Defense of the Common Law Against Postbellum American Codification: Reasonable and Fallacious Argumentation

by ANICETO MASFERRER*

It is undeniable that the codification movement does not belong just to past centuries, particularly the nineteenth and twentieth centuries. It is a current issue which continues to concern both American law and American legal historiography. It is difficult to find another topic in American legal history with so many different implications and consequences for the development of American law and jurisprudence.[1] Both the abundant literature that arose in the nineteenth century, especially in the postbellum period (1870s and 1880s),[2] and the bibliography produced by legal historians

* Professor of Legal History, University of Valencia, Spain; Visiting Professor at the Faculty of Law, University of Tasmania (January-February 2010); Visiting Scholar at Melbourne Law School (January-February 2010 and July-September 2008); Visiting Scholar at Harvard Law School (2006-07); Herbert Smith Visiting Professor at Cambridge University, UK (February-July 2005); Fellow Researcher at Max-Planck Institute for European Legal History, Frankfurt/Main, Germany (May-August, 2000-02); Associate Professor of Legal History, University of Girona, Spain (2000-03); Law Ph.D. (2000), University of Girona, Spain; Law D. (1995), University of Barcelona, Spain. I wish to thank Charles Donahue, Lewis A. Grossman, Morton J. Horwitz, and John Mansfield for their helpful comments. I am especially indebted to Daniel R. Coquillette, who gave me interesting insights at the beginning of this research. I acknowledge with thanks Harvard Law School and particularly the Mark DeWolf Howe Fund for generous financial support throughout this project. I am also grateful to Jonathan Rose, who showed great interest in publishing this paper. I also thank the *American Journal of Legal History* for publishing this article. An earlier version of this paper was presented at a Colloquium of the Graduate Program (Harvard Law School, January 2007), and as a part of the RCC Fellows' Lectures (Harvard University, February 2007).

1. The first part of my research on the codification movement in America has been published as: Aniceto Masferrer, *The Passionate Discussion Among Common Lawyers About Postbellum American Codification: An approach to Its Legal Argumentation*, 40 ARIZ. ST. L.J. 173 (2008) [hereinafter Masferrer, *Passionate Discussion*]. That article contains a brief account of the main features of the common law tradition, and surveys some of the shortcomings and pitfalls of American common law in the second half of the nineteenth century. It also describes some of the most remarkable features of the argumentatation surrounding the codification movement, considering both sides of the debate. The present article contains the second part of my research project on the postbellum American codification movement.

2. The literature produced in the context of the debate about the Field Civil Code is extensive. James C. Carter wrote an emotionally charged pamphlet against the Civil Code, THE PROPOSED CODIFICATION OF OUR COMMON LAW (1884) [hereinafter CARTER, PROPOSED CODIFICATION], while at the helm of the New York City Bar Association. In 1884, David Dudley Field answered with a pamphlet entitled A SHORT RESPONSE TO A LONG DISCOURSE: AN ANSWER TO MR. JAMES C. CARTER'S PAMPHLET ON THE PROPOSED CODIFICATION OF OUR COMMON LAW (1884). Field devoted himself intensively to the codification enterprise. *See* DAVID DUDLEY FIELD, CODIFICATION: AN ADDRESS DELIVERED BEFORE THE LAW ACADEMY OF PHILADELPHIA

from the end of the last century up to the present day,[3] demonstrate this fact very clearly.

(1886) [hereinafter FIELD, CODIFICATION, ADDRESS PHILADELPHIA]; DAVID DUDLEY FIELD, INTRODUCTION, CIVIL CODE OF THE STATE OF NEW YORK (1865) [hereinafter FIELD, INTRODUCTION, CIVIL CODE]; David Dudley Field, *Codification*, 20 AM. L. REV. 1 (1886); DAVID DUDLEY FIELD, SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS (A. P. Sprague ed., 1884) [hereinafter FIELD, SPEECHES, ARGUMENTS]; David Dudley Field, *Codification in the United States*, 1 JURID. REV. 18, 24–25 (1889) [hereinafter, Field, *Codification US*]; David Dudley Field, *Codification: Mr. Field's Answer to Mr. Carter*, 24 AM. L. REV. 255, 265 (1890) [hereinafter Field, *Codification, Answer*]; even earlier, *see also* DAVID DUDLEY FIELD, LEGAL REFORM: AN ADDRESS TO THE GRADUATING CLASS OF THE LAW SCHOOL OF THE UNIVERSITY OF ALBANY 11–12 (1855) [hereinafter, Field, LEGAL REFORM, ALBANY]. Scholars joined the debate on both sides: Albert Mathews on Carter's behalf: ALBERT MATHEWS, THOUGHTS ON CODIFICATION OF THE COMMON LAW (4th ed. 1887) [hereinafter MATHEWS, THOUGHTS]; Ludlow Fowler on Field's behalf: ROBERT LUDLOW FOWLER, CODIFICATION IN THE STATE OF NEW YORK (2d ed. 1884) [hereinafter FOWLER, CODIFICATION]. Five years after Field's *Short Response*, Carter delivered an address, THE PROVINCES OF THE WRITTEN AND THE UNWRITTEN LAW (1889) [hereinafter CARTER, PROVINCES] at the annual meeting of the Virginia State Bar Association; in 1890, Carter set forth a detailed portrait of the common law in anticode polemics in another address to the American Bar Association called THE IDEAL AND THE ACTUAL IN THE LAW [hereinafter CARTER, IDEAL] and in a posthumously published work titled LAW: ITS ORIGIN, GROWTH AND FUNCTION (1907) [hereinafter CARTER, ORIGIN]. *See also* JAMES C. CARTER, ARGUMENT OF JAMES C. CARTER IN OPPOSITION TO THE BILL TO ESTABLISH A CIVIL CODE BEFORE THE SENATE JUDICIARY COMMITTEE (1887) [hereinafter CARTER, ARGUMENT]; JAMES C. CARTER, THE IDEAL AND THE ACTUAL IN THE LAW: ADDRESS AT THE THIRTEENTH ANN. MEETING A.B.A. (Aug. 21, 1890). Many commentators also took part in the discussion: R. FLOYD CLARKE, THE SCIENCE OF LAW AND LAWMAKING (1898) [hereinafter CLARKE, SCIENCE]; GEORGE HOADLY, CODIFICATION OF THE COMMON LAW: ADDRESS AT THE CONVENTION OF THE A.B.A. (Aug. 16, 1888) [hereinafter HOADLY, CODIFICATION COMMON LAW]; GEORGE HOADLY, CODIFICATION IN THE UNITED STATES: AN ADDRESS DELIVERED BEFORE THE GRADUATING CLASSES AT THE SIXTIETH ANNIVERSARY OF THE YALE LAW SCHOOL (June 24, 1884) [hereinafter HOADLY, CODIFICATION USA]; Samuel F. Miller et al., *Codification*, 20 AM. L. REV. 315 (1886); Leonard A. Jones, *Uniformity of Laws Through National and Interstate Codification*, 28 AM. L. REV. 547 (1894) [hereinafter Jones, *Uniformity*]; John F. Dillon, *Codification*, 20 AM. L. REV. 22 (1886); WILLIAM B. HORNBLOWER, IS CODIFICATION OF THE LAW EXPEDIENT?: AN ADDRESS DELIVERED BEFORE THE AMERICAN SOCIAL SCIENCE ASSOCIATION (Sept. 6, 1888) [hereinafter HORNBLOWER, CODIFICATION]; W. H. H. Russell, *California System of Codes*, 2 MICH. L. REV. 279 (1893) [hereinafter Russell, *California*]. On codification in California, *see* JOHN NORTON POMEROY, THE CODE OF REMEDIAL JUSTICE, REVIEWED AND CRITICISED 20 (1877); *see also* JOHN NORTON POMEROY, THE "CIVIL CODE" IN CALIFORNIA 50 (1885); previously published in John Norton Pomeroy, *The True Method of Interpreting the Civil Code*, 3 W. COAST REP. 585, 691, 717 (1884), and 4 W. COAST REP. 1, 49, 109, 145 (1884).

3. The controversy of codification arose in the nineteenth century at two different moments: the antebellum period (1820s and 1830s) and the postbellum period (1870s and 1880s). Some scholars have preferred to show this general development in the whole nineteenth century: *see* MAURICE EUGEN LANG, CODIFICATION IN THE BRITISH EMPIRE AND AMERICA 114–96 (1924) [hereinafter, LANG, CODIFICATION]; David Gruning, *Vive la Différence? Why No Codification of Private Law in the United States?*, 39 REVUE JURIDIQUE THEMIS 153 (2005); John W. Head, *Codes, Cultures, Chaos, and Champions: Common Features of Legal Codification Experiences in China, Europe, and North America*, 13 DUKE J. COMP. & INT'L L. 1, 52–88 (2003); Gunther A.Weiss, *The Enchantment of Codification in the Common-Law World*, 25 YALE J. INT'L L. 435, 498–532 (2000) [hereinafter Weiss, *Enchantment*]; nevertheless, most of them have focused on one of the two periods. In fact, legal historiography has paid more attention to the postbellum codification debate rather than to the antebellum one. On the American codification movement before the Civil War, *see*

Reading carefully the extenisve literature that arose in the context of the debate on codification, it seems clear that, although a passionate controversy developed through scientific-legal argumentation, the personal and political biases of the debaters played a significant role. This consideration enables us to understand not only the jurisprudential shift (labeled by Lewis A. Grossman as "anticlassical") undertaken by James C. Carter, but also his contradictory position in some respects, his paradoxical argumentation, and his denial of principles which are fundamental to the common law tradition. In order to defend the common law from codification, Carter presented to some extent a disfigured or distorted face of the common law tradition, emphasizing only those aspects which could provide him with the most powerful legal argument against the appealing and increased interest in codifying the American law wholesale. In this regard, the emotional intensity with which that debate developed is apparent, as is the strong personal and political interest of the majority of debaters. It is indeed "tempting to ask what really drove Savigny's and Carter's opposition to codification—their legal theories, or their personal interests and political biases."[4] But I think, as Mathias Reimann has argued, that this is probably the wrong question to ask, "because these forces cannot be neatly separated. People's motivations operate on several levels at the same time, the vari-

---

CHARLES M. COOK, THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM (1981), and PERRY MILLER, THE LIFE OF THE MIND IN AMERICA 239–65 (1965). In fact, in the last two decades postbellum codification has been especially studied. On the American codification movement after the Civil War, *see* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 293–308 (3d ed. 2005); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 117-123 (1992); Lewis A. Grossman, *Codification and the California Mentality*, 45 HASTINGS L.J. 617 (1994) [hereinafter Grossman, *California*]; Lewis A. Grossman, *James Coolidge Carter and Mugwump Jurisprudence*, 20 LAW & HIST. REV. 577, 602–11 (2002) [hereinafter Grossman, *Carter]*; Lewis A. Grossman, *Langdell Upside-Down: The Anticlassical Jurisprudence of Anticodification*, 19 YALE J. L. & HUMAN. 149 (2007) [hereinafter Grossman, *Anticlassical*]; Andrew P. Morriss, *Codification and Right Answers*, 74 CHI.-KENT L. REV. 355 (1999) [hereinafter, Morriss, *Answers*]; Andrew P. Morriss, *This State Will Soon Have Plenty of Laws—Lessons from One Hundred Years of Codification in Montana*, 56 MONT. L. REV. 359, 396–97 (1995); Andrew P. Morriss, *Decius S. Wade's Necessity for Codification*, 61 MONT. L. REV. 407, 426–27 (2000) [hereinafter, Morriss, *Decius*]; Mathias Reimann, *The Historical School Against Codification: Savigny, Carter, and the Defeat of the New York Civil Code*, 37 AM. J. COMP. L. 95 (1989); Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311 (1988); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987); regarding older literature on this topic, *see* Wienczyslaw J. Wagner, *Codification of Law in Europe and the Codification Movement in the Middle of the Nineteenth Century in the United States*, 2 ST. LOUIS U. L.J. 335, 337 (1952); DAVID DUDLEY FIELD, CENTENARY ESSAYS: CELEBRATING ONE HUNDRED YEARS OF LEGAL REFORM (Alison Reppy ed., 1949); Marion Smith, *The First Codification of the Substantive Common Law*, 4 TUL. L. REV. 178 (1930); Samuel Williston, *Written and Unwritten Law*, 17 A.B.A. J. 39 (1931) [hereinafter, Williston, *Written*]; George A. Miller, *James Coolidge Carter*, in VIII GREAT AMERICAN LAWYERS 3 (William D. Lewis ed. 1908); Helen H. Hoy, *David Dudley Field*, in V GREAT AMERICAN LAWYERS 125 (William D. Lewis ed. 1908) [hereinafter, Hoy, *Field*].

4. Reimann, *supra* note 3, at 119.

ous levels legitimizing and strengthening each other, with the most personal and obscure perhaps providing the most force."[5]

For example, it seems clear that it was precisely Carter's outrage at the prospect of codification that led him to explain how the common law, unlike a code system, provided case specific justice, painting "a most un-Langdellian portrait of the manner in which common-law judges decided cases."[6] As Grossman asserted, Carter articulated a different vision of the common law, since he was "[i]mpelled by his opposition to codification."[7] In this regard, it is understandable that such an impellent purpose led Carter to carry out a paradoxical defense—at least in some aspects—of the common law. However, Grossman's depiction of Carter's legal theory did not pay enough attention to Carter's paradoxical argumentation, since Grossman concentrated primarily—if not exclusively—on Carter's method, which "largely rejected the formal and conceptual aspects of legal reasoning that dominated Langdell's system."[8] Consequently, Grossman and other scholars have tended to overlook the role that political and self-interested reasons played in the nineteenth-century controversy on the convenience and expediency of codifying American law.[9]

This article takes these factors into account as a starting point in order to show the extent to which they led code opponents to construct certain paradoxical arguments. Such paradoxical argumentation against codification, whose main purpose consisted of defending the common law system, was based on the use of arguments which paradoxically contradicted some of the most remarkable features of the common law tradition. Some arguments adopted and used by opponents of codification—fallacies rather than scientific reasons—show to what degree the nature of the controversy on codification was more passionate than scientific. This will help us to understand some of the contradictions and paradoxes expressed by code opponents.

That codification and the debate surrounding it produced a scientific legal discussion is undeniable. It would, however, be an error to regard the debaters' argumentation merely in terms of legal science or scientific jurisprudence. The codification debate was much more than scientific. It was, above all, passionate,[10] as American legal scholars recognize.[11] It is

5. *Id.*

6. Grossman, *Anticlassical, supra* note 3, at 172.

7. *Id.*

8. *Id.* at 147.

9. Reimann was probably the first author who showed most clearly the importance of politics and self-interest in the legal theoretical discussions that arose in the context of the New York Civil Code debate. *See generally* Reimann, *supra* note 3 However, the most recent and best explanation of the political and self-interested motivations of Carter's legal theory in the codification debate has been written by Grossman. *See generally* Grossman, *Carter, supra* note 3.

10. I am very grateful to Daniel R. Coquillette for this and many other insights about the American codification debate.

11. *See*, e.g., Morriss, *Answers, supra* note 3, at 356, 391 (". . . a dispute that touched on many issues at the core of how lawyers regarded the law and themselves.").

undisputable that codification was viewed as "always a *burning question.*"[12] To overlook the passionate element of the argumentation would neglect one of the most remarkable features of the American codification movement in the late nineteenth century. Taking this factor into account enables us to understand some paradoxes, contradictions and fallacies which arose in the context of the debate.

I do not deny the scientific character of the debate. I wish to emphasize that the debaters' arguments were nourished by both legal scientific reasoning and passion. The latter encompasses many factors—including feelings, prejudices, self-interest, political and ideological tendencies or preferences—which conditioned and even determined the former. I agree with Reimann, who asserts that "it is, of course, tempting to ask what really drove Savigny's and Carter's opposition to codification—their legal theories, or their personal interests and political biases." I also agree that "these forces cannot be neatly separated. People's motivations operate on several levels at the same time, the various levels legitimizing and strengthening each other, with the most personal and obscure perhaps providing the most force."[13] It is nevertheless true that it is possible to determine the intensity of the passionate element by examining the apparent—or not so apparent—paradoxes and contradictions which can be found in the debaters' legal arguments. This is precisely the question this article addresses by focusing specifically on the paradoxical arguments made by the scholars engaged in codification, particularly those used by the code opponents.[14]

The article is divided into two parts. Part I will show the passionate rhetorical features of the codification debate during the late nineteenth century. In Part II we will concentrate on some of the resulting fallacies and paradoxical arguments in the discussions on codification, considering both parties to the debate. My main topics of discussion on the codification of the common law include: a) Democracy and Lawmaking Process: Legislation-Custom and Legislature-Judiciary; b) Judge-Made Law or Judge-Declared Law?; c) Certainty and Flexibility, *Stare Decisis* and New

12. *Mr. Justice Brown on Codification*, 28 AM. L. REV. (1894), at 258.

13. Reimann, *Historical, supra* note 3, at 119.

14. In order to avoid misunderstandings, let me emphasize, as I do in my earlier article, Masferrer, *Passionate Discussion, supra* note 1, two additional comments. First, this does not mean to deny that the discussion of codification was not scientific or carried out for legal reasons. It only means that personal and political reasons should not be underestimated, and that they played a much more important role than scholars have recognized so far (*See* Grossman, *Anticlassical, supra* note 3, at 151; Reimann, *supra* note 3, at 115–16; Weiss, *supra* note 3, at 511; Crystal, *supra* note 3, at 256). Second, because it is clear to me that the discussion on codification was at least as impassioned as it was scientific, it would be incoherent to think that only opponents of the code, and not its proponents, fell victim to fallacies and contradictions. However, leaving aside the degree of righteousness of the positions held by both code opponents and proponents, and analyzing the arguments given by them all in terms of congruency, it seems that the code opponents' arguments are more paradoxical, since they tried to defend the common law against codification by using arguments that undervalued or underestimated some of the most important features of the legal tradition they were trying to defend.

Cases; and d) Other Remarks on Carter's Common Law Jurisprudence. I will conclude with some considerations on the significance of the debate on the New York Civil Code to American legal history.

I. PASSION AND "FALLACY" IN THE CODIFICATION DISCUSSION OF THE LATE NINETEENTH CENTURY

It was not uncommon for passionate statements to be made in the context of the discussion on codification. Sometimes they arose in a way out of all proportion; sometimes as a sign of enthusiasm and optimism; sometimes out of resentment, suspicion or mistrust against the opposing side's statements. Both code opponents and proponents voiced their feelings with greater or lesser intensity, and with different motives. Nonetheless, it seems quite clear that the code opponents' arguments were more passionate than those advanced by code proponents.[15]

Even some debaters recognized that, as to the desirability of codification, there were "extreme views on both sides. On the one hand, the extreme opponents of codification. . . On the other hand, the extreme advocates of codification."[16] But such sincere recognition did not prevent them from excessive, charged and exaggerated statements when they expressed their views. In this regard, William Hornblower's criticism of the proposed Civil Code of New York is revealing:

> This work is a good example of what a code ought not to be and illustrates on every page the defects and dangers of codification. Thus far our State has been spared the disaster of its enactment into law, for disaster it would be. Defective in arrangement, crude and inconsistent in its statement of principles, glaringly deficient in its definitions, ambiguous and often unintelligible in its language, revolutionary in its changes of existing law, grossly incomplete in some branches, absurdly minute in others, it has all the vices of a code with none of its virtues. These are severe words, but they are not used lightly or without due consideration. Every one of these criticisms could be abundantly justified by quotations and references to the proposed code had I time to give them, or had you patience to hear them.[17]

Polemical statements like this can also be found, perhaps less frequently, among code proponents, particularly when they describe the common law's deficiencies in order to present the code as a legal tool to improve the American legal system:

> The truth is that, considered as a means of advancement, of national growth, of social progress, as a reservoir of rules promotive of development, the Common Law does not exist. It is as fabulous as the fountain of perpetual youth. Its office is to retard, not to advance. . . The Common Law is the mass of the undigested customs, not reduced to system, often clashing, not cast into form, not collected,

15. *See* William B. Fisch, *The Dakota Civil Code: More Notes for an Uncelebrated Centennial*, 45 *N.D. L. Rev.* (1968-69), at 17, where Fisch maintains that the New York Bar Association's opposition to codification "was presented in a series of pamphlets and articles, spanning the decade of the 1880's, remarkable for a polemical style more typical of an advocate's brief than scholarly, 'scientific' discussion."

16. HORNBLOWER, CODIFICATION, *supra* note 2, at 3.

17. *Id.* at 17-18.

> scattered through myriads of volumes, often obsolete and outgrown, and possessing the element of uncertainty in very great measure. . . The search for the fountains of analogy at Common Law is the search for a lost coin in the desert, a weary turning over the pages of innumerable reports, digests, text-books, commentaries. . . The reduction of this vast mass within practicable compass is not impossible.[18]

The controversy was heated, and the confrontations tested "the rhetorical skills of some of the nineteenth century's greatest legal advocates."[19] Passionate debate unfolded continuously: "When Mr. Carter asserted that the common law is reasonably well settled, easily accessible, harmonious and fixed, he fairly took our breath away. Every lawyer at the table knew that it is no such thing, but that it is obscure, contradictory, inconveniently scattered and fluctuating."[20]

Passionate argument sometimes distracted the parties from what Robert Ludlow Fowler thought should be the discussion's principal concern: "Shall the form of the law be more simple?" He intended to "disembarrass the controversy . . . from that atmosphere of refined denigration of men and measures into which it has unfortunately fallen," but he was not sanguine, since it did not seem to him that, in this case, "the disputants upon either side are animated only by the most elevated motives."[21]

Instead of asking whether the form of the law could be made simpler, code opponents, and Carter in particular, preferred to consider "the lines upon all reformation and improvement of the law that should be attempted."[22] Carter firmly believed in "the intrinsic excellence of English jurisprudence, pre-eminent over that of any other civilized State."[23] Some of Carter's statements about the civil law tradition expressed in opposition to the views of David Dudley Field[24] and others reveal more than mere

---

18. HOADLY, CODIFICATION USA, *supra* note 2, at 24.

19. Morriss, *Answers, supra* note 3, at 356, 391.

20. Edmont Kelly, *Codification*, 20 AM. L. REV. 1, 9 (1886).

21. FOWLER, CODIFICATION, *supra* note 2, at 7 ("In any fair discussion of a great public question it is necessary to assume, in the absence of proof, that the disputants upon either side are animated only by the most elevated motives, or else truth will, in the side issue, inevitably elude pursuit. In New York this first canon of parliamentary debate has not always been borne in mind, and the result has not been favorable to the merits of the discussion concerning the Code–a discussion which en reality relates to one of the greatest problems of the time: Shall the form of the law be more simple?").

22. CARTER, PROVINCES, *supra* note 2, at 59.

23. *Id.* at 48.

24. *See*, e.g., FIELD, LEGAL REFORM, ALBANY, *supra* note 2, at 30 ("The Code of Justinian performed the same office for the Roman law, which the Code Napoleon performed for the law of France, and following in the steps of France, most of the modern nations of continental Europe have now mature codes of their own. We have now arrived at that stage in our progress, when a code becomes a want. . . The age is ripe for a code of the whole of our American law."); FIELD, SPEECHES, ARGUMENTS, *supra* note 2, at 372 ("If in France, and other parts of Continental Europe, where codes prevail, the people are found better acquainted with their laws than our people with ours, it is because they have them in a form accessible.").

disregard.[25] Code proponents expressed similar attitudes in their criticisms of the defects and shortcomings of the common law.[26] It is unsurprising, then, that such passionate confrontation and rivalry caused mutual mistrust.[27]

While opponents polemically rejected arguments in favor of codification, proponents were themselves inordinately enthusiastic, optimistic and confident in their defense. In 1855 David Field already envisioned codification as a dream that was close to being accomplished:

> The State of New York owes it to her history and her position not to be eclipsed by others in this magnificent undertaking. That state which shall first succeed in establishing a civil code of Anglo-Saxon-American law will give law to all the rest of the world where the English tongue is spoken, and that is to be the most nearly universal of any language ever yet spoken by man. No undertaking which you could engage in would prove half so grand or beneficent.[28]

Field was clearly aware that "no code of the common law of America or of England had ever before been attempted,"[29] and acted as if he had received a calling to undertake it. He was absolutely convinced, despite all the obstacles to be overcome, that the codification of private law would succeed. In this regard, in an Address to California Bar Association in 1870, he declared:

> Why New York has paused in the work of law reform it would be no difficult to explain. The pause, however, is not likely to be of long duration. It requires no prophet to foresee that our people, with all the other English-speaking communities, will yet insist upon having the whole body of their law in a form accessible and intelligible to all who are governed by it.[30]

---

25. CARTER, PROPOSED CODIFICATION, *supra* note 2, at 6, 8 ("We owe to this feature of our civilization many of those priceless blessings which distinguished it to its advantage from that of the continental States of Europe."), 45, 59-64; CARTER, ARGUMENT, *supra* note 2, at 7 ("Are we to go to the nations of Europe and ask what laws we should have in the State of New York?"), 17 (". . . the jurisprudence of England and America, in its refinement, in its certainty, in its conformity to the ideas of the most advanced civilization, is above, far above, that of the most refined nations of Continental Europe."), 18 ("And yet we are now advised to go to France and borrow her code in order to remedy the uncertainty of American law!"); CARTER, PROVINCES, *supra* note 2, at 22-23 (". . . and there is no unprejudiced observer who would not admit that the jurisprudence of England, and of the older States of America, was far superior to that of France, and pre-eminently so in the cardinal point on certainty.").

26. *See*, e.g., HOADLY, CODIFICATION USA, *supra* note 2, at 24 ("The truth is that, considered as a means of advancement, of national growth, of social progress, as a reservoir of rules promotive of development, the Common Law does not exist. It is as fabulous as the fountain of perpetual youth. Its office is to retard, not to advance. . . The Common Law is the mass of the undigested customs, not reduced to system, often clashing, not cast into form, not collected, scattered through myriads of volumes, often obsolete and outgrown, and possessing the element of uncertainty in very great measure. . . The search for the fountains of analogy at Common Law is the search for a lost coin in the desert, a weary turning over the pages of innumerable reports, digests, text-books, commentaries. . . The reduction of this vast mass within practicable compass is not impossible.").

27. CARTER, ARGUMENT, *supra* note 2, at 11 ("Well, I won't stop here to inquire whether their position [code proponents] about this code springs from bias, or what other cause."). On mutual distrust between code opponents and proponents, *see* Masferrer, *Passionate Discussion, supra* note 1.

28. FIELD, LEGAL REFORM, ALBANY, *supra* note 2, at 31.

29. FIELD, INTRODUCTION, CIVIL CODE, *supra* note 2, at viii.

30. FIELD, SPEECHES, ARGUMENTS, *supra* note 2, at 349-350.

Three years later, in his address before the Judiciary Committee of the two Houses of the Legislature, delivered on the February 19, 1873, he encouraged New York representatives to lead the path toward a modern legal reform through codification as a matter "of public benefit and State pride. We boast justly that we have inherited from our fathers that English law which proclaims and enforces the rights of men. Let us give ourselves cause to boast also that we have enriched the great inheritance."[31] As late as 1879 he continued to believe that, "despite all . . . obstacles, . . . a codification of our law is not far off."[32] Ten years later his optimism was diminished, causing him to become disenchanted. He warned that if his "Codes are not accepted, there will be none enacted within this generation."[33] He nevertheless believed at the end of his life that "[he] could not write any thing better than [he had] already written and published,"[34] because he was convinced that hardly anything more could be done to advance his goal.[35]

As a foreseeable consequence of the tenor of the discussion, there emerged fallacious, paradoxical and contradictory arguments, which the debaters tried to conceal by using their rhetorical skills. In fact, they all accused each other of making fallacious arguments. The words "fallacy" or "fallacious" were frequently used by Field, Carter and others to describe their opponents' positions.[36] Field, who was aware of the general reluctance of lawyers to legal reform in general, and to codification in particular,[37] felt "confident that the day is near when we shall all smile at the fallacies which are now so dominant."[38] He also considered "altogether fallacious" the code opponents' favorite argument on the common law's flexibility or elasticity.[39] Once he simply reproached and dismissed Carter's

---

31. FIELD, SPEECHES, ARGUMENTS, *supra* note 2, at 374.

32. *Id.* at 383.

