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Buried by the Sands of Time: The Problem with Peremption

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INTRODUCTION

Society is obsessed with time. We count down the number of shopping days until Christmas.[1] Days are measured in billable

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1. James Barron, *Turkey and Stuffing? Yawn. We're Jumping Ahead to Christmas*, N.Y. TIMES, Nov. 10, 2004, at B3.

hours.[2] We invest based on the time value of money.[3] Children are punished by time outs.[4] People struggle with time management,[5] worrying that if they waste time, time will doth waste them.[6] We want time to stand still when we are having the time of our lives because we know that as time goes by, the times will be a-changin'.[7] We believe there is a time for everything.[8] In sum, we are buried by the sands of time.

But as cognizant as we are of time in our day-to-day lives, we remain ignorant of how time affects our legal rights, especially our right to file suit.[9] Legal time mismanagement is particularly prevalent in Louisiana in part because of the doctrine of peremption. Peremption, as defined in the Louisiana Civil Code, is "a period of time fixed by law for the existence of a right."[10] In other words, it is a mode of destroying rights due to their nonuse.

Though seemingly simple in definition, peremption creates vast jurisprudential problems. First, peremption causes inequities in the law.[11] Because peremption abolishes a right after a fixed, absolute time period, a claimant's cause of action may be extinguished before the claimant even knows he can bring the cause of action. The loss of rights under such circumstances effectively denies the claimant his opportunity to file suit. This ostensibly unfair result leads to the second problem of peremption, the misapplication of

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2. *See generally* Stephen W. Jones & Melissa Beard Glover, *The Attack on Traditional Billing Practices*, 20 U. ARK. LITTLE ROCK L. REV. 293, 293–97 (1998) (recounting the history of law firms charging clients by billable hours).

3. DAVID R. HERWITZ & MATTHEW J. BARRETT, ACCOUNTING FOR LAWYERS 205–06 (4th ed. 2006).

4. *See* Hewitt B. Clark et al., *Timeout as a Punishing Stimulus in Continuous and Intermittent Schedules*, 6 J. APPLIED BEHAV. ANALYSIS 443 (1973).

5. ALEX MACKENZIE, THE TIME TRAP: THE CLASSIC BOOK ON TIME MANAGEMENT 4 (3d ed. 1997).

6. WILLIAM SHAKESPEARE, RICHARD II act 2, sc. 5.

7. *See, e.g.*, THE ALL-AMERICAN REJECTS, TIME STANDS STILL (Dreamworks Records 2003); CASABLANCA: ORIGINAL MOTION PICTURE SOUNDTRACK, AS TIME GOES BY (Rhino/Wea 1997); BOB DYLAN, THE TIMES THEY ARE A-CHANGIN' (Columbia Records 1964); GREEN DAY, GOOD RIDDANCE [TIME OF YOUR LIFE] (Reprise 1997).

8. *Ecclesiastes* 3:1–8.

9. In a 2006 American Bar Association presentation, one of the predominant reasons cited for clients filing legal malpractice claims against their attorney is because the attorney missed deadlines. *See* Mark C.S. Bassingthwaighte & Reba J. Nance, Presentation at the ABA Tech Show 2006: The Top Ten Causes of Malpractice—and How You Can Avoid Them 2 (Apr. 20–22, 2006), http://www.abanet.org/lpm/lpt/articles/tch12062.pdf (last visited Apr. 6, 2010).

10. LA. CIV. CODE ANN. art. 3458 (2007).

11. *See infra* Part II.A.

the doctrine.[12] Some courts (and occasionally the legislature) are unwilling to promulgate the aforementioned inequities of peremption; instead, they attempt to provide equitable remedies to claimants.[13] To do so, however, courts and the legislature apply—or, more accurately, misapply—rules inapposite to the underlying principles of peremption to peremptive periods.[14] Such misapplications further the third problem of the doctrine: confusion between peremption and other temporal doctrines.[15] Classifying whether a time period is peremptive has been an arduous task since the creation of the institution.[16] This difficulty lies largely in the doctrine's facial similarity to prescription, another institution that terminates litigation due to the passage of time.[17] The non-peremptive rules misapplied to peremptive periods are frequently rules of prescription.[18] As prescriptive rules are applied to peremptive periods, the differences between the two doctrines become blurred, thus making distinguishing peremption from prescription more onerous and, in turn, increasing the confusion of courts as to how to characterize particular time limitations.

Because of these issues, this Article argues that the laws pertaining to peremption are in need of vast legislative overhaul. Part I details the history and definition of peremption. Part II delineates the current problems with peremption, describing the inequities it creates, the misapplications of the doctrine, and the confusion courts face when determining whether a time limitation is peremptive. Part III suggests four alternative legislative solutions for peremption, explains how each solution alleviates the current problems, and discusses the solutions' advantages and disadvantages. This Article concludes by advocating for a particular legislative remedy.

I. AN OVERVIEW OF PEREMPTION

The history, definition, and effects of peremption shed light on many of the institution's current problems. Given the close relation

12. *See infra* Part II.B.
13. *See id.*
14. *See id.*
15. *See infra* Part II.C.
16. *See id.*
17. There are three types of prescription in Louisiana: acquisitive, liberative, and nonuse. LA. CIV. CODE ANN. art. 3445 (2007). Unless otherwise stated, prescription in this Article refers to liberative prescription. Liberative prescription in Louisiana is "a mode of barring . . . actions as a result of inaction for a period of time." LA. CIV. CODE ANN. art. 3447 (2007).
18. *See infra* Part II.B.

of peremption to prescription, however, these matters must be understood not only within the confines of peremption, but also as they compare to and contrast with prescription.

A. History of Peremption

The origins of peremption are rooted in the doctrine of liberative prescription.[19] Prescription was originally introduced in Roman law by the praetor[20] as an equitable means of temporally

19. The Louisiana Supreme Court stated in *Flowers, Inc. v. Rausch* that "peremption is but a form or prescription, a species thereof." 364 So. 2d 928, 931 (1978). In that same decision, the court proclaimed that "peremption is a common law term which has crept into our jurisprudence." *Id.* at 931 n.1. This statement is dubious at best. The first Louisiana case establishing the doctrine of peremption cited French authorities to support its use of peremption. *See* Shepherd v. Orleans Cotton Press Co., 2 La. Ann. 100, 105 (La. 1847) (citing French scholar Troplong and the Code Napoleon). The only early Louisiana case utilizing peremption that cited common law authorities was *Guillory v. Avoyelles Railroad Co. See* 28 So. 899, 901 (La. 1900). Though the *Guillory* court cited two common law cases that discussed the extinguishment of rights under a "strict" application of the statute of limitations, neither court used the term "peremption." *See* Taylor v. Cranberry Iron & Coal Co., 94 N.C. 525, 527 (N.C. 1886); Cooper v. Lyons, 77 Tenn. 596, 600 (Tenn. 1882). In actuality, peremption is not a common law term. There are only a handful of cases in common law states that use the term peremption, but none of these cases applies peremption as a theory of extinguishing rights. *See, e.g.*, Moore v. Estelle, 670 F.2d 56, 56 (5th Cir. 1982); HMO Ass'n v. Nicholas, 964 F. Supp. 230, 236 (E.D. Ky. 1997); State St. Bank & Trust Co. v. Mut. Life Ins. Co., 811 F. Supp. 915, 923 n.15 (S.D.N.Y. 1993); Roney v. NationsBank Corp., 799 F. Supp. 670, 672 (N.D. Tex. 1992); Hornaday v. Rowland, 674 P.2d 1333, 1335 (Alaska 1983); Morgan v. State, 635 P.2d 472, 478 (Alaska 1981); Tunley v. Anchorage Sch. Dist., 631 P.2d 67, 71 (Alaska 1980); Dexter v. Dexter, 661 A.2d 171, 175 (Md. Ct. Spec. App. 1995); Berrington v. Berrington, 633 A.2d 589, 591 n.2 (Pa. 1993). The majority of these cases mistakenly use the word "peremption" instead of "preemption." Though similar in spelling, the two concepts differ considerably in substance. In contract law, preemption refers to "the right to buy before others"; in constitutional law, preemption refers to the principle "that a federal law can supersede or supplant any inconsistent state law or regulation." BLACK'S LAW DICTIONARY 1216 (8th ed. 1999). Both concepts are quite different than the concept of peremption, which extinguishes unexercised rights. To be fair, Louisiana courts have made a similar error in the reverse by substituting "preemption" for "peremption." *See, e.g.*, Kimbrough v. Cooper, 915 So. 2d 344, 344 (La. 2005); Gettys v. Sessions & Fishman, L.L.P., 772 So. 2d 874, 875 (La. App. 5th Cir. 2000), *writ denied*, 787 So. 2d 311 (La. 2001); Fed. Nat'l Bank & Trust Co. v. Calsim, Inc., 340 So. 2d 611, 614 (La. App. 4th Cir. 1976), *writ denied*, 342 So. 2d 1110 (La. 1977). Presumably the misuse of the word "preemption" by Louisiana courts and "peremption" by American common law courts is a typographical error.

20. In Roman law, the praetor was an executive office that had "the power to prescribe the rules governing legal proceedings and declare the principles of

limiting newly created actions.[21] Through prescription, the praetor was able to protect debtors against unreasonably delayed claims while still providing creditors a reasonable time to file suit.[22] This equitable remedy was first codified in the Theodesian Code as a defense to be invoked by the debtor against stale personal claims.[23] Emperor Justinian maintained the concept of prescription in the *Corpus Juris Civilis*,[24] and it was similarly incorporated in the Code Napoleon of 1804,[25] the Louisiana Digest of 1808,[26] and the Louisiana Civil Code of 1825.[27]

While equity for the debtor was the underlying motive for the creation of prescription,[28] safeguards for the creditor—such as interruption and suspension of the prescriptive period—were ingrained in the institution from its beginning.[29] These protections stopped the running of prescription when the creditor took particular actions or was unable to act.[30] Devices like interruption and suspension highlighted the equitable underpinnings of the

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law on the basis of which disputes were resolved." GEORGE MOUSOURAKIS, A LEGAL HISTORY OF ROME 13 (2007). To execute his powers, the praetor issued edicts that established the principles of law and "the conditions under which [the praetor] would allow prosecutions and suits." *Id.* The edicts emerged as one of the most important sources of Roman private law. *Id.* at 14. For a further discussion on the role of the praetor, see PETER STEIN, ROMAN LAW IN EUROPEAN HISTORY 8–12 (1999).

21. G. INST. 1.110 (A.P. Scott trans.); *see* W.W. BUCKLAND, EQUITY IN ROMAN LAW 56 (1911); WILLIAM A. HUNTER, A SYSTEMATIC AND HISTORICAL EXPOSITION OF ROMAN LAW IN THE ORDER OF A CODE 646 (London, Sweet & Maxwell, Ltd. 1897).

22. REINHARD ZIMMERMANN, COMPARATIVE FOUNDATIONS OF A EUROPEAN LAW OF SET-OFF AND PRESCRIPTION 76–79 (2002) (discussing the balancing of interests of the creditor and debtor).

23. CODE THEOD. 4.14.1; *see* 2 M. PLANIOL, TREATISE ON THE CIVIL LAW pt. 1, at 347 (La. State Law Inst. trans., 11th ed. 1959) (1939).

24. Code Just. 7.39.3 (Arcadian & Honorian 365) (A.P. Scott trans.); *see* RUDOLPH SOHM, THE INSTITUTES: A TEXT-BOOK OF THE HISTORY AND SYSTEM OF ROMAN PRIVATE LAW 338–40 (James Crawford Ledlie trans., Oxford 2d ed. 1901) (discussing the inclusion of prescription by Justinian).

25. Code civil [C. CIV.] art. 2219 (Fr.).

26. LA. DIG. art. 32, at 482 (1808).

27. LA. CIV. CODE art. 3420 (1825).

28. ZIMMERMANN, *supra* note 22, at 164.

29. *E.g.*, G. BAUDRY-LACANTINERIE & A. TISSIER, TRAITE THEORIQUE ET PRATIQUE DE DROIT CIVIL, PRESCRIPTION no. 466 (4th ed. 1924), *reprinted in* 5 CIVIL LAW TRANSLATIONS 237 (La. State Law Inst. trans., West 1972) (noting that Justinian allowed judicial claims to interrupt prescription).

30. *Id.*; PLANIOL, *supra* note 23, at 361–67. For a more detailed explanation of interruption and suspension, see *infra* Part I.B.

institution because they served as a defense for creditors within a system generally designed to protect debtors.

The desire to protect the debtor, however, sometimes outweighed the courts' interest in allowing the creditor to raise equitable defenses.[31] In these instances, French courts classified the statutorily provided time period not as one of prescription, but as a forfeiture.[32] Forfeitures "were withdrawn from the reach of the rules which govern[ed] prescription," meaning that the equitable defenses prescription provided to creditors—such as interruption and suspension—were judicially barred.[33] The expiration of the time period operated as a "foreclosure" on the creditor's right against the debtor.[34] If the creditor did not file his claim timely, his right to sue was forfeited, regardless of the reason for his tardiness.[35]

Following its French counterparts, Louisiana courts also invoked the notion of forfeiture—referred to as peremption by Louisiana courts[36]—when the need to protect the debtor exceeded the interest in safeguarding the creditor's right to sue. Louisiana courts first utilized the doctrine of peremption with regard to mortgages in the mid-1800s. In the Civil Code of 1825, a mortgage could be re-inscribed by a mortgagee to preserve its effect against

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31. Actions such as the recognition of paternity and the revocation of donations for ingratitude were deemed to be such rights. *See* Cour de cassation [Cass.] May 7, 1923, D.P. I 1923, 57 (Fr.) (recognition of paternity); Cour d'appel [CA] [regional court of appeal] Grenoble, ch. réun, Feb. 19, 1868, S. Jur. II 1968, 171 (Fr.) (revocation of ingratitude).

32. "*[C]ette limitation de la durée de l'action en révocation constituent une simple déchânce ou fin de non-recevoir, et non une prescription dans le sens de la loi.*" Cour d'appel [CA] [regional court of appeal] Metz, ch. civ., Feb. 19, 1868, S. Jur. II 1868, 171 (Fr.) (describing the time period affecting the action of revocation of a donation as the loss of a remedy and not a prescription); *see also* Cour de cassation [Cass.] Feb. 11, 1925, S. Jur. I 1925, 209 (Fr.); Cour de cassation [Cass.] May 7, 1923, D.P. I 1923, 57 (Fr.); Cour d'appel [CA] [regional court of appeal] Rouen, 1e ch., Aug. 5, 1863, S. Jur. II 1863, 229 (Fr.). Forfeitures are also referred to as *délais prefixes* (strict limitations). 12 AUBRY & RAU, DROIT CIVIL FRANÇAIS, PRESCRIPTION § 771 (6th ed. 1958), *reprinted in* 5 CIVIL LAW TRANSLATIONS 421 (La. State Law Inst. trans., West 1972); Jean C. Carbonnier, "Notes on Liberative Prescription," 50 *Revue Trimestrielle de Droit Civil* § IV (1952), *reprinted in* 5 CIVIL LAW TRANSLATIONS 468 (La. State Law Inst. trans., West 1972).

