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ANCIENT LAW AND MODERN EYES

DAVID V. SNYDER*

My article on the Louisiana law of possession¹ argues that the Louisiana Digest of 1808, commonly called the Civil Code of 1808,² comes directly from the Roman law on the same subject. The redactors of the Louisiana law did not simply follow Spanish or French law or commentators. Although this argument is contradicted by Professor Batiza, he and I do not disagree about the law and its sources as extensively or as deeply as the tone of his Essay might suggest. In fact, my research often started with Professor Batiza's work, as my footnotes reflect. Professor Batiza, however, has largely misconceived the argument in my article. He reads it in a way that does not entirely make sense given modernity's imperfect knowledge of Roman law, and the even less perfect understanding of those living in the late eighteenth and early nineteenth centuries. Perhaps most importantly, Professor Batiza's insistence on one method³ of examination has obscured some of the sources of the Code. The approach that I have employed can offer responses to questions that his technique has not been able to answer, without making his work any less valid or valuable.

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1. David V. Snyder, *Possession: A Brief for Louisiana's Rights of Succession to the Legacy of Roman Law*, 66 TUL. L. REV. 1853 (1992).

2. Following general usage, this Essay will refer to the Louisiana Digest of 1808 as a "Code."

3. Professor Batiza's technique has been to examine texts side by side and then to classify the older text, as appropriate, according to the following categories: verbatim, almost verbatim, substantially influenced, or partially influenced. Rodolfo Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 TUL. L. REV. 4, 13 (1971). He has employed this same technique and classification system when examining provisions in different languages, although the sources obviously never receive a "verbatim" or "almost verbatim" designation. See *id.* at 14, 22-25.

I. ROMAN LAW EXPLAINS THE THEMES UNIFYING THE EARLY LOUISIANA LAW OF POSSESSION

Professor Batiza argues that some of the Code articles I discuss come from French commentators, such as Domat and Pothier. His theory may explain the provenance of certain specific language, but it does not explain how the unified concepts that pervade the law of possession in the 1808 Code came into the law. If one were only to look at the evidence that Professor Batiza cites, it would appear that the Code must be an incoherent hodge-podge, gathered from various French sources.⁴ My theory, that the redactors looked at the Roman legal principles, and even the specific provisions of Roman legal texts (albeit in the versions that were available in the early nineteenth century, and perhaps not in the original Latin), explains the legal rules and concepts of the possession laws.

The theme underlying all of the articles and overriding any specific provision is that Roman rules were adopted in much of the Louisiana law of possession. My article attempts to pinpoint answers to some questions, for which Professor Batiza has not offered answers, by examining the overarching theme of the possession articles and emphasizing rules and concepts as well as language. For instance, he says that the source of article 3.20.31 is Domat, "but the Louisiana Digest," he concedes, "added the words '*excepté par trente ans.*'"⁵ My method, which is less constrained than Professor Batiza's, can identify the source for these added words.⁶ As I pointed out in the original article, the thirty-year provision comes from the *longissimi temporis possessio*, or thirty-year acquisitive prescription, in the Justinian legislation.⁷ The original Latin words (whatever they may have been) may not have been copied exactly, but the concept seems to have come from Roman law. There is no mention of thirty-year

4. Professor Batiza's rejoinder, in fact, cites no fewer than five sources for the Louisiana provisions on possession: the French Ferrière translation of Justinian's *Institutes*, Domat, Pothier, the French Civil Code, and the *Projet de la loi de l'an VIII*. Rodolfo Batiza, *Justinian's Institute and the Louisiana Civil Code of 1808*, 69 TUL. L. REV. 1639, 1639 (1995).

5. Rodolfo Batiza, *Roman Law in the French and Louisiana Civil Codes: A Comparative Textual Survey*, 69 TUL. L. REV. 1601, 1621 (1995).

6. Professor Batiza concedes that he did not identify a source for the thirty-year rule. Batiza, *supra* note 4, at 1643.

7. Snyder, *supra* note 1, at 1878-79.

prescription in the provision of Domat on which Professor Batiza's article relies.