33. Field, *Codification, Answer*, *supra* note 2, at 266.

34. David D. Field, *From the Father of the Code*, 2 *Mich. L. J.* 171 (1893) [hereinafter Field, *Father*].

35. *Id.* at 172 ("This is all the contribution I can give to the discussions of your Bar Association, and you are quite at liberty to publish it, if you think it will do any good.").

36. Among non-American scholars, *see*, e.g., SHELDON AMOS, CODIFICATION IN ENGLAND AND THE STATE OF NEW YORK 9 (1867) [hereinafter AMOS, CODIFICATION] ("Most of the fallacies which have obscured the clear-sighted discussion of the present subject have been due to a premature haste to do this.").

37. FIELD, LEGAL REFORM, ALBANY, *supra* note 2, at 25 ("The prejudices that prevail on this subject among the members of the profession, both on the bench and at the bar, are well known, and I would not disguise the impediment which these prejudices create. But I have seen greater prejudices than these pass away; and believing in the power of the reason and the spread of the truth, I feel confident. . .").

38. *Id.* at 25.

39. *Id.* at 28 ("This is a favorite argument, but I conceive it to be altogether fallacious. It assumes two things, neither of which is true; first, that law is more flexible because unwritten, and second, that flexibility in law is excellence. A law is a rule of action; to say that the rule is not fixed, that is, flexible, is to say that it is not rule at all."); FIELD, CODIFICATION, ADDRESS PHILADELPHIA, *supra* note 2, at 20 ("The elasticity of this law is said to be its chief

arguments as "fallacies."[40] Carter, in his turn, also considered a fallacy Field's affirmation that whatever is known could be written, and that if a rule of law could be written by a judge in an opinion, then it could be written and enacted in a code. According to Carter, the fallacy consisted "in the false assumption that courts lay down rules absolutely, whereas, they lay them down provisionally only."[41]

Albert Mathews' argued that it was a "fallacy" to use the expression "judge-made-law," since "the assumption that the judge creates the law, instead of merely ascertaining and applying it"[42] was false in his view. Robert Fowler, like Field, regarded as a fallacy code opponents' idea that "codification will destroy the elasticity of the common law."[43] Similarly, Francis B. James, a member of the ABA's Committee on Uniform Laws, labeled as "fallacious" the argument against codification that codes make "the law too rigid and may sometimes work injustice in hard exceptional cases." He thought it was a fallacy "because every practitioner knows that when a hard case arises, the law books are ransacked from the time of the Norman Conquest and the court blindly applies any absolute precedent that may have been found by diligent counsel."[44] Hornblower recognized that overlooking the differences in the theories supporting codification had produced much confusion.[45] For that reason, "arguments for and against

advantage, its element of beneficence, its admirable distinction. It does not take a Philadelphia lawyer to detect the fallacy of this contention. A changeable law is no law at all. You may call it what else you please, but it is not a rule for the guidance of intelligent beings, who wish to make their conduct square with the laws of the land.").

40. Field, *Codification, Answer, supra* note 2, at 265 ("I do not think that I need take more of your space with Mr. Carter's address. If it were needful I could go over it page by page and point out fallacies nearly every one.").

41. CARTER, PROPOSED CODIFICATION, *supra* note 2, at 25; other charges of "fallacy" or "falsity" appear at 9, 69.

42. MATHEWS, THOUGHTS, *supra* note 2, at 20, 24 ("To state this proposition is to show it to be fallacious, if not absurd. All of this class of arguments against what is styled *judge-made-law*, or *case-law*, as distinguished from codification, are apt to leave out of view the corrective power of appeal.").

43. FOWLER, CODIFICATION, *supra* note 2, at 18 ("By elasticity in law is probably meant the facile applicability of laws to new groups of fact. In this idea the scientific jurists detect a fallacy, a confusion between the *terminus a quo* and the *terminus ad quem* of codification. Because codification defines the general principles from which all legal arguments start—*terminus a quo*—it is not necessarily true that it defines the *terminus ad quem*, the extent of the application of which these principles are susceptible. In simpler language, the error in question consists in assuming that the Code provides for all the cases and that new difficulties, clearly beyond the equity of the statute, will be dealt with improperly. If codification were to put an end to the proper solution of new difficulties, or to circumscribe the common law judicial powers, we might well pause before entering upon a systematic codification. There is, however, no such danger to be apprehended . . . the process of extracting new law by cross-application, and by the *ratio decidendi* is as old as anything we know of judicial precedent. It is fair to presume that in the future, as in the past, this purely logical process will not cease unless we concede a boundary to mental activities.").

44. FRANCIS BACON JAMES, CODIFICATION OF THE BRANCHES OF COMMERCIAL LAW 6 (1902) [hereinafter JAMES, CODIFICATION].

45. HORNBLOWER, CODIFICATION, *supra* note 2, at 2; he defined "codification" as "the reduction into the form of a statute, under the sanction of the Legislature, of the body of legal

codification upon one of these theories are often entirely fallacious when applied to the other theories."[46] He eventually opposed any form of codification,[47] and considered there to be no "greater fallacy" than to affirm that codification "will diminish litigation."[48]

II. FALLACIES AND PARADOXICAL ARGUMENTS

Most such "fallacies"—as the codification debaters called them—revolved around some of the main arguments used by both code opponents and proponents to defend and justify their legal theories for or against codification. Let us try to examine now the extent to which some arguments could be truly considered fallacious or paradoxical, and why they argued in such a way. In doing so, we will try to show the reasons that explained some of the fallacious arguments, discussing to what extent they were coherent according to their advocates' viewpoint.

a) Democracy and Lawmaking Process: Legislation-Custom and Legislature-Judiciary

Democratic legitimacy of the lawmaking process constitutes, as in the codification movement's antebellum period,[49] one of the main aspects to be considered by both sides. In fact, both were concerned about this matter, although they maintained different views of how such democratic legitimacy in the lawmaking process should be understood.

Code proponents, on the one hand, simply proclaimed that inasmuch as a code is enacted by the legislature, members of which were citizens' elected representatives, legal democracy was assured. They also, on the other hand, insisted that codification was pursued precisely to make the law accessible to laymen. Both arguments sounded legitimate.

Field reiterated tirelessly that codification would make it easier for non-lawyers to ascertain the law. In fact, he portrayed "accessibility" as

---

principles and rules which form the law of the State." He distinguished the following three kinds of codes: "It may be (1) confined to the statement of such principles and rules as have already been announced by the Legislature or the Courts, or it may (2) contain changes in such principles and rules to correct or amend them, or it may (3) extent still farther and may undertake to lay down entirely new principles and rules for future cases which have never as yet been provided for by the Legislature or which have never yet come before the Courts for adjudication."

46. *Id.* at 2.

47. *Id.* at 17 ("And for the reason already indicated, I am clearly of the opinion that codification is not expedient for us, in either of the three forms pointed out above, either as a statutory declaration of existing law without change, or of the existing law with changes, or of the existing law plus law not yet declared or announced by the courts.").

48. *Id.* at 9 ("Statutes breed litigation. Experience demonstrates this. Whatever other merits codification may have, the diminution of litigation is certainly not one of them.").

49. *See* Miller, *Mind*, *supra* note 3, at 239-265; Horwitz, *Transformation*, *supra* note 3, at 7; Cook, *Codification*, *supra* note 3, particularly at 158-184.

one of the main advantages of codification.[50] Convinced that "accessibility" was an indisputable advantage of codification, Field assumed that, unlike lawyers, laymen or people in general were genuinely interested in codifying the private law. In fact, he frequently referred to the general interest of the people in codification.[51] Carter, logically enough, disagreed with him, affirming that "this assertion of a public demand is a pretence; that it is all fictitious. There is no public demand for such thing. . . In that sense it is the private and personal scheme of the gentleman [Field] himself."[52]

More relevant—and grave—from the legal point of view is democratic legitimacy in the lawmaking process, which connects with the principle of separation of powers. There was no doubt that the legislative function

50. FIELD, SPEECHES, ARGUMENTS, *supra* note 2, at 377 ("There is as much reason why the American people should have their laws in four or five pocket-volumes as there is why the French people should have theirs. . . But not alone to the people would it be convenient; it would be a greater one to the lawyers and the Judges."); FIELD, INTRODUCTION, CIVIL CODE, *supra* note 2, at xxx ("In the fifth place, the publication of a Code will diffuse among the people a more general and accurate knowledge of their rights and duties, than can be obtained in other manner. This is an object of great importance in all countries, but more specially in ours."); Field, *Short Response, supra* note 2, at 9; FIELD, CODIFICATION, ADDRESS PHILADELPHIA, *supra* note 2, at 18 ("Assuming now that codification is feasible, is it also desirable? Desirable for whom? For the whole people, I think, the whole people, including lawyers and judges as well. Why is it desirable for people? Because the law is made for them; it is the measure of their rights and duties, the guide of their lives. They are bound to know the law, it is said. Ignorance is not excuse. They are to do what it commands; they are to avoid what it forbids. How are their obligations to do fulfilled, if they are kept in ignorance of what those obligations are? If, therefore, it could be shown that a Code would be of no service to the Bench or the Bar, it would nevertheless be beneficial to the people, and that is a sufficient reason for having it."); Field, *Codification US, supra* note 2, at 24-25 ("It is desirable alike for the judge, the lawyer, and the citizen. . . , and above all to the citizen, because it shows him the laws by which he is to guide his daily conduct. Strange indeed does it seem that any unprejudiced person should imagine that the laws of the land should not, if possible, be written down for the people of the land."); *see also* Morriss, *Decius, supra* note 3, at 410, 412; Morriss, *Answers, supra* note 3, at 371-374; Fisch, *Dakota Civil Code, supra* note 15, at 13-14.

51. DAVID D. FIELD, THE COMPLETION OF THE CODE 5 (1851) [hereinafter FIELD, COMPLETION] ("The people of this State have determined, and in their fundamental law have declared, that they will have a complete code of all their law, and however it may be delayed, it cannot be prevented."); FIELD, SPEECHES, ARGUMENTS, *supra* note 2, at 349-350, 377, 383 ("As an American, speaking to Americans, I venture to predict that the instincts of our people and the inexorable logic of events will hasten the completion of the work here and sooner than in England."); FIELD, LEGAL REFORM, ALBANY, *supra* note 2, at 30; FIELD, INTRODUCTION, CIVIL CODE, *supra* note 2, at viii ("The will of the people is the supreme law; that will is firstly expressed by their written constitution and their written laws. It should indeed have no other fit expression."); Field, *Short Response, supra* note 2, at 9 ("The Americans are a practical people, and they want something they can understand and live by."); *see also* HOADLY, CODIFICATION COMMON LAW, *supra* note 2, at 496 ("But the American people are not the English people, or of exclusively English descent. Germans, Celts, Scandinavians, Spaniards, Frenchmen, Italians enter into our midst and become American citizens."); Morriss, *Answers, supra* note 3, at 362 (referring to the positive reception which the commission's reports received in New York in 1865-1866).

52. CARTER, ARGUMENT, *supra* note 2, at 4.

was entrusted to legislatures, whose elected members represented the citizens, their interests, and the common good. From this perspective, it was clear that written law and codification were much more defensible than a jurisprudence based primarily on judicial precedent. Field pointed out that "in this country . . . it is a fundamental idea that the functions of government should be developed upon distinct departments, where the Legislature can not encroach upon the executive, and the judiciary cannot encroach upon either."[53]

Code proponents made good use of the expression "judge-made-law," a principle incompatible with the strict separation of powers, and criticized it as much as possible:

> A flexible common law means, therefore, judicial legislation. Is that desirable? If there be any reason for the policy of separating the different departments of government, the judges should no more be permitted to make laws than the legislature to administer them. All experience has shown that confusion in functions leads to confusion in government. Judges are not the wisest legislators, any more than legislators are the wisest judges.[54]

Field maintained that his Code addressed only cases which could be foreseen or reasonably anticipated. In his view, the idea that judges should establish the law in novel, unforeseeable cases, rather than allowing the legislature to define the law beforehand, was to make the claim that "government ought not to be divided, according to the fundamental American maxim, into three separate legislative, executive and judicial departments."[55] Field expresses what he holds to be the proper relationship between the legislature and the judiciary in his *Introduction* to the proposed Civil Code:

> So far as the choice lies between law, to be made by the legislature, and law to be made by the judiciary, there cannot be a doubt that whatever may be the determination elsewhere, the people of this State prefer that theirs shall be made by those whom they elect as legislators, rather than by those whose function it is, according to the theory of the Constitution, to administer the laws as they find them.[56]

Fowler linked citizens even more directly to the legislative function, concluding that in the State of New York, "where the people make the laws, the people alone codify them."[57] He accordingly argued that "there can be no very consistent development of the law outside of the legisla-

---

53. FIELD, SPEECHES, ARGUMENTS, *supra* note 2, at 369. He also stated that, "all law, deserving of the name, is written," and the real distinction was that common law sources (cases, reports, treatises and digests), "have no sanction of the legislator, while the statutory law had been enacted by the law-making department of the government." *Id.* at 366.

54. FIELD, LEGAL REFORM, ALBANY, *supra* note 2, at 28. He later added: "The judiciary have no rightful concern with the policy of laws. If they need to be changed, the legislature is the proper judge of the time and the manner of change." *Id.* at 29.

55. FIELD, INTRODUCTION, CIVIL CODE, *supra* note 2, at xxii-xxiii; *see also*, more extensively, at xxi-xiii; according to Field, in order to be valid, law must have "been provided beforehand." FIELD, CODIFICATION, ADDRESS PHILADELPHIA, *supra* note 2, at 22.

56. FIELD, INTRODUCTION, CIVIL CODE, *supra* note 2, at xxx-xxxi.

57. FOWLER, CODIFICATION, *supra* note 2, at 13.

ture. The theory of Democratic States. . ." requires that the lawmaking process to be entrusted to the legislature.[58] W.H.H. Russell, another code proponent, asserted that "a system of codes. . . , in all the states, under our form of government of written constitutions, will save our republic from ruin and decay, because the people who are the source of power, and the true sovereigns of the republic, could thus learn to know and respect the laws."[59]

Code opponents did not deny the separation of powers nor reject the constitutional requirements which help to establish the democratic legitimacy of the lawmaking process. They admitted both principles, but they interpreted their significance differently. In this sense, Carter valued and praised popular forms of government, but he focused his attention on "the separation of the legislative, executive and judicial departments."[60] In that respect, Mathews presented the system of unwritten law "as the natural outcome of civil progress in a democratic republic, while a written Code would be looked for under a parental or despotic form of government."[61]

The province of the public law did not unhinge this legal principle, since that branch of the law could be regulated by written laws enacted by the legislature. But as to private law, Carter found democratic legitimacy in the classic notion of common law based on custom, which the judges applied in the specific cases presented before them. By equating custom with common law, he argued that the common law is much more democratic than legislation, because, while the legislature can be dominated by biased or corrupt interests, custom is the product and reflection of the popular thought and belief:

> Customs . . . being common modes of acti on, are the unerring evidence of common thought and belief, and as they are the joint product of the thoughts of all, each one has his own share in forming them. In the enforcement of a rule thus formed no one can complain, for it is the only rule which can be framed which gives equal expression to the voice of each.[62]

Carter revitalized the classical idea of custom as the main legal source of the common law, asserting that the law is, above all—with the narrow exception of legislation—custom.[63] It is noteworthy that he used the term "custom" in his last writings.[64] In previous works he usually referred to a "popular of standard justice," a "social standard of justice," or a "national standard of justice," which ought to be applied by judges in order to pronounce a fair judgment. By equating the common law with customary standards of justice, based on popular customs, the province of the unwrit-

58. *Id.* at 60.

59. Russell, *California*, *supra* note 2, at 294.

60. CARTER, PROPOSED CODIFICATION, *supra* note 2, at 17.

61. MATHEWS, THOUGHTS, *supra* note 2, at 18.

62. CARTER, ORIGIN, *supra* note 2, at 143.

63. *See id.* at 173 ("*Custom* is not simply *one* of the *sources* of law from which selections may be made and converted into law by the independent and arbitrary *fiat* of a legislature or a court, but . . . law, with the narrow exception of legislation, *is* custom.").

64. *See* Grossman, *Carter*, *supra* note 3, at 605.

ten law seemed to be clearly legitimated in democratic terms. Since he was convinced that Anglo-American civilization was highly advanced, its legal tradition based mainly and primarily on custom, approached the ideal. From this point of view, it was clear to Carter that there was no need to codify the private law.

Leaving aside the province of public law[65] and other specific cases in which Carter recognized that legislation was needed,[66] he erected the "social standard of justice" as the cornerstone of his common law legal theory,[67] bestowing upon it, at the same time, the requisite democratic legitimacy. In fact, he introduced this expression for the first time American jurisprudence in his *Proposed Codification of our Common Law*. As previously mentioned, in his late works he tended to refer to the common law with the simpler expression "custom," or alternatively as the "opinions, customs and habits of the people."[68]

The notion of a "social standard of justice" flowing from custom enabled Carter to emphasized three relevant aspects in the context of the

---

65. CARTER, PROVINCES, *supra* note 2, at 16 ("We find it therefore to be substantially true that according to the actual division of the provinces of written and unwritten law, as they have arranged themselves in the natural growth and progress of society, public law alone is in writing, and is always in writing; unprivate law is left unwritten.").

66. *Id.* at 16 ("I say substantially, for there are occasions in the life of every State for making abrupt changes in the body and policy of private law, and such changes can be affected only by legislative intervention."), *Id.* at 18; (". . . those who think that the private law should be left in its unwritten form do not deny that there are from time to time occasions when legislative interference with it is necessary. From time to time progress and change in social conditions require corresponding changes in the law, which can be affected only through the instrumentality of statutes; and there are some branches of the law which have both private and public aspects, and which must consequently be dealt with to some extent by legislative action."), *Id.* at 52-55; ("There are, however, occasional exceptions to the most rigid rules, and cases will be sometimes occur where it may be necessary or expedient to reduce some special doctrine, or rule of private law, to writing. Such cases will, however, be found to be extremely rare. But three such instances occur to me: (1) The first is when some occasion arises for making a sharp and direct change in private law . . . (2) . . . some social or political question may be agitated in society which involves, directly or indirectly, some doctrine or rule of the unwritten law . . . The question is to be decided by vote . . . (3) . . . . it may be expedient, and to some extent necessary, to put some special parts of private law in the form of written enactments. In general it is the prime object of private law to do justice between man and man; and to do it in each particular case. But yet, while this is and should be the constant aim, stability and uniformity are important considerations. . . But the attempt should be made with caution. So far as the rules are *technical* and arbitrary, they may be safe and useful; but when they cease to be such—when justice becomes of more importance than simplicity and uniformity of method—the experiment becomes hazardous."), *Id.* at 55. While Carter maintained that the whole of the criminal law belongs to the province of public law, he nevertheless thought that the framing of procedural rules "should be delegated by the legislature to the courts," since "they who exercise the function of administering justice best know what rules are necessary to the efficient performance of that function. The State of New York furnishes an illustration of the mischiefs which are sure to flow from entrusting to legislative bodies those tasks which no legislation can properly perform." *Id.* at 55. On Carter's view about custom and the limits of legislation, *see* Grossman, *Carter, supra* note 3, at 614-618, 619, 623.

67. Grossman, *Carter, supra* note 3, at 604-606.

68. *See supra* note 63.

codification debate. First, to endow the common law with the requisite democratic legitimacy; second, to lay the foundations of judicial activity, which—according to him, as we will see—did not consist in making or creating law, but simply applying it to specific cases; and third, to erect justice as the main aim of his theory of jurisprudence, in which there are no absolute legal rules but rather provisional ones. Consequently, these rules, in constant change due to their application on a case-by-case basis, cannot be written or codified at all:

> If we attempt to make law by enacting it . . . it will not be law in any just or respectable sense. It will not be justice. It will be a mere arbitrary rule. It will not be an application of the social standard of justice to the transactions of men which . . . is the end and aim of jurisprudence. So far, therefore, as future transactions are concerned, codification is not simply morally impracticable, but philosophically impossible.[69]

Carter argued that the office of the judge was "to apply the existing standard of justice to the new exhibition of fact, and do this by ascertaining the conclusion to which right reason, aided by rules already established, leads."[70] Carter expressed this "vital and fundamental" truth is these terms:

> [A]ll just law, all law which consists in applying directly the standard of justice to human conduct, consists in applying that standard to known facts, and can have, in human apprehension, no existence apart from the facts. Until the facts come into existence, the questions arising upon such facts cannot be known, and surely cannot be decided. The law, therefore, in respect to future and unknown cases is and must be unknown; and if it be not, and cannot be known, it cannot be codified.[71]

However, the task of applying the social standard or ideal of justice to human affairs did not belong exclusively to judges deciding cases, since Carter maintained that it also belonged to the legislator or codifier who is involved in articulating the law.[72] In this regard, he concluded: "All well conceived efforts to make, or to declare, law, are, therefore, efforts to apply this public, or . . . national, standard of justice to human conduct."[73]

---

69. CARTER, PROVINCES, *supra* note 2, at 29.

70. CARTER, PROPOSED CODIFICATION, *supra* note 2, at 30.

71. *Id.* at 32-33; *see also* CLARKE, SCIENCE, *supra* note 2, at 255 ("Under the Code System the rule prescribed deals with something which is never found in actual life. The Code rule deals with a certain combination of facts which never occurs solely, or alone, in the outside world. The Code rule deals, therefore, with an abstraction of the human mind, and not with the facts as they exist.").

72. CARTER, PROPOSED CODIFICATION, *supra* note 2, at 40. He further adds: "That there is a standard by which the excellence of laws may be tested is proved by the simple fact that judges and legislators intelligently discuss the question what the law ought to be, and are able to convince each other. The work of the legislator, like that of the judge, is criticised by the public and condemned or applauded. . . Were the legislator asked what his ultimate object was in voting to enact any law, he would answer, to secure justice or utility, or to conform his sense of right; and if the judge, when declaring the law in a novel instance, were asked the corresponding question, his answer would be the same effect." *Id.*

73. *Id.* at 41. He also considered this "social standard of justice" as "the final result of the moral and intellectual life and culture of a nation . . ." *Id.* at 86; *see also* Grossman, *Carter*, *supra* note 3, at 604 ("Carter believed that the moral foundation of the common law, which

The legislature's lack of expediency in dealing with the province of the unwritten law was due to its inability to foresee new cases which normally arise in human affairs. In this sense, justice should not be sacrificed for the sake of uniformity, "whereas diversity is everywhere the characteristic of justice." According to Carter's view, to apply the standard of justice to human affairs meant that such a standard "must be adapted to human affairs,"[74] namely to each particular and single human affair, which was something beyond the legislature's capacity, since it could neither anticipate nor foresee the enormous variety of human affairs.

Reproaching Carter's view of the judicial task, code proponents replied that "the simple office of applying the standard of justice to the particular case is not attempted by any tribunal known among men. . . But judges in fact ask themselves in each case, *what is the established law of this case? Not what does justice require between these litigants?* The daily experience in every lawyer's life proves the untruth of this theory."[75] Concerning Carter's thesis on custom as the main source of law, Fowler remarked that Carter overlooked "the fact that custom has never, in this State, been in any way a fertile source of law," and that, for example, "the entire body of law promulgated in the courts of equity has in no sense a customary basis."[76]

Practically, the most relevant consequence of erecting the "social standard of justice" as the cornerstone of Carter's jurisprudence was clear: to maintain the judiciary as the main protagonist of common law decision-making, and to keep the legislature away from the private lawmaking process. In fact, code opponents opposed almost any kind of legislative interference into private law jurisprudence. Fowler argued that the main purpose of the "national standard of justice" was precisely to "oppos[e] any legislative interference with law."[77]

The controversy on this point seemed to be irreconcilable. The code proponents distrusted judges as lawmakers. Code opponents claimed that legislatures, especially democratically elected, non-expert ones such as were found in most American states, were even worse. Further, code opponents' mistrust of the legislature extended to viewing it as "corrupt," politically driven, and incapable of properly protecting the common and

---

he termed *unwritten law*, made it superior to the written law as a way to regulate private relations," because it "permitted judges to decide each matter on a moral basis, according to the requirements of *justice*.").

74. CARTER, PROVINCES, *supra* note 2, at 35.

75. HOADLY, CODIFICATION COMMON LAW, *supra* note 2, at 502-503. H later added: "The judge who . . . should simply apply the *standard of justice* to the particular case, would soon find himself exposed to impeachment. For first, his sagacity might not suffice to enable him to discern the *standard of justice* applicable to the particular case; and secondly, the office of judgement, its essential characteristics, is exposition, declaration, application, not prevision." *Id.* at 506.

76. FOWLER, CODIFICATION, *supra* note 2, at 11.

77. *Id.* at 60.

public interest.[78] While Field's followers insisted in the necessity of legislative enactment,[79] code opponents uncompromisingly rejected the idea of legislative interference into private law.

Carter's views on this matter are revealing. Carter seemed not to understand the necessity of enactment. He accepted the importance of framing a good *Digest*,[80] since it "asks not aid or sanction from the Legislature. It does not assume to *make* the law."[81] He also argued that the common law's lack of arrangement ("in a concise, scientific and orderly form") was not a problem of the law, but of "treatises upon the law" or "literature of the law," whose solution "does not require legislation; indeed, it is one in which legislation is wholly out of place."[82] According to his view, this defect could be also properly solved through *Treatises*, and once the written reduction would be satisfactorily achieved, "it needs no such aid from legislation."[83] Carter's references to the futility of codification are numerous. He concluded his first work by insisting on this point: "But enough. It clearly appears that . . . the enactment of this so-called Civil Code can work

78. HORNBLOWER, CODIFICATION, *supra* note 2, at 12 ("But even if a good and valuable code could be framed, a very formidable objection would remain–namely, the facility afforded for amendments by bungling and corrupt legislators." He also stated that the statutory law was "the result of lobbying, influence, politics, or at the very best of chance or hap-hazard blundering." *Id.* at 13. He further maintained that "the evils of elasticity and uncertainty in *judge-made* law dwindle into insignificance compared with the evils of elasticity and uncertainty in *politician-made* law," *Id.* at 14, concluding that we may well rest content with our present system of *judge-made* law, rather than risk the experiment of *commission-made* law or *politician-made* law." *Id.* at 18).