33. AUBRY & RAU, *supra* note 32, § 771, at 421; *see* Carbonnier, *supra* note 32, § IV, at 468.

34. Cour d'appel [CA] Metz, ch. civ., Feb. 19, 1868, S. Jur. II 1868, 171 (Fr.) (describing the running of the time period for a revocation for ingratitude as "a simple forfeiture, foreclosure of remedy").

35. *Id.*

36. The word "peremption" comes from the Latin word *perimere* meaning "to destroy." New Orleans Warehouse Co. v. Marrero, 24 So. 800, 801 (La. 1899).

third parties.[37] A ten-year limitation applied to the re-inscription such that, upon its re-inscription, a mortgage was preserved for ten years; if the mortgage was not renewed within the given time frame, the effect of the mortgage ceased.[38] In *Shepherd v. Orleans Cotton Press Co.*, the claimants filed to re-inscribe their mortgage within the applicable time period, but the filing was in improper form.[39] The claimants argued that despite the improper form, the filing of the re-inscription should interrupt the running of the time limitation under the general rules of interruption of prescription.[40]

The *Shepherd* court disagreed with the claimants' argument and found that the time period for the re-inscription of mortgages was a peremptive period; thus, it was not subject to the interruptive rules of prescription.[41] The *Shepherd* court viewed the right to re-inscribe a mortgage as solely within the discretion of the creditor and therefore determined that the statutorily provided time limitation was intended to protect only the debtor.[42] As the court stated, "The inscription is exclusively in the power of the party having an interest to make it. If he does not reinscribe, he cannot complain of losses sustained through his own neglect."[43] Based on this theory, the court held that "legal delays are fatal in all cases, unless expressly declared to be otherwise."[44] Numerous courts subsequently adopted this view, and the time period applicable to the re-inscription of mortgages became referred to as the "peremption of mortgages."[45]

At the turn of the century, the Louisiana Supreme Court began applying peremption to more rights. In the landmark case *Guillory v. Avoyelles Railroad Co.*, the court held that an action to void an election was subject to a peremptive period of three months.[46] The claimants in *Guillory* sought to nullify a tax election because of incorrect procedures used in ordering the election.[47] The election

37. LA. CIV. CODE art. 3333 (1825).
38. *Id.*
39. 2 La. Ann. 100, 113 (La. 1847). The form was improper because a description of the mortgaged property was omitted from the re-inscription. *Id.*
40. *Id.* at 111.
41. *Id.* at 112–13.
42. *Id.*
43. *Id.*
44. *Id.*
45. *See, e.g.*, Hyatt v. Gallier, 6 La. Ann. 321, 321 (La. 1851); Kemp v. Rowly, 2 La. Ann. 316, 320 (La. 1847); McElrath v. Dupuy, 2 La. Ann. 520, 523 (La. 1847). For a discussion of the peremption of mortgages, see Harriet Spiller Daggett, *The Chattel Mortgage in Louisiana*, 13 TUL. L. REV. 19, 39–40 (1938).
46. 28 So. 899, 901 (La. 1900).
47. *Id.* at 900.

occurred on July 26, 1894, but the claimants did not file suit until April 29, 1899.[48] The claimants argued that during the nearly five-year span between the election and their filing, other lawsuits regarding the election had been filed thereby interrupting what they asserted was a prescriptive period.[49] The claimants contended that they had three months from the date that the last lawsuit finished—February 6, 1899—to bring an action, i.e., they had until May 6, 1899, to file suit.[50]

The *Guillory* court did not accept the claimants' argument, stating that the statute providing the right to contest an election created a peremptive, not prescriptive, period.[51] Whereas the court in *Shepherd* determined that the statute was peremptive based on who it was intended to protect, the *Guillory* court focused on the language of the statute to reach its conclusion. The *Guillory* court distinguished between peremption and prescription by declaring that "[w]hen a statute creates a right of action and stipulates the delay within which that right is to be executed, the delay thus fixed is not properly speaking one of *prescription*, but it is one of *peremption*."[52] The court declared that "[s]tatutes of prescription simply bar the remedy. Statutes of peremption destroy the cause of action itself. That is to say, after the limit of time expires the cause of action no longer exists; it is lost."[53] Because the statute at issue in *Guillory* provided a right to contest elections and stipulated a three-month period for exercising that right, the limitation was peremptive, meaning that the claimants' cause of action was destroyed at the end of three months.[54]

The reasoning the *Guillory* court used in determining whether a statute created a period of peremption profoundly affected Louisiana jurisprudence.[55] Applying the *Guillory* rationale that a peremptive period was created by the stipulation of a time period

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48. *Id.*

49. *Id.* The case states that the claimants argued that the other cases had the effect of *suspending* prescription. *Id.* at 901. However, under article 3518 of the Civil Code of 1870, the other lawsuits would have had the effect of *interrupting* prescription. *See* LA. CIV. CODE art. 3518 (1870).

50. *Guillory*, 28 So. at 900.

51. *Id.* at 901. Numerous subsequent opinions of the Louisiana Supreme Court upheld the *Guillory* decision regarding the effect of the lapse of time on the right to contest elections. *See, e.g.*, Bone v. Sixth Ward & Crowley Drainage Dist., 55 So. 478, 479 (La. 1911); Ark. S. R.R. Co. v. Wilson, 42 So. 976, 978 (La. 1907); Baucum v. Policy Jury of Claiborne, 44 So. 289, 290 (La. 1907).

52. *Guillory*, 28 So. at 901.

53. *Id.*

54. *Id.*

55. James F. Shuey, Comment, *Legal Rights and the Passage of Time*, 41 LA. L. REV. 220, 230 (1980) (describing *Guillory*'s effect as "talismanic").

within which a right must be exercised, courts declared numerous statutorily provided time limitations to be peremptive. By the mid-1900s, courts concluded that an action to recover land sold at a tax sale,[56] the Workers Compensation Act,[57] a revendicatory action,[58] and, in some circumstances, personal injury actions[59] were subject to peremption. In all of these instances, the courts determined that upon the lapse of the peremptive period, the underlying cause of action was extinguished, thus leaving the claimant without further recourse.[60]

As the use of peremption by courts grew, the legislature also began expressly incorporating the concept of peremption into legislation.[61] In doing so, however, the legislature failed to define peremption or detail its effects. This lack of statutory definition prompted at least one scholar to call upon the legislature to clarify the differences in peremption and prescription.[62] The legislature responded to this plea thirty years thereafter when the articles of the Louisiana Civil Code pertaining to prescription were amended and reenacted in 1982.[63] In the 1982 revision, four articles defining

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56. Hollingsworth v. Schanland, 99 So. 613, 616 (La. 1924).

57. Heard v. Receivers of Parker Gravel Co., 194 So. 142, 144 (La. 1938); Brister v. Wray Dickinson Co., 164 So. 415, 416 (La. 1935).

58. Canada v. Frost Lumber Indus., Inc., 9 So. 2d 338, 341 (La. App. 2d Cir. 1942).

59. Miller v. Am. Mut. Liab. Ins. Co., 42 So. 2d 328, 331 (La. App. 1st Cir. 1949); Smith v. Monroe Grocery Co., 171 So. 167, 171–72 (La. App. 2d Cir. 1936).

60. *E.g.*, *Brister*, 164 So. at 416 (stating that upon the lapse of the peremptive period, "the cause of action no longer existed; it was lost"); *Hollingsworth*, 99 So. at 616 (holding that the articles in question "should be viewed as establishing periods of peremption rather than of prescription, and thereafter as destroying the cause of action by the lapse of time"); *Canada*, 9 So. 2d at 341 (finding the claimants "forever barr[ed] from bringing their revendicatory action").

61. For example, in Louisiana Acts number 381 of 1938, the legislature stated that the running of the time period "shall preempt" the right. When the legislation was placed in the Louisiana Revised Statutes, the wording was fixed to say "perempt." *See* 1938 La. Acts No. 381, § 15 (now LA. REV. STAT. ANN. § 34:816 (2006)) (establishing a one-year peremption period for exercising a lien or privilege against an offending vessel). Similarly, the text of 1968 Louisiana Acts number 105 did not use the word "peremption," but explicitly provided that the time period could not be interrupted or suspended. When the legislation was placed in the Revised Statutes, the heading "peremption" was added to it. *See* 1968 La. Acts No. 105 (now LA. REV. STAT. ANN. §§ 12:147, :255 (1994)).

62. Joseph Dainow, *Prescription, The Work of the Louisiana Supreme Court for the 1952–1953 Term*, 14 LA. L. REV. 129, 132 (1953).

63. 1982 La. Acts No. 187. The amendment and reenactment of the prescription articles were part of the continued revisions of the Civil Code and Revised Statutes tasked to the Louisiana State Law Institute by the legislature. *See* LA. REV. STAT. ANN. § 24:251 (2007). The general goal of the continued

peremption and its effects were added to the Civil Code.[64] These articles sought to codify "concepts that [had] been agreed upon by courts"[65] and highlight the "existence of an underlying public interest that a right exist only for a limited period of time."[66] As the codified version of peremption was intended to "not change the law,"[67] the definition provided in the Civil Code reflects the definition established by *Shepherd*, *Guillory*, and their progeny.

B. Definition and Effects of Peremption

Peremption is currently defined in the Civil Code as "a period of time fixed by law for the existence of a right."[68] When the peremptive period expires, the right is destroyed.[69] Thus, peremption is a means of precluding litigation because of the creditor's inaction for an established period of time. As no right exists upon the lapse of the peremptive period, there can be no litigation beyond the established time period.[70]

Prescription, the doctrine that gave birth to peremption, also prevents the filing of suit as a result of the creditor's inaction.[71] Instead of extinguishing the underlying right, however, prescription merely bars the creditor's ability to bring a cause of action.[72] Upon the running of prescription, the underlying right continues to exist, but the creditor is barred from exercising that right.[73] This distinction between extinguishing rights and barring

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revisions is to modernize the Civil Code. LA. REV. STAT. ANN. § 24:204 (2007). This being the case, it is of no surprise that peremption was added to the Civil Code in an effort to keep the Code up-to-date with modern jurisprudence.

64. LA. CIV. CODE ANN. arts. 3458–3461 (2007).

65. Marjorie Nieset Neufeld, Comment, *Prescription and Peremption—The 1982 Revision of the Louisiana Civil Code*, 58 TUL. L. REV. 593, 602 (1983).

66. Hebert v. Doctors Mem'l Hosp., 486 So. 2d 717, 722 (La. 1986).

67. *See* LA. CIV. CODE ANN. arts. 3458 cmt. a, 3459 cmt. a, 3461 cmt. a (2007).

68. LA. CIV. CODE ANN. art. 3458 (2007).

69. *Id.*

70. If there is no underlying right, the creditor has no cause of action, thereby making the claim "legally nonexistent." *See* LA. CODE CIV. PROC. ANN. arts. 923, 927 (2005). *See generally* FRANK L. MARAIST & HARRY T. LEMMON, CIVIL PROCEDURE § 6.7, *in* 1 LOUISIANA CIVIL LAW TREATISE 122–27 (1999) (discussing the peremptory exception of no cause of action).

71. LA. CIV. CODE ANN. art. 3447 (2007).

72. *Id.* "[Liberative prescription] is (very inexactly) described as extinctive prescription. No substantive right [is] extinguished." R.W. LEE, THE ELEMENTS OF ROMAN LAW 125 (4th ed. 1956).

73. 1 ROBERT JOSEPH POTHIER, A TREATISE ON OBLIGATIONS CONSIDERED IN A MORAL AND LEGAL VIEW 144 (Newbern, N.C., Martin & Ogden 1802)

actions may appear to be one of semantics, but it represents a fundamental distinction between peremption and prescription that leads to dramatically different consequences regarding whether a creditor may seek a remedy for his legal claim.[74]

Because a right subject to peremption only exists for a limited period of time, the duration of a peremptive period may not be altered.[75] As such, peremption "may not be renounced, interrupted, or suspended."[76] Understanding how renunciation, interruption, and suspension affect rights demonstrates why they clearly cannot apply to peremption.

Renunciation alters the running of time limitations because it is a mechanism by which the debtor may abandon rights that have accrued due to the creditor's inaction.[77] If a creditor fails to sue a debtor within the period provided by law, the debtor has gained a right, namely the right to bar the creditor's suit. Renunciation allows the debtor to renounce this right after the creditor's time period has run. The concept of renunciation cannot apply to peremption because through renunciation the debtor modifies the time period during which the creditor's underlying right exists.

While renunciation operates as an ex-post alteration of the creditor's ability to file suit, interruption and suspension serve as *ex-ante* alterations. Interruption occurs in one of two ways: by the creditor filing a claim or by the debtor acknowledging the debt.[78] Both manners of interruption stop the running of the time period when the interruption occurs and restart the time period from its beginning when the interruption ceases.[79] More simply put, the effect of interruption is like hitting a reset button on a stopwatch: when the interruption commences, the running of prescription stops; when the interruption ceases, the running of prescription restarts anew.[80]

("Pleas in bar do not extinguish the claim but they render it ineffectual, in rendering the creditor not receivable to bring the action which results from it.").

74. The Louisiana Supreme Court said that "[p]eremption differs from prescripti[on] in two respects: (1) the expiration of the peremptive time period destroys the cause of action itself; and (2) nothing may interfere with the running of a peremptive time period." Naghi v. Brener, 17 So. 3d 919, 926 (La. 2009), *r'hg denied*, 2009 La. LEXIS 3425 (La. 2009).

75. *See* LA. CIV. CODE ANN. art. 3458 (2007).

76. LA. CIV. CODE ANN. art. 3461 (2007).

77. LA. CIV. CODE ANN. art. 3449 cmt. c (2007).

78. LA. CIV. CODE ANN. arts. 3462, 3464 (2007).

79. BAUDRY-LACANTINERIE & TISSIER, *supra* note 29, no. 539, at 268; ZIMMERMAN, *supra* note 22, at 119.

80. PLANIOL, *supra* note 23, at 365.

Like interruption, suspension also stops the running of the time period, but instead of restarting the time period from zero, suspension requires that the time period resume running from where it stopped.[81] For example, entering into a compromise suspends prescription.[82] When a creditor and debtor enter into a compromise, the time period during which the creditor must file suit stops. If that compromise is rescinded, the creditor's time period resumes running from the point at which it was stopped. Whereas interruption is akin to hitting the restart button on a stopwatch, suspension is like hitting the pause button.[83] Since both alter the running of the time period, neither may affect peremption.[84]

While they may not affect peremption, suspension, interruption, and renunciation can apply to prescriptive periods.[85] This divergent consequence between peremption and prescription

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81. 1 *id.* at 493. Under the Civil Code, suspension of prescription should only occur when legislation provides for it. *See* LA. CIV. CODE ANN. art. 3457 (2007). Examples of legislatively prescribed suspensions include between spouses during marriage, parents and children during minority, tutors and minors during tutorship, and curators and interdicts during interdiction. LA. CIV. CODE ANN. art. 3469 (2007). Though suspension should only be created by legislation, there is a judicially created suspensive doctrine called *contra non valentem*. *Contra non valentem* prevents prescription from running in four situations: (1) where there was some legal cause that prevented the courts or their officers from taking cognizance of or acting on the plaintiff's action; (2) where there was some condition coupled with the contract or connected with the proceedings that prevented the creditor from suing or acting; (3) where the debtor himself has done some act effectually to prevent the creditor from availing himself of his cause of action; and (4) where the cause of action is not known or reasonably knowable by the creditor, even though his ignorance is not induced by the debtor. Corsey v. State Dep't of Corr., 375 So. 2d 1319, 1321–22 (La. 1979). Because this doctrine alters how the passage of time affects an individual's ability to file suit, it—like the legislatively created suspensive periods—should not apply to peremption. Naquin v. Lafayette Parish-Consol. Gov't, 950 So. 2d 657, 668 (La. 2007); Davis v. Coregis Ins. Co., 789 So. 2d 7, 17 (La. App. 3d Cir. 2000), *writ denied*, 788 So. 2d 1192 (La. 2001). Courts, however, occasionally apply the *contra non valentem* doctrine to peremptive periods without referring to the doctrine by name. *See* Part II.B.

