrine, after its Reconstruction Era resurrection and prior to Corsey. See, e.g., Green v. Grain Dealers Mut. Ins. Co., 144 So. 2d 685, 687 (La. App. 4th Cir. 1962):

This is an equitable doctrine, formerly denied entry into the law of the State of Louisiana, but subsequently applied on several occasions with the result that, under certain circumstances, prescription does not run against a person unable to bring an action. The rule "contra non valentem" is applied to prevent the injustice of an innocent party being lulled into a course of inaction in the enforcement of his right by reason of concealment or fraudulent conduct by defendant, or because of the defendant's failure to perform a legal duty causing the plaintiff to be kept in ignorance of his rights.

Lulling language, however, remains viable. See, e.g., Miley v. Consolidated Gravity Drainage Dist. No. 1, 642 So. 2d 693, 697 (La. App. 1st Cir. 1994). But see Corsey v. State Dep't of Corrections, 375 So. 2d 1319, 1322 n.8 (La. 1979) (criticizing lulling).

117. See, e.g., Hamilton v. Kelley, 641 So. 2d 981, 983 (La. App. 2d Cir. 1994) (plaintiff was ten years old when his father cut the signature off his uncle's olographic will). For a brief period immediately before legislative extension of the prescriptive period for child sexual abuse, abused children appeared to be the ideal plaintiffs to invoke the doctrine of contra non valentem. See, e.g., Wimberly v. Gatch, 635 So. 2d 206, 207 (La. 1994) (child was ten years old when the molestation ceased); see also La. Civ. Code art. 3496.1 (increasing the prescriptive period for abuse of a minor to three years from the time the victim attains majority).

Because of the prerequisite of innocence, attorneys are unlikely to receive the dispensation of contra non valentem. See, e.g., Abbott & Meeks v. de la Vergne, 643 So. 2d 827, 829 (La. App. 4th Cir. 1994).


119. Augustine, supra note 110, bk. xx, ch. 27, at 556. Augustine felt the need to justify the hardships shared by Christian and Pagan alike after the fall of Rome. See id. bk. 1, ch. 9, at 133-35. He noted that the Christians were by no means perfect themselves, in particular tending toward excessive amor mundi. Id. He also suggested the possibility of periodic Job-like tests for the faithful. Id.

120. Augustine, supra note 110, bk. xx, ch. 27, at 556.
characteristics of the wicked that become apparent in that light? They are the same as those of the defendant who unsuccessfully invokes prescription, discerned by the Louisiana appellate judge by the light of the ancient judicial desire to punish those who would pervert the spirit of the law with its letter.\textsuperscript{121}

2. \textit{Foedius, inmanius, contemptius, abiectius} \textsuperscript{122}

Equity must have begun when the very first judicial officer realized that he had been made a fool. Roman law had contained the equitable principle that no one benefit from his own fraud through the mechanism of the law.\textsuperscript{123} In the common law, the earliest known use of the writ of deceit was for a court deceived in 1534 AD.\textsuperscript{124} The judiciary is certainly not fond of collaborating with the deceitful.\textsuperscript{125} Louisiana judges invoke contra non valentem when they feel the alternative is for the legislator to unwillingly reward a fraud.\textsuperscript{126}

In fact, Louisiana judges inevitably examine the heart of the defendant but only after a tortured analysis.\textsuperscript{127} The Louisiana judge begins instead with the plaintiff, asking whether his ignorance was willful, negligent, or unreasonable. This question is answered in light of the knowledge imputed to a generic reasonable plaintiff. To determine whether the reasonable plaintiff would have remained inactive under the circumstances of the case, however, the court suddenly asks the defendant whether he attempted to mislead or impede this plaintiff, or whether he concealed information. Reptational reasoning is the inevitable product of the judicial juristic method.\textsuperscript{128}

\textsuperscript{121} See, e.g., Wimberly v. Gatch, 635 So. 2d 206, 215 (La. 1994); see also Bouterie v. Crane, 616 So. 2d 657, 657 (La. 1993).

\textsuperscript{122} Quid enim foedius avaritia, quid inmanius libidine, quid contemptius timiditate, quid abiectius tarditate et stupidia dici potest? Cicero, de Legibus l.xix.51.

\textsuperscript{123} Dig. 44.4.1.1 (Paul): “Ideo autem hanc exceptionem praeitor proposuit, ne cui dolus suus per occasionem iuris ciuilis contra naturalem aequitatem prosit.”