79. FOWLER, CODIFICATION, *supra* note 2, at 11, 60 ("But we should not forget that the genius of this country, notwithstanding many debased exceptions, has exhibited itself in legislation. Nearly every single distinctively American institution, either in the region of public or of private law, is due to legislation, nor to the action of the judicature." He concluded his work by asserting that "this is an era of legislation in Europe, in South America and elsewhere. . . . Here, as elsewhere, codification of substantive law must come."). HOADLY, CODIFICATION USA, *supra* note 2, at 17 ("We sometimes hear the absurd claim that the freedom of England is due to the spirit of the Common Law. . . The great monuments of freedom on both sides of the Atlantic . . . were not products of Common Law; they were all the work of legislative assemblies, or the grant of the Executive."); *see also* HOADLY, CODIFICATION COMMON LAW, *supra* note 2, at 512.

80. CARTER, PROPOSED CODIFICATION, *supra* note 2, at 93 ("And if there were any advantage in this particular, a Digest would furnish it as adequately as a Code, and such a work is the proper fruit of private labor and enterprise, and requires no legislative function."). Further, "a Digest, which, if it existed, or could be created, would be of priceless value to the world. . . Such a work would not, indeed, supersede the treatises and reports, or diminish the necessary size of libraries; but it would, by facilitating, *save* labor. . . Such a work would not, indeed, in our view, be suitable to be enacted as the positive law, for even it would be found to wholly fail in its operation upon new and unforeseen cases; but statutory enactment would not, in any degree, be necessary to its value. It could proudly dispense with any legislative sanction whatever." *Id.* at 96-97. *See also* CARTER, PROVINCES, *supra* note 2, at 45-46.

81. CARTER, PROPOSED CODIFICATION, *supra* note 2, at 22.

82. *Id.* at 73.

83. *Id.* at 73.

no benefit. The alleged advantages asserted in its behalf are unfounded pretenses. But more than this: it cannot but result in great mischief."[84]

Why did Carter insist so much in this matter? What was he afraid of? He once asked himself a similar question when examining the experience of the enactment of the New York Code of Civil Procedure. He lamented that some changes "would have been reached notwithstanding [its] enactment," and that "the real improvements effected by it might have been accomplished in a way that would not have brought about evils which that did bring in its train. What did it bring?" His answer reflects his overarching concern about legislative acts:

> The enactment of that Code of Procedure at once threw the whole question of the law of procedure into the hands of the Legislature. What had before been under the control of the courts, fell under the jurisdiction of the Legislature, and the consequence was that amendment after amendment, scores of them upon scores, were made by every succeeding Legislature.[85]

Carter also argued that the legislature would passively accept a civil code without each member exercising their independent judgment. When he presented his *Argument in Opposition to the Bill to Establish a Civil Code* before the Senate Judiciary Committee, in March 23, 1887, Carter asserted that the Bill had "not been carefully read by any one of you from the beginning to the end, or any considerable part of it."[86] He concluded that the only thing the legislature was asked to do was to *accept* the draft prepared by two lawyers.[87]

However, his main concern was to bar putting unwritten law "into the hands of the Legislature," an expression that he used many times.[88] In fact, he recognized expressly that his main purpose consisted in "demonstrating . . . that unwritten law is a science to be cultivated by study, and not subject to legislation."[89] What is not clear is whether he sincerely believed in his method of jurisprudence or he built it, above all, to maintain the court-centered common law, to prevent throwing the private law "into the hands of the Legislature."

The relationship between the legislature and judiciary regarding democracy, lawmaking process and legal decision-making was, indeed, controversial and complex. In this respect, code opponents seemed to be more radical than code proponents. For example, the latter generally did not look at the judiciary with the degree of distrust with which the former observed the legislature. They did not intend to undermine the judicial function but rather to emphasize the legislature's role in the lawmaking

---

84. *Id.* at 108.

85. CARTER, ARGUMENT, *supra* note 2, at 5.

86. *Id.* at 13. He later argued: "You don't propose to read this code . . . ; you can't; you haven't the time; of course, I do not state these things by way of reproach, but you haven't time to do it. . ." *Id.* at 14.

87. CARTER, PROPOSED CODIFICATION, *supra* note 2, at 23; CARTER, PROVINCES, *supra* note 2, at 42; CARTER, ARGUMENT, *supra* note 2, at 14.

88. CARTER, ARGUMENT, *supra* note 2, at 5-7.

89. CARTER, PROVINCES, *supra* note 2, at 46.

process. George Hoadly, for instance, recognized that "law springs from a two-fold source, courts and legislatures, the former applying analogies, the latter working by observation," nonetheless he explained that "the world has trusted legislatures, not courts, with the power of experiment and the gift of prevision."[90]

Code proponents did not mention the view of French lawyer and politician Jean-Étienne-Marie Portalis (1746-1807), according to which "it is impossible to regulate everything by strict rules," and that because "it is a wise prediction to realize that it is not possible to foresee everything," the judge should be granted broad discretion:

> The possibility of supplementing the law by natural truths and the right directions of common sense should be left to the judges. Nothing could be more childish than to endeavor to take necessary steps in order to provide the judges with strict rules. . . The exercise of the power to judge is not always directed by formal prescriptions. There are also maxims, usages, examples, opinions of text writers. . . The right approach, consisting in the knowledge of the spirit of laws, is superior to the knowledge of the laws themselves.[91]

In this regard, Portalis's statements on the broad powers of the judge diverged significantly from the picture of civil law codification articulated by code opponents. Portalis's views were clear: he stated that his Code did not pretend "to govern all and to foresee all," because "whatever one does, positive law can never completely replace the use of natural reason in the affairs of life."[92] Consequently, judicial activity would face constant problems, unsolvable by mere mechanical application of the Code: "Few cases are susceptible of being decided by a statute, by a clear text. It has always been by general principles, by doctrine, by legal science, that most disputes have been decided. The Civil Code does not dispense with this learning but, on the contrary, presupposes it."[93]

Portalis's views caused concern when they were circulated to the French appellate courts, *Conseil d'état* and *Tribunat*. According to some, judges would enjoy too much authority, facilitating usurpations of legislative power by the courts, and granting them a "despotic" power.[94] Despite this criticism, Napoleon Bonaparte approved and enacted Portalis's Civil Code after reducing the *Tribunal* to fifty members by expelling the critics.

Code opponents nevertheless preferred not to confront Portalis's views, because discussion of it would have aided code proponents. Instead,

---

90. HOADLY, CODIFICATION USA, *supra* note 2, at 11-12.

91. JEAN-ÉTIENNE-MARIE PORTALIS, CODE CIVIL (1803), *quoted* by Wagner, *Codification*, *supra* note 3, at 350-351. Portalis was appointed by Napoleon Bonaparte to the commission charged with drafting the *Code Civil*.

92. Jean-Étienne-Marie Portalis, *Discours préliminaire pronouncé lors de la présentation du project de la commission du government*, in P.A. FENET, RECUEIL COMPLET DES TRAVAUX PRÉPARATOIRES DU CODE CIVIL 469 (1827; reprinted 1968) [hereinafter Portalis, *Discours préliminaire*].

93. Portalis, *Discours préliminaire*, *supra* note 92, at 471.

94. James Gordley, "Myths of the French Civil Code," 42 *Am. J. Comp. L.* 459, 488-489 (1994) [hereinafter Gordley, *Myths*].

they preferred to ignore these views on the relationship between the legislature (code) and judiciary (with broad power of interpretation), and emphasized other aspects, albeit in a way that was not necessarily in agreement with Portalis. They argued, first of all, that private jurisprudence's development had to be based mainly on the decisions of judges applying the social standard of justice to each particular case, and secondly, that, if the Civil Code were enacted, judicial activity would turn into a mechanical application of the Code. In emphasizing mechanical application, they referred to the extreme theory defended by French Code's later commentators, who, unlike Portalis, maintained that judges should refer solely to the text of the Code, creating the myth that the Code was self-sufficient.[95]

It is unsurprising that code opponents sometimes used the most radical theories in favor of codification in order to hinder any agreement on possible schemes of codification. And more moderate positions were not being articulated in the middle of a contentious debate. When François Gény, whose *Méthod d'Interpretation et Sources en Droit Privé Positif* (1899) argued that the Civil Code could not be self-sufficient, and, consequently, both judicial decisions and writings of scholars should also be regarded as sources of French law,[96] the New York codification debate was already over. As a result, this authority's view had no impact on the discussion.

What reasons explain the reluctance to accept a balance between the legislature and the judiciary's exercise of power? Code opponents did not want to admit reasonable opinions on such a critical point. On the other hand, they also did not want to credit code proponents with moderate arguments, because they believed they were just a stratagem. How can such an attitude be explained?

The code opponents' starting point—namely, that the private law should be developed by judges—did not predispose them to a possible balance between the legislature and judiciary, because to do so would admit the feasibility and convenience of legislating private law. From this perspective, it is understandable that code opponents were not amenable to arguments in favor of codification which maintained, for example, that a judge would still be able to confront a gap in the law by looking to the needs and values of society in rendering a decision. As Lewis Grossman observes, because "Carter and his allies saw the common law as flexible

95. *Id.* at 490-492.

96. According to Grossman, "Gény was followed in the early twentieth century by the German "free law" school, including scholars such as Hermann Kantorowicz, Eugen Ehrlich, and Ernst Fuchs. These jurists, who were vital inspirations for Roscoe Pound and, through him, the American legal realists, expanded on Gény's arguments with reference to the German Civil Code, which went into effect in 1900. They contended that the logical and conceptual method of code interpretation was a deceptive cloak for creative judging. They urged judges to candidly embrace their role as creative law makers and, with the aid of social science, to base their decisions on sources outside the formal law." Grossman, *Anticlassical*, *supra* note 3, at 17, note 93.

and equitable, and valued it for these qualities, they were thus predisposed to oppose Field's efforts."[97]

Code opponents regarded the legislature with mistrust for a number of reasons. First, the legislature was seen as an institution where political and particular interests typically prevailed over the common good and justice. Many legislators were thought to be corrupt.[98] Second, legislators did not necessarily possess enough legal knowledge and skills to develop private law. Third, they had an insufficient amount of time to read all of the bills before passing them. Furthermore, the legislative procedure to enact a code was not simple.[99]

Whether the legislature was corrupt or not, it has been shown that pressure was placed on legislators by groups representing various interests groups. There was also evidence of political influence and corruption, including an excessive number of legislative enactments, surreptitious clauses inserted into bills, and attempts to control the judiciary, which eventually led to constitutional limits on legislative power at the end of the first half of the nineteenth century.[100] However, corruption and incompetence also affected the judiciary. As Grossman observes, "even in New York . . . judges came nearer to the paradigm than did legislators," and code opponents, Carter among them, were completely aware of it, but they "deemed the problems of incompetency and corruption of the bench to be *curable mischiefs*."[101]

From the technical point of view, code opponents were right to some extent. It has been said that "it was unfortunate that in the period in which so much was expected from the legislature, it revealed many shortcomings. One of the most serious problems of these was the poor technique of drafting legislative enactments."[102] Some defects of the drafting technique of American legislatures included "lengthy sentences, complicated style, confusing language, inconsistent provisions, many repetitions, [and] lack of thorough preparation of the enactments. . ."[103]

---

97. *Id.* at 17.

98. On Carter's mistrust of politicians, *see* Grossman, Carter, *supra* note 3, at 595-598.

99. In fact, Field addressed this matter several times in his writings. *See*, e.g., FIELD, SPEECHES, Arguments, *supra* note 2, at 348, 362.

100. JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 39 (1950) [hereinafter HURST, GROWTH]; ROSCOE POUND, THE FORMATIVE ERA OF AMERICAN LAW 52 (1938) [hereinafter POUND, FORMATIVE]; Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1907-1908) [hereinafter Pound, *Common Law*]; *see also* Wagner, *Codification, supra* note 3, at 355-356; *see also*, Masferrer, *Passionate Discussion, supra*, note 1.

101. Grossman, *Carter, supra* note 3, at 601.

102. Wagner, *Codification, supra* note 3, at 352; and he adds: "It is paradoxical that, whereas on the European continent legislative enactments in the nineteenth century were couched in general terms and left a wide power of interpretation and discretion to the judge, in common law jurisdictions, where the prestige and the law-making role of the judge are much greater, the legislatures too often followed the Prussian example of 1794 and attempted to make the courts an automaton in the application of detailed rules to any situation which might arise." *Id.*

103. *Id.* Wagner notes that "the very technique used in the nineteenth century American statutes was one of the reasons why the fight for supremacy between the legislatures and the courts was won by the judiciary." *Id.*

The prestige of legislatures was diminished not only by their own incompetence and lack of integrity, but also due to other motives, which altogether undervalued their popular image, preventing statutes and codes from playing a larger role in the American legal system. As Wienczyslaw J. Wagner observes, "even when good and well-prepared legislative enactments were passed, the courts often annulled them."[104] Different judicial methods contributed to this aim. Sometimes courts ignored legislative enactments completely,[105] or declared them unconstitutional.[106] At other times, courts undermined the application of enactments by construing or interpreting them strictly. Because legislative enactments were not supposed to bring about any changes in the common law, statutes tended to be regarded as declaratory of the current common law. Consequently, "the courts made every possible effort to construe written law in the light of the pre-existing common law rules."[107] According to some legal scholars, this could explain why some statutes and even nineteenth-century American codes were compilations of common law rules rather than actual attempts at codification.[108] Furthermore, once it was found that some legislative enactment clearly derogated from the common law, judges interpreted them as narrowly as possible. By doing so, they retained as much of the common law as much as they could. It is therefore unsurprising that statutes were regarded as setting specific and detailed rules rather than broad principles applicable in various situations.[109] As has been noted, "it is amazing to note that in its full scope the doctrine of narrow interpretation of statutes was applied only in United States in the nineteenth century after it had been discarded in England."[110]

This approach by the courts to legislative enactments was also applied to codes in general.[111] This judicial practice in fact was one the con-

104. *Id.* at 356.

105. HURST, GROWTH, *supra* note 100, at 37; Wagner, *Codification, supra* note 3, at 356 ("The legislature could do what it pleased, and the courts would follow their own way and simply forget all about the existence of some legislative acts; but this was not always possible.").

106. Wagner, *Codification, supra* note 3, at 356 ("The due process clause . . . became a real danger to any act of the legislature.").

107. *Id.* at 356-357.

108. *See* HURST, GROWTH, *supra* note 100, at 71; Wagner, *Codification, supra* note 39, at 357.

109. *See* COURTENAY ILBERT, LEGISLATIVE METHODS AND FORMS (1901), at 6-7; POUND, FORMATIVE, *supra* note 100, at 46 *et seq.*; Wagner, *Codification, supra* note 3, at 357.

110. Wagner, *Codification, supra* note 3, at 357.

111. I concur with Wagner, who maintains that "the role of the few codes which were enacted in nineteenth century United States cannot be compared to that of the continental codes," although he exaggerates when he states that "in Europe the code is everything." *Id.* It is nonetheless true that a doctrine of narrow interpretation makes codes rigid. As has been observed:

> the continental judge will look upon the method in which to construe Code-and-statute-law from an angle, basically opposed to that of the common-law judge. . . .
>
> How different is the picture of the English-American common law attitude in this respect! Here, the statute law is considered to be a gloss on the case law, and the rulings of

troversies in the codification debate. The proposed New York Civil Code contained a provision which expressly abrogated the canon that statutes in derogation of the common law were to be strictly construed. In Carter's opinion, such a provision regarding derogation purported to abandon a canon of statutory construction generally observed by courts, and which was regarded as a fundamental part of the American legal tradition.[112] However, as Roscoe Pound proved a few years later, that principle did not belong to the essence of the American legal tradition, since it was introduced in the nineteenth century. Therefore, it could not be considered or labeled as "ancient" at all.[113] Pound pointed out that "the proposition that statutes in derogation of the common law were to be construed strictly has no . . . justification," and criticized Carter for being "content to make of it an ancient and fundamental principle of the common law.[114] He demonstrated in 1908 that some courts still adhered to the principle,[115] and showed the different ways by which judges tried to undermine any legislative innovation or encroachment on judicial discretion. Pound said it represented "the orthodox common law attitude toward legislative innovations."[116]

Strict methods of interpretation explain—at least partly—why, as we will see, one of the main arguments voiced against codification was that the assumed flexibility of common law would be lost. To overcome this

---

> the statute have to be construed accordingly, whenever they seem to undertake to touch matters in the sacrosanct common-law field, matters bound and tied up, nay, frozen in by centuries-old precedents: hence, strict interpretations of statutes, specially when they deal with famous dicta and rules of the common-law.
>
> Most case-law lawyers are inclined to think, that a codification is too rigid. This certainly is a misconception, caused by their prevailing idea of strict interpretation, whereas . . . the code-lawyer and the code-judges are far much easier, and are led by the *ratio legislativa*, eventually in opposition to the 'natural' meaning of the words of the statute. G. de Grooth, *Codification and Case-Law*, 3 U. KAN. L. REV. 333, 336-337 (1955).

It is not surprising, then, that such a method of legislative interpretation hindered considerably any attempt to teach the civil code in accordance with the methods adopted in the civil law jurisdictions of continental Europe. *See* J.O. Muus, *The Influence of the Civil Code on the Teaching of Law at the University of North Dakota*, 4 DAKOTA L. REV. 175 (1932).

112. *See* GUSTAV ADOLF ENDLICH, A COMMENTARY ON THE INTERPRETATION OF STATUTES 174 (1888) (". . . in this country, the rule has assumed the form of a dogma, that all statutes in derogation of the common law, or out of the course of the common law, are to be construed strictly."); JOHN LEWIS, 2 SUTHERLAND'S STATUTES AND STATUTORY CONSTRUCTION 862 (2d ed. 1904) ("It is not presumed that the legislature intended to make any innovation upon the common law further than the necessity of the case required.").

113. Pound, *Common Law, supra* note 100, at 401-402 ("Finally in 1854 in Bouvier's Institutes we find it stated as a fundamental principle that *statutes in derogation of the common law are to be strictly construed.* From this time the tide of decisions and dicta runs steadily. The rule is now a part of the *fundamenta* of American law. In other words this wise and ancient rule of the common law is, in substance, an American product of the nineteenth century.").

114. *Id.* at 387-388 (*quoting* CARTER, ORIGIN, *supra* note 2, at 308).

115. Pound, *Common Law, supra* note 100, at 383-384 ("The courts . . . incline to ignore important legislation; not merely deciding to be declaratory, but sometimes assuming silently that it is declaratory without adducing any reasons, citing prior judicial decisions and making no mention of the statute. . . It is fashionable to preach the superiority of judge-made law.").

116. *Id.* at 385.

argument, the supporters of codification softened the rigidity of legislation in general "by eliminating strict statutory construction, to remedy the supposed inflexibility of statutory law."[117]

In 1907, Pound summed up the complex matter concerning democracy and its relationship with customary common law and legislation, with these terms:

> Formerly it was argued that common law was superior to legislation because it was customary law and rested upon the consent of the governed. Today we recognize that the so-called custom is a custom of judicial decision, not a custom of popular action. We recognize that legislation is the more truly democratic form of lawmaking. We see in legislation the more direct and accurate expression of the general will. . . . Courts are fond of saying that they apply old principles to new situations. But at times they must apply new principles to situations both old and new. The new principles are in legislation. The old principles are in common law.[118]

b) Judge-Made Law or Judge-Declared Law?

Code proponents reproached code opponents, arguing that the latter did not admit of any legislative interference in the province of the unwritten law because the lawmaking process was entrusted to the judiciary. In other words, it was the judges who made the law. The question whether the judges "make" the law, or just "declare" (or "find") it constituted one of the main issues of the codification debate.

According to code proponents, it was clear that in the common law, consisting primarily of judicial precedent, it was judges who made the law, in particular when they pronounced a judgment relying on no precedent at all. Field objected that "the legislative and judicial departments should be kept distinct." This principle, he argued, was violated "every hour that we allow judges to participate in the making of the laws."[119] Dealing with the distinction between "statute law" and "common law," he recognized that this distinction sometimes was also called by different names such as "written" and "unwritten," or "enacted law" and "judge-made law," although he was aware that the latter was "an expression offensive to some persons." For him, then, "the proper expression by which to designate our two kinds of present law, that which gives the true distinction between them, is that one is the law of statutes and the other the law of precedents."[120] Leaving aside this terminology, Field had no doubt about

117. Izhak Englard, *Li v. Yellow Cab Co.—A Belated and Inglorious Centennial of the California Civil Code*, 65 CAL. L. REV. 1, 17 (1977) [hereinafter, Englard, *Li*].

118. Pound, *Common Law*, *supra* note 100, at 406-407. On the relationship between legislation and custom, he further stated: "Legislation has not been regarded always as a mere supplement to or eking out of common law or customary law. On the contrary, an older view was that enacted law was the normal type, and customary law a mere makeshift to which men resort for want of enactment to prevent a failure of justice. *Id.* at 388.

119. David Dudley Field, *Codification*, 20 AM. L. REV. 1, 2 (1886); *see also* FIELD, INTRODUCTION, CIVIL CODE, *supra* note 2, at xxx; and FIELD, SPEECHES, ARGUMENTS, *supra* note 2, at 368.

120. FIELD, CODIFICATION, ADDRESS PHILADELPHIA, *supra* note 2, at 8-9.

this point: "Whatever of common law there is in this country is the law of precedents. These precedents are the common law, the unwritten law, made by the judges, and constitute the judge-made law of our day."[121] According to Field, if "the judges do not make but declared the common law," then, "who made this common law, if the judges did not? Your Legislature did not make it."[122] He maintained that, even admitting that the judges declared the law, the only explanation of the changing of the law by declaration is that "judges made the law, and the same power which made can unmake or change. This is not said in so many words, but it is at the bottom of the practice."[123]

Fowler, Hoadly and Oliver Wendell Holmes, among others, also recognized the principle of "judge-made law" and used it as an expression.[124] In fact, as Fowler pointed out, "the teachings of scientific jurists" defended the idea "that judiciary-made-law is in reality legislation, and that judicial bodies are to be classified with legislatures."[125] So widespread was this opinion among lawyers that even some active code opponents, outside of Carter's circle, recognized it.[126]

One serious objection to judge-made law was that it was largely *ex post facto*, as John Austin claimed, with the courts declaring the law applicable to a given set of facts in an actual controversy after the parties had acted, instead of the law being declared in advance by the legislature to meet future cases. Code proponents argued that the legislature should prescribe rules of law by which people's conduct could be governed and decided in advance of litigation rather than leave it to judges to determine legal rules in a charged lawsuit. It was argued to be unfair to the unfortunate litigant whose case was being hammered for the benefit of jurisprudence and posterity: "Well may he exclaim with the humorist: *What has posterity done for me, that I should suffer for the posterity?* Why should not the State bear the expense of having law made *ex post facto*?"[127] Sheldon Amos regarded it as an indisputable "fact" that "the large mass of English

121. *Id.* at 15.

122. *Id.*

123. *Id.* at 21; and later he relates the "dialog between counsel and judge: *There is no precedent for this*, says the former. *Then I will make a precedent*, says the latter." *Id.* at 22.

124. *See* FOWLER, CODIFICATION, *supra* note 2, at 17-18; HOADLY, CODIFICATION COMMON LAW, *supra* note 22, at 504 ("We have been so often warned against judge-made law that this has become a phrase, not descriptive of what is best, as it really should be, but the worst in our jurisprudence."); and Oliver Wendell Holmes, *Codes, and the Arrangement of the Law*, 5 AM. L. REV. 1, 5 (1870) (". . . it is to be remembered that the rules of judge-made law are never authentically promulgated as rules, but are left to be inferred from cases.").

125. FOWLER, CODIFICATION, *supra* note 2, at 17-18.

126. *See*, e.g., HORNBLOWER, CODIFICATION, *supra* note 2, at 14: "The evils of elasticity and uncertainty in judge-made law dwindle into insignificance compared with the evils of elasticity and uncertainty in politician-made law." He concluded that "we may well rest content with our present system of judge-made law, rather than risk the experiment of commission-made law or politician-made law." *Id.* at 18.

127. HORNBLOWER, CODIFICATION, *supra* note 2, at 6. Hornblower presents this argument rhetorically, and then subsequently attempts to refute it.

law has been, strictly speaking, the result of *ex-post-facto* legislation, its development having been accidentally determined by the nature of successive emergencies and the idiosyncrasies of individual judges."[128]

There was, as always, "another side to the question."[129] Commentators who were opponents of codification denied the principle of judge-made law, regarding it as a fallacy used by code proponents.[130] Mathews, for example, stated:

> The judge does not arrogate to himself to the office of the codifier. He is not a law-giver. He aims at no such imperial power or authority. His duty is far humbler. He does not even prophesy; but waits upon events. He can only declare the law as he finds it applicable to the case before him, and there his duty ends.[131]

Carter, following Blackstone, argued more exhaustively on this matter. He denied that judges "made" law, maintaining instead that they "declared" already existing law, which they "found." It has been accurately suggested that "this assertion was a critical feature of Carter's defense of the common law against the codifiers' attacks."[132] As we have seen, advocates of codification frequently protested that judges did not "find" the unwritten law, but rather "made" it themselves, denouncing the consequent lack of democratic legitimacy in the lawmaking process, as well as the contravention of the separation of powers principle. Carter responded to the claim by denying any judicial power of creating law. He argued that judges simply applied the custom or social standard of justice to the particular case presented before them.[133] In arguing in such a way, he attempted to confront any criticism concerning arbitrary or discretionary judicial power, the separation of powers, and the lack of democratic legitimacy in both lawmaking and judicial decision-making, since the judges were bound to the "habits, customs, business and manners of the people, and those previously declared rules which have sprung out of previous similar inquiries into habits, customs, business and manners."[134]

---

128. AMOS, CODIFICATION, *supra* note 36, at 10.

129. HORNBLOWER, CODIFICATION, *supra* note 2, at 6. It is worthwhile to read this paper to realize the extent to which completely opposite arguments could be presented as reasonable.

130. *See* MATHEWS, THOUGHTS, *supra* note 2, at 23-24 ("In the interest of the advocates of codification of 'customary,' or Common Law, complaint is not unfrequently made against evils alleged to arise out of what is sneeringly called 'judge-made law' or 'judicial legislation,' as distinguished from Code-law. . . The chief fallacy in the argument suggested by the phrase, 'judge-made law,' lies . . . in the false assumption that the judge creates the law, instead of merely ascertaining and applying it."). Some code opponents nevertheless recognized that judges do create legal rules, describing the common law as "judge-made law." *See*, e.g., CLARKE, SCIENCE, *supra* note 2, at 238.

131. MATHEWS, THOUGHTS, *supra* note 20, at 24.

132. Grossman, *Anticlassical*, *supra* note 3, at 9.

133. CARTER, PROPOSED CODIFICATION, *supra* note 2, at 31 ("The law of a new case can be determined by him only by building upon the foundation of law already known and declared. His office is to apply the existing standard of justice to the new exhibition of fact, and to do this by ascertaining the conclusion to which right reason, aided by rules already established leads. There is no arbitrary power in him; and any exercise of it by him would form clear ground for his impeachment.").

134. CARTER, IDEAL, *supra* note 2, at 224.

Carter's arguments on this matter were sophisticated. In order to distinguish as clearly as possible between legislative and judicial activity, he introduced an original criterion, namely, "freedom of action":

> The function of making the law supposes in the body which exercises it freedom of action. Existing rules are not of binding force upon it. . . But the judge is never free. He is bound, in declaring the law of a new case, by established rules just as much as deciding a case which has been decided a hundred times before.[135]

Fowler criticized and emphatically rejected this argument, concluding that "the test of the legislative power is not freedom of action in the law maker, but the power to pronounce what shall be law, and the power to impose a sanction for the future infraction of this law."[136]

Although Carter often expressly defended the view that judges do not make law, it is not clear to me whether he really believed what he argued on this matter. In fact, it seems rather that what really mattered was not so much whether the judicial action in question constituted making law or not, but rather what he regarded to be the best way to develop the law, or what he considered to be "the best law." He sometimes recognized this when dealing with the question of judge-made law.