In his rejoinder, Professor Batiza notes that another part of Domat's *Loix Civiles* mentions the thirty-year period, and that some of this other Domat provision came into article 3.20.67 of the Code of 1808, via article 2265 of the French Civil Code.⁸ Yet if the redactors were simply following Domat, they would presumably have put the thirty-year period in article 3.20.67 with the rest of the material in that provision of Domat.⁹ Furthermore, as Professor Batiza himself notes, Pothier wrote about a thirty-year prescriptive period that derives from customary (as opposed to Roman) law.¹⁰ Professor Batiza, however, does not offer a way to decide who or what the redactors were following. My technique was to examine the rules and concepts in the possession articles. Given the Roman theme present throughout that part of the Code, a Roman derivation for the thirty-year period seems the most reasonable conclusion.

The appearance of "*animo Domini*" in the Louisiana Code is another example of an answer that my article provides to a question that Professor Batiza does not address. Again, he criticizes my article for indicating the origin of a concept without mention of the "sources," as he sees them, of the particular provisions in the Louisiana Code. He goes on to quote these "sources," but they do not mention *animo domini*.¹¹ This intent element, however, has been a classic problem in the law of possession, and the Louisiana Code article at issue treats the problem more fully than the sources quoted by Professor Batiza. My article offers a reason for the treatment given by the Code of 1808, and even its wording. It comes from the Roman law, as understood by Savigny and others. (My article expressly states that we still do not know how the Romans dealt with this problem but mentions several theories current at the time the redactors were putting together the Louisiana Code.) Savigny used these words—"animo domini," in Latin—and explained their meaning in the same way as the 1808 Code

8. Batiza, *supra* note 4, at 1643 & n.11.

9. The redactors would have had to consult Domat and not just the French Civil Code, *see* CODE CIVIL [C. CIV.] art. 2265 (Fr. 1804), but if they followed Domat for article 3.20.31 there is no reason they could not have done so for article 3.20.67.

10. Batiza, *supra* note 4, at 1643 n.11, 1644.

11. Batiza, *supra* note 5, at 1625-27.

does. Neither the words nor as full an explanation is given by the French sources on which Professor Batiza's article relies.

Others, no doubt, also used these or similar words, as the rejoinder observes.¹² Largely for anachronistic reasons, Professor Batiza believes it odd that the redactors would have followed Savigny or his school.¹³ But whether the words come from Savigny or some other expositor of the Roman Law is not the issue. My arguments was—and is—that the Louisiana redactors followed the Roman law, as understood in their time.¹⁴ This hypothesis explains the use of the words "*animo Domini*"¹⁵ in the Code of 1808. It also explains why these words were added (together with a brief explication of the concept), even though the "source" that Professor Batiza has identified does not account for their appearance in the Louisiana law.

In addition to some of these more important differences, there are many minor points that I will not undertake to rebut one by one. I would like to mention one incidental issue, however. Professor Batiza criticizes me repeatedly for referring to the "redactors" of the Civil Code of 1808, as he takes the view that Moreau Lislet was "the sole drafter." Here, as elsewhere in his essay, Professor Batiza allows no room for disagreement. Distinguished scholars have differed from him on this point,¹⁶ however, and even the evidence that Professor Batiza cites is conflicting.¹⁷

12. Batiza, *supra* note 4, at 1644.

13. *Id.*

14. See also *infra* section II.

15. Professor Batiza criticizes my article for capitalizing "*Domini*," implying that I have misunderstood the term. Batiza, *supra* note 4, at 1644. Actually, my article uses lower case except when quoting from the Code of 1808, which does capitalize the word. Snyder, *supra* note 1, at 1883-84.

16. E.g., A.N. Yiannopoulos, *The Civil Codes of Louisiana*, in LA. CIV. CODE xxviii (West 1995).

17. See Rodolfo Batiza, *Origins of Modern Codification of the Civil Law: The French Experience and Its Implications for Louisiana Law*, 56 TUL. L. REV. 477, 583 & nn.494-95 (1982). The Act appointing "James Brown, and Moreau Lislet, lawyers, whose duty it shall be to compile and prepare, jointly, a Civil Code," obviously refers to two redactors. Act of June 7, 1806, in 1806 La. Acts, cited in Batiza, *supra*, at 583 & n.494. In concluding that only Moreau Lislet actually served, Professor Batiza relies on a report submitted 17 years later. Moreau Lislet was a co-author of this later report, but James Brown was not. See E. Livingston, L. Moreau Lislet & P. Derbigny, Preliminary Report of the Code Commissioners (Feb. 13, 1823), reprinted in 1 LA. LEGAL ARCHIVES xciii (1937) and cited in Batiza, *supra*, at 583 n.495. In the final analysis, there is support for both points of view.