\textsuperscript{124} Billson, \textit{ supra} note 36, at 144.

\textsuperscript{125} See, e.g., Hyman v. Hibernia Bank & Trust Co., 139 La. 411, 417-18, 71 So. 598, 600 (1916).

\textsuperscript{126} See, e.g., Plaquemine Parish Comm’n Council v. Delta Dev. Co., 502 So. 2d 1034, 1055-56 (La. 1987); see also Hyman, 139 La. at 411, 71 So. at 606 (O’Neill, J., dissenting) (“No law was ever enacted which contemplated the defeat of its purpose by fraud, and no court was ever organized which would knowingly permit a litigant to profit by his own wrong.”). On Chief Justice O’Neill and his dissents, see Katherine L. Brash, \textit{Chief Justice O’Neill and the Louisiana Civil Code—The Influence of His Dissents}, 19 Tul. L. Rev. 436 (1945).


\textsuperscript{128} We may be admonished that “[f]irst, Morality is not a source of law.” Tomkins & Jenckin, \textit{ supra} note 95, at 37. And common lawyers may boast that “in our days Equity has become a science founded upon the reasonings and experience of the past.” Id. at 38. But the common law
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however, that in comparison to a plaintiff, and in light of all circumstances, a defendant's nature is best illuminated.\textsuperscript{129}

Aquinas found evil to be the cause of hatred, just as good naturally draws love.\textsuperscript{130} However, hate can only exist, according to Aquinas, if preceded by love; nothing is hated unless it is baneful to a thing beloved.\textsuperscript{131} In contrast, Augustine believed that, because he considered evil a defect rather than a positive quality, it is as futile to look for evil's cause as it is to listen for silence.\textsuperscript{132} Although he found the cause of sin unfathomable, Augustine was able to provide exacerbating factors.\textsuperscript{133} For example, Augustine found the most easily avoided sin to be the worst.\textsuperscript{134} The Louisiana judge combines the Thomist and Augustinian traditions after translating the easily avoided sin into the incomprehensible sin. Hence, a sin so outside the norm, so odious, and perpetrated against an innocent, such as the sin of child molestation, was fertile ground for the doctrine of contra non valentem.\textsuperscript{135} The Louisiana judge prefers to invoke contra non valentem against the defendant that Cicero might describe as more filthy, more horrible, more despised, and more mean.

B. \textit{Lege quoque consociati homines cum dis putandi sumus} \textsuperscript{136}

If Cicero is correct that man and God share reason and law, then we ought to be able to reduce the principles of the divine prerogative of grace to a workable rule for contra non valentem. In doing so, potestas must be avoided.\textsuperscript{137} Reliance on potestas produces extreme results, often requiring that a

\begin{itemize}
  \item It is, in my opinion, unfortunate that when an expression is used by a judge, however eminent, in explaining his view of a particular case, and the principles on which it ought to be dealt with, if that expression was not previously a vox signata, or a technical term of law, it should be taken up by other judges as if it had either established or recognized a technical rule which did not otherwise exist.

\end{itemize}


\textsuperscript{129} Cf. Whitnell v. Menville, 540 So. 2d 304, 308 (La. 1989).

\textsuperscript{130} Aquinas, \textit{supra} note 101, q. 29, art. 1, at 745.

\textsuperscript{131} \textit{Id.} q. 29, art. 2, at 745-46.

\textsuperscript{132} Augustine, \textit{supra} note 110, bk. xii, ch. 7, at 346.

\textsuperscript{133} \textit{Id.} bk. xiv, ch. 12-14, at 387-88.

\textsuperscript{134} \textit{Id.} bk. xiv, ch. 12, at 387. Hence, Adam and Eve's inability to avoid the forbidden fruit in the Garden of Eden was, according to Augustine, quite heinous. \textit{Id.} Augustine also found that sin is made worse by blaming someone else when caught. \textit{Id.} bk. xiv, ch. 14, at 388. Thus, when Adam blamed Eve, and Eve blamed the Serpent, they sealed their fate. \textit{Id.} Likewise, the Louisiana judge has little sympathy for the defendant whose only defense is the plaintiff's laches.