> The only important thing for society is that it should be governed by the best law. If the judges really assumed to make the law, it would be no ground for objection, provided the law made by them was the best that society could obtain. If, in fact, they do make better law upon the subjects with which they deal than legislatures or codifiers, their services should be retained, and that of others dispensed with.[137]

It would be difficult to express it more clearly. Here Carter's argumentation and strategy were defeated by his own strong and deep feelings, which could not always be easily masked or covered by his legal arguments. He also defended this position arguing that, although a legal system based mainly on judicial activity entailed the danger that some judges will "act from prejudice or caprice," taking into account that "no men are perfect," "what can be more unjust, untrue and unphilosophical than to convert the exception into the rule, and assert all law declared by judges to be but the conclusions of arbitrary will or caprice, because it may, by possibility, be so in some instances?"[138]

Sometimes, Carter even used criticism of judge-made law to attack code proponents. He argued, for example, that if the legislature formally adopted a code that had been drafted by other persons, such as code commissioners, who "simply take the rules which they have already been laid down in judicial decisions" (what they "sometimes derided as *judge-made* law"), "and they do this . . . by re-shaping rules, or adding new ones, according to their views of justice and expediency," then commissioners

---

135. CARTER, PROPOSED CODIFICATION, *supra* note 2, at 29-30.

136. FOWLER, CODIFICATION, *supra* note 2, at 18. Fowler came to this conclusion after showing that "legislatures are not free," and that "freedom of action . . . is not the finality of legislative power." *Id.* at 17.

137. CARTER, PROPOSED CODIFICATION, *supra* note 2, at 39.

138. *Id.*

did "exactly the same thing which they insist nobody should do, except the law-making power!" His conclusion reflects what appears to be his sincere view:

> The[ir] complaint therefore really amounts to this, that *judges* make the law instead of *commissioners*. And in which of these two ways is the law likely to be the best, when it is made *per saltum* by a Board of Commissioners, without actual facts before them, without the argument of counsel, and without revision on appeal, or by a body of judges enjoying all these advantages?[139]

The "real" authors of a law formally adopted by a legislature, and whether they declared it, discovered it, found it, or made it, were not Carter's principal concern. It was his view that judges, not legislators, were the authentic experts in law. Not surprisingly, then, he insisted that judges were society's experts at ascertaining legal custom,[140] although, as Grossman observes, "he never offered any real support for this assertion."[141]

Carter's jurisprudence was based on the principle that judges did not make the law, but rather apply it after discovering or finding it in the people's customs. Although he tried to solve the problem of conflicting practices[142] by creating an artificial and discretionary distinction between "bad practices" and "customs,"[143] he never succeeded in doing so, and was eventually challenged by modernist critics, particularly by legal legalists, who recognized what Carter never wanted to acknowledge:

> Customs are, indeed, the raw material out of which justice is constructed. But customs differ, customs change, customs are good and bad, and customs conflict. They are uncertain, complex, contradictory, and confusing. A choice must be made. Somebody must choose which customs to authorize and which to condemn or let alone. . . Whoever chooses is the lawgiver.[144]

Certainly it would have been much easier for Carter to admit what appeared to be just a fact: that judges, to a considerable extent, made law. But he never did it. Grossman explains Carter's reason for preserving a neat separation between law and politics by pointing out that, "as a combatant in the codification wars, he had to be particularly careful about maintaining the law-politics distinction, for a denial of this distinction lay at the core of the codifiers' assault on the common law."[145] Although it was not really necessary to deny any recognition of the significant degree of discretionary lawmaking power of judges, it seems clear that Carter adopted such a view because of the codification debate.

---

139. *Id.* at 42.

140. *Id.* at 1; *see also* CARTER, PROVINCES, *supra* note 23, at 11; CARTER, ORIGIN, *supra* note 2, at 327.

141. Grossman, *Anticlassical, supra* note 3, at 9, note 47.

142. *See* Grossman, *Carter, supra* note 3, at 611-614.

143. CARTER, IDEAL, *supra* note 2, at 240.

144. JOHN COMMONS, LEGAL FOUNDATIONS OF CAPITALISM (University of Wisconsin Press 1995) (1924) (*quoted* by Grossman, *Carter, supra* note 3, at 614, note 108).

145. Grossman, *Carter, supra* note 3, at 614.

c) Certainty and Flexibility: *Stare Decisis* and New Cases

The debate over codification centered on questions of feasibility and expediency. Opponents of codification argued that codification, if practicable, would be desirable.[146] However, they really did not believe in the convenience of codifying the private law. Otherwise, they would not have conceived codification as appropriate only for non-advanced civilizations,[147] or for despotic systems.[148] Because they regarded codification as both convenient, and a distinctive sign of legal development and maturity,[149] proponents of codification sought to demonstrate both its expediency and its feasibility.

The arguments used by the debaters revolved around the same topics, which reflected their views on the relative advantages and disadvantages of codification versus the common law: certainty-uncertainty, flexibility-inflexibility, stability-instability, known cases-new cases (or future cases), accessibility-inaccessibility, complexity-simplicity, etc.

For instance, most of Field's papers and speeches followed the same structure. To confront possible criticism from code opponents,[150] he addressed the feasibility of codification[151] by pointing out historical experiences of codification,[152] arguing that judicial precedents (unwritten law) were expressed in words,[153] or asserting that statutes proved, in fact, the possibility of codifying the whole body of the law.[154] In response to the criticism of inexpediency,[155] he focused carefully on five aspects presented by code opponents as the main disadvantages of the codification: uncertainty,[156] inflexibility,[157] the inability to foresee and cover future

146. *See*, e.g., CARTER, PROVINCES, *supra* note 2, at 22, 28-29; CARTER, ARGUMENT, *supra* note 2, at 12-13; MATHEWS, THOUGHTS, *supra* note 2, at 6, 9, 11; Charles M. Platt, *The Proposed Civil Code of New York*, 20 AM. L. REV. 713, 717 (1886).

147. MATHEWS, THOUGHTS, *supra* note 2, at 8.

148. CARTER, PROPOSED CODIFICATION, *supra* note 2, at 6, 9, 14.

149. *See* FOWLER, CODIFICATION, *supra* note 2, at 11; JAMES, CODIFICATION, *supra* note 43, at 9; HOADLY, CODIFICATION USA, *supra* note 2, at 25-26; HOADLY, CODIFICATION COMMON LAW, *supra* note 2, at 513; Russell, *California*, *supra* note 2, at 292; *see also* Williston, *Written*, *supra* note 3, at 41.

150. FIELD, INTRODUCTION, CIVIL CODE, *supra* note 2, at xiv.

151. FIELD, SPEECHES, ARGUMENTS, *supra* note 2, at 376-377; FIELD, LEGAL REFORM, ALBANY, *supra* note 2, at 26-27; *see also* FOWLER, CODIFICATION, *supra* note 2, at 8; Morriss, *Answers*, *supra* note 3, at 380-384.

152. FIELD, CODIFICATION, ADDRESS PHILADELPHIA, *supra* note 2, at 17.

153. *Id.* at 14.

154. *Id.* at 9-12.

155. FIELD, SPEECHES, ARGUMENTS, *supra* note 2, at 377; FIELD, LEGAL REFORM, ALBANY, *supra* note 2, at 27-30.

156. FIELD, SPEECHES, ARGUMENTS, *supra* note 2, at 353-354, 368, 379; FIELD, INTRODUCTION, CIVIL CODE, *supra* note 2, at xix-xx; *see also* Morriss, *Answers*, *supra* note 3, at 369-371.

157. FIELD, SPEECHES, ARGUMENTS, *supra* note 2, at 354, 368-370, 379-380; FIELD, LEGAL REFORM, ALBANY, *supra* note 2, at 28; FIELD, INTRODUCTION, CIVIL CODE, *supra* note 2, at xxi-xvii; FIELD, CODIFICATION, ADDRESS PHILADELPHIA, *supra* note 2, at 20.

cases,[158] excessive shortness,[159] and prevention of the natural growth of jurisprudence.[160] Once he had confronted all the criticisms from code opponents, he defended what he saw as the advantages of codification[161]: it would make the law more accessible to laymen,[162] as well as lawyers and judges[163]; it would enable legislatures to make thoughtful legal reforms[164]; it would settle some legal questions,[165] it would produce significant savings of capital and time (in terms of volumes of law reports and other legal sources to lawyers and judges)[166]; and it would make the law more predictable.[167]

In doing so, Field inevitably connected and mixed different arguments and aspects of the debate, since some of them were closely related. In this regard, the question of "future cases" (or "new cases") is paradigmatic. The example of "future cases" frequently appears in his arguments, sometimes in connection with either the feasibility or the expediency of codification.[168] Field treated them independently, but also in relation to the question of inflexibility (linking inflexibility with judicial power, new cases, and general-particular rules).[169] The issue about "general vs. particular rules" also emerged in different contexts, either with inflexibility,[170] or new cases.[171] To emphasize the need for codification, he described the

158. FIELD, SPEECHES, ARGUMENTS, *supra* note 2, at 347, 353, 366-368, 378-379; FIELD, LEGAL REFORM, ALBANY, *supra* note 2, at 27; FIELD, INTRODUCTION, CIVIL CODE, *supra* note 2, at vii, xvi-xix; FIELD, CODIFICATION, ADDRESS PHILADELPHIA, *supra* note 2, at 13-14.

159. FIELD, SPEECHES, ARGUMENTS, *supra* note 2, at 357-358.

160. FIELD, CODIFICATION, ADDRESS PHILADELPHIA, *supra* note 2, at 20-22; *see also* Morriss, *Answers*, *supra* note 3, at 378-379; Morriss, *Decius*, *supra* note 3, at 413.

161. FIELD, SPEECHES, ARGUMENTS, *supra* note 2, at 352-353; FIELD, LEGAL REFORM, ALBANY, *supra* note 2, at 30; FIELD, INTRODUCTION, CIVIL CODE, *supra* note 2, at vii, xxix-xxx; Field, *Codification US*, *supra* note 2, at 23-24.

162. FIELD, SPEECHES, ARGUMENTS, *supra* note 2, at 377; FIELD, INTRODUCTION, CIVIL CODE, *supra* note 2, at xxx; FIELD, CODIFICATION, ADDRESS PHILADELPHIA, *supra* note 2, at 18; Field, *Codification US*, *supra* note 2, at 24; *see also* Morriss, *Answers*, *supra* note 3, at 371-374; Morriss, *Decius*, *supra* note 3, at 410, 412.

163. FIELD, SPEECHES, ARGUMENTS, *supra* note 2, at 371, 377; FIELD, INTRODUCTION, CIVIL CODE, *supra* note 2, at xxix; FIELD, CODIFICATION, ADDRESS PHILADELPHIA, *supra* note 2, at 18-19, 21-27; Field, *Codification US*, *supra* note 2, at 24.

164. FIELD, INTRODUCTION, CIVIL CODE, *supra* note 2, at xxx; *see also* Morriss, *Answers*, *supra* note 3, at 374-376.

165. FIELD, SPEECHES, ARGUMENTS, *supra* note 2, at 371-372; FIELD, INTRODUCTION, CIVIL CODE, *supra* note 2, at xxix.

166. FIELD, SPEECHES, ARGUMENTS, *supra* note 2, at 371, 377-378; FIELD, INTRODUCTION, CIVIL CODE, *supra* note 2, at xxix; FIELD, CODIFICATION, ADDRESS PHILADELPHIA, *supra* note 2, at 25; *see also* Morriss, *Decius*, *supra* note 3, at 410.

167. FIELD, SPEECHES, ARGUMENTS, *supra* note 2, at 368.

168. *See*, e.g., FIELD, SPEECHES, ARGUMENTS, *supra* note 2, at 376-377; FIELD, LEGAL REFORM, ALBANY, *supra* note 2, at 26-30.

169. FIELD, INTRODUCTION, CIVIL CODE, *supra* note 2, at xxi-xxvii.

170. *Id.* at xxiii-xxvii.

171. FIELD, SPEECHES, ARGUMENTS, *supra* note 2, at 366-368.

law as chaotic,[172] although he was aware of lawyers' opposition to any legal reform, and therefore, to codification as well.[173]

Carter's argumentation also exhibits similar features. Although he dealt more extensively with some issues, such as whether judges make or simply declare the law,[174] *stare decisis*,[175] custom,[176] and the social standard of justice,[177] he also linked and mixed some arguments, especially the issues of novel cases[178] and the uncertainty of rules.[179] He was more concerned about criticizing codification schemes than showing the consistency of the common law. He tried in particular to offer consistent arguments on the common law to confront and refute code proponents' argumentation. In this regard, he focused exhaustively on the distinction between the written and unwritten law,[180] and on uncertainty,[181] which enabled him to criticize

---

172. FIELD, SPEECHES, ARGUMENTS, *supra* note 2, at 350, 364, 366, 369, 371, 380; FIELD, LEGAL REFORM, ALBANY, *supra* note 2, at 16-17; Field, *Short Response*, *supra* note 2, at 3-4; FIELD, CODIFICATION, ADDRESS PHILADELPHIA, *supra* note 2, at 23-24.

173. FIELD, SPEECHES, ARGUMENTS, *supra* note 2, at 350, 356, 364, 375-376, 381-382; FIELD, LEGAL REFORM, ALBANY, *supra* note 2, at 17-21, 25; Field, *Short Response*, *supra* note 2, at 9-11; FIELD, CODIFICATION, ADDRESS PHILADELPHIA, *supra* note 2, at 15-16; Field, *Codification US*, *supra* note 2, at 20, 23; FIELD, COMPLETION, *supra* note 51, at 2, 5; Field, *Father*, *supra* note 34, at 172; *see also* Williston, *Written*, *supra* note 3, at 41; HOADLY, CODIFICATION USA, *supra* note 2, at 10-11.

174. *See*, for example, CARTER, PROPOSED CODIFICATION, *supra* note 2, at 29-30, 39; CARTER, PROVINCES, *supra* note 2, at 42 *et seq*.

175. *See*, for example, CARTER, PROPOSED CODIFICATION, *supra* note 2, at 27, 36-37, 65; CARTER, ORIGIN, *supra* note 2, at 68-69. On *stare decisis*, *see* Samuel C. Damren, Stare Decisis: *The Maker of Customs*, 35 NEW ENG. L. REV. 1 (2000); Jill E. Fisch, *The Implications of Transition Theory for Stare Decisis*, 13 J. CONTEMP. LEGAL ISSUES 93 (2003); Thomas P. Hardman, *Stare Decisis and the Modern Trend*, 32 W. VA. L. Q. 163 (1926); Wallace Jefferson, *Stare Decisis*, 8 TEX. REV. L. & POL. 271 (2003); Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 AM. J. LEGAL HIST. 28 (1959); Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71 (1928); Roscoe Pound, *What of Stare Decisis?*, 10 FORDHAM L. REV. 1 (1941); Clarence G. Shenton, *The Common Law System of Judicial Precedent Compared with Codification as a System of Jurisprudence*, 23 DICK. L. REV. 37 (1918); Note, *Stare Decisis*, 30 ME. L. REV. 55 (1978).

176. *See*, e.g., CARTER, PROVINCES, *supra* note 2, at 54; *see also* Grossman, *Carter*, *supra* note 3, at 611-619.

177. *See*, e.g., CARTER, PROPOSED CODIFICATION, *supra* note 2, at 30, 32, 40-41, 86-87; CARTER, PROVINCES, *supra* note 2, at 29, 35; *see also* Grossman, *Carter*, *supra* note 3, at 604-606.

178. On the relationship between uncertainty and new cases, *see*, for example, CARTER, PROPOSED CODIFICATION, *supra* note 2, at 36-37.

179. On the relationship between uncertainty and rules, *see*, e.g., CARTER, PROPOSED CODIFICATION, *supra* note 2, at 25-27; on the relationship between *stare decisis* and rules, *see* CARTER, PROPOSED CODIFICATION, *supra* note 2, at 27; on the relationship between judge-made law and rules, *see also* CARTER, PROPOSED CODIFICATION, *supra* note 2, at 29-30.

180. CARTER, PROPOSED CODIFICATION, *supra* note 2, at 8, 16-21, 34, 36-38; CARTER, ARGUMENT, *supra* note 2, at 4, 11-12, 18-19; CARTER, PROVINCES, *supra* note 2, at 13-16, 39. Field also dealt with this issue, above all, to refute Carter's argumentation: FIELD, LEGAL REFORM, ALBANY, *supra* note 2, at 26; FIELD, INTRODUCTION, CIVIL CODE, *supra* note 2, at vii, vii-ix, xiv; FIELD, CODIFICATION, ADDRESS PHILADELPHIA, *supra* note 2, at 8-9; Field, *Codification, Answer*, *supra* note 2, at 259-260; *see also* MATHEWS, THOUGHTS, *supra* note 2,

codification, to shield the common law from code proponents' criticisms and, at the same time, to praise the latter as a legal system.

Carter also presented as clearly as possible what he considered to be the evils of codification: the inevitable ambiguity of language,[182] uncertainty,[183] constant legal amendments,[184] the reduction of the controversies from principles to mere words,[185] stopping the true method of private law's growth,[186] the loss of private jurists' writings,[187] the lack of unity for all English speaking jurisdictions,[188] and the loss of stability in the judicial administration of the law.[189] In order to make clear that he was aware of these evils, and that the common law should be improved, he even declared the common law's main evils: some bad judges[190] and bad legislation.[191] The improvement of the common law did not require, then, any scheme of codification, he maintained, since such evils could be dealt with by other measures.[192]

If the leading debaters argued in this way, it is not surprising that their supporters, following in their footsteps, dealt with the same topics. In this regard, discussions about uncertainty,[193] inflexibility,[194] and future cases,[195] among other issues, appeared often in the literature.

---

at 7, 9, 11; FOWLER, CODIFICATION, *supra* note 2, at 11, 19-20; Jones, *Uniformity, supra* note 2, at 758; HOADLY, CODIFICATION COMMON LAW, *supra* note 2, at 517.

181. CARTER, PROPOSED CODIFICATION, *supra* note 2, at 8, 13-17, 25-27, 34, 114, 117; CARTER, ARGUMENT, *supra* note 2, at 4, 17-18; CARTER, PROVINCES, *supra* note 2, at 37, 57-58.

182. CARTER, PROPOSED CODIFICATION, *supra* note 2, at 82.

183. *Id.*, at 83.

184. *Id.*, 83-85; CARTER, ARGUMENT, *supra* note 2, at 5-6; CARTER, PROVINCES, *supra* note 2, at 33-34.

185. CARTER, PROPOSED CODIFICATION, *supra* note 2, at 85-86. Interestingly, some code proponents criticized judicial activity with the same argument. *See* HOADLY, CODIFICATION USA, *supra* note 2, at 12 ("Hence the timidity of judges, the disposition, so often manifested, to sacrifice the spirit to the letter, to call for cases and disregard the study of principles.").

186. CARTER, PROPOSED CODIFICATION, *supra* note 2, at 86-90; CARTER, PROVINCES, *supra* note 2, at 48-49; *see also* Morriss, *Answers, supra* note 3, at 378-379.

187. CARTER, PROPOSED CODIFICATION, *supra* note 2, at 90-91.

188. *Id.*, at 91-92; CARTER, PROVINCES, *supra* note 2, at 51-52.

189. CARTER, PROVINCES, *supra* note 2, at 50.

190. CARTER, PROPOSED CODIFICATION, *supra* note 2, at 115-116; CARTER, PROVINCES, *supra* note 2, at 59.

191. CARTER, PROPOSED CODIFICATION, *supra* note 2, at 116.

192. CARTER, PROVINCES, *supra* note 2, at 59 ff.

193. MATHEWS, THOUGHTS, *supra* note 2, at 17-18, 22; FOWLER, CODIFICATION, *supra* note 2, at 51; HOADLY, CODIFICATION COMMON LAW, *supra* note 2, at 515-116; HORNBLOWER, CODIFICATION, *supra* note 2, at 5, 8-9; JAMES, CODIFICATION, *supra* note 43, at 4, 6; Morriss, *Decius, supra* note 3, at 411; Head, *Codes, supra* note 3, at 64-66; AMOS, CODIFICATION, *supra* note 36, at 9-23.

194. HORNBLOWER, CODIFICATION, *supra* note 2, at 4-5, 8; HOADLY, CODIFICATION USA, *supra* note 2, at 12, 19, 28; *see also* Morriss, *Answers, supra* note 3, at 376-378; Fisch, *Dakota Civil Code, supra* note 15, at 19; Englard, *Li, supra* note 117, at 17; on the flexibility of codification, *see also* Denis Tallon, *Codification and Consolidation of the Law at the Present Time*, 14 ISR. L. REV. 1, 8-12 (1979).

195. MATHEWS, THOUGHTS, *supra* note 2, at 11-12; FOWLER, CODIFICATION, *supra* note 2, at 18-19; Williston, *Written, supra* note 3, at 39.

I do not intend to focus on each one of these topics specifically, but rather to highlight the main arguments used by debaters—and particularly, by code opponents—in order to be able to emphasize, then, their shortcomings, contradictions or paradoxes, which were mainly caused by their own prejudices, personal feelings and preferences. In doing so, we necessarily need to combine and connect various topics that are inextricably linked.

This is the case with the following topics: certainty, flexibility, stability, *stare decisis*, and future cases. Traditionally, the common law has been characterized and praised as a stable yet flexible legal system, mainly because of the gradual development through judicial precedent aided by the principle of *stare decisis*. It is precisely by means of judicial activity that the common law is applied to future cases, no matter whether they are mere repetitions of preceding cases or novel cases. The relation between all these topics in the context of the common law system is, then, remarkably close. Code opponents took advantage of this traditional understanding of the common law to criticize codification for its inflexibility, instability, and uncertainty.

Regarding the latter, although code opponents admitted that the common law was uncertain, some of them argued that codification would bring even more uncertainty because of the use of language. This argument was indeed used quite often. Carter, in two of the conclusions of his *Proposed Codification*, made precisely this point. A code would introduce necessarily "into the law a great mass of error," because, even though the language employed was accurate, it would be "still impossible that its framers should intelligently provide for unforeseen cases." Hence, he maintained that because "statutory provisions, by reason of their generality, must unavoidably embrace such cases . . . the result necessarily is that such cases must be disposed of by a statute framed without reference to them, and consequently such disposition is as likely to be wrong as right. . ." Carter envisioned that the imprecision of human language and its application to an unknown case would cause "a great increase of uncertainty in the administration of justice."[196] That was not all. He also claimed that, with a code, forensic debate would not revolve anymore around principles, but merely around words.[197]

196. CARTER, PROPOSED CODIFICATION, *supra* note 2, at 82-83.

197. *Id.* at 85-86 ("At present . . . [t]he search is for a rule. . . But when the law is conceded to be written down in a statute, and the only question is what the statute means, a contention unspeakably inferior is substituted. The dispute is about words."). Fowler responded to Carter, asserting that the common law, at some stage, ceased "to be so much the application of principles as a law of precedents." FOWLER, CODIFICATION, *supra* note 2, at 51-52. According to Fowler, "another great objection to case-law is that the vast agglomeration of decisions tends to make the law one of precedent and not one of principle; judges and lawyers lawyers are so overwhelmed and confounded by the array of authority that in desperation they shield themselves behind some ill-considered precedent without regard to substantial justice in the given case." *Id.* at 49.

As Carter, who admitted uncertainty, accepting it as an unavoidable feature of the law,[198] other code opponents like Mathews praised it as "proverbial."[199] They recognized expressly that "Common Law . . . has, undoubtedly, many imperfections. . . , great inconsistencies, and often works injustice," but such deficiencies should be remedied only by "supplemental legislation," since it would "be unwise to abolish the old system that has grown up with us, and to substitute a new one, which is wholly untried among us."[200] Code opponents' argumentation over uncertainty was clear: we recognize that the common law is uncertain, which, to some degree is unavoidable, but a code would entail even more uncertainty, making then false the claim of code proponents' view about the certainty provided by a code. Trying to prove it, they brought up some examples of statutes which raised problems of interpretation for several reasons, the linguistic one among them.[201]

In theory, code opponents gave clear priority to flexibility (or elasticity), while code proponents preferred certainty. In a heated debate, however, while the latter recognized the flexibility of the common law—at least to the extent permitted by the principle of *stare decisis*, as we will see—the former hardly admitted that codification would bestow more certainty on the administration of justice. I say "hardly" because, in fact, sometimes they admitted it more or less explicitly. Code opponents intended to uncover the assumed certainty of codification by arguing that, because of linguistic constraints, a code would bring "other evils greater

198. CARTER, PROVINCES, *supra* note 2, at 37 ("Nor is this uncertainty to be deprecated. It is rather to be welcomed, met, and surmounted. It is the discipline of human nature. It furnishes the conditions upon which moral and intellectual progress are made. *Progress is the child of struggle, and struggle is the child of difficulty.* What would become of science, reason, and morals, if new problems were not incessantly presenting themselves for solution? What progress would be possible in law, if justice could be frozen into a rigid body of unchangeable rules?"). However, Carter sometimes, when comparing with other legal systems, dared to praise the common law's certainty: ". . . the Jurisprudence of England and America, in its refinement, in its certainty, in its conformity to the idea of the most advanced civilization, is above, far above, that of the most refined nations of Continental Europe." CARTER, ARGUMENT, *supra* note 2, at 4, 17. *See also* Grossman, *Anticlassical*, *supra* note 3, at 40 ("In short, Carter asserted that the common law's embodiment of customary morality did not make it less certain than a codified system. To the contrary, the common law's reflection of the social standard of justice was the very source of its superiority in this respect.").

199. MATHEWS, THOUGHTS, *supra* note 2, at 17 ("The uncertainty of the law is proverbial. It is presumed to result somewhat from the nature of things, and to be, to a great extent, remediless. Whoever proposes a plan to remove this seemingly chronic difficulty is bound to demonstrate, in some manner, the practicability of his method before asking to destroy the present system. If that uncertainty shall be found to grow out of the imperfection of language, in what tongue shall the codifier embody his statute? . . . There is no magic in Legislature. Obscurity and inconsistency are not strangers to statutes. . . The evil and the proposed remedy run, alike, in old grooves.").

200. *Id.* at 17-18.

201. *See*, e.g., *id.* at 22 (discussing the Statute of Frauds); HORNBLOWER, CODIFICATION, *supra* note 2, at 9-10 (discussing the New York Code of Civil Procedure, the Statute of Frauds, and the New York Revised Statutes on Trusts and Powers).

than the one it cures,"[202] admitting—at least implicitly—that uncertainty would be cured, but not clarifying what greater evils it would cause.