II. ANCIENT LAW REQUIRES A FLEXIBLE AND CAREFUL EXAMINATION

Professor Batiza's exacting technique may not be the best suited for accommodating certain peculiar difficulties inherent in researching and interpreting ancient law. Without question, examining texts side by side has allowed Professor Batiza to reach conclusions about the "sources" of Louisiana law, tracing specific words to older texts in an effort to reach a nearly scientific understanding of how a code was put together. Of course this technique has great worth; it has provided insight into the origins of current Louisiana law and has sparked much scholarly controversy.¹⁸ But because of its focus on where the words come from, it sometimes obscures the provenance of the concepts.

As I explained in my article, those who work in the twentieth century do not have all of the original texts of the seminal Roman legal works. The law of Rome developed from the early laws of the Twelve Tables, which provided an early view on *usucapio* four and one-half centuries before the Common Era, to the famous Justinian legislation that was promulgated in the sixth century of the Common Era. The millennium of development saw growth and change in the law. Further, the sheer vastness of the time separating us from Rome, not to mention the coming of the barbarians and the consequent loss of many vital texts, has deprived us of perfect versions of "the Roman law," to the extent that there was something in particular that might be called "the Roman law."

Given the task that I undertook, my method had to differ from Professor Batiza's, and much of my article emphasizes concepts more than words. Where it makes sense, though, I have also utilized a technique similar to Professor Batiza's, showing how some articles in the Code of 1808 match the Institutes of Justinian. The method cannot follow his exactly, though, because of the limitations of the texts and the languages.

In the first part of my article, I argue that certain provisions of the Code of 1808 come directly from Justinian's *Institutes*. A large part of

18. Compare Batiza, *supra* note 3, and Rodolfo Batiza, *Sources of the Civil Code of 1808, Facts and Speculation: A Rejoinder*, 46 TUL. L. REV. 628 (1972) with Robert A. Pascal, *Sources of the Digest of 1808: A Reply to Professor Batiza*, 46 TUL. L. REV. 603 (1972). For additional discussion of the scholarly controversy, see Joseph M. Sweeney, *Tournament of Scholars over the Sources of the Civil Code of 1808*, 46 TUL. L. REV. 585 (1972); Yiannopoulos, *supra* note 16, at xxvii-xxx.

Professor Batiza's quarrel with this conclusion is based on his belief that some of those provisions come from a certain translation of the *Institutes*, which he has identified. I freely admit that they may well come from a translation, and perhaps Professor Batiza is merely quibbling semantically over the meaning of "direct."¹⁹ I do not believe it makes a significant difference to my argument, however, whether the provisions come from a translation or an edition.

In fact, it would be unreasonable to argue that the redactors used anything other than an edition. The earliest known text of Justinian's *Institutes* dates from the ninth century, about three hundred years after the text was first promulgated. None of the extant texts are uncorrupted, and scholars have spent their careers trying to refine and improve the text. By 1817, approximately the period when the early Louisiana redactors worked, there had been at least 667 different editions.²⁰ The lack of a perfect text is common in this sort of work, yet Professor Batiza does not account for this difficulty. Modern scholars may prefer the Latin text compiled by Krüger in 1867 or that of Huschke in 1868, but neither was available to the early redactors.²¹ It was no less legitimate of the redactors to use a translation than for us to quote the King James version of the Bible.²²

Professor Batiza is correct, then, that the Louisiana redactors did not look at the original text that was drafted in the sixth century of the Common Era. Surely, nuances can be lost in even a good translation, and if the Code of 1808 had followed the best Latin text of the *Institutes* available around 1805, the Code might have been closer to that part of the Roman law. But following a translation instead of the best available Latin does not make a significant difference, especially where the final product would not be written in Latin in any case.

I show six provisions of the Code of 1808 against five parallel provisions of Justinian's *Institutes*. Both the Louisiana Code and the *Institutes* are quoted in English, which Professor Batiza says is "clearly

19. He states that certain provisions were borrowed "from the *Institutes* and *Digest*, although not directly, but from those translations." Batiza, *supra* note 5, at 1615.