82. LA. CIV. CODE ANN. art. 3083 (Supp. 2008).

83. 1 PLANIOL, *supra* note 23, pt. 2, at 593 (La. State Law Inst. trans., 11th ed. 1959) (1939).

84. That interruption does not apply to peremption must be understood to mean that interruption does not apply to non-filed peremptive claims. If an action subject to peremption is filed within the peremptive period and the time period lapses while the claim is amid litigation, the claim will not be dismissed due to peremption. LA. CIV. CODE ANN. art. 3461 cmt. c (2007). "[S]o long as the action is pending the lapse of the period of peremption does not extinguish the right." *Id.*

85. LA. CIV. CODE ANN. arts. 3449, 3462–3472 (2007).

has tangible effects. For instance, the right to claim spousal support after a divorce is subject to a peremptive period of three years.[86] The peremptive period may commence on the date that the last payment of spousal support is voluntarily made.[87] Therefore, if the former husband voluntarily pays spousal support to his ex-wife on January 1, 2005, and fails to provide spousal support thereafter, the ex-wife must file a cause of action for spousal support prior to January 1, 2008; thereafter her action is perempted.

Suppose, however, the ex-husband voluntarily makes his last payment on January 1, 2005, and then becomes financially unable to make subsequent payments. Instead of going to court, the ex-husband calls his ex-wife on June 1, 2005, and acknowledges that he owes her spousal support. If the time period for an action for spousal support were prescriptive instead of peremptive, the ex-husband's acknowledgment on June 1, 2005, would serve as an interruption.[88] On that date, the prescriptive clock would be reset to zero, meaning that the ex-wife would have a new three-year period in which to bring an action for spousal support (i.e., until June 1, 2008). An action for spousal support, though, is not prescriptive—it is peremptive.[89] Since peremption cannot be interrupted, the acknowledgment made by the ex-husband has no effect on the running of the peremptive period. Thus, despite the acknowledgment by her ex-husband, in order to not lose her right to spousal support, the ex-wife must file an action by January 1, 2008.

Another difference between peremption and prescription is that a perempted claim cannot serve as the object of a natural obligation,[90] whereas a prescribed claim may.[91] "A natural obligation arises from circumstances in which the law implies a particular moral duty to render a performance."[92] Though natural

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86. LA. CIV. CODE ANN. art. 117 (1999).

87. *Id.* The word "may" is used because Civil Code article 117 provides three different commencement dates for the peremptive period for the right to claim spousal support after a divorce. *See id.*

88. LA. CIV. CODE ANN. art. 3464 (2007).

89. LA. CIV. CODE ANN. art. 117 (1999).

90. State Bd. of Ethics v. Ourso, 842 So. 2d 346, 349 (La. 2003) (citing Reeder v. North, 701 So. 2d 1291, 1298 (La. 1997)); State v. McInnis Bros. Constr., 701 So. 2d 937, 939 (La. 1997); Hebert v. Doctors Mem'l Hosp., 486 So. 2d 717, 723 (La. 1986); Davis v. Coregis Ins. Co., 789 So. 2d 7, 17 (La. App. 3d Cir. 2000) (citing *Hebert*, 486 So. 2d at 723), *writ denied*, 788 So. 2d 1192 (La. 2001).

91. LA. CIV. CODE ANN. art. 1762 (2008).

92. LA. CIV. CODE ANN. art. 1760 (2008). For a full discussion of how a moral duty turns into a natural obligation, see SAUL LITVINOFF, OBLIGATIONS § 2.4, *in* 5 LOUISIANA CIVIL LAW TREATISE 28–29 (2d ed. 2001).

obligations are alone not enforceable by law,[93] a promise to fulfill a natural obligation may serve as the object and cause for a civil obligation.[94] This civil obligation operates as an onerous contract because each party gains an advantage: the creditor receives the performance of the contract while the debtor is freed from his moral duty.[95] Because a perempted claim may not serve as the object of a natural obligation, the promise to fulfill a perempted claim cannot serve as the object and cause of a civil obligation.

The classic example of such a situation is the promise to pay a prescribed claim.[96] In the previous example, assume that instead of calling his ex-wife on June 1, 2005, the ex-husband sends her a letter on June 1, 2008, six months after the ex-wife's right to spousal support is extinguished by peremption. In this letter, the ex-husband promises to pay all of the payments of spousal support that he missed. If the right were prescriptive, the ex-wife's right to claim spousal support, though prescribed, would serve as the object of the ex-husband's natural obligation. This natural obligation would be the object of an onerous contract that the ex-husband made in writing with his ex-wife, and that onerous contract would be enforceable by law.

The right to claim spousal support, however, is subject to peremption,[97] not prescription. Because the ex-wife's underlying right is destroyed on January 1, 2008, due to her inaction, the ex-husband owes no moral duty to the ex-wife on June 1, 2008 (at least no moral duty as implied by the Civil Code). Therefore, there is no natural obligation. With no natural obligation, there is no object of an onerous contract, so nothing is enforceable at law.[98] The ex-husband's written promise to pay spousal support is not legally binding because the ex-wife's right to spousal support is subject to peremption.

In addition to the aforementioned substantive distinctions between peremption and prescription, there are procedural

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93. LA. CIV. CODE ANN. art. 1761 (2008).

94. For a full discussion of how a natural obligation gives rise to a civil obligation, see LITVINOFF, *supra* note 92, § 2.7, at 32–33.

95. *Id.* § 2.23, at 38; *see* LA. CIV. CODE ANN. art. 1909 (2008).

96. The Civil Code lists the duty to fulfill a prescribed claim as an example of a circumstance in which the law implies a moral duty. LA. CIV. CODE ANN. art. 1762(1) (2008).

97. LA. CIV. CODE ANN. art. 117 (1999).

98. Though the promise the ex-husband made on June 1, 2008, could be classified as a gratuitous donation (*see* LA. CIV. CODE ANN. art. 1523 (2000)), gratuitous donations, unlike onerous contracts, require an authentic act to be valid. LA. CIV. CODE ANN. art. 1541 (Supp. 2009). As there was no authentic act involved in the letter from the ex-husband to the ex-wife, his promise is not enforceable.

differences between the two doctrines. These distinctions are also a function of the institutions' fundamental differences. Peremption may be supplied by the court (or it may be pleaded),[99] whereas prescription must be specially pleaded by the defendant.[100] Since peremption destroys the underlying right, a claimant filing suit after the peremptive period has no cause of action because the claimant has no right.[101] As such, it makes sense that the court may provide the exception of peremption; if there is no underlying right, there is no claim on which to litigate, regardless of whether the defendant raised the appropriate exception. With prescription, however, the right still remains even after the prescriptive period has run. Consequently, the defendant may graciously waive (or negligently allow) the defense of prescription and permit the claimant to continue his prescribed claim.

By way of example, an action for legal malpractice is subject to two periods of peremption.[102] If these periods were prescriptive instead of peremptive, then an attorney who is sued for malpractice and negligently fails to plead the exception of prescription in his answer could not be saved from litigation by the court supplying the defense of prescription. Because the time periods for legal malpractice are peremptive, though, an attorney facing a legal malpractice claim need not plead peremption—the trial court or the appellate court can supply on its own the exception.[103]

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99. LA. CIV. CODE ANN. art. 3460 (2007).

100. LA. CIV. CODE ANN. art. 3452 (2007); 2008 La. Acts No. 824.

101. Prior to the 2008 revision of article 927 in the Louisiana Code of Civil Procedure, the appropriate peremptory exception to bring in order to claim that the claimant was perempted from pursuing his claim was an exception of no cause of action. *See* LA. CODE CIV. PROC. ANN. art. 927 (2005); Russland Enters. v. City of Gretna, 727 So. 2d 1223, 1226 (La. App. 5th Cir. 1999), *writ denied*, 743 So. 2d 669 (La. 1999); Poree v. Elite Elevator Servs., Inc., 665 So. 2d 133, 136 (La. App. 4th Cir. 1995) (Barry, J. dissenting), *writ denied*, 667 So. 2d 1053 (La. 1996); Davis v. Sewerage & Water Bd., 469 So. 2d 1144, 1147 (La. App. 4th Cir. 1985). Routinely, however, claimants filed exceptions of prescription. *See, e.g.*, Saia v. Asher, 825 So. 2d 1257, 1259 n.5 (La. App. 1st Cir. 2002); *Poree*, 665 So. 2d at 134. On occasion, claimants filed an "Exception of Prescription and Peremption." *See, e.g.*, Int'l Paper Co. v. Hilton, 966 So. 2d 545, 549 (La. 2007); Turner v. Consol. Underwriters, 176 So. 2d 420, 421 (La. 1965). In 2008, the legislature amended Code of Civil Procedure article 927 to include a peremptory exception for peremption. 2008 La. Acts No. 824. Though countless defendants erred when raising their defense of peremption, the inclusion of a peremptory exception for peremption is unnecessary. If a claim is perempted, the claimant has no right and therefore has no cause of action.

102. *See* LA. REV. STAT. ANN. § 9:5605 (2007).

103. LA. CIV. CODE ANN. art. 3460 (2007); LA. CODE CIV. PROC. ANN. art. 2163 (2002).

Although the procedural and substantive differences in peremption and prescription are vast, the fact remains that on a superficial level, both institutions have the same effect: they prevent the claimant from filing suit. The problems of peremption occur because peremption and prescription have such shallow similarities while maintaining deep, doctrinal distinctions.

II. THE PROBLEMS WITH PEREMPTION

The problems with peremption originate in the doctrine's bedrock principle that rights may only exist for a finite period of time. Because the institution is built on this foundation, it naturally produces inequitable results. Legislative and judicial attempts to rectify these injustices cause the misapplication of the doctrine. Misapplications increase the confusion in determining whether a time period is peremptive. The only way to end such confusion is to legislatively or judicially clarify the classification of each right, but once a right is firmly characterized as peremptive, the original problem of inequity returns.

A. Inequity

For debtors, peremption serves as an extraordinary protective measure because it destroys the creditor's right upon nonuse. This extinction, however, has inequitable effects. Because a right subject to peremption has a temporally limited existence that cannot be altered, the creditor's right may be terminated before he is aware that the right ever existed. Similarly, a creditor may know of his right but still lose that right through peremption because he is unable to exercise the right through no fault of his own during the peremptive period. In either case, the creditor is never afforded a meaningful opportunity to bring his claim. Because of peremption, inequity inherently occurs.

Courts readily acknowledge in such situations that the laws of peremption are unjust.[104] Such unjust situations arise with some degree of frequency in the realm of legal malpractice. Legal malpractice is subject to two peremptive periods: "one year from the date that the alleged act . . . is discovered or should have been discovered" and in no event later than "three years from the date of

104. Reeder v. North, 701 So. 2d 1291, 1296 (La. 1997); Biggers v. Allstate Ins. Co., 886 So. 2d 1179, 1183 (La. App. 5th Cir. 2004); Raby-Magee v. Matzen, 764 So. 2d 978, 979 (La. App. 1st Cir. 2000); Drennan v. Killian, 712 So. 2d 978, 980 (La. App. 5th Cir. 1998).

the alleged act . . . ."[105] This means that if a lawyer performs an action that gives rise to a claim of legal malpractice, the client has one year from the date that the client discovered or should have discovered the lawyer's negligent act, but, regardless of when the client discovers the negligence, the client must bring his claim within three years of the negligent act.

The effect of this peremptive time period is that "a person's claim may be extinguished before he realizes the full extent of his damages"[106] or before he realizes he has damages at all. This was allegedly the situation in *Brumfield v. McElwee*.[107] In *Brumfield*, the claimant originally filed a personal injury suit for injuries sustained while playing in a high school basketball game.[108] The attorney for the claimant's personal injury case abandoned the case without telling the claimant, which led to the dismissal of the case with prejudice.[109] The claimant, unaware of the status of his case and unhappy with this attorney's unresponsiveness, retained new counsel who discovered that the original personal injury case had been dismissed with prejudice.[110] The claimant then filed a legal malpractice action against his former attorney,[111] but the filing of the malpractice suit took place more than three years after the former attorney had abandoned the personal injury suit.[112] In a correct application of the doctrine of peremption, the *Brumfield* court held that the client's claim was perempted, and thus the client could not file suit despite the fact that, during the peremptive period, the claimant was unaware that he had potentially been a victim of legal malpractice.[113]

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105. LA. REV. STAT. ANN. § 9:5605 (2007).

106. *Reeder*, 701 So. 2d at 1296; *see* Delahaye v. Plaisance, No. 2007 CA 1697, 2008 WL 2065927, at *3 (La. App. 1st Cir. May 2, 2008) (holding that the peremptive period for legal malpractice may extinguish the plaintiff's claim prior to his knowledge of the exact amount of tax liability he was exposed to as a result of a settlement agreement), *writ denied*, 992 So. 2d 945 (La. 2008).

107. 976 So. 2d 234 (La. App. 4th Cir. 2008).

108. *Id.* at 236–37.

109. *Id.* at 237–38.

110. *Id.* at 242.

111. *Id.* at 237.

112. *Id.*

113. *Id.* at 243. The possibility that a client's legal malpractice claim will become extinguished before the client is cognizant of the claim becomes even greater given that "Louisiana courts have consistently held that 'the knowledge of an attorney, actual or otherwise, is imputed to his or her client.'" Davis v. Conroy, No. 09-142, 2009 La. App. LEXIS 1752, at *8 (La. App. 5th Cir. Oct. 13, 2009). Thus, if all that Louisiana Revised Statute § 9:5605 requires for the peremptive period to commence is that the client "should have known that a lawyer's actions or inaction may cause the client to incur damages," and the client is imputed with all knowledge—actual or otherwise—of the lawyer, then

In reaching this conclusion, the court noted that the legal malpractice statute contains "perceived inequities."[114] These inequities are the natural outcome of peremption. If a right exists for an absolute, limited period of time, there is always the possibility that a potential claimant will be unaware of his right until after it is extinguished.

This situation becomes more prevalent—and arguably more unfair—the shorter the time period. Courts, in determining if a limitation is peremptive, use the length of the time period as an indicator of the legislature's intent to characterize a period as peremptive.[115] The rationale is that short time periods indicate a desire by the legislature to protect debtors; the shorter the time period, the more likely the time period was intended to be peremptive.[116] From a creditor's perspective, however, the shorter the time period, the more likely it is that the creditor may be unaware of his legal rights prior to their termination. As such, one indicator courts use to determine if a right is subject to peremption increases the inherent inequities that exist within the doctrine.