On other occasions, when inquiring whether codification would be considerably more certain than judge-made law, they did not use the word "certainty" but "rigidity," and emphasized, first of all, that codes, like statutes, would attain certainty by sacrificing justice, which requires the elasticity of the common law,[203] and second, "statutory law is quite as uncertain as judge-made law, nay, even more so."[204]

Among code opponents, it was Carter who treated the topic of "uncertainty" more exhaustively.[205] Confronting the criticism of codifiers against the uncertain common law of the time, which could not be denied,[206] he admitted it, but regarded it as "one characteristic feature of unwritten law,"[207] simply because the main purpose consisted in doing justice in each particular case:

> [W]ritten law offers a means by which certainty may, in some cases, be better attained, though it must frequently happen at the sacrifice of justice; and . . . unwritten law offers a means by which justice may be better attained, though it sometimes happens at the sacrifice of certainty.[208]

---

202. HORNBLOWER, CODIFICATION, *supra* note 2, at 5 ("I regard certainty as one of the greatest *desiderata* in jurisprudence. Law that is certain can at least be known and obeyed; law that is uncertain can neither be known nor obeyed. Law that is uncertain is no law at all. It is only when law defines itself and declares itself in precise and accurate and definite language that it becomes a rule of conduct demanding and enforcing obedience. If codification can give us a practical remedy for elastic and uncertain law, and a remedy which will not bring with it other evils greater than the one it cures, then, I, for one, am heartily in favor of codification.").

203. HORNBLOWER, CODIFICATION, *supra* note 2, at 8 ("Judge-made law, on the whole, tends to conform itself to the principles of common sense, right reason and justice. Statutory law, on the other hand, tends to become technical and arbitrary. . . There is this much of truth on the side of those who favor elasticity of the common law. Elasticity in itself is not an advantage, but a disadvantage. . . But the opposite extreme of rigidity and technicality is also a disadvantage, and we are thus left to a choice of evils. My own opinion is that if this were the only objection to codification, the balance of expediency would be in favor of the codifiers. It seems to me that certainty would be a gain, even if the law became more rigid and technical, since it is better in most cases that the law should be certain and ascertainable than it should be theoretically just.").

204. *Id.* at 9 ("Experiences show that when rules of law are reduced to statutory form the work of interpretation and construction commences. Each word in the statute assumes importance and calls for enforcement. A but or an and becomes as important as the subject or the predicate of the sentence. In judge-made law this element of uncertainty is largely eliminated, since the opinion amplifies, reiterates in different form, illustrates and applies the principles enunciated. . . Human language is at best defective and ambiguous. . . No matter how clear and simple the language may appear at first sight, doubts will arise, ambiguities will be disclosed, inconsistencies between different sections will present themselves, and a series of never-ending decisions will be inaugurated, construing and interpreting the statute, till each section becomes overlaid with a body of judge-made law commentaries forming a new body of precedents and a new jurisprudence.").

205. CARTER, PROPOSED CODIFICATION, *supra* note 2, at 8, 13-17, 25-27, 34, 114, 117; CARTER, ARGUMENT, *supra* note 2, at 4, 17-18; CARTER, PROVINCES, *supra* note 2, at 37, 57-58.

206. *See*, e.g., JAMES, CODIFICATION, *supra* note 43, at 4.

207. CARTER, PROPOSED CODIFICATION, *supra* note 2, at 13.

208. *Id.* at 8, 13-14; *see also* CLARKE, SCIENCE, *supra* note 2, at 239 ("The Court attempts to arrive at a fair and just result in the particular case.").

Carter asserted that "absolute certainty cannot be obtained even by written laws, nor can the flexibility of unwritten rules secure in every case absolute justice," but then emphasized that "statutory law does not in all instances even tend to promote certainty."[209] Summing up, he argued that, while certainty was essential in the province of public law, in which the law should be laid down beforehand, justice—rather than certainty—was the main aim in private law, and therefore, rules neither should nor could be laid down in advance.

The flexibility of the common law was, then, seen as a means of achieving justice, although it entailed a certain degree of uncertainty. That was one of the limits of the law, and a reflection of the human condition. Any wholesale attempt to codify the private law might therefore hinder fair outcomes in the administration of justice. In Carter's view, the "mere circumstance that such rules cannot be found set down in words and arranged in orderly and systematic form, is not, of itself, a very serious matter,"[210] because what really matters is "that *justice must be done*." And, in order to achieve justice, "the social standard of justice should be applied upon the *known facts*; otherwise justice could be not attained."[211] In this sense, legislation in general—and codification, in particular—which established general rules to be applied in particular cases conflicted with the demands of justice, potentially causing unfair outcomes.

Code proponents argued that "whatever is known to the judge or to the lawyer can be written, and whatever has been written in the treatises of lawyers or the opinions of judges, can be written in a systematic Code."[212] Field disagreed with Carter's distinction between written and unwritten law, since "all that we know of the law, we know from written records. To make a Code of the known law is therefore but to make a complete, analytical, and authoritative compilation from these records. The records of the common law are in the reports of the decisions of the tribunals; the records of statute law are in volumes of legislative acts."[213]

Carter acknowledged that the opinions of judges are written, but disagreed with Field's conclusion that they then could be written and enacted in a code, because the rules laid down by the courts are not absolute but provisional, so that "whenever a case arises presenting different aspects, the rule is subject to modification and adoption as justice or expediency may dictate. This, of course, cannot be done with a rule enacted."[214]

209. CARTER, PROPOSED CODIFICATION, *supra* note 2, at 14-15.

210. *Id.* at 72-73.

211. *Id.* at 26; *see also* CLARKE, SCIENCE, *supra* note 2, at 249 "The first and most important investigation is into the facts of the particular case—facts which have already happened and are now presented for observation and decision. Given the facts, the attempt is made to decide the case so that justice will result.").

212. FIELD, INTRODUCTION, CIVIL CODE, *supra* note 2, at viii.

213. *Id.* at xiv.

214. CARTER, PROPOSED CODIFICATION, *supra* note 2, at 26-26; *see also* CARTER, ORIGIN, *supra* note 2, at 233 (". . . vast body of so-called rules found in our digests and treatises and mentioned in the reports of decided cases. . . None of them are absolute. They are all provisional and subject to modification.").

Carter's real concern was not about the agent of law-making. Since he was convinced that the private law should be developed and applied by judges, and not by legislatures, he argued that "the primary advantage of the common law approach over code systems was the power common law judges had to resolve individual cases according to the demands of justice. Whereas codification would compel courts to decide particular matters by mechanical deduction from the principles and rules set forth in the code, the common law achieved case-specific fairness by avoiding such rigid formality." In that sense, Grossman argues, "Carter's crusade against codification was, above all, a battle against deductive reasoning."[215] I would argue, however, that because the deductive model of reasoning is not antithetical to the common law, Carter's battle against deductive and formal reasoning was, above all, a means of confronting and resisting codification.

His position had consequences, and Carter was fully aware of them.[216] He knew the advantages and disadvantages of opposing codification. Concerning certainty, for example, Carter's depiction of the common law sacrificed certainty for the sake of fairness. He acknowledged that "this was a risky strategy, for the uncertainty of the common law was one of the main themes of codification proponents." He also knew that his "contention that the fact-specific common law did not establish clear rules in advance of actual disputes provided his opponents yet another basis for maintaining that the existing system was too uncertain."[217] He was nevertheless willing to take these risks because he thought it was the best way to refute, by legal argumentation, any scheme of codification, and thereby preserve the traditional common law system under judicial auspices.

Because "justice in the individual cases" was the *raison d'être* of Carter's common law jurisprudence, he gave clear priority to flexibility at the expense of certainty, seeking to produce fair outcomes in each case by judicial application of legal rules, which remained always provisional. If these rules were necessarily provisional, then the role of judges in the both the legal system and the administration of justice would be fully secured, and it would become inappropriate for the legislature to deal with the private law wholesale. By so depicting the common law, he tried both to emphasize the flexibility and justice of the common law, and to exaggerate the rigidity and formality of codification, no matter whether his depiction properly reflected the codifiers' proposal. From this perspective, the debaters' legal argumentation in general—and Carter's in particular—can be much better understood.

---

215. Grossman, *Anticlassical*, *supra* note 3, at 13.

216. One consequence, as Grossman observes, was Carter's "un-Langdellian portrait" of judges' legal decision-making: "In light of this argument, Carter's outrage at the prospect of codification would have been hollow if the common law was itself characterized by soulless logical reasoning. He had to explain how the common law, unlike a code system, provided case-specific justice. In doing so, Carter painted a most un-Langdellian portrait of the manner in which common law judges decided cases." *Id.* at 176.

217. *Id.* at 188.

This explains, for example, Carter's radical depiction of Field's proposed codification. As Grossman observes, "Carter depicted Field's code as striving for completeness, formality, and conceptual order at the expense of equitable outcomes."[218] Karl Llewellyn later pointed out that Carter combated "not codification as . . . a fresh and fertile start for case law, which at its best already incorporates existing tendencies . . . but the utopian ideal of the blinder advocates of codification: a closed system, 'certain'—and dead."[219] This is undeniable. That was precisely Carter's strategy. However, this does not mean that Field's proposed codification was, in fact, as Carter depicted it. This is so because the legal argumentation of both code opponents and proponents—at least in some aspects—lacked the proper correspondence, typical of a strictly scientific discussion. Nevertheless, this debate was something more than just a scientific discussion. Deeply rooted personal biases and tendencies played a significant role, inattention to which would considerably limit our understanding of the nature of this legal discussion.

In this regard, it can be said that Carter succeeded in his purpose. Although he never achieved consistency in all aspects of his legal theory, he managed to focus the legal discussion on the points he put forward, and to present a rather radical picture of Field's proposal. Carter argued that Field's code would turn judicial activity into a mere mechanical application of the code, and that Field's code purported to be complete, anticipating future cases. Arguing in this way, he usually did not invent false points; he just pointed to extreme elements of some real features of codification, or called attention to others by radicalizing them. Carter was so successful that even current literature on the American codification debate sometimes assumes his depiction of Field's proposed codification, as if Field intended to replace the common law system wholesale with the civil-law system[220]:

> Carter had good reason to equate codification with mechanical formalism, for such logical rigidity characterized the legal systems of the many civil law countries that had adopted codes over the previous hundred years. The drafters of the Prussian Landrecht, enacted in 1794 under Frederick the Great, intended their enormous code to be complete—that is, to serve as the sole basis of decision for every case. The jurists who prepared the French Civil Code of 1804 (the *Code Napoléon*) were aware of the Prussians' utter failure to articulate a rule for every fact situation. They thus embraced the much more modest goal of setting forth general principles and maxims to be developed and applied by judges and jurists. Nevertheless, the revolutionary impulses and rationalist tendencies of the early nineteenth century shaped the reception of the *Code Napoléon* in France and in the many other European and Latin American countries that adopted it. In all

218. *Id.* at 162.

219. Karl N. Llewellyn, *Carter, James Coolidge.* ENCYCLOPEDIA OF THE SOCIAL SCIENCES (1931).

220. Grossman, for example, suggests that: "In the decades following the Civil War, the American legal profession engaged in a heated debate about the wisdom of replacing the substantive common law with a written civil code." *Anticlassical, supra* note 3, p. 149. This was exactly how Carter presented his struggle against Field's proposal, but it was not, in fact, an accurate presentation of Field's proposal.

> these jurisdictions, the Code tended to be viewed as a clear and complete source of all law.[221]

Carter's identification of codification with mechanical formalism does not correspond with the historical facts in civil law countries. Carter could have had a thorough understanding of both the Prussian and the French Codes, as well as of the German Civil Code project. Carter instead used some historical examples, even though notalways accurate, to show the most radical face of codification, no matter whether his depiction reflected Field's proposal or not, claiming that Field was misrepresenting, in order to promote and call attention to, his codification scheme.

Leaving aside Carter's view of the Prussian and French Codes,[222] it is clear that Carter would not admit that Field's code did not intend to be complete and to foresee future cases, and also that Field did not think that judicial activity would devolve into a mechanical application of the code. In Carter's view, codification consisted necessarily "in enacting rules, and such rules must, . . . from their very nature, cover future and unknown, as well as past and known cases." No matter what Field said, according to Carter, "it does not embody justice; it is a mere *jump in the dark*; it is a *violent* framing of rules without reference to justice."[223]

Carter's argumentation sometimes intended to make it difficult to reach a compromise among codification debaters. Concerning certainty, the matter of new cases, known-unknown facts, and absolute-provisional rules, constitute good examples. Trying to explain the philosophical reason why judges' rules are always *provisional*, and, thus, impossible to be codified, he pointed out:

> All unwritten law consists of rules by which the standard of justice is applied to *known* facts and conditions. Apart from, and independent of, *known facts*, there is no such thing, in human apprehension, as law, except the broad and empty generalization that *justice must be done*.[224]

This legal theory left no room for reaching any compromise among the debaters. Indeed, it was clear that only judges, as opposed to legislators, could apply and develop the private law properly, and produce fair outcomes by pronouncing the judgment in each particular case with "known facts and conditions." But yet, Carter and other code opponents tried to combine such a conception of the administration of justice with the idea that judges undertake a modest and limited function that did not make law:

---

221. *Id.* at 162-163.

222. Recent historians emphasize that neither the Prussian Code nor the French Code intended to foresee all cases. They recognize that this was utterly impossible, and that judges should fill in the gaps themselves. In fact, articles 49 and 50 of the Introduction to the Prussian Code allowed judges to decide according to the "general principles adopted in the code." Weiss, *Enchantment*, *supra* note 3, at 459. On the French Code, *see* Gordley, *Myths*, *supra* note 94, at 484-492.

223. CARTER, PROPOSED CODIFICATION, *supra* note 2, at 33.

224. *Id.* at 26 (italics in original).

> The judge never undertakes to decide anything more than the precise case brought before him for judgment. He considers the facts of *that case*, and, with the aid of such precedents, analogies and familiar rules as the deliberate and accumulated wisdom of the past furnishes, he pronounces judgment, and there stops. He does not even declare, at least as a necessary part of his function, what the law is. He is not bound to write an opinion. He usually does write one, stating his views upon the legal questions. But this is of no binding force. The strictest doctrine of *stare decisis* requires subordinate tribunals to follow, not the opinion, but the judgment; and the obligation is of no force in a future case presenting materially different aspects.[225]

One of the most striking and paradoxical aspects of the codification debate can be seen in the efforts made by both code opponents and proponents to emphasize the specific extent of judicial power in their legal theories. Code opponents tried to minimize it, while code proponents emphasized judicial discretion. The former, confronting code proponents' reproach for granting excessive power to the judiciary, insisted on the limited—even humble—judicial function. The latter, facing code opponents' charge of turning judicial activity into a mechanical task, reiterated that judges, to some extent, continued to play an important role in the administration of justice.

That Carter and other code opponents intended to present Field's scheme of codification as a system that would reduce judicial activity to a mere mechanical application of code provisions cannot be denied. It is also undeniable that Field's proposed codification contained a different conception of the judicial power of judges. Field recognized the law-making power of judges. His proposed code, after declaring that the "law is a rule of property and of conduct, prescribed by the sovereign power of the state,"[226] laid down a provision which established that ". . . the judgments of the tribunals enforcing those rules, which, though not enacted, form what is known as the customary or common law."[227] Field's proposal went even farther by providing that "the evidence of the common law is found in the decisions of the tribunals."[228]

Grossman notes that "civil law jurists would not . . . have agreed with the . . . provision, which stated that *the will of the sovereign* was expressed not only by the Constitution and by acts of the legislature and subordinate legislative bodies," and, consequently, admitted that "Field thus enshrined the authority of judicial precedent in a manner totally alien to the civil

---

225. CARTER, PROPOSED CODIFICATION, *supra* note 2, at 27, *see also*, MATHEWS, THOUGHTS, *supra* note 2, at 12 ("The precedent itself may be necessarily limited to the precise concatenation of facts to which it was judicially applied. . . It is the duty of a court of justice to ascertain and apply [the unwritten law] so far only as respects the particular concrete combinations of facts properly presented to it requires. However, it is no part of its province to formulate general rules, or even principles, beyond what the particular case before it demands.").

226. DAVID DUDLEY FIELD, CIVIL CODE OF THE STATE OF NEW YORK §2 (1865) [hereinafter FIELD, CIVIL CODE].

227. *Id.* at §3.

228. *Id.* at §5.

law."[229] Field made it as clear as possible in his code that cases not covered by the code would be decided "precisely as they would now be decided,"[230] which meant, in other words, according to the prior court decisions and the doctrine of *stare decisis*.

Although at first glance, in light of Field's repeated attacks on the common law's *judge-made* character, the statement "that the common law would survive codification, at least in the code's interstices,"[231] could seem curious, it should be regarded as a logical consequence of Field's reiterated affirmation that the code intended neither to provide a solution for all cases, nor to foresee future cases. Since Field did not believe in such completeness and self-sufficiency, he simply framed a general code of principles, whose application required indispensable judicial interpretation, not only to ascertain the meaning of its provisions, but also to resolve unforeseen cases by using common law precedents, other code provisions and natural justice. Had he believed in a complete and closed code, his proposed code would have been different, and consequently, would not have allowed judges to decide cases "precisely as they would now be decided." Furthermore, John Austin, trying to make compatible the separation of powers with judicial discretion, had already advocated that the legislature tacitly delegated its sovereign power to the courts for limited purposes.[232] Later, Fowler defended the same thesis.[233] From this point of view, although it is true that Field did not articulate explicitly this theory, I would not say that there was an "obvious tension between Field's acknowledgment of the continuing authority of judicial precedent and his . . . judicial lawmaking."[234]

Moreover, it seems clear to me that Field's code actually rejected Bentham's notion of a complete and self-sufficient code—as Fowler and, later, even Williston remarked[235]—but not just as a political stratagem of

---

229. Grossman, *Anticlassical*, *supra* note 3, at 169.

230. FIELD, INTRODUCTION, CIVIL CODE, *supra* note 2, at xix.

231. Grossman, *Anticlassical*, *supra* note 3, at 169.

232. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 35 (Wilfrid E. Rumble ed., 1995). *See also*, PETER J. KING, UTILITARIAN JURISPRUDENCE IN AMERICA 358, 364-66 (1986).

233. *See* FOWLER, CODIFICATION, *supra* note 2, at 9 ("The analytical jurists have demonstrated that under any advanced type of government laws are evolved in two modes, by the legislature proper, and by the various subordinate persons possessing law-making powers. Among the latter are the judges. . . .").

234. Grossman, *Anticlassical*, *supra* note 3, at 169 ("There is obvious tension between Field's acknowledgment of the continuing authority of judicial precedent and his argument that judicial lawmaking 'will commend itself to no one in this country of popular institutions where it is a fundamental idea that the functions of government should be devolved upon distinct departments. . . .'").

235. FOWLER, CODIFICATION, *supra* note 2, at 52; Williston, *Written*, *supra* note 3, at 39 ("Field did not take the absurd view of Jeremy Bentham that a Code would do everything, but he did say, in Carter's words, that whatever was clearly understood could be clearly stated, and if that was true, it was possible to enact a Code which should cover everything that was clearly known. It would not be possible to cover all possible cases that might arise in

adopting a "modest pose."[236] It is true that Field's views on codification, and particularly those regarding the judicial power, "allowed code supporters to present Field's scheme as an incremental, pragmatic step rather than a wholesale rejection of Anglo-American jurisprudence."[237] To maintain the opposite view would constitute another clear example of Carter's triumph even over current American legal historiography. Field's theory of the judicial powers assumed that the code was not at all complete, and therefore, that unforeseen new cases would necessarily arise.[238] In 1866, one year after the presentation of his proposed code, he stated:

> Do not suppose it to have been pretended or imagined that every case which can arise has been foreseen or provided for. The language of the Civil Code is very explicit on this point. Thus:
>
> §6: In this State there is no common law in any case where the law is declared by the five codes.
>
> §2,034: The rule, that statutes in derogation of the common law are to be strictly construed, has no application in this Code.
>
> §2,035: All statutes, laws, and rules, heretofore in force in this State, inconsistent with the provisions of this Code, are hereby repealed or abrogated.[239]

Field, interpreting these provisions together, concluded:

> Therefore, if there be any rule of the common law not mentioned in the Code, it will continue to exist as it was before; while if a new cases arises, not foreseen and therefore not provided for, it will be decided, as it would be now decided, by analogy to a rule expressed in the Code, or to a rule omitted, and therefore still existing outside of the Code, or by the dictates of natural justice.[240]

If the Code simply articulated basic and general principles, as Field argued,[241] then unforeseen cases were supposed to be resolved by judges

---

the future; but the answer to that was that the Code should not attempt to do so, and that as to such matters, you would be not worse off than you would be if there were no Code, and as to other matters you would be better off.").

236. Grossman, *Anticlassical, supra* note 3, at 17 ("By denying that his code was meant to be a complete system of law, Field was resisting his opponents' charge that he was a grandiose idealist, dedicated, like England's Jeremy Bentham, to extirpating the common law and making the law judge-proof. The political advantages of Field's modest pose were clear.").

237. *Id.*

238. In 1855 he already advocated this notion of codification, quite different from the first theoretical codifiers like Bentham. *See*, FIELD, LEGAL REFORM, ALBANY, *supra* note 2, at 27 ("The plan of a code does not include a provision for every future case, in all future times; it contemplates the collecting and digesting of existing rules and the framing of new ones, for all that man's wisdom can discern of what is to come hereafter.").

239. FIELD, SPEECHES, ARGUMENTS, *supra* note 2, at 347.

240. *Id.*; *see also, id.* at 379 ("Should a case, however, occur now and then not within any provision of a code, it would be adjudged precisely as a case would be adjudged now, which there was no statute and no precedent to cover. There would be no difference between the law of precedents and the law of a code in this respect. All that I affirm is, that whatever is now written in the statutes and in the books of reporters and jurists can be written in the book of a code, and that a defect is to be supplied in the same manner in both cases.").

241. *Id.* at 367 ("The province of a code is not to give all the rules of law, general and particular, but only such as are general and fundamental. Some one has estimated the whole number of rules laid down in the reports at two million. No man would dream of collecting

according either to their own analogical interpretation of the code, or to common law principles of adjudication.[242] In any case, judicial power did not dwindle into mere mechanical application. Field expressly rejected the false assumption that the code would "undertake to exclude all law except that which contains, an assumption not founded in fact. The Civil Code prepared for New York does not profess to contain all the law."[243] He agreed with code opponents "that all future case cannot be foreseen," and "that the code cannot provide for them specifically and expressly, but he added that "no more can an unwritten law provide for them; if there be any difference in this respect, it is in favor of the Code, because that is framed with an endeavor to provide for the future so far as it is possible to do so."[244]

Despite the impossibility of foreseeing all future cases, he maintained that "the ability of any system of law to provide for the future depends on the generality or minuteness of its provisions."[245] In this respect, the notions of an open code (not complete), general rules (not particular ones), and judicial power (not mechanical application) were closely linked in Field's overall view.

Carter's arguments against Field's proposal supposed a complete code, replacing the common law and reducing judicial power to a mechanical application of its provisions. Carter misrepresented Field's project. Carter's strategy was logical. If he had accepted the code truly proposed by Field, it would have been much more difficult to argue against it. Carter placed the discussion as far away as possible from Field's moderate conception of codification. In doing so, he intended to protect his main concern, namely, the prevention of any general interference by the legislature in private law, thereby bolstering the law-making role of the judiciary. For instance, had Carter agreed with Field "that whatever is now written in the statutes and in the books of reporters and jurists can be written in the book of a code, and that a defect is to be supplied in the same manner in both cases,"[246] it would not have been easy at all for him to confront and reject the codification scheme. Carter's argumentation tended to deny almost every statement Field had made. And sometimes, when he found it difficult to do so, he claimed that he did not believe in the veracity of

---

and arranging all these in a code. Most of them are mere deductions from other rules more general; the latter are those only which it would be useful or possible to bring together in a convenient form.").

242. Fowler advocated the same thesis. *See*, Fowler, *Codification*, *supra* note 2, at 18, note 43.

243. FIELD, SPEECHES, ARGUMENTS, *supra* note 2, at 353; *see also*, FOWLER, CODIFICATION, *supra* note 2, at 18, where he denounced the same false assumption that a complete code must embrace a statutory statement of thousands of decisions of peculiar groupings of facts, and he pointed out ("A true system of codification is concerned only with those larger principles indicated; those which have the force of law universally, or independently of the peculiar groups of facts to which they have, or have not, been applied.").

244. FIELD, SPEECHES, ARGUMENTS, *supra* note 2, at 367.

245. *Id.* at 378.

246. FIELD, SPEECHES, ARGUMENTS, *supra* note 2, at 379.

some of Field's statements, thus avoiding having to take them seriously. For example, Carter argued that Field's code would not deal with unforeseen cases,[247] and suggested that Field should have laid down express "general clauses" to that effect, "in order to render the assertion true that the proposed codification does not declare the law for future and unknown cases," although he remarked that "such a provision would indeed be ridiculous."[248]

It is clear that Carter had in mind an idea of codification quite close to that of some theoretical codifiers like Bentham, and was not willing to consider seriously another scheme, more open and flexible, which would have made it more difficult to argue against. In fact, in his *Provinces*, dealing again with Field's codification theory, Carter resisted the idea of a code with only general rules: "But, if this limited form of codification were practicable, what good would it accomplish? It must be very plain that it would furnish none of the benefits asserted as the grounds upon which the utility of codification is defended by its friends."[249]

This was just a rhetorical move since he did not agree with such "friends" either. Carter's argumentation against this scheme of codification was indeed poor, even though he drew a conclusion that revealed his real concern. According to him, any code entailed the problem of embracing future cases, "a danger which begins the moment codification begins, and increases precisely in proportion to the minuteness and detail to which the process is extended."[250]

Leaving aside whether the judge would enjoy more or less power in the application of code provisions, what really mattered for Carter was that from its enactment onwards, the legislature would start to regulate the private law, having the power to reform and to introduce amendments whenever legislators considered it convenient. This point was clearly made by Field ten years before framing his code:

> If it were assumed as essential to a code that it should contain a rule for every transaction that in the compass of time can possibly arise, the objection might have some force; but no sane person holds any such idea. We know that new relations will hereafter arise which no human eye has foreseen, and for which new laws must be made.[251]

And those "new laws must be made" by the legislature, of course. In light of Carter's main concern, his assertion that the "danger which begins

247. CARTER, PROPOSED CODIFICATION, *supra* note 2, at 31-32 ("But what a manner of reasoning is this? A statute not applicable to an unforeseen case even if the case fall within its terms! . . . When, therefore, any case arises for disposition under a Code, if it present the features belonging to a class created by it, it must be dealt with the same as other instances in that class, no matter what additional and theretofore unknown features it may present, which ought to subject, and would have subjected, it to a wholly different disposition, had the new features been present to the mind of the codifier. The proposed Civil Code does, therefore, deal with the future and the unknown, precisely the same as with the present and unknown.").

248. *Id.* at 32.

249. CARTER, PROVINCES, *supra* note 2, at 44.

250. *Id.* at 45.

251. FIELD, LEGAL REFORM, ALBANY, *supra* note 2, at 27.

the moment codification begins" was sincere, although it did not spread to Field's flexible scheme of codification. It is apparent that Carter always tended to defend this opposite theory. This tendency caused, however, contradictions and paradoxes in his legal theory. His notion of legal rules is a good example. Probably because Field's proposed codification was based on such general rules, which enabled him to reconcile—to some extent, at least—his code with the judicial common law adjudication of unforeseen cases,[252] Carter sometimes seemed to disregard legal rules. As Grossman accurately notes, "Carter argued that the main problem with codification was the injustice that inevitably resulted when courts applied general rules to particular circumstances."[253] In following this line of reasoning to its ultimate conclusion, he sometimes even rejected legal rules themselves.