20. Peter Birks & Grant McLeod, *Introduction to Justinian's Institutes* 27 (Peter Birks & Grant McLeod trans., 1987).

21. *Id.*

22. I am indebted for this analogy to Shael Herman, who in turn credited Peter Stein, Regius Professor of Civil Law Emeritus, Queens' College, Cambridge. I would also like to acknowledge Professor Stein's insightful comments on a draft of my original article.

wrong.”²³ I cannot agree, although I did recognize his point in my article. As I noted, the official and original version of the Code was in French; the English version was merely a translation, and the French controls in case of conflict.²⁴ The *Institutes*, of course, were originally written in Latin. A side-by-side comparison of a French text with a Latin one, however, did not seem as useful as showing both in English, with relevant portions of the original given “[w]hen the original French or Latin indicates a less-than-perfect translation or shows a closer parallel between the two texts.”²⁵ Throughout the article, I gave the original language whenever it appeared to be useful.²⁶ I also offered my own translations throughout the article when they appeared more salient than the translations of others, always noting my departures.²⁷

My argument was that these provisions of the Louisiana law came directly from the Roman law, not “through intermediate laws, the French and Spanish sources being the main contenders.”²⁸ In my view, it is not a reasonable objection to say, as Professor Batiza does, that these Louisiana Code articles do not come straight from a Roman source but rather through a French edition and translation of Justinian’s *Institutes*. Of course the law must come from a more recent version. Furthermore, the Code was written in French, and using a French translation of the *Institutes* would be a sensible step. But the law still comes from the *Institutes*.

III. CONCLUSION

I have addressed, I hope, the primary criticisms that Professor Batiza has leveled at my work. By examining ideas and concepts in addition to language, my article explained what Professor Batiza’s technique cannot account for. Given this focus, I do disagree with

23. Batiza, *supra* note 5, at 1615. Interestingly, when comparing provisions in different languages, Professor Batiza himself quotes the Code of 1808 in English only. See Batiza, *supra* note 3, at 22-25. Apparently he has changed his view on the propriety of doing so. Batiza, *supra* note 4, at 1645 (arguing that the use of English translation is “inadmissible”).

24. Snyder, *supra* note 1, at 1856 n.12.

25. *Id.* at 1857 n.14.

26. See, e.g., *id.* at 1856 n.12 and accompanying text, 1859-60, 1862 n.21, 1863 n.22, 1870 n.52, 1872 n.67.

27. *Id.* at 1856 n.12 (“I . . . give more appropriate translations than appear in the official English version”).

28. *Id.* at 1861.

Professor Batiza's complaint that I embark on long discussions of the rules and concepts in Roman and Louisiana law "without going into the more relevant question of the specific source of [the] Louisiana Digest."²⁹ A broader definition of relevance has allowed my article to delve into areas that Professor Batiza has not fully explored.

Although I have not attempted a point-by-point rebuttal of Professor Batiza's essay, I suspect that the reader's attention may have already been taxed by the points that I have addressed. For the rest, I would refer interested readers to the sources cited in Professor Batiza's footnotes and in mine.³⁰ I believe that anyone who does not agree with my view would at least agree that my conclusions have solid support.

Certainty, however, is one area in which I strongly disagree with Professor Batiza. After the many years of painstaking work that Professor Batiza has devoted to understanding the origins of Louisiana law,³¹ and his exacting method of examination, it is easy to understand why he would offer his conclusions with certainty.³² But a scientific technique, while absolutely necessary in studying ancient law, does not always allow the precise conclusions to which our modern eyes have grown accustomed.

29. Batiza, *supra* note 5, at 1618.

30. For example, although Professor Batiza suggests that I am unaware of certain work of his, see Batiza, *supra* note 5, at 1615 & n.106, my footnotes cite the article—and even the page—in question, see Snyder, *supra* note 1, at 1854 n.2.

31. See, e.g., Batiza, *supra* note 3; Batiza, *supra* note 18; Rodolfo Batiza, *The Actual Sources of the Louisiana Project of 1823: A General Analytical Survey*, 47 TUL. L. REV. 1 (1972); Rodolfo Batiza, *The Actual Sources of the Marriage Contract Provisions of the Louisiana Civil Code of 1808: The Textual Evidence*, 54 TUL. L. REV. 77 (1979); Batiza, *supra* note 17, at 578-600 (discussing "Codification of the Civil Law in Louisiana").

32. Of course, even a method as rigorous as Professor Batiza's is not immune from error. The examination of texts side by side led him to conclude that the Code of 1808 borrowed from Gaius, Batiza, *supra* note 3, at 12, 22, but Professor Batiza later conceded a mistake on this point. Batiza, *supra* note 5, at 1614. Except for a few fragments, the Institutes of Gaius had not been rediscovered until after the Code of 1808. BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 35 (1987 rpt.).