\textsuperscript{135} \textit{See}, e.g., Wimberly v. Gatch, 635 So. 2d 206, 212-17 (La. 1994); \textit{see also} Bouterie v. Crane, 616 So. 2d 657, 658-59 (La. 1993); Held v. State Farm Ins. Co., 610 So. 2d 1017, 1019-20 (La. App. 1st Cir. 1992), \textit{writ denied}, 613 So. 2d 975 (1993).

\textsuperscript{136} \textit{Est igitur, quoniam nihil est ratione melius eaque est et in homine et in deo, prima homini cum deo rationis societas; inter quos autem ratio, inter eosdem etiam recta ratio communis est; quae cum sit lex lege quoque consociati homines cum dis putandi sumus.} Cicero, \textit{de Legibus} L.vii.23.

\textsuperscript{137} Misplaced reliance on potestas contributed to the judiciary's initial refusal to extend contra
plaintiff be comatose before attracting judicial sympathy. Instead of abstract potestas, guidance should be gleaned by comparison to other civilian systems.

In modern civilian systems, as well as in Louisiana, prescription is the rule rather than the exception. Civilians tend to except prescription with general non valentem to the victims of abuse. See, e.g., Fontaine v. Roman Catholic Church, 625 So. 2d 548, 553 (La. App. 4th Cir. 1993), writ denied, 630 So. 2d 787 (1994); see also Laughlin v. Breaux, 515 So. 2d 480, 482 (La. App. 1st Cir. 1987) ("We find that [the learned helplessness of a battered woman] is not, of itself, sufficient to interrupt prescription under contra non valentem."); Crosby v. Keys, 590 So. 2d 601, 602 (La. App. 2d Cir. 1991), writ denied, 593 So. 2d 373 (1992) ("Even though the alleged sexual abuse may have caused psychological injury, contra non valentem should not be applied where there is no evidence that the defendants took any action to prevent the plaintiffs from filing suit."). Particularly shameful invocations of potestas appear in Landreneau v. Fruge, 598 So. 2d 658, 662 (La. App. 3d Cir. 1992):

We note that in the present case Capucine lived at home and thus had ample opportunity to confide in and seek help from her mother. While she may have been hesitant to discuss sexually deviant conduct with her mother, we cannot say that such hesitancy and the avoidance of the subject gave rise to the requisite level of incapacity necessary to invoke the rule of contra non valentem.


Any psychological block which Fred may have had about bringing a civil action against his father cannot really be compared to the organic brain damage suffered by the plaintiff in Corsey.

Fred was fully aware of the illegality and perverse nature of the things his father did. His failure to file suit was due to a number of factors, including embarrassment, fear of ridicule, a distorted view of his father's power and accountability for his actions, as well as a general ignorance of his legal remedies as an injured party. We do not mean to deprecate the psychological trauma Fred was experiencing but we are unable to apply the "exceptional" doctrine of contra non valentem to the facts of this case.

In defense of these judges, see Smith v. Stewart, 21 La. Ann. 67, 76 (1869):

And so long as courts continue to act under the notion, that their equity powers authorize them to correct, control, moderate or supersede the law, with the view of enforcing rights which are just, great uncertainty and confusion will ensue; and as Mr. Justice Blackstone says, courts of equity "will rise above all laws, either common or statute, and be most arbitrary legislators in every particular case."

138. See, e.g., Harsh v. Calogero, 615 So. 2d 420, 422-23 (La. App. 4th Cir. 1993):

In other words, due to the tortious conduct of the defendant, the plaintiff was placed into a mental stupor in which he could not understand anything much less the facts surrounding his injury. This state of mind would be analogous to total amnesia or being in a coma. Thus, the rule simply stated is if the defendant's tortious conduct causes the plaintiff to be in such a condition that he cannot even understand the facts which surrounded his injury, then prescription will not be running until the condition subsides. This severe state of mental incapacity is the threshold set by the Supreme Court in order for the doctrine of contra non valentem to apply in situations such as this.

Applying this principle to the case before us, clearly, the action is prescribed. The plaintiff was in a coma for two weeks. During this period prescription was suspended. During approximately the next four weeks the plaintiff was still in such a mental stupor that she could not even remember the facts surrounding her accident. During this period prescription was suspended. However, once the plaintiff regained such faculties so as to be able to recall the facts surrounding her accident, prescription commenced.
rules, which immediately follow the establishment of prescription in a civil code. In Louisiana, however, there is also a Roman tendency to establish nearly nominate varieties of contra non valentem within individual articles. Given that both prescriptive periods and their causes for suspension are inherently factually dependent, this trend seems appropriate. But once a general principle of contra non valentem is codified, it will be necessary to coordinate the interaction between the general and the specific. To these ends, I propose retaining Civil Code article 3467 but with the following revision to its infamous comment d:

Article 3467. Persons against whom prescription runs.
Prescription runs against all persons unless exception is established by legislation.