Some courts defend the termination of creditors' rights through peremption because peremption serves a greater purpose by protecting "public policy."[117] In examining many of the rights subject to peremption, this argument has some merit. Filiation[118] is a prime example of an area of law with numerous peremptive periods that strive to promote family stability and protect children from an "upheaval of [filiation] litigation."[119]

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the client's claim could be extinguished merely because the attorney was aware of his own malpractice, even though the client was never actually aware of the malpractice. LA. REV. STAT. ANN. § 9:5605 (2007); *see Davis*, 2009 La. App. LEXIS 1752, at *7–8.

114. *Brumfeld*, 976 So. 2d at 242 (quoting Reeder v. North, 701 So. 2d 1291, 1297 (La. 1997)).

115. *See infra* Part II.C.

116. *See* Metro. Erection Co. v. Landis Constr., 627 So. 2d 144, 148 (La. 1993).

117. *See, e.g.*, Broadscape.com v. Matthews, 980 So. 2d 140, 145 (La. App. 4th Cir. 2008); *Brumfield*, 976 So. 2d at 241. A similar argument was raised by French courts in the mid-1800s. AUBRY & RAU, *supra* note 32, § 771, at 423. For example, the right to establish paternity was subject to forfeiture because it was "of a higher order of interest [that] prevent[ed] troubles in families." Cour d'appel [CA] [regional court of appeal] Rouen, 1e ch., Aug. 5, 1863, S. Jur. II 1863, 229 (Fr.).

118. Filiation is a juridical relation that unites a child to his father or mother. J.-R. Trahan, *Glossae on the New Law of Filiation*, 67 LA. L. REV. 387, 388 n.1 (2007) (citations omitted).

119. Katherine Shaw Spaht, *Who's Your Momma, Who Are Your Daddies? Louisiana's New Law of Filiation*, 67 LA. L. REV. 307, 324 (2007).

Even within filiation, however, the inequities of peremption cannot go unrecognized. For example, under Louisiana's rules of filiation, an alleged biological father has a one-year peremptive period to establish paternity as to a child who is presumed to be the child of another man.[120] This time period commences on the date the child is born.[121] Assume that a husband and wife marry on January 1, 2007. The wife has an affair on March 1, 2007, and gives birth to a child on January 1, 2008. Though the law presumes that the husband is the father of the child,[122] as the child's features develop, the mother questions this presumption. On January 1, 2009, unhappy in her marriage and convinced that the child is not biologically related to her husband, the mother files to divorce the husband. She tells the alleged biological father that she thinks he is the true father of the child. He submits to a blood test the following day, confirms the mother's suspicions, and reignites his relationship with her. Despite his attempts to create a family, at this point the biological father has lost his right to establish paternity because his right is subject to a one-year peremptive period commencing at the child's birth.[123] His right to establish paternity has been destroyed forever.[124]

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120. LA. CIV. CODE ANN. art. 198 (2007).

121. *Id.*

122. LA. CIV. CODE ANN. art. 185 (2007).

123. Had the mother in bad faith deceived the biological father of his paternity, the biological father's time period to institute an action would be a one-year peremptive period "from the day [he] knew or should have known of his paternity, or within ten years from the day of the birth of the child, whichever first occurs." LA. CIV. CODE ANN. art. 198 (2007). Because the mother in this scenario was unsure of the biological father's paternity until January 2009, it is unlikely that she would be found to be in bad faith. *See* LA. CIV. CODE ANN. art. 1997 cmt. b (2008) (defining bad faith as the intentional and malicious failure to perform an obligation).

124. Though the biological father's right to establish paternity no longer exists, he could be able to filiate to the child based on actions taken by the mother. The mother has the right to contest paternity of her husband and assert that the biological father is the true father. LA. CIV. CODE ANN. art. 192 (2007). However, the mother cannot contest paternity until she is remarried, and remarriage cannot occur until the mother is divorced. LA. CIV. CODE ANN. art. 88 (1999); LA. CIV. CODE ANN. art. 192 (2007). If the mother files for a no-fault divorce under Civil Code article 103(1), as is likely to occur, the divorce will take a minimum of 365 days because there is a minor child involved. LA. CIV. CODE ANN. arts. 103(1), 103.1(2) (2007). The mother's right to contest paternity is subject to two peremptive periods, one of those periods requiring the mother to file suit within two years of the child's birth. LA. CIV. CODE ANN. art. 193 (2007) (providing that a contestation action must be filed within two years of the child's birth and 180 days of remarriage). By the time the mother is divorced from her husband, her right to contest the husband's paternity and establish the paternity of the biological father will also be perempted, thus denying the

Undoubtedly, protecting children and preserving families are important public policies that society should defend. In the above situation, though, it is not clear that peremption is the best mechanism for protecting these public policies. The original family of husband, mother, and child is no longer an actual unit, and the theoretical subsequent family of biological father, mother, and child is prevented from becoming a legally bound unit.[125] Allowing the biological father to filiate to the child in this scenario would arguably be in the best interest of the child because then the biological father, mother, and child can become a legally bound family with reciprocal duties of support.[126] Be that as it may, because of the current peremptive periods that govern filiation, this desirable result will not occur.

Regardless of the importance of the public policies that peremption purports to protect, the fact remains that the doctrine can lead to inequitable results. However, courts—and occasionally legislators—are not always willing to ignore these perceived inequities. In their attempts to remedy the inequities caused by peremption, courts and the legislature create a further problem: the misapplication of peremption.

B. Misapplication

In order to prevent unjust applications of peremption, courts and the legislature make piecemeal revisions to specific applications of the doctrine. These well-intentioned efforts constitute misapplications of peremption because the changes made are frequently inapposite to the foundational principles of the institution. For example, Louisiana Code of Civil Procedure article 1067 provides that incidental demands are not "barred" by

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biological father a remedy via the mother. Paternity may still be established by the child filing an action to establish paternity. LA. CIV. CODE ANN. art. 197 (2007). No peremptive or prescriptive period, in this situation, is attached to the child's right. *Id.* However, it hardly seems that the public policy is to place the onus of filiation on the child.

125. Unless the child establishes paternity, the biological father will never have a legal duty to support the child. *See* LA. CIV. CODE ANN. art. 227 (2007) (providing that parents owe their children support, maintenance, and education). Moreover, the biologically unrelated husband, who is now removed from the child's life, will have a continuing duty to support the child because the time period in which he could have disavowed paternity has passed. *See* LA. CIV. CODE ANN. art. 189 (2007) (providing that the husband has a one-year prescriptive period from the date he learned or should have learned of the birth of the child).

126. *See* LA. CIV. CODE ANN. arts. 227, 229 (2007).

peremption provided they are filed within ninety days of service of the main demand and were "not barred at the time the main demand was filed . . . ."[127] In effect, this rule extends peremption for certain incidental demands for ninety days following service of the main demand. Because peremption, by definition, creates a fixed period of time for the existence of a right,[128] any extension of that time period constitutes a misapplication.

By way of example of the misapplication of peremption in Code of Civil Procedure article 1067, suppose an attorney performs legal services for a client on January 1, 2007. The client never pays the attorney because the client has believed since January 1, 2007, that the attorney committed legal malpractice. The attorney files an action against the client for payment of services rendered. The client is served with notice of this suit on December 31, 2007. In accordance with the general rules of peremption, the client must file her claim for legal malpractice "one year from the date that the alleged act . . . is discovered," so, in this case, before January 1, 2008.[129] The Code of Civil Procedure, however, allows the client to file her claim until March 31, 2008, because the client's action for legal malpractice is an incidental demand to the lawyer's principal demand. The client's claim for legal malpractice was not perempted on December 31, 2007, when the principal demand was served on the client, so the client has an additional ninety days to bring her action. In this instance, the extension of peremption for incidental demands provides equity to the client; if the attorney sues the client for payment, it seems only fair that the client be able to sue the attorney for malpractice.[130] Be that as it may, allowing for such

127. LA. CODE CIV. PROC. ANN. art. 1067 (2005). The use of the word "barred" is inappropriate in reference to peremption, as peremption is a mode of extinguishing rights. LA. CIV. CODE ANN. art. 3458 (2007). "Barred," however, is appropriate in reference to prescription.

Incidental demands include demands in reconvention, cross-claims, intervention, and demands against third parties. LA. CODE CIV. PROC. ANN. art. 1031 (2005). In the case of third-party defendants, the ninety-day period commences with the service of process on the third party. LA. CODE CIV. PROC. ANN. art. 1067 (2005). Filing an incidental demand, however, should not be confused with filing an amended or supplemental petition that relates back to the original filing under Code of Civil Procedure article 1153. LA. CODE CIV. PROC. ANN. art. 1153 (2005). The Louisiana Supreme Court has held that a party may not file a supplemental petition that relates back to the original filing when the filing of the supplemental petition occurs outside of the peremptive period. Naghi v. Brener, 17 So. 3d 919 (La. 2009).

128. LA. CIV. CODE ANN. art. 3458 (2007).

129. LA. REV. STAT. ANN. § 9:5605 (2007).

130. It has been stated that protection for the defendant—in this case the client—was the purpose in enacting Code of Civil Procedure article 1067. *See*

equities effectually extends the client's peremptive period. This runs counter to the principal notion behind peremption, namely that particular rights—such as an action for legal malpractice—are destroyed when the peremptive period lapses.

The legislature regularly makes other exceptions to the rule that peremption may not be interrupted or suspended. Actions against officers of banks are subject to peremption but may be interrupted by the filing of suit.[131] This means that if suit is filed against a bank officer on the last day of the peremptive period and is dismissed without prejudice one month later (i.e., one month after the peremptive period has lapsed), the claimant may re-file his suit because the time period affecting his right was restarted by his original filing. Under the general rules of peremption, such an interruption should not take place.[132]

While the interruption regarding bank officers is limited in scope in that it only applies to a particular category of persons, the legislature has also provided very broad statutes that run afoul of the doctrine of peremption. Following Hurricanes Katrina and Rita, legislation was passed that suspended all peremptive periods that "would have otherwise lapsed during the time period of August 26, 2005, through January 3, 2006."[133] Though certainly well-

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MAX TOBIAS JR., JOHN M. LANDIS & GERALD E. MEUNIER, LOUISIANA CIVIL PRETRIAL PROCEDURE § 10:38, *in* LOUISIANA PRACTICE SERIES 541 (2008–2009 ed. 2008). Be that as it may, the client will only be able to sue the attorney if the attorney files his action within the client's peremptive period. If the client's claim for legal malpractice is perempted when the attorney brings his cause of action, the client may not file his incidental demand. Had the attorney filed his claim on January 2, 2008, the client would not receive the benefit of Code of Civil Procedure article 1067. Therefore, any time when the time period affecting the principal demand exceeds the time period affecting the incidental demand, the principal demand may be filed so as to keep the incidental demand perempted. Regardless of when the attorney files suit, the client would not be required to pay the attorney if malpractice took place. The client would argue that by committing malpractice, the attorney failed to perform his contractual obligation, thus dissolving the contract. *See* LA. CIV. CODE ANN. arts. 2013, 2018 (2008).

131. LA. REV. STAT. ANN. §§ 6:293, :787, :1191 (2005). The statutes require that the filing of suit be done in a court of competent jurisdiction and proper venue. *Id.* This is the same requirement attached to interruption by filing of suit for prescription. *See* LA. CIV. CODE ANN. art. 3462 (2007).

132. LA. CIV. CODE ANN. art. 3461 (2007).

133. LA. REV. STAT. ANN. § 9:5822(A) (2007). Ultimately, no claims regarding a right subject to a peremptive period were reported under the statute, but had a perempted claim covered by the statute been brought, the peremptive period would have been suspended.

intentioned, the statute was inapposite to the general rule that "[p]eremption may not be . . . suspended."[134]

Like the legislature, courts also misapply the doctrine of peremption. In *Leger v. Weinstein*, the Louisiana Third Circuit Court of Appeal opted to disregard the peremptive periods that apply to an action for legal malpractice.[135] The claim of malpractice in *Leger* arose when the clients realized their attorney was negligently handling their case.[136] The clients fired the attorney, retained new counsel, and filed a claim of legal malpractice against the original attorney.[137] After the original attorney was made aware that his services were no longer desired, he continued filing motions in the original case on behalf of the clients without their knowledge.[138] The court found that the clients' original action for legal malpractice was premature and dismissed their case under the theory that if any of the motions filed by the original attorney were effective, the clients would have no grounds for legal malpractice because the clients would not have suffered a loss.[139] Once the original attorney's motions were denied, the clients re-filed their suit for legal malpractice.[140] By that point, more than one year had passed since the clients had actual knowledge of the original attorney's negligent act.[141] Faced with the possibility that a claim for legal malpractice could be perempted before it ever ripened, the third circuit chose to disregard the legislatively provided peremptive periods.[142] To do otherwise, the court stated, would produce "serious injustice" and "an absurd result."[143] Though the court's disregard for the peremptive period may be an equitable result, the facts of *Leger* indicate that based on the clear text of the legal malpractice statute, the claim was perempted. To find otherwise implies that the court is not required to apply the doctrine of peremption, but instead has

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134. LA. CIV. CODE ANN. art. 3461 (2007).

135. 885 So. 2d 701, 707 (La. App. 3d Cir. 2004), *writ denied*, 893 So. 2d 873 (La. 2005).

136. Ironically, the case being handled by the attorney was one for legal malpractice. *Id.* at 703.

137. *Id.*

138. *Id.*

139. *Id.* In order to bring a claim for legal malpractice, a client must show (1) the existence of an attorney–client relationship, (2) negligence on part of the attorney, and (3) that the attorney's negligence caused the client a loss. WILLIAM E. CRAWFORD, TORT LAW § 15.21, *in* 12 LOUISIANA CIVIL LAW TREATISE 267–68 (2000).

140. *Leger*, 885 So. 2d at 703.

141. *Id.* at 705.

142. *Id.* at 706.

143. *Id.*

the option to ignore the doctrine when the court deems such actions are reasonable.

The Louisiana Supreme Court also misapplied peremption in *Teague v. St. Paul Fire and Marine Insurance Co.*[144] In *Teague*, an attorney allegedly committed two acts of legal malpractice: first, on August 1, 1999, the attorney failed to file the required jury bond, thus resulting in the loss of the right to trial by jury; second, on October 29, 1999, the attorney mediated the case to the dissatisfaction of the client.[145] On October 29, 1999, the same date as the second negligent act, the settlement was made known to the client.[146] According to the legal malpractice statute, the client had one year from the time the alleged act "is discovered or should have been discovered" to file suit.[147] The *Teague* court, however, slightly shifted the commencement date by stating that it is not the knowledge of the alleged act that commences the running of peremption, but the "knowledge of the cause or reason for the undesirable result that commences the running of peremption."[148] This minor shift in language created a major change in the outcome; the court found that though the client knew of the negligent act on October 29, 1999 (more than one year before filing suit), he did not realize the negligent act was the cause of the undesirable result until "several weeks after October 29, 1999" (less than one year before filing suit).[149] Therefore, his action filed on November 3, 2000, was not perempted.[150]

In addition to the suspect interpretation of the legal malpractice statute, the *Teague* court also misapplied peremption in the methodology it used to reach its decision. The court stated: "Before we address the issue of peremption under legal malpractice, we must first determine if defendants' conduct constituted legal malpractice."[151] By detailing the merits of the case prior to determining whether the cause of action was perempted, the court convincingly declared that "[s]ound policy

144. 974 So. 2d 1266 (La. 2008).