Since Carter was aware that general rules constituted the cornerstone of any theory of codification which would not reduce judicial activity to a mechanical application of provisions, he denounced the unfair outcomes which could derive from such a legal method, and made great efforts to emphasize the common law aspects. This led him to present it as the most just legal system in each particular case. In this way he tried to make the common law seem as flexible as possible, thus undervaluing one of the most characteristic common law principles, which both restricted judicial power and provided it with a significant degree of certainty: the principle of *stare decisis*.

Carter's view of *stare decisis* was the logical consequence of his legal theory. If the main goal of the common law system was achieving justice in each particular case, Carter was not concerned whether the law became uncertain. *Stare decisis* could constitute a judicial obstacle to obtaining a fresh outcome in some cases. Carter did not deny this principle, and other code opponents presented it as a clear sign of a "scientific and civilized jurisprudence," granting certainty to the common law system:

> The more nearly we are able to predict what decision will be made by the courts on a given state of facts, the more nearly do we approach to a scientific and civilized jurisprudence. This is the reason for the principle of *stare decisis*, under which the judges are in duty bound to follow previous adjudications. Even the best of judges is liable to errors of judgment. Hence, our elaborate system of appellate tribunals.[254]

Nevertheless, that classic notion of *stare decisis* hurt Carter's argumentation against codifiers, since, after having emphasized the judicial application of the social standard of justice in each particular case as the ideal for private jurisprudence, he could not admit that, in fact, judges were not always able to pronounce a fair judgment because they were "bound to follow previous adjudications." Some code proponents made this point explicitly:

---

252. *See*, FIELD, INTRODUCTION, CIVIL CODE, *supra* note 2, at vii, xvi-xix.

253. Grossman, *Anticlassical*, *supra* note 3, at 34.

254. HORNBLOWER, CODIFICATION, *supra* note 2, at 8.

> Tendency . . . is always to stand by the record past. The main spring of judicial action is the rule *stare decisis*. Hence jurisprudence studied in this way has no centrifugal, no expansive force whatever. It has no provision for contingencies which lie beyond the line of experience. The world has trusted legislatures, not courts, with the power of experiment and the gift of prevision.[255]

Carter was aware that adhering to the principle of *stare decisis* would have made it more difficult to fend off the codifier's proposal, whose supporters explicitly criticized the excessive inflexibility of the common law, due mainly to binding precedent: "Even from the very beginning the Common Law has been inflexible, incapable of expansion, or power to meet new issues."[256]

Carter could not deny the principle of *stare decisis*, but he did in fact minimize it to a great extent.[257] In doing so, he emphasized his ideal of justice and confronted the most radical criticism of the common law made by code proponents:

> The problem to which the judicial mind applies itself is not what judgment will most benefit these parties or the community, nor what will be the most consonant to justice, but what is most nearly in analogy to—most readily derivable from legal provisions previously ascertained. The question the judge asks himself is: *What direction does the existing law require me to give this case? In what path does the inexorable law of stare decisis compel my feet to travel?* No doubt it is pleasing to every judge to find that his conclusions coincide with and gratify his sense of justice, but they are never, or at least rarely, provoked by it. His sense of justice and his performance of duty ride side by side, perhaps exchanging glances of friendship, if not love. But justice does not hold the bridle or prescribe the path . . . Each new statement of rule is founded on a prior statement, not evoked by considerations of present justice, and in turn each earlier rule sprung from something behind it. In searching for the fountains of the unwritten law we never reach a time when *the simple office of applying the standard of justice* was used by any one unless this be found in the earlier ages of English jurisprudence. . . .[258]

According to this view, *stare decisis* constitutes an obstacle to the achievement of justice in particular cases. Consequently, Carter tried to diminish its importance in common law decision-making. How did he manage to do it? By emphasizing that *stare decisis* required subordinate tribunals to follow a judicial judgment only if the case exhibited materially similar aspects, or using his own terms, *stare decisis* has no binding force "in a future case presenting materially different aspects."[259] He adopted the strictest version of the doctrine of *stare decisis*.

Because *stare decisis* is not applicable to novel cases, Carter focused his attention on them, maintaining that almost all the cases which could arise were, in fact, novel: "In the State of New York, each successive day witnesses acts, millions in number, each one of which may, by possibility,

---

255. HOADLY, CODIFICATION USA, *supra* note 2, at 11-12.

256. *Id.* at 12.

257. *See* Grossman, *Anticlassical*, *supra* note 3, at 185 ("To emphasize the contrast between the common law and codification, Carter thus had to downplay the significance of *stare decisis*. Consequently, Carter whittled away the doctrine into insignificance.").

258. HOADLY, CODIFICATION COMMON LAW, *supra* note 2, at 507.

259. CARTER, PROPOSED CODIFICATION, *supra* note 2, at 27.

become the source of dispute, and call for judicial decision, and no two of them be alike!"[260]

By emphasizing the heterogeneity of facts and conditions, Carter made a case for sacrificing certainty for justice, making it clear that "where every case which arises must be decided . . . in accordance with justice," "the ever-varying conditions of the future cannot be foreseen, and consequently cannot be dealt with before hand by written law."[261] Moreover, by declaring "the necessity of enforcing justice in particular instances" as the "imperative" goal which "can be subordinate to no other object,"[262] he was renouncing the certainty of the common law, and therefore, disregarding the principle of *stare decisis*, albeit never denying it explicitly.[263]

Of course he knew that "this was a risky strategy, for the uncertainty of the common law was one of the main themes of codification proponents,"[264] but he was also acquainted with the criticisms of the common law: the rigidity, the inability of expansion, and the lack of power to meet new issues.[265] Carter's focus on justice as the main objective enabled him to present a much more flexible portrait of the common law, although at the cost of opening the door to potentially extreme degrees of uncertainty, and of doing without *stare decisis*, which constituted then—continues to constitute now—one of the most remarkable features of the common law. According to Carter, uncertainty emerged from future transactions, and it was beyond human power to achieve certainty when the law had to deal with future transactions:

> No; it is in respect to future transactions that the great mass of uncertainty in the law is met with. It is with these that the courts are incessantly engaged, and it is here also that the infinite superiority of unwritten law is manifest. Both systems are based upon the wisdom of the past; but unwritten law uses that wisdom as a guide; written law erects it into a dictator. The one in chains; the other is free.[266]

---

260. *Id.* at 36.

261. *Id.*

262. *Id.* at 37.

263. On the contrary, he even praised it at times. For instance, in an assessment of the Louisiana Civil Code, he observed that the drafters were "largely imbued with the principles and methods of the English Common Law, they have looked to that body of jurisprudence, so far as the Code permitted them, as containing the real sources of the law, and have fully adopted its maxim of *stare decisis*. Nothing is more observable than the extent to which the English and American reports and text books are cited as authoritative in that State." *Id.* at 65.

264. Grossman, *Anticlassical*, *supra* note 3, at 188.

265. *See*, e.g., HOADLY, CODIFICATION USA, *supra* note 2, at 12.

266. CARTER, PROVINCES, *supra* note 2, at 36; *see also, id.* at 57-58; CARTER, PROPOSED CODIFICATION, *supra* note 2, at 114 (". . . a large, perhaps the largest, part of the admitted uncertainty and difficulty in our law and its administration, proceeds from causes quite beyond human control. The interpretation of laws, written or unwritten, must forever depend upon human opinion; and uncertainty, variety, and conflict are, and must be, inseparable attendants upon this condition . . . Most of the uncertainty and doubt does not arise in consequence of any failure to settle old questions, but from the perpetual birth of new points of controversy."); and CARTER, ARGUMENT, *supra* note 2, at 4, 18.

This view in fact contradicted his assumption that the judge did not make law. Once he had discarded—or at least undervalued—the principle of *stare decisis* by declaring that the majority of the future cases were new, and plunged the common law into the deepest uncertainty, it became inconsistent to label judicial activity "humble."[267]

Carter focused on the issue of new cases in order to illustrate the unavoidable character of uncertainty, the inexpediency of unwritten law to meet such cases, and the need for court-centered private jurisprudence to attain justice in each particular case. For this reason, although he recognized that "the great mass of transactions of life are indeed repetitions of what has happened before—not exact repetitions, for such never occur—but repetitions of all substantial features," in which the rules applicable were known, he stated that "they arise and pass away without engaging the attention of lawyers or the courts," coming to the conclusion that he needed as a starting point of his legal theory:

> The great bulk of controversy and litigation springs out of transactions which present material features never before exhibited, or new combinations and groupings of facts. It is here that doubt and difficulty make their appearance. It is not that the case is generally wholly new; but the grouping of facts of which it is made new.[268]

It was precisely these different "combinations and groupings of facts" that the judge should examine in order to find, among "several different rules . . . competing with each other for supremacy," the appropriate rule in each particular case. Paradoxically, despite Carter's theoretical resistance to legal rules, in the end his account of legal decision-making consisted precisely in applying the proper rule to the particular case (with its combinations of facts) presented before the judge.[269] After having criticized codification for the inevitable injustice of applying general rules to particular circumstances, and having expressed his rejection of rules themselves, he ultimately could not avoid their use and application. Carter's portrait of a flexible common law concerned with justice in each particular case, and suspicious of legal rules in general, collapsed when Carter, in his *Provinces*, tried to justify that judges, unlike legislators, did not make law because they did not have the same freedom that the latter enjoyed. Otherwise,

---

267. *See*, note 133 and accompanying text.

268. CARTER, PROVINCES, *supra* note 2, at 35; CARTER, IDEAL, *supra* note 2, at 227. On other occasions, he stated just the opposite, namely, "a large number of [judgments] declare that the particular transactions described are like, or substantially like, some other transactions which had previously engaged the attention of the courts and had been decided in a particular way, and the like decision is therefore made in the particular case under consideration; in other words, the case is decided by an appeal to known precedent, or to known precedents." CARTER, ORIGIN, *supra* note 2, at 68-69.

269. CARTER, PROVINCES, *supra* note 2, at 35 ("It is not that no rule is known which is applicable to the transaction; there may be many which have a bearing upon it. . . . The question is not whether the rules are right or wrong; they may all be right; but which must give way to other; or whether a modified and partial operation must not be given to all, or some. It would be a fatal error to force upon such transactions a rule which had arisen out of different ones.").

"they would not in fact be bound, or feel that they were bound, by the pre-existing law. I need not to say the case is precisely the contrary. . . . They must follow the law as it has been before declared; or, if the case has new features, they must decide consistently with established rules."[270]

Despite judges' compliance with "established rules," Carter was convinced that the existing rules of the common law constituted a source by which all future cases, known and unknown, could be covered and fairly resolved. Nevertheless, if such rules were written in a code, their judicial application could not produce fair outcomes because the principal difficulty did not consist "in ascertaining the rules of law, but in applying them to facts," and the latter operation could not be properly done if the rules were written before the facts had actually occurred: "The real difficulty in what is thus termed applying the law is that the facts are not sufficiently apprehended."[271]

Carter assumed that common law rules could produce fair outcomes, not by virtue of their content or doctrine, but because such doctrine had not been written down, and the judges, who knew it, could apply it without being troubled by the interpretation of words expressed before the facts actually occurred.

Yet if the problem was not the rules themselves, why did he tend to disregard them? If, in the end, common-law judges "must decide it consistently with established rules," why would such rules produce fair outcomes merely in virtue of their not having been written down? Was it always possible to pronounce a just judgment by deciding consistently with the "established rules"?

Carter's argumentation, rooted excessively in the necessity to confront the proposal of the codifiers, sometimes changed surprisingly, giving rise to paradoxes and contradictions. As we can see, Carter's portrait of a flexible common law concerned with justice in each particular case, and resistant to legal rules in general, was not consistent with both his own legal decision-making and with his denial of judge-made law.

Hence, it is striking that after having renounced legal certainty in order to give more emphasis to the flexibility of the common law, applicable to the "new combinations and groupings of facts," Carter recognized that sometimes legislation was needed, because society progresses, and "rules which were just necessary at one period of time, and which have been firmly established, become outgrown, and different are needed, better accommodated to existing wants." He was aware that this "necessity" to adapt the common-law rules to changes did not fit with "its inherent flexibility and capacity for gradual change and growth . . . but sometimes a rule becomes established which is rigid in its nature, and courts are not at liberty to abruptly supersede it."[272]

270. *Id.* at 43.

271. *Id.*

272. *Id.* at 53; *see also*, CARTER, IDEAL, *supra* note 2, at 232 ("Society in its progress and development outgrows its old usages and essays to form new ones. The uniformity and persistency at which the judicial office always aims, become a barrier to this development; and

Carter recognized, on the one hand, that a rule, even though not written down, could itself be rigid, and therefore, not applicable to any combination of facts. But he did not recognize that a right judicial interpretation of the content (or doctrine) of a rule, and not its being unwritten or written, is what produced fair outcomes.

On the other hand, it seems clear that his legal decision-making had more to do with the judicial application of particular rules than with an abstract judicial duty to apply the social standard of justice. In fact, when a general or particular rule became obsolete—no matter if it was either because of rigidity or simply obsolescence—the aid of legislation was needed to overcome such inadequacy, given the inability of Carter's common law system to accommodate itself to the progress and changes of human affairs. In these cases, Carter's abstract legal theory concerning both the social standard of justice and the previously mentioned "provisional rules," whose permanent provisional character enabled them to be applied to all kinds of know facts, collapsed. Carter's statement that, "apart from, in independence of, *known facts*, there is no such thing, in human apprehension, as law, except the broad and empty generalization that *justice must be done*," seems indefensible.[273] It was apparent, then, that the common law also had legal rules beforehand, that is, apart from *known facts*, whose rigid or old-fashioned character produced unfair outcomes until legislators "abruptly supersede it." Sometimes Carter's argumentation focused more on criticizing and obstructing any possible scheme of codification rather than on building a defensible theory of the common law. In this regard, his views on the social standard of justice, new cases, know-unknown facts and absolute-provisional rules provide a good example.

As we mentioned above, Carter's real concern was to keep legislators away from private law making. His distinction between written and unwritten law, which enabled him to distinguish between the roles of the legislature and of the judiciary, also lacked consistency. In this context, his notion of "freedom of action" as the distinctive feature of the legislature's activity was not always clear. Depending on the occasion, he stated different views: once he claimed that because the function of making law supposes freedom of action, and the judge was never free, "freedom of action" was the clear distinction between their respective activities; elsewhere, he recognized that, since there was a science of legislation consisting in making absolute political regulations, legislating is not itself free[274]; however, he

---

the need is felt of an agency less fettered by precedent and clothed with a power somewhat resembling the creative function. It is the office of legislation to supply this need.").

273. CARTER, PROPOSED CODIFICATION, *supra* note 2, at 26.

274. CARTER, PROVINCES, *supra* note 2, at 4 ("I do not mean that legislation is itself free from operation of scientific principles. There is, indeed, a science of legislation; but, though allied to the science of jurisprudence, it does not include it, and is quite different from it. It is the science of making absolute political regulations, not of discovering the rules of justice. Legislation is, in one aspect, the opposite of jurisprudence, according to the more precise import of the latter term.).

also defended the view that both the legislature and the judiciary were bound to the social standard of justice:

> [T]here is a standard of justice by which the excellence of the laws may be tested. . . . Were the legislator asked what his ultimate object was in voting to enact any law, he would answer, to secure justice or utility, or expediency, or to conform to his sense of right; and if the judge, when declaring the law in a novel instance, were asked the corresponding question, his answer would be to the same effect.[275]

He emphasized in his conclusion that, "All well conceived efforts to make, or to declare, the law, are, therefore, efforts to apply this public, . . . national, standard of justice to human conduct."[276]

Interestingly, despite Carter's recognition that the social standard of justice constituted the legislature's and the judiciary's polestar in making and declaring the law, courts' decisions in a code system were based not on the social standard of justice, but on the words of a statute (although both institutions, theoretically, pursued the same ideal of justice).[277]

On the other hand, if, as Carter said, the legislature was bound to the same standard of justice as a judge, how could it be stated, then, that the distinctive feature of the legislature was its "freedom of action"? The conclusion should be different: because both were bound to the same social standard of justice, one making the law and the other applying it, neither had real freedom of action. This was not, however, Carter's conclusion, since he preferred to use the expression "declare" the law rather than "apply" it concerning the judicial task.

Carter, by recognizing that "the essential function of making or declaring the law for new cases is the same, whether the work be done by the Legislature, or the judges, consisting, in each instance, in applying the national standard of justice," probably did not realize that this recognition undermined his own previous criterion of the "freedom of action" between the legislature's and the judiciary's activity. Such inconsistency was probably due to the fact that the goal of his argumentation was to resolve his main concern, namely, "the question, whether it should be done by the Legislature, or by the courts, must be determined by the answer to the question, which will do it best. . ." Carter concluded that, while the legisla-

---

275. CARTER, PROPOSED CODIFICATION, *supra* note 2, at 41; *see also* CARTER, PROVINCES, *supra* note 2, at 8, 11; sometimes he continued to use the word "liberty" to describe the legislative activity, but in a different way: the legislator "is at liberty, morally speaking, to make that rule only which is conformity with justice. *Id.* at 8.

276. CARTER, PROPOSED CODIFICATION, *supra* note 2, at 41 ("This national standard, more particularly stated, is the final result of the moral and intellectual life and culture of a nation, the product of all the influences, public and private, which tend to cultivate and develop men's conceptions of what is just, expedient and useful, and which is unconsciously perceived and felt by every individual member of society by reason of the fact that he is such member, and exposed to like influences with his fellows.").

277. *See* CARTER, PROPOSED CODIFICATION, *supra* note 2, at 83 (". . . human language is, at best, so inaccurate an instrument, there being often numerous different senses in which the same word is understood that there are, and always will be, a multitude of doubts concerning the meaning of the best drawn statutes.").

ture, which made the law beforehand, should regulate public law, the judiciary should deal with private law.[278]

Carter contradicted himself again regarding the difference between the activity of the legislature and that of the judiciary, by dropping inconsistent statements in different instances. Furthermore, he was interested, as we have seen, in focusing the discussion on the issue of new cases, whose judicial resolution made it easy for him to emphasize what he considered to be the reason of "the infinite superiority of unwritten law" over the written. In one instance, he surprisingly maintained that, although "both systems are based upon the wisdom of the past"—a statement not consistent with his reiterated reproach against the legislature for its despotism and its biases—the "unwritten law uses that wisdom as a guide; written law erects it into a dictator. The one in chains; the other is free."[279] According to Carter, while legislative enactments constituted a chain, the "unwritten" judicial rules remained freer and more flexible to be applied.

Carter did not conceive of the possibility that legislation could be properly applied by judges, because he thought that such law, even in case of judicial rules laid down in written form, lost their flexibility when being enacted. Summing up, and pushing this argument of Carter to an extreme in order to illustrate better its paradoxical character, it could be said that the legislature enjoyed a large degree of freedom but its enactments constituted a chain: they were not flexible because private law could not be laid down beforehand. On the contrary, the judgments of judges, who had no freedom, were in another sense free because they could be pronounced after careful consideration of the specific facts of each particular case; or, in other words, a judge, in seeking the "unwritten" rule to be applied to the case, would produce fairer outcomes and develop better the private law than if he applied always the same, enacted rule. The main argument of code opponents was that legal rules concerning private law should be applied by judges but not enacted by the Legislature in the form of a code; however, its reasoning appeared not to be fully consistent, but also to agree with code proponents: "Whether formulated by a Code, or illustrated by a precedent, such rules must still be applied to cases as they arise, according to judicial notions of reason and justice."[280]

The fact that Carter was not able to conceive of the possibility that the same rule, or good legislation in general, could be properly applied by judges, producing just outcomes, can be partly explained by Carter's identification of code with statute; the nature, technique, and strict process of interpretation were problematic to him. Yet this is not a full explanation, unless it is added that Carter, in fact, had no intention to conceive of this possibility, since he would never agree to entrust the development of private law in general to the legislators, although he covered up his authentic motives with the legal argument that "the practical business of administering private law consists in the application by the courts of the national

278. *Id.* at 42.

279. *Id.*

280. MATHEWS, THOUGHTS, *supra* note 2, at 21.

standard of justice to the business and dealing of men."[281] This argument was legal, but it was more deeply based on personal and ideological reasons rather than on strictly scientific ones, as his previously discussed inconsistencies, paradoxes and contradictions show.

Indeed, although it is true that statutory interpretation is a complex issue, sometimes code opponents' arguments did not seem to be really interested in answering the question whether or not codification would bring more certain and fairer outcomes. This did not seem to be the point. The point instead appeared to consist in constantly raising new objections, making as clear as possible that, through whatever argument used, codification was neither feasible nor expedient, and that if theoretically expedient, then practically inexpedient, or unfeasible. In this regard, Carter depicted an exaggerated contrast between absolutely certain statutory law and the uncertain common law.[282] In his view, if "most of the uncertainty and doubt does not arise in consequence of any failure to settle old questions, but from the perpetual birth of new points of controversy,"[283] and statutory law should "not attempt to make rules for *unknown* conditions of facts,"[284] since a code was regarded as a statutory-law form, then his conclusion was indisputable: "Codification, surely, is no remedy."[285]

As we have seen, the identification of a code with statutory law, whose general legislative framework and strict judicial interpretation in favor of common-law rules, was well used by code opponents. In refusing the proposed code's rule that "statutes in derogation of the common law are to be strictly construed, has no application to this Code,"[286] they could describe and criticize the code more easily as a rigid, unfair legal tool, whose judicial interpretation would produce so many doubts and uncertainties as some statutes, in fact, did.[287]

However, Field argued that the fact that enacted law would cause

281. CARTER, PROPOSED CODIFICATION, *supra* note 2, at 86.

282. *See id.* at 34 ("In statute law, when limited to its proper subjects and kept within its appropriate boundaries, there is no attempt to make rules for unknown conditions of facts. . . *It* must deal with every case which falls within its general province; it is all-embracing; it must apply the standard of justice *in every instance*. If a man commit what seems to be a wrong action, the statute law must be consulted to learn whether the act is made a crime. If it be not, although the deed may have been one of great moral enormity, justly demanding punishment, it must go unavenged and justice remain unexecuted. This is the evil which society must suffer as the price of that certainty which can be secured only by statutory law. But if a controversy arise between two men concerning the ownership of property, and there be no statute upon the subject, the unwritten law *must*, nevertheless, decide it.

283. CARTER, PROPOSED CODIFICATION, *supra* note 2, at 114; CARTER, PROVINCES, *supra* note 23, at 58.

284. *Id.*

285. CARTER, PROPOSED CODIFICATION, *supra* note 2, at 117 ("For the evils . . . the only remedy lies in direct action against the causes on them. Codification, surely, is no remedy.").

286. FIELD, CIVIL CODE, *supra* note 226, § 2032.

287. *See* CARTER, PROVINCES, *supra* note 2, at 27.

much judicial interpretation was not reason enough to refuse it, giving some remarkable examples:

> Probably no statutes have ever been the subjects of so much judicial interpretation as Magna Charta and the Statute of Frauds; yet who would wish them never to have existed? The Constitution of the United States has been the subject of infinite debate, judicial and legislative, ever since it was promulgated, yet all Americans appeal to it as their guide in peace and their security in war.[288]

Confronting code opponents' criticism that a code would soon be overloaded with glosses and comments in texts, as numerous and contradictory as the cases in the common law, Field called such arguments an overstatement:

> [T]he fact is overstated. There would be glosses and comments of course; but with a common tribunal to settle questions which now occur upon the common law, since the latter regard not merely the meaning but the existence of a rule, the extent of its design, its applicability to our situation, and its policy also.[289]

This broad notion of judicial interpretation of statutory law sounded somewhat odd in the context of nineteenth-century American jurisprudence, since the legal reality was quite different. Trying to face code opponents' argument that the unwritten law would be susceptible of different interpretations, Field admitted that it "may be true," but he contended that it was "no more susceptible of different interpretations when written in a code that when written in reports." He was right, but case reports should not be strictly construed as a statutory code should, according to code opponents and to the mentality of the nineteenth-century American legal tradition. Henceforth, code opponents took advantage of John Pomeroy's work to warn about "the uncertainties and confusion which would spring up in the administration of this code," since "substantially every section of it demands judicial interpretation."[290]

d) Other Remarks on Carter's Common Law Jurisprudence

It is not necessary to reiterate here the main features of Carter's legal theory. Summing up, it could be said that Carter's jurisprudence, to some extent, was built and based much more upon his fierce and passionate resistance to codification rather than on a considered, mature, and scientific reflection about the common law. His argumentation did not aim so much to create a consistent and coherent common law jurisprudence as to emphasize those aspects that attacked the proposal of codification.

Had the New York codification debate not arisen, Carter would most probably have written nothing about common law jurisprudence. Perhaps the same thing could be said about Field, although the latter began to write

---

288. FIELD, SPEECHES, ARGUMENTS, *supra* note 2, at 348.

289. FIELD, LEGAL REFORM, ALBANY, *supra* note 2, at 29; he further added: "This objection, moreover, is inconsistent with the first objection which I answered [(regarding the code's inflexibility)]; for if there are to be so many commentaries and different interpretations, the text and the comments will soon come to have that flexible character which is thought by some to be so beneficial an element of the common law." *Id.*

290. CARTER, ARGUMENT, *supra* note 2, at 25.

on legal reform twenty years earlier than Carter.[291] Both were outstanding lawyers, not scholars. Moreover, the codification debate primarily engaged legal practitioners.

Carter's argumentation was aimed at defeating Field's attempt to codify New York's private law. He wrote *The Proposed Codification of our Common Law* when he realized that the governor's veto to Field's proposal had "only scotched the snake, not killed it."[292] In refuting Field's proposed code, he chose to undertake his main purpose using scientific argumentation,[293] but his arguments revealed other motivations beyond mere legal scientific reasoning. In this regard, and leaving aside his deep distrust of politicians in general, and of the legislature in particular, Carter's references to Field are frequent,[294] and sometimes remarkably charged.[295]

Carter's portrait of the main purpose of the Code proposed by Field did not always match Field's own statements.[296] Debates on both sides talked past each other.

Despite Carter's role as a practicing lawyer, and therefore his reluctance to legal theory, he realized that the codification proposal should be defeated through scientific argumentation.[297] Furthermore, since code proponents and some opponents of the code proposed by Field believed in the compatibility between common law and codification,[298] Carter's main scientific argument needed to be consistent enough to be able to confront successfully Field's attempt, as well as any other scheme of codification.

He firmly believed that a theoretical and scientific approach to jurisprudence could be better undertaken by practicing lawyers rather than by legal scholars. In his argumentation he tried to emphasize theoretical reasoning and jurisprudence as a science, but from the perspective of someone acquainted with the practical dimension of the law. In this regard, he criticized some theories for being too abstract, in particular if they came from

---

291. As far as I know, Field's first published work was a series of five articles, entitled "The Completion of the Civil Code, written for the *New York Evening Post*, December 1850. Carter's first publication—*Proposed Codification, supra* note 2—appeared in 1884 .

292. CARTER, PROPOSED CODIFICATION, *supra* note 2, at 10.

293. *See* CARTER, PROVINCES, *supra* note 2, at 46 ("My main purpose—that of demonstrating (. . .) that the unwritten law [has] separate and distinct provinces, and especially that unwritten law is a science to be cultivated by study, and not a subject for legislation—has now been accomplished.").

294. *See*, e.g., CARTER, PROPOSED CODIFICATION, *supra* note 2, at 11, 21, 22, 23, 25, 28, 40, 41, 44, 46, 94, 96; and CARTER, ARGUMENT, *supra* note 2, at 7.