Comment d (PROPOSED).
Prescription runs against absent persons and incompetents, including minors and interdicts, unless exception is established by legislation.

Exception to prescription may be established generally, such as in the articles that follow. Exception may also be provided elsewhere, such as where the cause of action is granted. Because of the fact-intensive process of excepting prescription, and consistent with general civilian principles of interpretation, the general formulation always must yield to the specific.

Exception must, however, be established by legislation. Therefore, the judicial doctrine of contra non valentem is no longer relevant except to the extent it is codified in the following articles.

It has been suggested that the discovery rule is not useful in a civilian system because the legislator allows sufficient time for discovery when establishing a prescriptive period. Louisiana's extraordinarily short prescriptive period for delict, however, borders on what Pufendorf might feel obligated to disregard as a legal absurdity. In the absence of a reasonable prescriptive

139. See, e.g., Code civil arts. 2219, 2251-2253, 2257 (Fr.).
141. As the probatio becomes more diabolica, the prescriptive period should decrease. See J.E. deBecker, The Principles & Practice of the Civil Code of Japan 132-33 (1921).
144. Taken verbatim from La. Civ. Code art. 3468. Presumably, if Article 3467 is to be taken seriously, then Article 3468 would be unnecessary and should be repealed.
145. Compare Favrot, supra note 9, at 253-54 with Barber v. Houston, 18 L.R. Ir. 475, 480 (1885).
146. Compare Whitnell v. Silverman, 646 So. 2d 989, 992-93 (La. App. 4th Cir. 1994) (listing diseases unlikely to be discovered before three years); LeBlanc v. Meza, 620 So. 2d 521, 523 (La. App. 3d Cir. 1993), writ denied, 639 So. 2d 1176, cert. denied, 115 S. Ct. 514 (1994). It has been suggested that the short prescriptive period for delict was what necessitated the grafting of the discovery rule onto contra non valentem in the first place. See Patrick D. Gallaughier Jr., Revision
period for delict, the discovery rule must be codified. Following the example of
the legislator, and to lessen the liberality of codified discovery, I have
chosen to couple this codification with an outside peremptive limit based upon
statutes of limitations of other American jurisdictions. The discovery article
would read as follows:

Article 3492 (PROPOSED). Delictual actions.
Delictual actions are subject to a liberative prescription of one
year. This prescription does not begin to run until the delictual
action has accrued. An undiscovered delictual action cannot accrue
until it is reasonably knowable. A person is deemed to know what he
could by reasonable diligence have learned.

After five years from the day injury or damage is sustained, even
an undiscovered delictual action is barred by peremption unless
exception is established by legislation.

Comment a (PROPOSED).
The first sentence of this Article reproduces the substance of Article
3536(1) . . . of the Louisiana Civil Code of 1870. The remainder
codifies the discovery rule with the addition of a peremptive period.
Whether the cause of action could have been discovered with reasonable
diligence is evaluated in light of all relevant circumstances, including
any act by the defendant to conceal the cause of action or hinder the
plaintiff.

The general peremptive period may be altered or dispensed with by
specific legislation. There is, however, no room for judicial exception.

Comment e (PROPOSED).
This prescriptive period does not run against minors or interdicts in
actions involving permanent disability and brought pursuant to the
Louisiana Products Liability Act or state law governing product liability
actions in effect at the time of the injury or damage.