145. *Id.* at 1269.

146. *Id.*

147. LA. REV. STAT. ANN. § 9:5605 (2007).

148. *Teague*, 974 So. 2d at 1277. To reach this result, the *Teague* court compared the discovery rule in the legal malpractice statute to the discovery rule in the doctrine of *contra non valentem*. *Id.* at 1274–75. As the court noted, however, *contra non valentem* does not apply to peremption. *Id.* at 1275 n.4.

149. *Id.* at 1278.

150. *Id.*

151. *Id.* at 1272. *But see* Stanley v. Trinchard, No. 02-1235, 2008 U.S. Dist. LEXIS 51840, at *32–33 (E.D. La. July 27, 2008) ("In light of the fact that [the client's] malpractice claims axe [sic] time-barred, the Court need not address the remaining issues raised by [the client] in this motion.").

reasons" supported its holding that the claim was not perempted.[152] This is a misapplication of peremption because it implies that whether a claim is perempted depends on the merits of the underlying claim. Such insinuations are simply untrue. If a claim is perempted, the underlying right is non-existent, regardless of how merit-worthy the cause of action was prior to its extinction. The result-oriented methodology of *Teague* suggests that there is an equitable underpinning to peremption, thereby reinforcing the *Leger* court-type notions that peremption may be regarded or disregarded as the court deems reasonable.

Such implications may appear to be harmless given the facts to which they apply. However, these misapplications of peremption have been followed by other state courts. Within months of the Louisiana Supreme Court's decision in *Teague*, the Louisiana Second Circuit Court of Appeal—relying on the *Teague* court's analysis—concluded that the legal malpractice statute includes "an equitable suspension of the one-year peremption period."[153] Unquestionably this statement is incorrect.

Misapplications of peremption frequently arise because of courts' desires to prevent inequitable results. These errors usually involve the application of prescriptive principles to peremptive periods. For example, interruption by the filing of suit is a rule that applies to prescription[154] and is currently applied to the peremptive periods affecting actions against bank officers.[155] Suspension of time limitations is also a characteristic of prescription.[156] The legislature utilized this prescriptive device in the legislation following Hurricanes Katrina and Rita.[157] Even the actions by the *Leger* court in disregarding peremption may be said to be an application of the doctrine of *contra non valentem agere non currit praescriptio*,[158] a doctrine that applies only to prescription.[159] Under *contra non valentem*, prescription is suspended if there is a legal cause that "render[s] it impossible to institute a suit until after the expiration of the [prescription period]."[160] The clients in *Leger*

152. *Teague*, 974 So. 2d at 1277.

153. McGuire v. Mosley Rogers Title Co., No. 43,554-CA, 2008 WL 4226026, at *7 (La. App. 2d Cir. Sept. 17, 2008), *writ denied*, 999 So. 2d 757 (La. 2009).

154. *See* LA. CIV. CODE ANN. art. 3462 (2007).

155. LA. REV. STAT. ANN. §§ 6:293, :787, :1191 (2005).

156. *See* LA. CIV. CODE ANN. art. 3467 (2007).

157. LA. REV. STAT. ANN. §§ 9:5822, :5824 (2007).

158. "Prescription does not run against one who is unable to act."

159. Davis v. Coregis Ins. Co., 789 So. 2d 7, 17 (La. App. 3d Cir. 2000), *writ denied*, 788 So. 2d 1192 (La. 2001).

160. Smith v. Taylor, 10 Rob. 133, 135 (La. 1845). Legal obstacle was the original reason that the doctrine of *contra non valentem* was developed.

were prevented from filing suit any earlier than they did because the court originally held that their claim was premature.[161] Because they were prevented by a legal cause from instituting their suit until after the expiration of the peremptive period, the court allowed the tardy filing.[162]

The problem with applying—or misapplying—prescriptive rules to peremptive periods is that it muddies the distinction between peremption and prescription, thus giving the illusion that the two doctrines are more than just superficially similar. As such, misapplying the doctrine of peremption makes distinguishing between peremption and prescription all the more onerous.

C. Confusion

Distinguishing between peremption and prescription has been problematic since the origins of the doctrines. Unfortunately, the codification of peremption in Louisiana did little to reduce this confusion. Courts in Louisiana continue to vacillate between peremption and prescription when classifying particular rights. To combat the confusion, courts have developed an analytical framework within which to consider what time period affects the right. However, the factors utilized by courts when characterizing rights do not always lead to the conclusive results desired.

Since the inception of peremption, French commentators such as Aubry and Rau, Merlin, and Baudry-Lacantinerie and Tissier had great difficulty in articulating a test to determine whether a time period is peremptive or prescriptive; those that attempted to delineate the doctrines did so with little success. Aubry and Rau proposed that "prescriptions [apply] whenever a time limitation for the exercise of an action in court is involved; and . . . forfeiture when the time limit is afforded to declare an intent for a different purpose."[163] Merlin believed that jurists "must consider it as established that forfeiture is subject to all the rules governing liberative prescription, unless the statutes provide differently in a particular case, whether the rule is explicit or implicit."[164]

Bartolous first inserted the maxim in his glosses on Justinian's Digest to provide that "prescription did not run against a son with regard to property outside the paternal estate . . . until he was free from paternal power." BAUDRY-LACANTINERIE & TISSIER, *supra* note 29, no. 367, at 192.

161. Leger v. Weinstein, 885 So. 2d 701, 703 (La. App. 3d Cir. 2004), *writ denied*, 893 So. 2d 873 (La. 2005).

162. *Id.* at 707.

163. AUBRY & RAU, *supra* note 32, § 771, at 421.

164. *See* BAUDRY-LACANTINERIE & TISSIER, *supra* note 29, no. 36, at 23.

Unsatisfied by the explanations of other jurists, Baudry-Lacantinerie and Tissier concluded that "[no] one can define a priori any differences between what are called forfeitures and what is [sic] called prescriptions."[165]

Louisiana scholars and courts have had no more success than their French counterparts. In an essay attempting to differentiate the two doctrines, Professor Joseph Dainow concluded that "[t]here are important implications in each classification, and a clearer delineation [in the Civil Code] of all of them would be a contribution."[166] Ideally, the clarity that Dainow desired should have occurred in 1982 when the articles on prescription were revised and peremption gained legislative footing.[167] Instead, the articles themselves contained no specific, meaningful guidance, and the comments simply stated that the determination should be made based on the purpose of the rule.[168] Foreshadowing years of confusion on this subject, the comments to the peremption articles also noted that "[i]t is not always easy to determine whether a period of time fixed by law is peremptive or prescriptive."[169]

Louisiana courts have proved the accuracy of such comments by their frequent vacillation between the two doctrines. For example, an action to annul a judgment for fraud or ill practices—which is entitled "[a]nnulment for vices of substance; *peremption* of action"[170]—has been held to be both peremptive[171] and prescriptive.[172] The Louisiana Supreme Court's most recent pronouncement on the matter is that the right is subject to peremption.[173] Differing authority similarly exists regarding claims

165. *Id.* no. 40, at 28.
166. Dainow, *supra* note 62, at 132; *see also* Shuey, *supra* note 55, at 252.
167. 1982 La. Acts No. 187; *see* notes 63–67 and accompanying text.
168. LA. CIV. CODE ANN. art. 3458 cmt. c (2007).
169. *Id.*
170. *See* LA. CODE CIV. PROC. ANN. art. 2004 (2003) (emphasis added).
171. Williams v. Williams, 22 So. 3d 1165, 1169–70 (La. App. 3d Cir. 2009); Lowe's Cos. v. Leblanc, 839 So. 2d 434, 437 (La. App. 3d Cir. 2003); Russland Enters., Inc. v. City of Gretna, 727 So. 2d 1223, 1226 (La. App. 5th Cir. 1999), *writ denied*, 743 So. 2d 669 (La. 1999); A.S. v. M.C., 685 So. 2d 644, 648 (La. App. 1st Cir. 1996), *writ denied*, 690 So. 2d 38 (La. 1997); Burkett v. Prop. of Douglas, 575 So. 2d 888, 892 (La. App. 2d Cir. 1991); *In re* S.R., 582 So. 2d 956, 958 (La. App. 2d Cir. 1991), *writ denied*, 585 So. 2d 574 (La. 1991); Davis v. Sewerage & Water Bd. of New Orleans, 469 So. 2d 1144, 1146 (La. App. 4th Cir. 1985).
172. Stewart v. Goeb, 432 So. 2d 246, 248 (La. 1983); State v. Turner, 705 So. 2d 293, 296 (La. App. 4th Cir. 1997); Succession of Albritton, 497 So. 2d 10, 12 (La. App. 4th Cir. 1986), *writ denied*, 498 So. 2d 742 (La. 1986).
173. Turner v. Busby, 883 So. 2d 412, 416 (La. 2004).

for workers' compensation.[174] For many years, there was great confusion as to whether a survival action[175] and a wrongful death action[176] were subject to peremption or prescription. The majority of recent cases hold that both actions are subject to prescription,[177] though at least one court within the past decade declared the actions to be peremptive.[178]

While clearly not always successful, courts have attempted to develop an analysis for determining whether a time limitation is peremptive. Originally, courts followed the test provided in *Guillory*[179]: if the statute created a right of action and stipulated the time period to exercise that right, then the right was subject to a peremptive period.[180] This test evolved through the years to focus

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174. Winford v. Conerly Corp., 897 So. 2d 560, 565 (La. 2005) (finding workers' compensation claims to be prescriptive); Brister v. Wray Dickinson Co., 164 So. 415, 416 (La. 1935) (finding workers' compensation claims to be peremptive); Norwood v. Lake Bisteneau Oil Co., 83 So. 25, 27 (La. 1918) (finding the limitations in the Employers' Liability Act to be prescriptive); Schulin v. Serv. Painting Co., 479 So. 2d 939, 944 (La. App. 1st Cir. 1985) (finding workers' compensation claims to be peremptive). *See generally* H. ALSTON JOHNSON III, WORKERS' COMPENSATION § 384, *in* 14 LOUISIANA CIVIL LAW TREATISE 307–29 (2002).

175. CRAWFORD, *supra* note 139, § 5.9, at 99–100. *E.g.*, Guidry v. Theriot, 377 So. 2d 319, 328 (La. 1979) (holding that a survival action is subject to prescription); Woods v. Monroe Manor Nursing Homes, Inc., 530 So. 2d 1221, 1223 (La. App. 2d Cir. 1998) (holding that a survival action is subject to peremption), *writ denied*, 531 So. 2d 765 (La. 1988); Kennedy v. Powell, 401 So. 2d 453, 457 (La. App. 2d Cir. 1981) (same), *writ denied*, 406 So. 2d 607 (La. 1981).

176. Trahan v. Liberty Mut. Ins. Co., 314 So. 2d 350 (La. 1975) (holding that the wrongful death action is subject to prescription); Stephenson v. New Orleans Ry. & Light Co., 115 So. 412 (La. 1927) (holding that the wrongful death action is subject to peremption); Goodwin v. Bodcaw Lumber Co., 34 So. 74 (La. 1902) (same); Sansone v. La. Power & Light Co., 164 So. 2d 151 (La. App. 1st Cir. 1964) (same), *writ refused*, 165 So. 2d 486 (La. 1964); Smith v. Monroe Grocery Co., 171 So. 167 (La. App. 2d Cir. 1936) (holding that the wrongful death action is subject to peremption but may be interrupted); Matthews v. Kansas City S. Ry. Co., 120 So. 907 (La. App. 2d Cir. 1929) (holding that the wrongful death action is subject to peremption). *See generally* Gerald J. Talbot, Comment, *Wrongful Death: Prescription? Peremption? Confusion!*, 39 LA. LAW REV. 1239 (1979).

177. Warren v. La. Med. Mut. Ins. Co., 21 So. 3d 186, 193–94 (La. 2008); Tureaud v. Acadiana Nursing Home, 696 So. 2d 15, 17 (La. App. 3d Cir. 1997). *See generally* FRANK L. MARAIST & THOMAS C. GALLIGAN, JR., LOUISIANA TORT LAW § 18.08 (2d ed. 2004).

178. Courtland v. Century Indem. Co., 772 So. 2d 797, 801 (La. App. 5th Cir. 2000), *writ denied*, 785 So. 2d 822 (La. 2001).

179. For a complete discussion of *Guillory*, see *supra* Part I.A.

180. Hebert v. Doctors Mem'l Hosp., 486 So. 2d 717, 724 (La. 1986); Hollingsworth v. Schanland, 99 So. 613, 616 (La. 1924); Guillory v. Avoyelles R.R. Co., 28 So. 899, 901 (La. 1900).

on the text and purpose of the statute.[181] The Louisiana Supreme Court described its process for determining if a limitation is peremptive by stating:

> When the statute does not indicate in plain words that the period is one of peremption, the court must analyze the statute in its entirety and construe the statute with particular focus on whether the purpose sought to be achieved involves matters of public policy or other compelling reasons for absolutely extinguishing a right which is not promptly exercised.[182]

This analysis has been well-utilized by Louisiana courts. In examining the legal malpractice statute, the Louisiana Supreme Court has stated that "[t]he Legislature was particularly clear in wording [the statute] so as to leave no doubt as to its intent."[183] Therefore, no further interpretation of the legal malpractice statute is necessary; the statute is peremptive. When further interpretation is necessary, courts turn to the purpose of the statute. For example, by examining the specific purpose of the filiation provisions, the Louisiana Supreme Court held that, prior to the revision of the filiation articles, the right to disavow paternity was subject to a peremptive period.[184] The Court reached this conclusion by determining that the purpose of the six-month disavowal time limitation was intended to "zealously guard[] and enforce[] the presumption [of paternity]," thus protecting and preserving the family unit.[185] Similarly, the Private Works' Act is characterized as peremptive because having short, extinctive rights helps fulfill the purpose of the Act, that purpose being to facilitate the construction of building improvements.[186] If general contractors were subject to lengthy, non-extinctive liability, construction projects would be hindered.[187]

In an effort to establish firm guidelines for determining peremptive periods, courts and scholars have tried to make broad

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181. *See* State Bd. of Ethics v. Ourso, 842 So. 2d 346, 349 (La. 2003); State v. McInnis Bros. Constr., 701 So. 2d 937, 940 (La. 1997); Metro. Erection Co. v. Landis Constr., 627 So. 2d 144, 147 (La. 1993); Pounds v. Schori, 377 So. 2d 1195, 1199–1200 (La. 1979); Conerly v. State *ex rel.* La. State Penitentiary, 858 So. 2d 636, 642–43 (La. App. 3d Cir. 2003), *writ denied*, 858 So. 2d 423 (La. 2003).

182. *Metro. Erection Co.*, 627 So. 2d at 147.

183. Reeder v. North, 701 So. 2d 1291, 1295 (La. 1997).

184. *Pounds*, 377 So. 2d at 1200.

185. *Id.*

186. *Metro. Erection Co.*, 627 So. 2d at 148.