295. *See*, e.g., CARTER, PROPOSED CODIFICATION, *supra* note 2, at 11, 40. *See also*, Masferrer, *Passionate Discussion, supra*, note 1.

296. *See*, e.g., *id.* at 10, 12-13, 21-24; and CARTER, ARGUMENT, *supra* note 2, at 1, 6-7, 13-14.

297. CARTER, PROPOSED CODIFICATION, *supra* note 2, at 10 ("Their pursuits, more than those of the practicing lawyer, lead them to contemplated the law as a science, and to survey it as a system.").

298. *See*, e.g., FIELD, SPEECHES, ARGUMENTS, *supra* note 2, at 307, 329, 347; FOWLER, CODIFICATION, *supra* note 2, at 14-15, 52-53; Crystal, *Codification, supra* note 3, at 269-270; and Englard, *Li, supra* note 117, at 13-15.

non-practicing lawyers. Sometimes he disqualified other views for being too practical and scientifically inconsistent.[299] In general terms, it can be said that Carter disregarded and undervalued the argumentation of code proponents for their excessively theoretical approach.

When Carter was dealing with the feasibility and expediency of codification, he sought support from John Austin and Sheldon Amos, who, despite being strong believers in some features of codification, also pointed out the failure of previous attempts at codification. Nevertheless, because they argued that those failures did not disprove the feasibility and the expediency of codification, Carter argued that Austin and Amos were too theoretical, and were not able to rectify their conclusions in the light of the evidence.[300]

Carter asked himself why, if experience showed the failure of any attempt of codification, there were still "learned and scientific jurists" who advocated such a policy. In answering this question, and referring to Jeremy Bentham, he asserted: "He was a man of pre-eminent intellectual ability, but not an experienced lawyer, or a safe guide upon any subject. . . He imagined that a system of law could be created. . . ."[301] In Carter's view, while Bentham was a non-experienced lawyer who "imagined," the position of other advocates for codification could be explained by considering the fact that "their views are doubtless largely affected by their studies in that [Roman Law] field of jurisprudence. They find there a system, the want of which they lament in the Common Law."[302]

Confronting the criticism from codifiers that "the Common Law is destitute of System," Carter argued that the lack of *orderly and scientific form* did not require any codification to be solved, and that their opinion indeed revealed the point of view from which figures like Austin and Amos looked upon that matter, being "the views of professors of law, . . . not . . . those of lawyers and judges. . . ."[303]

Indeed, Carter claimed that private jurisprudence was a science whose proper development and natural growth should be entrusted to the experts, namely judges[304]—not legislators—since they were the only ones

299. *See* CARTER, PROPOSED CODIFICATION, *supra* note 2, at 94-95.

300. *See id.* at 62-63 ("It is indeed a common failing of those whose knowledge of any science is gained by studies in the closet, and has never been corrected by an acquaintance with its practical application, to insist upon the conclusions of their theories, against the evidence of the facts. The true course in such cases is to consider the theory, with the view of ascertaining whether come material factors in the problem have not been overlooked, or some error committed in weighing the value of those which have been taken into account.").

301. *Id.* at 70.

302. *Id.* at 73.

303. *Id.*

304. *Id.* at 88-89 ("(1) It is agreed on all hands that private jurisprudence is a science; whence it follows that it can be cultivated, developed and advanced only by the masters of that science. (2) It is also agreed that a legislative body consisting principally of laymen, possesses no single qualification which enables it to prosecute the cultivation and improvement of this science, and its adaptation to human affairs."); *see also* CARTER, PROVINCES, *supra* note 2, at 49 ("The question is, shall this growth, development, and improvement of the law

who could attain justice in each particular case and also guarantee the necessary stability in the administration of justice: "Next to absolute right, stability is the chief excellence in jurisprudence. So long as the law remains in the custody of the courts, it will possess this merit. It never can be secured if private law should be reduced to statutory form."[305]

Carter's claim about stability revealed what he feared if the private law would fall into the legislators' hands: "Unnecessary and unwise changes will be sought from personal and unworthy motives."[306] His reluctance did not proceed only from the fact that the law would be constantly amended, which he criticized and considered to be one of the evils of codification, but also from the biased and inappropriate reasons that could motivate such amendments. His distrust of the legislature emerged here again. In addition to justice and stability, the third aim of private jurisprudence for Carter was uniformity.

Carter's views on the stability and uniformity of the law are also somewhat surprising and, to some extent, even paradoxical. He declared that both aims, besides justice, could be better attained by judges rather than by legislators. Concerning uniformity, he contended that the common law, in fact, unified the law of the whole country and secured the unity of private law for all English speaking States. Despite his recognition that "the popular standards of justice in different States and nations . . . are yet in many respects different, and lead to the adoption of different rules," because "right, reason and justice are . . . everywhere the same. . . , the progress of civilization acting upon the courts under our present system is continually aiding this approach to unity."[307] Carter's purpose with such an idealistic view of the common law as the unifying legal source of all the States and nations was to point out that the "Codes, each different from every other, without any conceivable agency for bringing then into unison," would be a great mischief.[308] Sometimes he argued that the language of statutes would hinder the desired legal unity: ". . . unison must of necessity cease when the courts, instead of founding their judgments upon principles which must be everywhere the same, are obliged to base them upon the language of statutes which may everywhere be different."[309]

---

remain under the guidance of men selected by the people on account of their special qualifications for their task, aided by the whole of a learned profession, or be transferred to a numerous legislative body, disqualified by its constitution and character for the discharge of this supreme function?").

305. *Id.* at 50.

306. *Id.*

307. CARTER, PROPOSED CODIFICATION, *supra* note 2, at 91; CARTER, PROVINCES, *supra* note 2, at 51; Leonard Jones agreed with Carter, saying that statutory enactments had contributed to diversifying the law, while the common law produced a unifying effect: "The wonder is that the common law system through statutory changes did not become more diverse and discordant in the several States than it is; though the common law when left alone tends to unity throughout all States and countries in which it prevails." Jones, *Uniformity*, *supra* note 2, at 549.

308. CARTER, PROPOSED CODIFICATION, *supra* note 2, at 92.

309. CARTER, PROVINCES, *supra* note 2, at 52.

He firmly believed in a uniform customary law—or social standard of justice—present in all States and nations (I suppose he was thinking particularly in the English speaking countries), although he never could prove such customary uniformity, and yet he was not able to perceive the unifying power of the laws enacted by the legislature when he knew that, as in many European countries, that had been the main impetus for codification.

Nevertheless, he recognized that sometimes the aims of stability and uniformity required the aid of legislation, inasmuch as "in the natural course of the business of men there is a tendency to create artificial rules . . . and those rules of law which require transactions to be evidenced in writing . . . are essentially *arbitrary*; and what is *arbitrary* is of course *known*, and may be stated with certainty in writing." Carter admitted in these cases, then, the need for intervention by the legislature, concluding that:

> Courts, in applying the social standard of justice, sometimes need artificial *instrumentalities*. These are often furnished by the customs of business; but must sometimes be supplied by the Legislature. . . But the attempt should be made with caution. So far as the rules are technical and arbitrary, the process may be safe and useful; but when they cease to be such—when justice becomes of more importance than simplicity and uniformity of method—the experiment becomes hazardous.[310]

Although Carter's theory about the two provinces of the law was clear, in practice he admitted that sometimes the boundary separating them was not so clear. Furthermore, he also agreed that some specific matters concerning private law could be properly regulated through legislation. Such irresolution led Field to ask Carter what was the exact part of the law that could not be codified, since, according to historical experiences, several parts of private law like real property, partnership, law of negotiable paper, and commercial contracts had been already subjected to statutory enactment.[311]

If the main problem was maintaining private law under the custody of the courts, because judges were the best qualified to develop the law and to make it grow, it was coherent to hold that the lack of an "orderly and systematic form, is not, of itself, a very serious matter." According to his view, the fact that the rules were not arranged in that form did not concern "the law, but rather to the treatises upon the law, in other words, to the literature of the law," and such work "does not require legislation; indeed, it is one in which legislation is wholly out of place."[312] However, Carter contradicted himself later when he stated that a digest "would be of priceless value to the world" precisely, among other reasons, for its "systematic form":

---

310. *Id.* at 54-55.

311. Field, *Short Response*, *supra* note 2, at 2-3, finishing his reproach with these words: "Tell us, then, what other subject is that on which the rules of the common law cannot be written down with method and precision. Until you can tell us this, pray do not declare against codification."

312. CARTER, PROPOSED CODIFICATION, *supra* note 2, at 73.

> A book containing a statement in the manner of a *Digest*, and in analytical and systematic form of the whole unwritten law, expressed in a accurate, scientific language, is indeed a thing which the legal profession has yearned after. . . Such work would not, indeed, supersede the treatises and reports, or diminish the necessary size of libraries; but it would, by facilitating, *save* labor.[313]

Since he reiterated this same idea several times, it is clear that, in spite of his first statement, he actually regarded the disarray of the common law as an important matter. Regarding the preparation of a good Digest, he declared: "Such a work, well executed, would be the *vade mecum* of every lawyer and every judge. It would be the one indispensable tool of his art."[314] Furthermore, in suggesting some possible lines to improve the common law, he mentioned expressly the necessary "work of preparing treatises and digests": "Third; the employment of men of the highest ability and attainments in law schools, and in the literary work of preparing treatises and digests."[315]

Tellingly, Carter did not mention among the three necessary requisites for achieving such improvement of the common law, the benefits of improving legislation in general, or some specific aspect of statutory law in particular. After having criticized legislation,[316] he then had hardly anything to say for its improvement.[317] The only thing that he really cared about was that "legislation should be restricted to its just province, that of public law, and should not attempt to deal with those scientific problems of private law which are beyond its power to solve."[318]

From his own point of view, it is understandable that Carter asserted that an "orderly and systematic form" was not a very serious matter, even though it was convenient. Much more serious was to keep the legislature away from "scientific problems of private law," and to maintain this province under the custody of the courts, "learned, incorruptible, and diligent judges, aided by a learned, faithful, and diligent bar."[319]

Carter regarded treatises and digests as the best tools to face the disarray of the common law without causing any legislative interference in the private jurisprudence. He insisted and remarked several times that such measures would not require any legislative enactment,[320] thus avoiding to "engage the attention of the courts," so that "the new problems which spring from human activity . . . would be resolved in conformity with justice."[321]

---

313. CARTER, PROPOSED CODIFICATION, *supra* note 2, at 96-97; CARTER, PROVINCES, *supra* note 2, at 45-46.

314. CARTER, PROVINCES, *supra* note 2, at 46.

315. *Id.* at 59.

316. CARTER, PROPOSED CODIFICATION, *supra* note 2, at 116.

317. *See* CARTER, PROVINCES, *supra* note 2, at 59.

318. *Id.*

319. *Id.*

320. *See* CARTER, PROPOSED CODIFICATION, *supra* note 2, at 97; and CARTER, PROVINCES, *supra* note 2, at 46.

321. CARTER, PROVINCES, *supra* note 2, at 59; *see also* CARTER, PROPOSED CODIFICATION, *supra* note 2, at 97.

It is apparent that Carter's rejection of codification was due to his main idea that the unwritten law should be developed and improved under the custody of the judges, who possessed the requisite expertise. However, Carter never explained consistently why judges were better experts in private law than legislators. On the contrary, after portraying common law as based on a "social standard of justice that grows and develops with the moral and intellectual growth of society," he contended that such law should be "ascertained and made effective by the judges, who know it and feel it because they are part of the community."[322] Of course legislators were also part of "the community," but we already know Carter's views and feelings toward them. In any case, such arguments were not at all consistent.

In this respect, his main legal, or scientific, argument to justify—or, at least, to explain—the priority he grants to judges over legislators was then based exclusively on the fact that the former, in applying the law to each particular case, and considering all the facts, foreseeable and unforeseeable, knowable and unknowable, would produce fairer outcomes than enacting rules beforehand, which would then be subject to a rigid and strict judicial interpretation and application. Carter was aware that this was his best argument and, consequently, he emphasized it and insisted on it as much as possible.

In fact, despite all the contradictions and paradoxes we have mentioned, it was an appealing argument, and it was attractive partly because it was both historical and idealistic, typical of the nineteenth-century romantic movement, which tried to combine the scientific method to the study and exaltation of one's own culture and tradition.

III. CONCLUDING CONSIDERATIONS: NOTES ON THE SIGNIFICANCE OF THE NEW YORK CIVIL CODE DEBATE FOR AMERICAN LEGAL HISTORIOGRAPHY

American legal historiography has tended to regard the failure of Field's New York Civil Code as a decisive event in the American legal tradition. Wagner argued that "had the executives' veto not been exercised, the whole idea of codification of law might have prevailed throughout the United States."[323] In the same line of reasoning, Reimann declared:

> The failure of private law codification in New York was an important event in American legal history. Given the New York role as a legal jurisdiction, it is arguable that a victory of the Civil Code would have greatly strengthened the cause for codification nationwide, and that the defeat greatly weakened it.[324]

Less clear are the reasons for defeat, although "the precise cause of the substantial failure of the 19th century codification has been much

322. CARTER, PROVINCES, *supra* note 2, at 48.

323. Wagner, *Codification*, *supra* note 3, at 353.

324. Reimann, *Historical*, *supra* note 3, at 106; he added: "This does not mean that had Carter and his Savignian ideas not prevailed in New York, American private law would be codified today."

speculated over."[325] Moreover, different explanations have been given to explain why Field's proposed Civil Code failed: the historical reluctance in American law to enact civil-style codification with the dichotomous structure of the common law (law and equity); the insufficient methods of developing legislative texts and interpretation; lack of the historical and political circumstances typical of European countries; no need to clarify and to systematize the common law at that moment, since the writings of James Kent and Joseph Story had provided a more stable basis for the common law in the mid-nineteenth century; and, finally, the conservatism of the legal profession.[326]

In my opinion, the main reason for the failure of Field's attempt to codify the private law in New York was the intelligent and fierce opposition of the Bar Association of the City of New York, led by its most outstanding figure: James C. Carter.[327] But that was not the only reason. Since Field and Carter were the main protagonists of the codification debate in the United States from 1884 until 1894,[328] the final fate of the proposed New York Civil Code reflected the triumph of Carter's legal argumentation over Field's. Despite the paradoxes in Carter's legal theory, he succeeded in persuading the institutional authority (governors) to deny final approval to Field's Code, even after it had already been passed twice by the legislature.[329]

Carter's argumentation was also based on distrust toward the legislature for their lack of ability and competency. As Wienczyslaw Wagner observes: "The problem of codification was, of course, strictly connected with the confidence in the ability and competency of the legislative branch of the government, and the fate of codification, the supreme form of legislation, was dependent upon the success or failure of the legislature."[330] Wagner went further, contending that the majority of the American legislatures were, at that moment, "unable to cope adequately not only with the problem of codification but also with the enacting of important and good statutes." And when they sometimes achieved "good and well-prepared

325. Fisch, *Dakota Civil Code*, *supra* note 15, at 53.

326. All these reasons are presented and discussed by Weiss, *Enchantment*, *supra* note 3, at 509-511.

327. For further discussion, *see* Masferrer, *Passionate Discussion*, *supra* note 1; and Grossman, *Anticlassical*, *supra* note 3, at 155 ("Field's codification campaign failed in New York State largely because of the energy, passion, and talent of the opponents of codification there. The leader of this opposition was James Coolidge Carter, an extremely prominent legal figure in the late nineteenth-century—perhaps the most famous lawyer of his era."); *see also* Crystal, *Codification*, *supra* note 3, at 255; and Gruning, *Différence*, *supra* note 3, at 183.

328. *See* Reimann, *Historical*, *supra* note 3, at 101; and Fisch, *Dakota Civil Code*, *supra* note 15, at 19.

329. An overview on these events can be seen in Hoy, *Field*, *supra* note 3, at 159-163; LANG, CODIFICATION, *supra* note 3, at 144-148; and Fisch, *Dakota Civil Code*, *supra* note 15, at 15-25.

330. Wagner, *Codification*, *supra* note 3, at 355.

enactments . . . , the courts often annulled them" by using different methods.[331] William Fisch echoes this view, arguing that "the American legislature, popularly elected and without technical expertise, was not competent to do the job of codifying or of maintaining the vitality and integrity of a code once adopted."[332] And when codes were actually enacted, "State legislatures were still inexperienced at updating and revising the codes."[333] Although Carter's disregard toward legislators was also due to corrupt character,[334] he was fully aware of the legislature's technical shortcomings in drafting, updating and revising legislative enactments, and he made good use of this undeniable fact in his legal argumentation.

Legal historiography has emphasized that the main source of inspiration of Carter's jurisprudence was F.C. Savigny, the leader of the German Historical School. In doing so, Reimann pointed out some of the elements which Carter borrowed from Savigny, namely the appeal to custom as the source of law (or social standard of justice), the use of science (*Wissenschaft*) as a tool against codification, the value of the law as a science whose development principally concerned lawyers, etc. As Reimann noted, Carter even followed Savigny's method in specific argumentative strategies. For instance, as we have seen, "Carter, like Savigny, extensively criticized already existing codes in order to prove them failures."[335] In this regard, it is true that "Savigny's theories contributed to a second defeat of codification, two generations after their birth and in a common law country many thousands of miles from home."[336]

Nevertheless, the differences between Savigny's and Carter's legal theories were numerous and deep.[337] Reimann himself proved accurately that Carter's methodological conceptions "share little with Savigny beyond the mere label."[338] In fact, Carter's use of Savigny's legal theory to argue against any kind of codification was more tacit than explicit, since he realized that Savigny's jurisprudence not only did not preclude codification in theory, but also provided a scientific foundation for carrying it out. Tellingly, Fowler proved to have better knowledge of the German Historical School than Carter,[339] and code proponents, in fact, invoked German efforts at

---

331. *Id.*

332. Fisch, *Dakota Civil Code*, *supra* note 15, at 53. He adds: "Certainly to the extent that the debate over codification resolved itself into arguments over the relative merits of legislatures and judges as lawmakers, the influential writers and commentators were not prepared to give the nod to the legislatures. The polemics of the New York City Bar Association and especially of Pomeroy in California show little confidence in legislators in this respect." *Id.*

333. Crystal, *Codification*, *supra* note 3, at 260.

334. Grossman, *Carter*, *supra* note 3, at 595-598, 614-626.

335. Reimann, *Historical*, *supra* note 3, at 103.

336. *Id.* at 107.

337. *See* Reimann's discussion, *id.* at 101-111.

338. *Id.* at 110.

339. *See* FOWLER, CODIFICATION, *supra* note 21, at 35, 52, 62-63.

codification on their behalf.[340] Carter, on the contrary, hardly quoted Savigny's work,[341] and preferred not to mention the German Civil Code, which was about to be enacted.

It is true that "one must not mistake connection for identity." Hence, if "a closer look reveals that there is actually quite significant difference between their arguments,"[342] it is pertinent to ask what non-scientific reasons led Carter to adopt such a scientific label to fight against the New York Civil Code. First of all, Carter saw that Savigny had succeeded in putting Thibaut's legal project off for about a half-century. Furthermore, inasmuch as Carter intended to prevent any important changes in the private lawmaking process by exalting the American legal tradition as a part of the American culture, Savigny's legal theory constituted the most remarkable European example of such an achievement. Furthermore, "Savigny . . . popularized the notion that the law was a science in the modern sense, that is, not scholastic but empirical, not deductive but inductive."[343]

There was another aspect which linked Savigny and Carter's enterprises. Both Savigny and Carter built and used their jurisprudence much more as a means to avoid something they feared and detested rather than out of scientific concern with their respective legal systems. In this sense, it is probable that neither of them would have engaged in such a scientific enterprise if they had not had to confront both their opponents and their opponents' views. If it is hard to believe that Savigny would have done what he did without Thibaut and his heated confrontation with him, it is even harder to imagine Carter, an outstanding practicing lawyer, engaged in a scientific discussion, writing and publishing on legal theory, without the appearance of Field's proposed Civil Code for New York. On the one hand, "beyond the professional interests in the codification struggle, personal motives played a role for both Savigny and Carter"[344]; on the other, since their main motivation was not scientific, they both built an idealistic legal theory directed much more at confronting and defeating their respective opponents' jurisprudence rather than at constructing a realist legal theory to improve the law.

Consequently, even from a strict scientific point of view, their main concern was not what it seemed to be, or what they pretended it to be. In this regard, it has been accurately suggested that Savigny's real concern was not so much that a people not be governed by a premature codifica-

340. *See* Field, *Codification, Answer, supra* note 2, at 262; Freund, *The Proposed German Civil Code*, 24 *Am. L. Rev* 237 (1890); FOWLER, CODIFICATION, *supra* note 2, at 30. Code proponents recognized that code opponents based their argumentation on Savigny's legal theory. *See* FOWLER, CODIFICATION, *supra* note 2, at 35, 52, 62-63. Interestingly, Field and Fowler, in their turn, hardly quoted and scarcely relied on Thibaut. *See* Field, *Codification, supra* note 2, at 264; FOWLER, CODIFICATION, *supra* note 2, at 63.

341. *See* CARTER, PROPOSED CODIFICATION, *supra* note 2, at 41.

342. Reimann, *Historical, supra* note 3, at 105.

343. William B. Fisch, *Civil Code: Notes for an Uncelebrated Centennial*," 43 *N.D. L. Rev.* 485, 496 (1966-1967) [hereinafter Fisch, *Civil Code Uncelebrated*].

344. Reimann, *Historical, supra* note 3, at 495.

tion, as that Germany not be governed by a French code.[345] Similarly, Carter's authentic concern was not so much with a private law based on custom (or social standard of justice) and fairly applied by judges, as with a legislature involved in private lawmaking, thus avoiding the paths of other European countries, in particular France, in enacting modern codes.

Such interested and biased approaches to the law, while in the guise of being scientific, explain, to a great extent, their resulting idealist legal theories and, at the same time, their contradictions and paradoxes. The German scholar Paul von Koschaker has provided clear evidence of the contradictions in Savigny's legal theory.[346] Carter's paradoxes have also been examined in this work and in Grossman's works.[347]

Carter defeated Field's Civil Code in New York. Several reasons have been given to explain it, but it is not easy to arrange them in order of importance. Fisch argues that Carter's empirical and inductive notion of science, borrowed from Savigny, constituted the main "weapon that ultimately defeated Field's Code in New York."[348] Reimann points out that "Savigny's ideas played an important role in the defeat of the New York Civil Code."[349]

I agree with them to some extent. First of all, it is clear to me that the defeat of Field's Civil Code was due most directly to Carter's ability to persuade the inexpediency of such legal reform in the context of the examined legal debate.[350] Furthermore, I have shown that the codification debate was more passionate than scientific. The essence of the matter is that Carter was more persuasive than Field. Savigny provided Carter with a source of legal reasoning and inspiration that allowed and helped him to defeat Field's attempt, even though Savigny's and Carter's legal theories presented numerous and important differences. However, since the scientific aspect was neither the only one nor the most important one,[351] Carter's merit consisted principally in developing fully the potential of some Savigny's

345. PAUL VON KOSCHAKER, EUROPA UND DAS RÖMISCHE RECHT 258-259 (1947).

346. *See id.*

347. *See* Grossman, *Carter, supra* note 3; and, Grossman, *Anticlassical, supra* note 3.

348. Fisch, *Civil Code Uncelebrated, supra* note 343, at 496.

349. Reimann, *Historical, supra* note 3, at 106.

350. *See* Christina Boerner, *The Institutional Backgrounds for the Field Civil Code in New York* (1865) *and California* (1872), 1:3 GLOBAL JURIST Article 3 (Available at: http://www.bepress.com/gj/advances/vol1/iss3/art3). Even though suggestive, I do not agree with Boerner, who contends that Field's Civil Code "was not enacted because of the institutional setting at that time." She missed, among others, Grossman's work on the California Civil Code, which may have been helpful to her historical and social approach.

351. I agree with Reimann, who suggests that Carter, and many of his contemporaries, probably lacked "an understanding of Savigny's sophisticated concept of *Rechtswissenschaft*, [and] interpreted it differently." Reimann, *Historical, supra* note 3, at 110. Fowler possessed a better understanding of the German Historical School. He was very interested in German jurisprudence, particularly in the dispute between Savigny and Thibaut, with which he dealt more deeply, extensively, and explicitly than Carter. *See* FOWLER, CODIFICATION, *supra* note 21, at 35, 52, 62-63.

ideas. For example, Carter developed the anti-legislative and anti-democratic aspects of Savigny's ideas.[352]

Carter also developed the patriotic—or nationalistic—aspect of Savigny's legal theory, so much, that, unlike the antebellum codification movement,[353] the debate revolved mainly—sometimes tacitly, sometimes explicitly—around the rivalry between civil law and common law systems, or between the Anglo-American and the European legal traditions. Carter succeeded in presenting Field's attempt as a drastic and dramatic legal measure, as if enacting a civil code would sweep the common law away wholesale, and replace it with a foreign legal system. Carter succeeded in presenting himself as a defender of the American legal heritage, while portraying Field as a presumptuous lawyer who threatened to abolish one of the most remarkable accomplishments of American culture. Even though it is clear that Field did not attempt to do this, and that the substance of his Civil Code was "overwhelmingly . . . that of the common and statutory law of New York in the 1860s,"[354] Carter eventually succeeded in depicting a rather different image of Field and his proposal.

Code proponents, of course, tried to oppose it, although it was not easy. Moreover, they needed to criticize and show the common law's shortcomings and defects in order to persuade jurists, politicians, and public opinion of the necessity of codification. In fact, they succeeded to a great extent, as Field's proposed Code was approved twice by the New York Legislature.

Code proponents, like some antebellum codifiers, also showed their attachment to the American tradition inasmuch as they complained about the excessive dependence of the American legal system on English law, and tried to present legal reform as an effective way to get rid of the English heritage. Fowler boasted the "genius" of America and its "distinctively American institution[s],"[355] and, by emphasizing the immense "difference between the essentials of English and American jurisprudence,"[356] encouraged American lawyers "to become legally as independent of England as

352. *See* Reimann, *Historical, supra* note 3, at 116.

353. *See* Cook, *Codification, supra* note 3, at 5.

354. Reimann, *Historical, supra* note 3, at 116; *see also* Wagner, *Codification, supra* note 3, at 348-349.

355. FOWLER, CODIFICATION, *supra* note 2, at 60-61: "But we should not forget that the genius of this country, notwithstanding many debased exceptions, has exhibited itself in legislation. Nearly every single distinctively American institution, either in the region of public or of private law, is due to legislation, not to the action of the judicature. Is not then the true American policy to perfect that which is natural rather than to return to the methods of either Roman or Anglican legal development?".