Civilians agree that vis major is an appropriate ground for suspension of
prescription. Civilians also tend to suspend prescription for the duration of
special relationships, even when these relationships do not result in the legal
incapacity to sue one another. In Louisiana, contra non valentem is invoked

\[147. \text{See, e.g., La. R.S. 9:5628 (1994).}\]
\[148. \text{Taken verbatim from La. Civ. Code art. 3492.}\]
\[149. \text{Taken verbatim from La. Civ. Code art. 3492 cmt. a.}\]
\[150. \text{Taken almost verbatim from the last sentence of La. Civ. Code art. 3492.}\]
\[151. \text{See, e.g., Greek Civil Code art. 255.}\]
\[152. \text{See, e.g., Code civil arts. 2219, 2251-2253, 2257 (Fr.); see also Codice civile arts. 2934-
2935, 2941-2942 (Italy); Greek Civil Code arts. 247, 251, 255-256, 258.}\]
\[153. \text{For example, suspension during marriage was retained in the German Civil Code when
spousal immunity was abolished. Retention was justified by concerns for family harmony. See 2}\]
by the judge to suspend prescription in legislatively unforeseen circumstances. Our judges, who are naturally ill at ease with this contra legem role, have relied inordinately on precedent to restrict contra non valentem to an antiquated set of categories. To restore judicial flexibility and to place the Louisiana judge at ease, I propose that judicial contra non valentem be codified in the following article on suspension:

Article 3469 (PROPOSED). Suspension of prescription.

Prescription is suspended between spouses during marriage, caretakers and children during minority, tutors and minors during tutorship, and curators and interdicts during interdiction.

Prescription is also suspended by legal moratorium or vis major that occurs within the last six months of the prescriptive period.

Prescription may be suspended under extraordinary circumstances for good cause unless prohibited by law.

Comment (PROPOSED).

A caretaker means a person legally obligated to provide or secure adequate care for a child, including a tutor, guardian, legal custodian, or parent.

Legal moratorium includes occasions on which courts are made inaccessible by war, legislative order, or judicial refusal to act. To obtain the benefit of suspension, either legal moratorium or vis major must have occurred, at least in part, during what would have been the last six months of the original, unsuspended prescriptive period.

This article replaces the judicial doctrine of contra non valentem with a legislative grant of the discretion to suspend prescription to prevent obvious injustice. Courts should avoid reliance on precedent in performing such an inherently fact-intensive and equitable role.

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154. See, e.g., La Plaque Corp. v. Chevron USA Inc., 638 So. 2d 354, 356 (La. App. 4th Cir.), writ denied, 644 So. 2d 395 (1994) ("Contra non valentem is an exceptional remedy recognized by our jurisprudence which is in direct contradiction to the articles in the Civil Code and therefore should be strictly construed.").

155. It has already been suggested that contra non valentem, as an equitable doctrine, ought not be straitjacketed in precedential categories, but rather should be applied whenever warranted by exceptional circumstances. Hackenberg, supra note 3, at 830.

156. According to Symeonides, the Law Institute rejected one attempt to codify contra non valentem, which would have appeared as a second paragraph to Civil Code art. 3467:

Liberative prescription is exceptionally suspended when the filing or prosecution of a suit is prevented by the fraud of the creditor or is made impossible by extraordinary circumstances totally beyond the control of the plaintiff, and the accrual of prescription would result in obvious injustice.

See Symeonides, supra note 2, at 139 n.109 (quoting proposal to the Law Institute of Feb. 19, 1982).


158. Adapted from Greek Civil Code art. 255.

159. Adapted from the second paragraph of La. Civ. Code art. 3469.
III. NEQUE CUM LITTERIS AUT ORIATUR AUT OCCIDAT 160

The Louisiana judge, like the Roman praetor, bridged the gap between the utilitas and ius of prescriptive legislation with a Latin gloss. But stoic universals such as good faith, exceptional circumstances, and good cause are the proper building blocks of the judicial juristic method. 161 In their absence, the judge becomes mired in precedential accretion. Disingenuous codification only adds to the muck. Injustice inevitably takes root. In the absence of genuine revolutionary sentiment in Louisiana, it might be time to allow the Louisiana judge to be iudex, and to require the Louisiana legislator, under the tutelage of the Louisiana Law Institute, to become praetor. The alternative is to continue to deny what Cicero knew, that the law neither begins nor ends with codification.

160. Adsentior, frater, ut, quod est recte verumque aeternum quoque sit neque cum litteris, quibus scita scribuntur, aut oriatur aut occidat. Cicero, de Legibus II.iv.11.

161. For a demonstration of the proper judicial juristic method, see Zimmermann’s discussion of the use made of “factum sit neque fiat” in the exceptio doli by the Roman iudex. See Zimmermann, supra note 21, at 667-68. Asking what has become of the jurist, see John P. Dawson, The Oracles of the Law 100-47 (1968).