187. *Id.*

statements regarding the classification of rights based on particular characteristics that indicate the purpose of the time period. The brevity of the existence of a right indicates the legislature's desire to protect the defendant; the shorter the right, the more likely the time period is to be peremptive.[188] Some courts have even stated in dicta that one factor in determining if a period is peremptive is whether it is less than one year.[189] Similarly, claims of a public law nature are likely to be deemed peremptive because "there is . . . a strong interest in regulating the litigation" of such claims.[190] In these situations, public policy "favor[s] a strict interpretation of the requirements for interrupting the term," thus lending the time period to be characterized as one of peremption.[191]

Though these interpretive techniques have been enhanced throughout the years, they do not always lead to clear results. The shortcomings of the aforementioned factors are best demonstrated in the Louisiana Supreme Court case *Borel v. Young*.[192] *Borel* involved the question of whether an action for medical malpractice was subject to peremption or prescription.[193] On original hearing, the court held that the action was subject to peremption.[194] The court reached this conclusion largely based on the text of the statute,[195] which states that "[n]o action . . . shall be brought unless filed within one year" and "in all events such claims shall be filed at the latest within . . . three years."[196] The use of the word "shall" originally prompted the court to hold that an action for medical malpractice is subject to peremption.[197]

When *Borel* came before the court on rehearing, the court reversed itself and held that an action for medical malpractice is subject to prescription.[198] On rehearing, the court found that there

188. AUBRY & RAU, *supra* note 32, § 771, at 422; Shuey, *supra* note 55, at 252.

189. *See* Hebert v. Doctors Mem'l Hosp., 486 So. 2d 717, 723 (La. 1986); Conerly v. State *ex rel.* La. State Penitentiary, 858 So. 2d 636, 644 (La. App. 3d Cir. 2003), *writ denied*, 858 So. 2d 432 (La. 2003).

190. Shuey, *supra* note 55, at 252; *see* Crier v. Whitecloud, 486 So. 2d 713, 714 (La. 1986); *Conerly*, 858 So. 2d at 644; Green v. La. Dep't of Safety & Corr., 603 So. 2d 800, 802 (La. App. 1st Cir. 1992); Weems v. Dep't of Pub. Safety & Corr., 571 So. 2d 733, 735 (La. App. 2d Cir. 1990).

191. Shuey, *supra* note 55, at 251.

192. Borel v. Young, 989 So. 2d 42 (La. 2008) (*Borel II*).

193. *Id.* at 53.

194. Borel v. Young, 989 So. 2d 42, 51 (La. 2007) (*Borel I*).

195. *Id.* at 50.

196. LA. REV. STAT. ANN. § 9:5628 (2007).

197. *Borel I*, 989 So. 2d at 51. The Revised Statutes provide that "shall" is to be interpreted as a mandatory provision. LA. REV. STAT. ANN. § 1:3 (2003).

198. *Borel II*, 989 So. 2d at 65.

is no language in the statute that indicates a legislative intent for the three-year time limit to be one of peremption.[199] That being the case, the court examined the purpose of the statute.[200] One of the purposes of the Medical Malpractice Act is to control health insurance costs.[201] To achieve this goal, claimants are required to file their complaints before a medical review panel prior to filing suit in court.[202] The *Borel* court found that the legislature recognized that by requiring the filing with the medical review panel first, claimants need the safeguard of the equitable protections of prescription to ensure that claimants can bring their claim in court.[203] According to the court, the purpose of the statute dictates that the time limitation is prescriptive.[204]

Borel highlights the flaws in the jurisprudentially provided factors for determining whether a limitation is peremptive: the text and purpose do not always lead to the same result. In these instances, courts are offered little guidance on how to determine whether a statute creates a peremptive or prescriptive period. Echoing the comments to the Civil Code, numerous courts have stated that "it is not always easy to determine whether a particular time limitation is prescriptive or peremptive."[205] The difficulties that courts face in characterizing rights leave courts, counselors, and claimants wading in a pond of confusion. Given the confusion that surrounds peremption, as well as the problems of inequity and misapplication, it is past time that peremption underwent a vast legislative overhaul.

III. SOLVING THE PROBLEMS: FOUR LEGISLATIVE REMEDIES

The three aforementioned problems with peremption are cyclical in nature. Peremptive periods inherently lead to inequitable results. Attempts at remedying these results cause misapplications of the doctrine. Misapplications of the doctrine

199. *Id.* at 60–63.
200. *Id.* at 63–64.
201. *Id.* at 63.
202. LA. REV. STAT. ANN. § 40:1299.47 (2008).
203. *Borel II*, 989 So. 2d at 63.
204. *Id.* at 63–64. Despite the court's pronouncement in *Borel* that the Medical Malpractice Act contains prescriptive periods, at least one Louisiana Supreme Court Justice continues to assert that the time periods are peremptive. *See* Warren v. La. Med. Mut. Ins. Co., 2009 La. LEXIS 2224, at *19–45 (Knoll, J., concurring).
205. *Borel II*, 989 So. 2d at 59; *see* State Bd. of Ethics v. Ourso, 842 So. 2d 346, 349 (La. 2003); State v. McInnis Bros. Constr., 701 So. 2d 937, 940 (La. 1997); Dendy v. City Nat'l Bank, 977 So. 2d 8, 14 (La. App. 1st Cir. 2007); Matherne v. Broussard, 959 So. 2d 975, 979 (La. App. 1st Cir. 2007).

increase confusion in determining whether a time period is peremptive. When legislators or courts do succeed in clarifying that a time period is subject to peremption, the original problem of inequity returns. In other words, the solution to one problem of peremption gives rise to a new problem, thus creating a perpetual cycle of the problems with peremption.

There are, however, legislative actions that could quell these concerns. Four mutually exclusive remedies include: (1) requiring explicit legislative intent to create a peremptive period; (2) giving guidance in the Civil Code for distinguishing between peremption and prescription; (3) creating equitable exceptions to the consequences of peremption; and (4) extinguishing peremption.

A. Require Explicit Legislative Intent

On rehearing, the *Borel* court succinctly stated that "[t]he legislature would not 'hint' about peremption when it clearly knows how to specify its intention."[206] The court is correct; the legislature is aware of how to ensure that a statute will be considered peremptive. For example, the rules regarding filiation demonstrate how clear the legislature can be.[207] In providing when a father can establish paternity if the child is presumed to be the child of another man, the Civil Code states that "[t]he time periods . . . are peremptive."[208] Such statements leave little room for doubt in how the legislature intended the time period to be classified.

If the legislature wants to end confusion between peremption and prescription, it can do so by creating a rule stating that, unless otherwise stated, prescription is the default time period.[209] This would mean that when the legislature fails to make an explicit statement that a time period is peremptive, the period would be considered prescriptive. Enacting such a rule would end all

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206. *Borel II*, 989 So. 2d at 63. "Had the Legislature meant for the time period to be peremptive, it could have expressed its intent in the . . . text of the act [enacting the statute] . . . ." *Id.*

207. The Civil Code articles on filiation specify how each time period is to be classified. *See* LA. CIV. CODE ANN. arts. 186, 189, 190, 193, 195, 197, 198 (2007).

208. LA. CIV. CODE ANN. art. 198 (2007).

209. Conversely, a rule could be made that if the legislature fails to expressly classify a time period, the period is automatically considered to be peremptive. Having prescription serve as the default rule is superior, though, because prescription does not create the same inequities as peremption because prescription may be interrupted, suspended, and renounced. *See supra* Part I.B. Also, because prescription has existed in Louisiana law for a longer period of time, there is a greater understanding of the doctrine by Louisiana courts. Thus, prescription is the better default rule.

confusion for courts, lawyers, and claimants because the classification of the time period would be clear from the text of the statute. This solution also has the advantage of being easy to implement, requiring only the inclusion of one additional article in the Civil Code: "Time limitations provided by legislation are prescriptive unless otherwise explicitly provided in the legislation establishing the time limitation."

The proposed article mirrors the first step that courts claim to take when analyzing whether a period is peremptive.[210] If a statute indicates in plain words that it is peremptive—as in the case of filiation—then the court discontinues its analysis and accepts the legislatively provided classification.[211] Under this solution, if the statute indicates in plain words that it is peremptive, the court should accept that characterization; if the statute is silent, the court should consider the period to be prescriptive.

Aside from being easy to implement, this solution has the added benefit of having already been proven effective. Prior to the 1986 revision of the Civil Code article regarding survival actions, article 2315.1, there was great confusion as to whether the survival action was subject to peremption or prescription.[212] The article was revised to provide expressly that the time period was prescriptive.[213] All confusion subsequently ceased.[214] By requiring that legislation expressly state whether the time period is peremptive, all confusion surrounding the peremption doctrine may cease.

There are, however, disadvantages to this remedy. It does nothing to prevent the perceived inequities of peremption; a claimant may still lose his right to sue before he knows that the right existed. This solution also does not prevent the misapplication of peremption; courts may continue to propose incorrect notions, such as the notion that peremption is subject to "equitable suspension[s]."[215] Perhaps the biggest drawback,

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210. *See* Part II.C.

211. Metro. Erection Co. v. Landis, 627 So. 2d 144, 147 (La. 1993); St. Charles Parish Sch. Bd. v. GAF Corp., 512 So. 2d 1165, 1169 (La. 1987).

212. CRAWFORD, *supra* note 139, § 5.9, at 99–100; *see, e.g.*, Guidry v. Theriot, 377 So. 2d 319, 328 (La. 1979); Jones v. Philco-Ford Corp., 452 So. 2d 370, 372 (La. App. 1st Cir. 1984), *writ denied*, 457 So. 2d 1193 (La. 1984); Woods v. Monroe Manor Nursing Homes, Inc., 530 So. 2d 1221, 1223 (La. App. 2d Cir. 1988), *writ denied*, 531 So. 2d 765 (La. 1988); Kennedy v. Powell, 401 So. 2d 453, 457 (La. App. 2d Cir. 1981), *writ denied*, 406 So. 2d 697 (La. 1981).

213. LA. CIV. CODE ANN. art. 2315.1(C) (Supp. 2008).

214. *See* CRAWFORD, *supra* note 139, § 5.9, at 99–100.

215. *See* McGuire v. Mosley Rogers Title Co., 997 So. 2d 23, 28 (La. App. 2d Cir. 2008), *writ denied*, 999 So. 2d 757 (La. 2009).

though, is that this remedy will alter the current classification of some rights. Time limitations that are currently considered peremptive without being explicitly described as such will, under this solution, be considered prescriptive.[216]

That this solution changes how some rights are classified may be troublesome. Stability in the law is a desirable outcome,[217] particularly when that stability pertains to when suit may be filed. In contemplating the degree to which the current classification of rights should be changed, the legislature must examine two issues: first, which rights should be affected by this new classification and, second, how those rights should be affected. In response to the first issue, the legislature should decide if it wants the new rule to affect all rights or only those rights created after the implementation of the proposed article.[218] The benefit of only changing newly created rights is that there will be no alteration in the manner in which existing rights are classified. The downside to this limited application is that it will perpetuate the confusion surrounding current rights, the very problem this solution strives to ameliorate.

If the legislature decides to apply the new rule to already-created rights, then the legislature will have to address the temporal application of the new rule. Namely, the legislature should determine if the new rule will be applied prospectively or retrospectively. If applied only prospectively, then the new article

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216. For example, it is currently unknown if the time period attached to a right to bring a private action under the Unfair Trade Practices and Consumer Protection Law is peremptive; some cases hold that the right is subject to peremption, but the Louisiana Supreme Court failed to address the issue in a recent case on the matter. *See, e.g.*, Miller v. ConAgra, Inc., 991 So. 2d 445, 455–57 (La. 2008); Glod v. Baker, 899 So. 2d 642, 647–48 (La. App. 3d Cir. 2005), *writ denied*, 920 So. 2d 238 (La. 2006); Canal Marine Supply, Inc. v. Outboard Marine Corp., 522 So. 2d 1201, 1203 (La. App. 4th Cir. 1988). If the right is deemed to be prescriptive, passage of the proposed article would change the classification of the right because the word "perempt" (or any variation thereof) is not used in the text of the statute. Similarly, if the right to annul a judgment is currently considered peremptive, this article would alter that classification. See *supra* note 171 for cases holding that the right to annul a judgment is subject to peremption. The right to annul a judgment only uses the word "peremption" in the title of the article. LA. CODE CIV. PROC. ANN. art. 2004 (2003). This suggested legislative change requires that the word "peremption" be expressly used in the text of the actual legislation.

217. "[The] casual change from existing laws to new and different ones weakens the power of law itself." ARISTOTLE, POLITICS 49 (C.D.C. Reeve trans., Hackett Pub. Co. 1998).

218. Determining which rights should be affected has been a long-standing issue for lawmakers. In 491, Emperor Anastasius opted to only change newly created time limitations when he changed the length of prescription from thirty years (as provided in the Theodosian Code) to forty years. HUNTER, *supra* note 21, at 646.

will not govern cases arising from factual scenarios occurring before its passage. This means that for at least a few years following its enactment, the new article will not govern all cases.[219] On the other hand, if the legislature wants the new article to apply retrospectively, then the legislature must include in its drafting a clear "legislative expression" that the article should be applied retrospectively.[220] Even with a clear legislative expression, though, the legislature will be constitutionally limited in the retrospective application of the new rule, as the legislature cannot deny individuals vested rights.[221] Creditors whose rights are changed in classification from peremptive to prescriptive will have greater rights because prescription, unlike peremption, may be interrupted, suspended, and renounced. This may cause the time period in which a creditor can sue his debtor to be extended. As creditors' rights increase, their debtors' rights decrease. Therefore, any vested right a debtor has regarding a claim that has been perempted cannot be altered by the passage of the proposed article. Given these difficult issues of when and how the proposed article should be applied, there may be merit to developing a solution that works within the current confines of the doctrine of peremption without changing the characterization of already-determined rights.

B. Give Guidance in the Civil Code

An alternative legislative remedy that would not change already-classified time periods is to provide specific guidance in the Civil Code regarding how to distinguish peremption and prescription.[222] If the directions were clear and meaningful, it would not only end the courts' current confusion, but also would relieve the legislature from having to include in every statute the statement "this time period is peremptive" or "this time period is prescriptive" to ensure that its intent is followed; courts should be able to deduce the correct classification from the guidance provided within the Civil Code.

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219. The issue of prospective or retrospective application of law has been discussed with regard to the changes made to the filiation rules in 2005. *E.g.*, Succession of McKay, 921 So. 2d 1219 (La. App. 3d Cir. 2006) (holding that the new filiation time periods could not be applied retrospectively because the time periods altered substantive rights), *writ denied*, 929 So. 2d 1252 (La. 2006).

220. *See* LA. CIV. CODE ANN. art. 6 (1999).

221. *See id.* cmt. b. The constitutionality of applying new time periods to existing rights has also been discussed with regard to the amended filiation articles. *See* W.R.M. v. H.C.V., 951 So. 2d 172 (La. 2007).

222. Scholars have long called for such an addition. *See* Dainow, *supra* note 62, at 132; Shuey, *supra* note 55, at 249.

There are great disadvantages to this solution. Like the previous remedy, the problem of inequities remains ignored. The solution also does not attempt to fix the current misapplications of peremption. Moreover, this solution provides courts more flexibility in determining if a limitation is peremptive or prescriptive because strict rules are not provided.[223] The more flexibility left to courts, the more uncertainty will remain surrounding the delineation of the doctrines.

The biggest hurdle for this solution, however, is its actual implementation. Devising a test that determines whether a time period is peremptive has been difficult since the creation of the doctrine. Louisiana courts have battled this issue for almost a century with relatively little success.[224] French scholars Baudry-Lacantinerie and Tissier described such attempts as "impossible."[225] Executing this solution will, at a minimum, be an uphill battle. Part of the reason why this undertaking is difficult is because it is unclear what exactly such a test should include. Presumably the test should be based on the factors on which the courts currently rely.[226] Using these factors, the focus should be on the text of the statute and the legislative intent behind the stated time period.[227]

But if the focus of the legislative guidance is the text of the legislation and the legislative intent, then such a test is superfluous because it simply amounts to a specific application of the methods of statutory interpretation already provided in the Civil Code.[228] Civil Code article 9 provides that if the law is clear and

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223. This presumes that the guidance given is not a bright-line rule, but a subjective analytical framework. If a bright-line rule is provided, then there would be little flexibility for courts in determining whether a limitation is peremptive or prescriptive. However, any bright-line rule will run into the same problems of application that the first solution—requiring the legislature to expressly state that a period is peremptive—encounters. *See supra* Part III.A. Almost necessarily, a bright-line rule will alter the classification of some currently existing rights; thus, the question of how and when the rule should apply will arise.

224. *See supra* Part II.A.

225. BAUDRY-LACANTINERIE & TISSIER, *supra* note 29, no. 40, at 30.

226. See *supra* Part II.C. for a discussion of the factors that courts currently use to determine whether a time period is peremptive.

227. *See* State Bd. of Ethics v. Ourso, 842 So. 2d 346, 349 (La. 2003); State v. McInnis Bros. Constr., 701 So. 2d 937, 940 (La. 1997); Metro. Erection Co. v. Landis Constr., 627 So. 2d 144, 147 (La. 1993); Pounds v. Schori, 377 So. 2d 1195, 1199–1200 (La. 1979); Conerly v. State *ex rel.* La. State Penitentiary, 858 So. 2d 636, 642–43 (La. App. 3d Cir. 2003), *writ denied*, 858 So. 2d 432 (La. 2003).

228. *See* LA. CIV. CODE ANN. arts. 9–13 (1999).

unambiguous, it should be applied as written;[229] courts have stated that when the text of the statute clearly indicates that the statute is peremptive, no further analysis is needed.[230] Civil Code article 10 provides that when the text of the statute is subject to different interpretations, the purpose of the legislation should be examined;[231] when the text of the statute is not abundantly clear, courts have looked at the purpose behind the statute and whether the intent of the legislature was to extinguish the right or merely to bar the right.[232]

No court has expressly noted the similarity between the interpretive factors that courts employ and the general methods of interpretation already provided in the Civil Code,[233] but it is inarguable that the two mirror one another. That being the case, why a specific test is needed in the peremption context is questionable. More importantly, it is unclear what a specific test based on the factors that courts currently utilize would add to the methods of interpretation already established. Perhaps the most practical addition that could be made to help guide the courts would be to add a new comment to the article defining peremption that states: "To determine if legislation setting forth a time limitation establishes a prescriptive or peremptive period, courts should use the methods of interpreting laws provided in Book I, Chapter 2." This proposed comment, though perhaps self-evident, would remind courts that there are five articles in the Louisiana Civil Code[234] and eighteen Revised Statutes[235] dedicated to directing the interpretation of legislation.

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229. LA. CIV. CODE ANN. art. 9 (1999). This textual method of interpretation is also reflected in the Revised Statutes. *See* LA. REV. STAT. ANN. §§ 1:3–:4 (2003).

230. *Metro. Erection Co.*, 627 So. 2d at 147; St. Charles Parish Sch. Bd. v. GAF Corp., 512 So. 2d 1165, 1169 (La. 1987).

231. LA. CIV. CODE ANN. art. 10 (1999).

232. *Ourso*, 842 So. 2d at 349; *McInnis Bros. Constr.*, 701 So. 2d at 940; *Metro. Erection Co.*, 627 So. at 147; *Pounds*, 377 So. 2d at 1199–1200; *Conerly*, 858 So. 2d at 642–43.

233. In *Teague*, the majority noted that it was "bound to apply the exception [of peremption] provided by law as clearly and unambiguously written by the Legislature," citing Civil Code article 9 for support. Teague v. St. Paul Fire & Marine Ins. Co., 974 So. 2d 1266, 1275 n.4 (La. 2008). After making this observation, the *Teague* court went on to deviate from the words in the statute and shift when peremption begins. *Id.* at 1277–78.

234. LA. CIV. CODE ANN. arts. 9–13 (1999).

235. LA. REV. STAT. ANN. §§ 1:1–:17 (2003).

C. Create Equitable Exceptions

The two aforementioned solutions operate on the premise that confusion between peremption and prescription is the primary problem. The remedies strive solely to end (or decrease) that confusion; they do not address the "perceived inequities" in peremption[236] or the misapplications of the doctrine that result from those inequities.[237] By their very nature, they cannot. The best method of ending the current confusion is to propose strict, bright-line rules that clearly establish when peremption is to be applied. But for every non-malleable rule that is imposed, there exists a set of facts in which the application of that rule leads to an unjust result. When piecemeal, equitable exceptions are crafted for the rules of peremption (as courts have regularly done), the clarity that the bright-line rule strives to achieve is lost.

If, instead of confusion, inequity is seen as the primary problem with peremption, then a different solution must be developed. The inequity primarily recognized by courts and the legislature is the peremption of a claimant's right before he is able to act on that right either because he is unaware that the right exists[238] or because he is incapable of exercising the right due to circumstances beyond his control.[239] To remedy this unfairness, the solution must allow equitable exceptions to the general rule that peremption cannot be interrupted, suspended, or renounced. By doing this, courts can prevent the running of peremption while the claimant is unable to exercise the cause of action.

A rule that would alleviate these inequities could be crafted by amending current Civil Code article 3461 to say: "Peremption may not be renounced, interrupted, or suspended *except as may be*

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236. This is not to say that the above rules do not end any inequities. Treating claimants differently, i.e., strictly applying the peremption period to claimant A but allowing claimant B to have peremption equitably suspended, can also be viewed as an inequity in the law. However, when the courts have referred to the inequities of peremption, the reference has been made with regard to claimants' right to sue being extinguished before the right is realized. *E.g.*, Reeder v. North, 701 So. 2d 1291, 1296 (La. 1997); Biggers v. Allstate Ins. Co., 886 So. 2d 1179, 1183 (La. App. 5th Cir. 2004); Raby-Magee v. Matzen, 764 So. 2d 978, 979 (La. App. 1st Cir. 2000); Drennan v. Killian, 712 So. 2d 978, 980 (La. App. 5th Cir. 1998).

237. *See supra* Parts II.A & II.B.

238. *See, e.g.*, *Reeder*, 701 So. 2d 1291; *Biggers*, 886 So. 2d 1179; *Drennan*, 712 So. 2d 978.

239. *See, e.g.*, LA. REV. STAT. ANN. § 9:5824 (2007); Leger v. Weinstein, 885 So. 2d 701 (La. App. 3d Cir. 2004), *writ denied*, 893 So. 2d 873 (La. 2005).

required to achieve equity."[240] This alteration essentially provides that the general rule set forth in Civil Code article 4—that the law should not lead to inequitable results—applies to peremption.[241] For example, if not allowing peremption to be suspended leads to the destruction of the claimant's right before he knows of its existence, then the court could decide that such a result is inequitable, not apply the rule of peremption, and remain within the letter of the new law. Similarly, if a claimant is unable to exercise his right during the peremptive period and after the running of the period a defendant renounces his right, a court could find that permitting the renunciation is fair to both parties and disregard the general rule that peremption is not subject to renunciation.

This solution, like the other remedies offered, has troubles of its own, the primary one being that it does not help to distinguish peremption and prescription. In fact, if anything, this solution will likely increase confusion because it prompts a new question: what is equity? Equity, as described in article 4 of the Civil Code, refers to "justice, reason, and prevailing usages."[242] By allowing equity to circumvent the general rule that peremptive periods may not be interrupted, suspended, or renounced, courts will still be faced with deciding whether a right is subject to peremption or prescription. After answering that question, courts will then have to determine if applying the peremptive period will lead to an inequitable result. Answering both questions will increase the lack of uniformity in results regarding when a claimant can bring his claim.

Even if equity could be adequately defined for the purposes of peremption, there is a second problem with this solution. Encouraging courts to decide whether a claim is subject to peremption based on equity goes against the very purpose that equity is intended to serve in the Civil Code. Equity is to be resorted to only "in the absence of a positive law or custom."[243] It

240. The text that the author proposes to add to the current version of Civil Code article 3461 is italicized.

241. *See* LA. CIV. CODE ANN. art. 4 (1999).

242. *Id.* Equity is also defined in the Civil Code in reference to how doubtful provisions of contracts should be interpreted. *See* LA. CIV. CODE ANN. art. 2053 (2008). Article 2055 of the Civil Code refers to equity as "the principle[] that no one is allowed to take unfair advantage of another and that no one is allowed to enrich himself unjustly at the expense of another." LA. CIV. CODE ANN. art. 2055 (2008). This definition, though arguably more functional than the description of equity provided in Civil Code article 4, does not adequately describe the type of inequity that courts lament when discussing the "perceived inequities" of peremption.

243. A.N. Yiannopoulos, *Requiem for a Civil Code: A Commemorative Essay*, 78 TUL. L. REV. 379, 394 (2003).

is intended to be used to fill gaps within the law, not to create law.[244] Allowing peremptive periods to be altered at the court's discretion in essence allows courts to use equity to deviate from the legislature's intent in creating a peremptive period. When it creates a preemptive period, the legislature is aware of the effect of such a classification. When the legal malpractice statute was debated, for example, the subject of peremption arose and was opposed by some organizations "because it could extinguish a cause of action before it arises."[245] These "pitfalls" of peremption were well articulated before the legislature, but the legislature still opted to subject actions for legal malpractice to peremption.[246] Applying equity to a statute like the legal malpractice statute would not be filling in a gap in the law; it would be creating law, and, more particularly, it would be creating law directly in opposition to that which was passed by the legislature.

Legislative intent aside, there is an even greater problem with the above solution: it destroys the foundation of the doctrine of peremption. By definition, a right that is subject to a peremptive period exists only for a limited amount of time.[247] At the end of the time period, the right is destroyed. To allow the time period to be interrupted or suspended would change the nature of the right because the right would no longer be finite; the right would be infinite so long as equity required.[248] While allowing peremptive periods to be interrupted, suspended, or renounced may rid the system of some inequity, its effects are much broader because the remedy destroys the underlying notion of peremption.

D. Extinguish Peremption

If allowing for equitable deviations from peremption or defining what rights are peremptive does not solve all problems, perhaps there is another solution: eliminate peremption. Destroying the doctrine of peremption would mean no more confusion between peremption and prescription because peremption would

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244. *E.g.*, Katherine Shaw Spaht, *The Remnant of Forced Heirship: The Interrelationship of Undue Influence, What's Become of Disinherison, and the Unfinished Business of the Stepparent Usufruct*, 60 LA. L. REV. 637, 657 n.113 (2000).

245. Reeder v. North, 701 So. 2d 1291, 1297 (La. 1997).

246. *Id.*

247. LA. CIV. CODE ANN. art. 3458 (2007).

248. H. Alston Johnson III, *Death on the* Callis *Coach: The Mystery of Louisiana Wrongful Death and Survival Actions*, 37 LA. L. REV. 1, 36–41 (1976) ("A period that admits of suspension or interruption cannot properly be called a peremptive period." (emphasis omitted)).

no longer exist; the only type of temporal limitations would be prescriptive limitations. Inequities created by peremption would cease. The misapplications of peremption would stop. The problems discussed herein would largely be solved. The removal of an entire doctrine from Louisiana law may at first blush seem extreme, though, in reality, it is not the first time such a solution has been proposed. Aubry and Rau questioned the doctrine of forfeitures years ago, stating that "[t]he fact that the time period limits the exercise of a faculty rather than extinguishes upon its expiration an action or a right, does not justify a different regime."[249]

This solution, however, comes at a high price. First, to truly enact this remedy, peremption would have to be deleted from the vocabulary of all Louisiana legislation. There are currently sixty-eight legislative provisions in the Civil Code,[250] Revised

249. AUBRY & RAU, *supra* note 32, § 771, at 422.

250. The following fourteen Civil Code articles would need to be revised in order to extinguish peremption from Louisiana law: LA. CIV. CODE ANN. art. 117 (1999) (establishing a three-year peremptive period to claim spousal support); LA. CIV. CODE ANN. art. 186 (2007) (establishing a one-year peremptive period for the disavowal of paternity by the second husband presumed to the father of the child); LA. CIV. CODE ANN. art. 193 (2007) (establishing a peremptive period for a mother to contest paternity of 180 days from the marriage of her husband and two years from the birth of the child); LA. CIV. CODE ANN. art. 195 (2007) (establishing a 180-day peremptive period for the disavowal of paternity by the formally acknowledged father); LA. CIV. CODE ANN. art. 197 (2007) (establishing a one-year peremptive period for a child to establish paternity for the purposes of successions); LA. CIV. CODE ANN. art. 198 (2007) (establishing one- and ten-year peremptive periods for a father to establish paternity when the child is filiated to another man); LA. CIV. CODE ANN. art. 2571 (2005) (stating that peremption runs against all persons including minors); LA. CIV. CODE ANN. art. 2595 (2005) (establishing a one-year peremptive period for lesion); LA. CIV. CODE ANN. art. 3458 (2007) (defining peremption); LA. CIV. CODE ANN. art. 3459 (2007) (providing that the rules for computing time under prescription apply to peremption); LA. CIV. CODE ANN. art. 3460 (2007) (providing that peremption need not be pleaded); LA. CIV. CODE ANN. art. 3461 (2007) (providing that peremption may not be renounced, interrupted, or suspected); LA. CIV. CODE ANN. art. 3496.1 (1994) (providing that the action against a person for abuse of a minor is subject to any peremption period provided by law); LA. CIV. CODE ANN. art. 3549 (Supp. 2008) (providing the conflicts of law rules concerning prescription and peremption). Additionally, the comments of two Civil Code articles discuss peremption, though the text of the articles does not. LA. CIV. CODE ANN. art. 112 cmt. j (1999) (discussing the peremptive period of Civil Code art. 117); LA. CIV. CODE ANN. art. 189 cmt. a (2007) (discussing the peremptive period of a disavowal action). For the sake of clarity, an Editor's Note should be added to these articles to specify that peremption has been extinguished.

Statutes,[251] and Code of Civil Procedure[252] that use the word peremption or a variation thereof.[253] All of this legislation would

251. The following fifty-one Revised Statutes would need to be changed in order to truly extinguish peremption from Louisiana law: LA. REV. STAT. ANN. § 6:293 (2005) (establishing one-, two-, three-, and four-year peremptive periods for actions against directors and officers of banks and bank holding companies); LA. REV. STAT. ANN. § 6:787 (2005) (establishing one-, three-, and four-year peremptive periods for actions against directors and officers of financial institutions); LA. REV. STAT. ANN. § 6:1191 (2005) (establishing one-, two-, three-, and four-year peremptive periods for actions against directors and officers of savings banks); LA. REV. STAT. ANN. § 9:404 (2008) (referring to the peremptive periods for a father's paternity action); LA. REV. STAT. ANN. § 9:1109 (2008) (statutes shall not be construed as validating, by reason of prescription or peremption, any transfer of navigable waters or beds); LA. REV. STAT. ANN. § 9:1123.115 (2008 & Supp. 2010) (establishing a one-year peremptive period for privileges on immovables); LA. REV. STAT. ANN. § 9:1147 (2008) (establishing a five-year peremptive period for privileges against lots of association of owners in a residential or commercial subdivision); LA. REV. STAT. ANN. § 9:2234 (2005) (establishing two- and three-year peremptive periods for actions for damages against a trustee); LA. REV. STAT. ANN. § 9:2503 (2005) (establishing a one-year peremptive period for an action to annul an alienation, lease, or encumbrance owned by a decedent at his death); LA. REV. STAT. ANN. § 9:2772 (2005) (establishing six-month and five-year peremptive periods for actions involving deficiencies in surveying, design, supervision, or construction of immovables or improvements thereon); LA. REV. STAT. ANN. § 9:2800.8 (1997) (referring to the peremptive periods applicable to property adjudicated to local governmental subdivisions); LA. REV. STAT. ANN. § 9:2800.9 (1997) (referring to periods of peremption affecting actions against a person for abuse of a minor); LA. REV. STAT. ANN. § 9:2800.12 (Supp. 2008) (establishing three- and ten-year peremptive periods for liability for performing an abortion); LA. REV. STAT. ANN. § 9:3146 (Supp. 2008) (establishing a thirty-day peremptive period for enforcing warranties under the New Home Warranties Act); LA. REV. STAT. ANN. § 9:3150 (Supp. 2008) (establishing that the New Home Warranties Act provides the exclusive peremptive periods as between builders and owners for home construction); LA. REV. STAT. ANN. § 9:5014 (2007) (referring to the peremption of inscription against owners of immovables and heirs and legatees who have accepted a succession); LA. REV. STAT. ANN. § 9:5015 (2007) (establishing a three-month peremptive period for the inscription of the privilege of a succession creditor or particular legatee); LA. REV. STAT. ANN. § 9:5016 (2007) (same); LA. REV. STAT. ANN. § 9:5604 (2007) (establishing one- and three-year peremptive periods for actions against professional accountants); LA. REV. STAT. ANN. § 9:5605 (2007) (establishing one- and three-year peremptive periods for actions for legal malpractice); LA. REV. STAT. ANN. § 9:5606 (2007) (establishing one-and three-year peremptive periods for actions for professional insurance agent liability); LA. REV. STAT. ANN. § 9:5607 (2007) (establishing a five-year peremptive period for actions against a professional engineer, surveyor, professional interior designer, architect, or real estate developer); LA. REV. STAT. ANN. § 9:5609 (2007) (establishing the "peremption of the effect of recordation" of contracts to buy or sell immovables); LA. REV. STAT. ANN. § 9:5628.1 (2007) (providing one- and three-year peremptive periods for actions against healthcare providers arising from the use of blood or tissue); LA. REV. STAT. ANN. § 9:5822 (2007)

(providing for the suspension and extension of all peremptive periods in the wake of Hurricanes Katrina and Rita); LA. REV. STAT. ANN. § 9:5824 (2007) (same); LA. REV. STAT. ANN. § 12:147 (1994) (entitling the procedural time limits that affect claims against corporations in liquidation as peremptive); LA. REV. STAT. ANN. § 12:255 (1994) (same); LA. REV. STAT. ANN. § 12:1338 (1994) (entitling the procedural time limits that affect claims against limited liability companies in liquidation as peremptive); LA. REV. STAT. ANN. § 13:5108 (2006) (establishing a one-year peremptive period for filing suit in contract for injury to person or property against the state, state agencies, and political subdivisions); LA. REV. STAT. ANN. § 13:5122 (2006) (modifying the laws for suits affecting the validity of bonds, but providing that nothing in the modified laws affects any peremptive or prescriptive period for the contesting of bonds of governmental units); LA. REV. STAT. ANN. § 15:574.11 (Supp. 2008) (establishing a ninety-day peremptive period for petitioning review of a denial of a revocation of a parole hearing); LA. REV. STAT. ANN. § 33:175 (Supp. 2008) (establishing a thirty-day peremptive period for attacking municipal ordinances); LA. REV. STAT. ANN. § 33:4100 (2002) (establishing a thirty-day peremptive period for actions contesting the validity of New Orleans bond issues); LA. REV. STAT. ANN. § 33:4128 (2002) (same); LA. REV. STAT. ANN. § 33:4141 (2002) (same); LA. REV. STAT. ANN. § 33:4720.60.1 (2009) (establishing a one-year peremptive period for annulling an expedited quiet title or foreclosure action); LA. REV. STAT. ANN. § 34:816 (2006) (establishing a one-year peremptive period to seize a vessel held liable for injuries to persons or property); LA. REV. STAT. ANN. § 34:3112.1 (2006) (establishing a thirty-day peremptive period for contesting the legality of a resolution authorizing revenue bonds); LA. REV. STAT. ANN. § 34:3483 (2006) (same); LA. REV. STAT. ANN. § 34:3503 (Supp. 2010) (same); LA. REV. STAT. ANN. § 35:200 (2006) (establishing one-and three-year peremptive periods for actions for damages against a notary); LA. REV. STAT. ANN. § 37:92 (2007) (establishing that all peremptive periods of accountants must be governed by LA. REV. STAT. ANN. § 9:5604 (2007)); LA. REV. STAT. ANN. § 39:1041 (2005) (establishing a thirty-day peremptive period for contesting the legality of a resolution authorizing the issuance of bonds by the city of New Orleans); LA. REV. STAT. ANN. § 39:1451 (2005) (establishing a thirty-day peremptive period for contesting the legality of a resolution or ordinance authorizing the issuance of refunding bonds); LA. REV. STAT. ANN. § 47:2241 (2009) (stating that all redemptive periods in the Louisiana Constitution are peremptive); LA. REV. STAT. ANN. § 47:6006.1 (Supp. 2008) (stating that nothing in the revised statutes regarding tax credits for taxes paid with respect to vessels in the Outer Continental Shelf Lands Act Waters affects peremptive periods that may apply under the Louisiana Constitution); LA. REV. STAT. ANN. § 48:27 (2004) (establishing a thirty-day peremptive period for contesting the legality of a resolution adopted by the State Bond Commission under the Grant Anticipation Revenue Vehicle Act of 2002); LA. REV. STAT. ANN. § 51:1158.1 (2003) (establishing a thirty-day peremptive period for contesting a resolution authorizing the issuance of bonds by a corporation or a lease, with the thirty-day period commencing on the date the resolution is published in the appropriate newspaper); LA. REV. STAT. ANN. § 51:1605 (2003) (establishing a thirty-day peremptive period for contesting the legality of a revenue bond authorized by the Secretary of Natural Resources). Additionally, LA. REV. STAT. ANN. § 47:2133 cmt. c (2009) discusses peremption. For the sake of clarity, an Editor's

need to be amended in order to remove peremption from Louisiana law.[254] Though tedious and time consuming to do, this hurdle could be overcome.

The second concern with extinguishing peremption is that there may be a need for the doctrine. There may arguably be some rights of debtors that society values so much that it truly believes the rights of the creditor should be destroyed if not exercised promptly. By deleting peremption, the legislature could lose its ability to govern these rights that the public has an interest in seeing exist only for a limited amount of time.

This second concern is unfounded. The authority of the legislature to provide an absolute protection of the rights of the debtor is not entirely thwarted by deleting peremption. The legislature may opt to create a prescriptive period that cannot be suspended, interrupted, or renounced. The only difference is that without the doctrine of peremption, the legislature must explicitly state that a particular time period provided by law is not subject to interruption, suspension, or renunciation, as provided in Civil Code articles 3462 through 3472, and is not subject to the judicially-

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Note should be added to this statute to specify that peremption has been extinguished.

252. The following three articles in the Code of Civil Procedure would need to be changed in order to truly extinguish peremption from Louisiana law. LA. CODE CIV. PROC. ANN. art. 927 (Supp. 2010) (establishing peremption as a peremptory exception); LA. CODE CIV. PROC. ANN. art. 1067 (2005) (providing when an incidental demand is not barred by peremption); LA. CODE CIV. PROC. ANN. art. 2004 (2003) (entitling the period for annulling a judgment as peremptive).

253. Though some provisions have been interpreted to be peremptive, the use of peremption does not occur in the Louisiana Children's Code, the Louisiana Code of Evidence, the Louisiana Constitution, the Louisiana Constitution Ancillaries, or the Louisiana Code of Criminal Procedure.

254. A statute that explicitly states that peremption no longer exists in Louisiana may also need to be enacted. Though such a provision would be inartful, it may be necessary in order to ensure that courts do not apply peremption to legislatively provided time periods that do not expressly use the term "peremption." The eradication of peremption from sixty-eight legislative provisions should be enough to show the legislature's clear intent to rid Louisiana of the doctrine, but the fact remains that peremption existed jurisprudentially before it existed statutorily. As such, courts may reason that legislation is not necessary to apply peremption to time limitations. To avoid such a conclusion, the legislature would be wise to include legislation in the Revised Statutes that states that time limitations may not be considered peremptive.

created suspensions provided under the doctrine of *contra non valentem*.[255]

Admittedly, the judicial and legislative efficiency of deleting peremption seems questionable if it will simply lead to the alteration of sixty-eight pieces of legislation by deleting the word "peremption" (or "perempt," "peremptive," etc.) and then adding a sentence to the formerly peremptive statutes that says the prescriptive period provided may not be interrupted, suspended, or renounced. There are, however, advantages to this approach. By requiring the legislature to state the exact characteristics of prescription that should not apply to particular time limitations, the legislature may be more inclined to tailor each prescriptive period to the individual action. For example, there may be valid reasons why an action for legal malpractice should not be interrupted or suspended, but there seems to be little reason for not allowing the action to be renounced or for not requiring the negligent attorney to plead the exception himself. Forcing the legislature to explicitly state which prescriptive rules are not to be applied will increase the likelihood that the legislature will consider the specific effects of each rule of prescription and how those rules should apply to individual time periods.

There is, though, a broader reason why peremption should be extinguished: it does not actually fulfill its purpose of protecting underlying public interests.[256] The reason that peremption does not always protect public policy is because peremptive periods are established *ex ante* and make no room for alteration *ex post*. To truly serve as a defender of societal values, courts must be able to examine the situation and determine what the best protective method is based on the facts at hand. Such determinations should certainly be guided by legislation, but having rules as hard-and-fast as peremptive periods means that some public policies that society believes are important will fall on the wrong side of the peremptive line. In such situations, the public policy that peremption purports to protect may actually be harmed by the doctrine.

This problem with peremption is particularly prevalent when peremption pits public policies against one another. At least one example of such a situation exists within the laws of filiation and successions. The rules of filiation strive to promote family stability

255. The Louisiana Supreme Court recently recognized the legislature's ability to modify the general rules of prescription. In *Warren v. Louisiana Medical Mutual Insurance Co.*, the court held that the Medical Malpractice Act provides the exclusive means of interrupting and suspending prescription, such that the general Civil Code articles on interruption and suspension do not apply. No. 2007-CC-0492, 2009 La. LEXIS 2224, at *15–19 (La. June 26, 2009).

256. *See* Hebert v. Doctors Mem'l Hosp., 486 So. 2d 717, 722 (La. 1986).

and protect children from an "upheaval of [filiation] litigation."[257] In successions, requiring certain heirs to claim their succession rights within a relatively short period of time promotes the "orderly disposition of estates,"[258] which leads to "the stability of land titles."[259] Inarguably, both stability of family and stability of title are important values for society to protect.

Peremption, however, causes these values to collide. A child's action to establish paternity is subject to a one-year peremptive period that commences upon the death of the alleged father.[260] In other words, one year after the biological father dies, the child's right to filiate for the purposes of inheriting from him also dies. Suppose an unmarried mother and father conceive a child and the father never takes the requisite steps to filiate. On the child's fourteenth birthday on January 1, 2005, the father abruptly leaves the mother and child. The mother and child search for the father until January 1, 2009, when they discover that the father died intestate two years earlier on January 1, 2007. At this point, the child has no opportunity to inherit from her biological father because she is perempted from establishing paternity for the purposes of the succession. In this scenario, the public policy of protecting children is diametrically opposed to the public policy of protecting title. Allowing the child to inherit from the father would likely be in the best interest of the child. Not allowing the child to inherit from the father protects third parties who have acquired an interest in the father's estate.

And therein lies the problem with peremption. In some scenarios it would be in the best interest of society if the court favored the protection of children and allowed the child to filiate. In other scenarios, it would be better for society if the court did not allow the child to filiate and instead protected the stability of title. The problem with peremption is that the doctrine ties the court's hands such that it cannot (or at least should not) consider what the more important public policy is in an individual situation.[261] Some of society's beloved values are left vulnerable by the doctrine, and

257. LA. CIV. CODE ANN. arts. 186, 193, 195, 197, 198 (2007); Spaht, *supra* note 119, at 324.

258. LA. CIV. CODE ANN. art. 197 cmt. e (2007); *see also* Trimble v. Gordon, 430 U.S. 762, 771 (1977) (noting the importance of "[t]he orderly disposition of property at death").

259. LA. CIV. CODE ANN. art. 197 cmt. e (2007).

260. LA. CIV. CODE ANN. art. 197 (2007).

261. This is not to say that declaring all rights prescriptive will solve all problems; admittedly, the doctrine of prescription has its own limitations. This hypothetical merely establishes that peremption does not always fulfill its purpose of protecting public policy.

yet protecting public policy is one of the main goals of peremption. Given that peremption cannot serve its very purpose, the problems of inequity, misapplication, and confusion that the doctrine creates are not worth their trouble; peremption should be extinguished from Louisiana law.

CONCLUSION

How the passage of time affects legal rights should be clear, but instead, we find ourselves buried under temporal ambiguity. Much of this ambiguity arises from the doctrine of peremption. Peremption has been problematic in Louisiana because it inherently leads to inequitable results that courts and legislators attempt to remedy. Such remedies create further problems because they misapply the doctrine of peremption by allowing non-peremptive rules to affect peremptive periods. These misapplications foster confusion in determining when a time limitation is peremptive. As confusion increases, courts and the legislature attempt to clarify how a particular right should be classified. Once a court or the legislature is successful in clarifying that a right is subject to peremption, the original problem of inequity returns. The problems of peremption abound.

These problems might be well worth their trouble if the doctrine of peremption achieved its goal of protecting public policy. The fact of the matter is, though, that peremption frequently fails in this regard. Because peremption provides non-malleable, *ex-ante* rules, the doctrine finds itself working against some of the very values it purports to protect. As peremption creates a host of problems without achieving its goal, the doctrine of peremption should be extinguished from Louisiana law. When the legislature takes action to ameliorate this current situation, it should also reflect upon the much broader, more utilized temporal doctrine of prescription, for if peremption is this problematic, what issues lurk within prescription?