356. FOWLER, CODIFICATION, *supra* note 2, at 58-60: "The mere fact that the English have not arrived at a codification of the *ius privatum* division of their susbstantive law is due to several cause, none of which apply here. . . It is poor counsel to Americans to await at this day the result of pending British reforms for the English have ceased to afford us a parallel . . . the real difference between the essentials of English and American jurisprudence is immense, and it would be as wise for us to wait for England before entering upon an era of practical codification of the *ius privatum* as it would be to await the ressucitation of the Indo-European cult which has been jocosely proposed by one active partisan of Mr. Carter's committee. . . ."

we are politically."[357] Similarly, Hoadly lamented that common law lawyers "live too often intellectually in England, and not in the world," and suggested that they "present to the world a new people, an American people, not an English . . . people."[358] He criticized common law lawyers' narrow "intellectual map,"[359] and their conception of the law as "a set of rules founded on the customs of his English ancestry."[360] W.H.H. Russell also made clear the same point in the State of California.[361]

Besides, their approach to codification was as much speculative, or merely theoretical, as historical. Indeed, they presented the common law as a "single phase of jurisprudence,"[362] and the code, not as the result of an abstract and intellectual effort unconnected with the American legal tradition, but as a result of the natural growth, a historical "precipitate."[363] In spite of the code opponents' efforts to link codification with tradition,[364] they did not succeed in presenting the code as a legal source "novel in its form," but with "no element of arbitrary or original mandate . . . concentration of what has preceded; the stating not the making of law."[365]

Carter and his disciples succeeded so much that even today American legal history tends to reflect more closely Carter's depiction of Field's attempt rather than Field's actual proposal. In this regard, it has been accurately recognized, for example, that "the argument for which the opposition to Field remains best remembered in the jurisprudential literature . . . is that which denied the propriety of any codification of the common law,"[366]

357. FOWLER, CODIFICATION, *supra* note 2, at 45-49, 55-56.

358. HOADLY, CODIFICATION USA, *supra* note 2, at 24; HOADLY, CODIFICATION COMMON LAW, *supra* note 2, at 496-497.

359. HOADLY, CODIFICATION USA, *supra* note 2, at 499 ("France and Germany and Italy and Spain and Scotland, South America and Mexico, even Louisiana and Texas are not on his intellectual map; these are to him undiscovered continents, waiting the revelation of some legal Columbus. The Institutes and the Digest of Tribonian and his associates, the Partidas of the wise Alfonso have no place in his library. Gaius and Ulpian, and Pampinian and Mostesquieu, Savigny and Von Ihering are to him names without meaning.").

360. HOADLY, CODIFICATION USA, *supra* note 2, at 500 ("There is very much in the environment of such student and lawyer to justify the provincial character of his thoughts. His training has been like that of the Flathead Indians—it has compressed his brain with common-law bandages, even to the extent that the eyes of his mind have become inverted, and look only backwards. His daily reading confirms his first impressions. To him law is a set of rules founded on the customs of his English ancestry . . .").

361. *See* Russell, *California*, *supra* note 2, at 294.

362. FOWLER, CODIFICATION, *supra* note 2, at 8.

363. HOADLY, CODIFICATION USA, *supra* note 2, at 11.

364. *See* Wagner, *Codification*, *supra* note 3, at 348-349, who, referring to Field's attempt, wrote: ". . . but his concept was far from being revolutionary. He did not intend to discard the whole tradition and achievements of the common law and create a completely new legal system, unconnected with the realities of society in which it was to be in force and founded merely upon purely theoretical speculations. He believed in the common law which he considered to be based upon natural justice, but he was convinced that this common law should be thoroughly revised and codified so as to constitute a coherent and logical whole. In short, his approach to codification was historical."

365. HOADLY, CODIFICATION USA, *supra* note 2, at 26-27.

366. Fisch, *Dakota Civil Code*, *supra* note 15, at 21.

missing the different approaches toward codification.[367] If it would be false to deny that there were different classes of opponents to codification,[368] it is also "erroneous" to assume "that the codification movement and the attitude of the legal profession toward codification were monolithic."[369]

Despite the efforts code proponents made to show the compatibility between the common law and Field's Civil Code, Carter succeeded in presenting the opposite, and today, some scholars continue to contend that Field intended to enact a code that mirrored those of civil law countries,[370] sometimes simply basing such a contention on the code as a formal legal source,[371] without paying much attention to Field's actual proposal. In other words, although Morriss concluded that "the code opponents' vision of the common law is largely lost from the American legal system today,"[372] some legal scholars continue to present the codification of the common law as a kind of rivalry or confrontation between common law and civil law systems.[373] In this regard, some contemporary comparativists, such as Pierre Legrand, maintain this view: "To promote this adoption of a European Civil Code is arrogant, for it suggests that the civilian representation of the world is more worthy than its alternative and is, in short, so superior that it deserves to supersede the common law's world-view."[374]

I do not mean that comparativists' current literature is directly based on code proponents' defense of the common law, but I do mean that some American comparativists have sometimes reinforced the incompatibility between codification and common law, and confirmed—tacitly or, sometimes, even explicitly—Carter's radical depiction of Field's attempt at codification as consisting of sweeping the common law away and replacing it with a written civil code, typical of civil law countries.

American comparative law has two very well known works which, to some extent, have portrayed this incompatibility between codification and the common law: *The Civil Law Tradition*, by John H. Merryman, and *Oracles of the Law*, by John P. Dawson.[375] These works, although con-

367. *See* Crystal, *Codification, supra* note 3, at 269-272.

368. *See* AMOS, CODIFICATION, *supra* note 36, at 6-8; Crystal, *Codification, supra* note 3, at 256-259, 269-272; Englard, *Li, supra* note 117, at 13.

369. Crystal, *Codification, supra* note 3, at 269.

370. Rudolfo Batiza, *Sources of the Field Civil Code: The Civil Law Influences on a Common Law Code*, 60 *Tul. L. Rev.* 799, 815 (1986).

371. *See* Reimann, *Historical, supra* note 3, at 100; Head, *Codes, supra* note 3, at 78-79.

372. Morriss, *Answers, supra* note 3, at 389.

373. *See* Brian Simpson, *The Common Law and Legal Theory*, in LEGAL THEORY AND COMMON LAW 8, 15 (William Twining ed., 1986); and Pierre Legrand, *Codification and the Politics of Exclusion: a Challenge for Comparativists*, 31 U.C. DAVIS L. REV. 799, 804 (1997-1998).

374. Pierre Legrand, *Against a European Civil Code*, 60 MOD. L. REV. 44, 56 (1997) [hereinafter, Legrand, *Civil Code*].

375. JOHN H. DAWSON, ORACLES OF THE LAW (1968); JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEM OF WESTERN EUROPE AND LATIN AMERICA (2d ed. 1985) [hereinafter, MERRYMAN, CIVIL LAW]. Merryman, for example, identified in the civil law tradition a feeling of superiority vis-à-vis other legal traditions as one of its distinctive features. *See id.* at 3.

taining a suggestive and synthetic presentation of the civil law system, present some commonplaces (or clichés) which do not accurately reflect some aspects of European legal systems, in particular concerning the role of the judges. The inaccuracy of other aspects is simply due to passing of time, during the course of which some features of the European legal tradition have changed significantly.

This literature on comparative law is used not only by comparativists such as Legrand as a means of resisting contemporary attempts at codification,[376] but also by legal historians, who, in trying to understand the New York codification debate and, particularly, Carter and Field's legal theories, resort to these works. This is not, however, the most accurate way to reconstruct the discussion, since Field's position potentially becomes distorted, reinforcing Carter's depiction of Field's attempt, rather than Field's actual proposal. This was what happened, in my opinion, with—among others[377]—one of the best works in the American historiography on the codification debate, recently written by Lewis A. Grossman.[378]

In his *Anticlassical Jurisprudence of Anticodification*, Grossman, probably the greatest expert on Carter's legal theory,[379] made this mistake. Examining Carter's jurisprudence and confronting it with Field's proposed Civil Code, he went so much further and entered so deeply into Carter's argumentation, that sometimes he adopted Carter's depiction of Field's attempt without realizing it. In doing so, he relied several times on Merryman's work, since it allowed him to present some of the commonplaces that Carter emphasized in his legal argumentation. It would be neither true nor just to state that Grossman did not identify some of the main paradoxes and shortcomings in Carter's arguments, because he addressed them in other work.[380]

For example, in order to emphasize Carter's antagonism toward formal conceptualism, typical of the codification method, he described such conceptualism in the civil law tradition relying, above all, on Merryman,

376. *See* Legrand, *Civil Code*, *supra* note 374, at 56.

377. *See*, e.g., Englard, *Li*, *supra* note 117. Englard, who cites and quotes both Merryman and Dawson, concludes: "Field's plan to codify common law according to the civil law pattern was basically unattainable. Given the profound differences in legal technique, a formal combination of the two systems was bound to create insuperable problems of application. . . . The maintenance of common law rules alongside the Code resulted in the Code's own loss of identity because it necessarily became immersed in the sea of common law." *Id.* at 14-15. Englard's work probably constitutes one of the clearest examples of Carter's triumph in depicting Field's attempts as radical and unfeasible on the one hand, and the pernicious impact of Merryman's and Lawson's works on the history of American legal codification on the other. Since he does not seem to understand Field's ideas for the codification of the common law, it is not surprising that, in Englard's conclusion, "the *Li* decision constitutes a landmark in California's legal history. It epitomizes the ultimate of failure of Field's idea of a common law codification." *Id.* at 27.

378. Grossman, *Anticlassical*, *supra* note 3.

379. Grossman also completed a doctoral thesis on Carter: Lewis A. Grossman, *The Ideal and the Actual of James Coolidge Carter: Morality and Law in the Gilded Age* (2005) (unpublished Ph.D. dissertation, Yale University).

380. *See*, Grossman, *Carter*, *supra* note 3.

whose description is in some respects scarcely consistent with either the civil law or Field's actual proposals.[381] To be concrete, Grossman's assertions on the separation of powers and judicial function extracted from Merryman's *Civil Law Tradition*, in addition to their inconsistency considered by themselves, did not in any way fit Field's proposed Civil Code. Grossman himself recognized this when he examined Field's proposal.[382] Furthermore, Grossman seems to be fully aware of the strategy of Carter's argumentation. After describing Field's proposal, he started his description of Carter's depiction with these terms:

> By contrast, it behooved Carter, as the leader of the anticodification forces, to magnify the differences between Field's proposal and the common law status quo. If the proponents of codification could persuade legislators that the Civil Code was merely an inoffensive, sensible way to make the law more certain and accessible, Carter and his colleagues would have a difficult time defeating it. They thus had to present a convincing case that Field's plan would suddenly, significantly, and detrimentally transform New York's legal system.[383]

That is certainly true. Grossman is also right in presenting the codification debate in terms of "persuasion" rather than from a strictly scientific point of view. Moreover, he asserted that "Field's codification campaign failed in New York State largely because of the energy, passion, and talent of the opponents of codification there,"[384] and not only—or entirely—because of scientific reasoning alone. Apparently, then, Grossman, by resorting to the civil law system to explain Field's legal theory, tried to explain and emphasize Carter's attempt to depict Field's proposal as radically as possible. Grossman succeeded in doing so. Such a methodological approach, nonetheless, involves some inconveniences and one danger.

The main inconvenience consisted in that, after having synthetically described the main features of the civil law system as a means of approaching Field's proposal, several rectifications and qualifications are needed in order to avoid a false identification between civil law codification and Field's proposal when some aspects of the civil law's synthetic approach are not consistent enough. In this regard, Grossman realized that, in some respects, Field's proposal diverged from the civil-law codification. He contended, for example, that "Field diverged from his continental counterparts, however, by also allowing courts to continue to refer to the common law, a body of rules derived solely from judicial precedents."[385] Several other rectifications were needed regarding the legislative power of

---

381. Grossman argues that "modern civil law theorists, by contrast, have assumed an increasingly flexible attitude toward traditional civil law principles, although Merryman contends that the pure model continues to shape their mindset as a kind of *folklore*." Grossman, *Anticlassical, supra* note 3, at 14. The problem is that even some of the aspects which would comprise what Merryman called "*folklore*" are not consistent with the real historical development of the civil law tradition. Merryman himself pointed out that "this is the theory, but the facts are different." MERRYMAN, CIVIL LAW, *supra* note 375, at 47.

382. *See*, Grossman, *Anticlassical, supra* note 3, at 18-21.

383. *Id.* at 21.

384. *Id.* at 7.

385. *Id.* at 19.

the judges, regarded by Field in a remarkably different way than it is in the civil law tradition.[386] Consequently, Grossman recognized that "Field thus enshrined the authority of judicial precedent in a manner totally alien to the civil law."[387]

Despite these accurate distinctions between Merryman's model of civil law and Field's proposal, Grossman did not succeed completely in getting rid of the principal danger of applying his methodological approach to the codification debate, which I regard as an excellent approach for examining Carter's arguments, but not so suitable for Field's. The danger consists in examining Field's legal theory from Carter's legal point of view, which necessarily involves regarding Field's proposed Civil Code in terms of incompatibility between common law and codification—the reflection of a heated rivalry between two different legal systems—as if codification constituted a legal tool so characteristic of the civil law system that its adoption in a common law country would imply the recognition of the superiority of the civil-law system. This was precisely—at least in my opinion—the message that Carter and other code opponents intended to communicate with their arguments, and, in trying to do so, they succeeded so much that it is understandable that the scholar most acquainted with Carter's legal theory in current American historiography was not able to detach himself from such an idea.

In that respect, it seems to me that Carter's thinking pervaded Grossman's work excessively. It is apparent, for example, in Grossman's distrust—or at least, suspicion—of some of Field's statements, a clear reflection of Carter's professional and personal attitude toward Field and his legal theory. Hence, Grossman presented some aspects of Field's proposal as a matter of mere strategic argumentation, and not as fundamental principles of Field's real proposed Code. In this regard, Field's persistent claim that the proposed Civil Code would not constitute a complete system of law is regarded by Grossman as a mere "modest pose" to take political advantage.[388] It is not so clear—at least to me—that "Carter's assertion that the Civil Code's text alone would dictate the result of almost every case had a firm basis in the language of the draft code itself,"[389] and even less convincing is his suspicion that "sections 6 and 2032 appeared almost as far apart in the Civil Code as possible" because Field possibly intended "to obscure their combined impact."[390] Merryman and Carter's commonplace that a civil code intended to be complete, covering all the legal rules

386. *Id.* at 20 ("Civil law jurists would not, however, have agreed with the next provision, which stated that 'the will of the sovereign' was expressed not only by the Constitution and by acts of the legislature and subordinate legislative bodies, but also by 'the judgments of the tribunals enforcing those rules, which, though not enacted, form what is known as the customary or common law.').

387. *Id.*

388. *Id.* at 17.

389. *Id.* at 23.

390. *Id.*

required to govern all future human transactions seems to be firmly engraved in Grossman's mind. This explains his comment on the 1886 ABA's approval of Field's resolution, stressing that a vote in favor would not represent support for general codification, "but merely for the position that principles of law should be stated in statutory form when it was feasible to do so."[391] And further: "In short, the ABA's approval of Field's resolution cannot be interpreted as anything like an endorsement of European-style complete codification."[392]

Grossman, like Carter—and other common law lawyers and scholars, perhaps relying on Merryman's views—erroneously identifies "continental-style code" with an enacted legal text which provides "for every case within its scope,"[393] "reducing the court's role to the mechanical application of clearly written rules."[394] Despite Llewellyn's comment on the kind of codification which Carter attacked, a "utopian ideal of the blinder advocates of codification"[395] did not reflect Field's proposal. I do believe, then, that Carter most probably would have fought and criticized Llewellyn's proposed UCC equally, unless he had gotten along better with this legal realist than with Field.

Grossman's depiction of Carter's jurisprudence is indeed excellent, but I also think that from Carter's perspective it is hard to appreciate accurately the true extent of Field's real proposed Civil Code. Carter, "impelled by his opposition to codification," not only "articulated a vision of the common law that is difficult to characterize as classical at all,"[396] but also distorted Field's proposal in the process. It is not surprising, then, that Grossman's depiction of Field's attempt suffers precisely from Carter's distortion.

Another remarkable sign of code opponents' success is clearly reflected in Pomeroy's opposition to codification. As Grossman stated some years ago, Pomeroy is reputed "as the man who killed the California Civil Code."[397] His reputation is based mainly on his influential article entitled *The True Method of Interpreting the Civil Code* (1884). The New York Bar Association reprinted this work in 1885, one year after Pomeroy's death, in order to make use of it in their battle against Field's Civil Code. In doing so, code opponents assumed that Pomeroy's opinion on this matter had changed, as it stood against any scheme of codification. Despite

391. Grossman wanted to make clear the point that "although he [Field] remarked that he personally supported the adoption of a code, he emphasized that he did *not mean by it a book which shall contain within its covers all the rules of law which are to govern all the transactions of men in all future time.*" (Grossman, *Anticlassical, supra* note 3, at 64, *quoting* in the note 332 the source: *Rep. Ninth Ann. Meeting A.B.A.*, 1886, at 68).

392. *Id.* at 64-65.

393. *Id.* at 60, note 305.

394. LEWIS A. GROSSMAN, *Codes and Codification: United States, in* THE OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY (2009).

395. Grossman, *Anticlassical, supra* note 3, at 60.

396. *Id.* at 28.

397. Grossman, *California, supra* note 6, at 619.

Field's complaints of such an assumption,[398] code opponents did not rectify it and code proponents, in their turn, regarded Pomeroy to be among the "advocates of the codification of private law and continued to be so to the end of their lives."[399]

It is undeniable that Pomeroy, both a reputable practicing lawyer and even more distinguished scholar,[400] originally regarded codification as a good method to improve the law. Moreover, he boasted the Code of Civil Procedure as "the greatest achievement in the history of legal reform."[401] In 1872, the year in which the California Civil Code was enacted, Pomeroy championed the enactment in different publications,[402] and one year later he called explicitly for codification of the common law in *The Nation*, through an unsigned book review.[403] In 1878, six years after the California Civil Code's enactment, he delivered a memorable *Inaugural Address* in which he praised the California's spirit of improvement reflected clearly in the law:

> California to-day stands absolutely the foremost in the promotion of legal reform among the communities whose jurisprudence has been based upon the English system of common law and equity. While other States, and England itself, have deliberated. . . California has acted, and by one mighty stride has reached the point towards which the other commonwealths are tending with greater or less rapidity. She has accepted the principles of law reform, and reduced them to a practical operation.[404]

Pomeroy emphasized that such exemplary legal reform had consisted of reducing legal principles by means of the practical operation of codification, expressing his conviction that other States would follow in the California's footsteps: "[California] has embodied the important and controlling doctrines of her jurisprudence in the form of a scientific code. . . The work

---

398. Field, *Codification, Answer, supra* note 190, at 265 ("Mr. Carter is unfortunate and not quite ingenuous in his quotations from Pomeroy and Amos. He knows very well the explanation given by me on several occasions of their criticisms upon the Civil Code proposed for New York, but he omits all reference to this explanation, and further omits to state that both these gentlemen were, when they wrote, most pronounced advocates of the codification of private law, and continued to be so to the end of their lives.").

399. Field kept on pointing to California codes as an example of successful codification: "The Codes of California, Political, Civil, Penal, and Procedure, are complete Codes of the different branches of the law of the Golden State." FIELD, CODIFICATION, ADDRESS PHILADELPHIA, *supra* note 3, at 27.

400. On John Norton Pomeroy, *see*, JOHN NORTON POMEROY, JR., *John Norton Pomeroy*, 8 GREAT AMERICAN LAWYERS 91-135 (William Draper Lewis ed. 1909).

401. JOHN NORTON POMEROY, THE CODE OF REMEDIAL JUSTICE, REVIEWED AND CRITICISED 20 (1877).

402. *See*, e.g., JOHN NORTON POMEROY, *The Civil Code of California*, 5 ALB. L. J. 69, 70 (1872) ("If [the Civil Code] should prove, as we are confident it must, an easily working and satisfactory ordinance, the future Solons of our eastern land, when old teachings and customs have lost their influence, may perhaps, be induced to seek for legislative wisdom on the shores of the Pacific.").

403. *See*, Grossman, *California, supra* note 3, at 619.

404. JOHN NORTON POMEROY, THE HASTINGS LAW DEPARTMENT OF THE UNIVERSITY OF CALIFORNIA: INAUGURAL ADDRESS 10 (1878).

which California has thus accomplished will certainly be imitated by other states . . . spread with ever increasing rapidity, until its effect shall be shown throughout the entire extent of our common country."[405]

Grossman asserts that "modern scholars who have examined the history of the California Civil Code would probably be surprised to learn of this speech," as well as other writings, since Pomeroy is generally viewed "as the Civil Code's greatest nemesis."[406] Consequently, it does not seem to be consistent to say that Pomeroy "hardly was a great partisan of the idea of codification in general and certainly made no secret of his genuine dislike of the California Civil Code in particular."[407]

Nevertheless, the majority of American legal historians maintain that, in fact, Pomeroy's work attacked—or even "killed"—the California Civil Code.[408] Regardless of whether it would be better to use other terms to describe Pomeroy's work,[409] it is unquestionable that because "the fate of the California Civil Code is commonly ascribed to . . . Pomeroy,"[410] this figure and his main work should be examined more carefully. In this regard, it is not clear whether Pomeroy changed his mind about codification.

It seems to me that theories which contend that Pomeroy changed his initial opinion about codification assume that his purpose consisted in underestimating the California Civil Code as much as possible.[411] This claim, and the idea that his proposal succeeded in 1888,[412] to the extent that the Code hardly played any role in California, still reflect the triumph of Carter's argumentation in American legal historiography. I do not think that Pomeroy either denied the practicability of codification in general, or changed his mind about the convenience of its adoption to improve a legal system, as Carter tried to suggest.[413] Pomeroy's work does not seem to

405. *Id.* at 11.

406. Grossman, *California, supra* note 3, at 619.

407. Englard, *Li, supra* note 117, at 9-10; *see also*, Grossman, *California, supra* note 3, at 619.

408. *See*, e.g., Head, *Codes, supra* note 3, at 83-84; Fisch, *Dakota Civil Code, supra* note 15, at 29; Englard, *Li, supra* note 117, at 9-10.

409. *See*, e.g., Crystal, *Codification, supra* note 3, at 259 (using the word "criticized").

410. Weiss, *Enchantment, supra* note 3, at 515.

411. In this sense, Fisch's statement that "the purpose of [Pomeroy's] criticism was to establish a uniform method of interpreting the Code, namely by reading it as completely as possible as if it did not change a thing," Fisch, *Dakota Civil Code, supra* note 15, at 29, should be understood in the context of Fisch's whole article; *see also*, Grossman, *California, supra* note 3, at 620.

412. *See, Sharon v. Sharon*, 16 P. 345 (Cal. 1880); Crystal, *Codification, supra* note 3, at 260; Fisch, *Dakota Civil Code, supra* note 15, at 33-34; Grossman, *California, supra* note 3, at 620; Weiss, *Enchantment, supra* note 3, at 515; Head, *Codes, supra* note 3, at 84; Grossman, *Anticlassical, supra* note 3, at 26, note 139.

413. *See*, CARTER, PROVINCES, *supra* note 2, at 24 ("Professor Pomeroy. . . , although originally inclined to give his assent to the project of codification . . ."). Pomeroy's work did not contain any statement which revealed any conversion from advocate to opponent of codification. His legal argumentation, unlike Carter's, seemed to be much more scientific rather than passionate. He praised what he thought deserved to be praised and criticized what he maintained to be scientifically inappropriate. He did not depart from so definite and unquestion-

involve any rejection of codification as a method and legal tool, or any suggestion to derogate the already enacted Civil Code,[414] but to attain the "benefits of codification."[415]

Although Pomeroy's attitude may seem inconsistent, it has its logic. Despite his praise of codification in the 1870s, Pomeroy never took active part in the heated codification debate. So, it is not completely accurate to label him as either a code proponent or code opponent like other lawyers (Field, Carter, Mathews, Fowler, Hornblower, Clarke, Hoadly, etc.), who were engaged in a discussion and whose real motives were not strictly scientific. Pomeroy, who largely kept himself out of the debate, seemed more concerned with the current legal system in practice, and did not regard the common law as incompatible with a good scheme of codification. Witnessing the problems that the California Civil Code caused, and clearly distrusting of the legislature's ability and competency to settle such issues, Pomeroy did not hesitate to propose what he understood to be the best way to minimize the problem, trying to keep the advantages and "excellencies" of both the common law and codification.[416]

Regarding the impact of Pomeroy's work on the California legal system, its true extent is still not quite clear. Fisch considered Pomeroy's articles to be "the most significant single event in the history of the Code of California."[417] Some years later, Englard contended that, since Pomeroy's remarks "merely enhanced the already existent and unavoidable tendency to integrate the Code into the common law," "Fisch was therefore incorrect in defining Pomeroy's attack on the Code" in such a way.[418]

There is no unanimity among scholars on *Sharon v. Sharon*'s impact and consequences for the development of the California legal system. They all emphasize that the case explicitly adopted Pomeroy's method of judicial interpretation,[419] but scholars disagree over the extent and significance of the adoption, and how the California courts have been interpret-

---

able a legal statement for or against codification, as Carter did. Even if he had declared himself as a codification supporter, this did not prevent him at all from criticizing those specific schemes of codification he regarded as inappropriate, like the California's. *See*, Pomeroy, *Civil Code, supra* note 2, at 58 ("It is, perhaps, inevitable that the system of codifying the private civil jurisprudence, the common law and equity—shall finally prevail in this country and in England").

414. Pomeroy never proposed to derogate the Civil Code. Rather he did the opposite: ". . . the civil code must be accepted and acted upon as it is." Pomeroy, *Civil Code, supra* note 2, at 68.

415. *Id.* at 32.

416. In this regard, Pomeroy's conclusion was clear: "We thus reach the conclusion that the element of certainty should not be attained in a code by a sacrifice of all these other peculiar features which belong to the common law; but on the contrary, these distinguishing excellencies of the common law should be preserved and maintained in connection with the *certainty* which, it is claimed, accompanies statutory legislation." Pomeroy, *Civil Code, supra* note 2, at 54).

417. Fisch, *Dakota Civil Code, supra* note 15, at 29.

418. Englard, *Li, supra* note 117, at 10, note 34.

419. *See*, e.g., Fisch, *Dakota Civil Code, supra* note 15, at 29-35.

ing the Civil Code from 1888 onward. According to Fisch, the approach taken by the California court in the *Sharon* case was that the Code should be looked to first, and the common law consulted only where the meaning of the Code was not clear.[420]

Other scholars maintain that, as a result of court's adoption of Pomeroy's method of interpretation, the Civil Code was rendered little more than restatement, unless its provisions clearly differed from common law rules.[421] Englard argued that "in reality, the courts to a large extent simply ignored the Civil Code."[422] However, such general conclusions drawn by scholars after examining one part of the Civil Code, or even just one section,[423] do not seem to be consistent enough. In this regard, it is interesting that Fisch, after having analyzed several cases, came to a rather different conclusion, asserting that "the cases do show a very ambivalent attitude toward the Code as a source of law, but the courts have neither ignored it nor flatly repudiated."[424]

Controversy on codification continues, and although there is no proposal similar to Field's about to be enacted, Carter's passionate spirit is still present in current American legal historiography. Were Carter now a legal historian living among us, most probably he would argue similarly to other current scholars. It is less clear what Pomeroy would argue, but perhaps he would at least make Carter feel uncomfortable.

---

420. Fisch, *Dakota Civil Code, supra* note 15, at 34-35.

421. *See*, Englard, *Li, supra* note 117, at 9-22; Grossman, *California, supra* note 3, at 620, note 15. According to Grossman, "the *Sharon* court's embrace of Pomeroy's mode of interpretation was, however, apparently limited to unclear code provisions, like the one at issue in that case. The court did not consider Pomeroy's contention that even an unambiguous code provision should be construed as a continuation of the common law, including subordinate common law rules inconsistent with the code's text." Grossman, *Anticlassical, supra* note 3, at 26, note 139.

422. Englard, *Li, supra* note 117, at 18.

423. *See*, e.g., Englard, *Li, supra* note 117, at 18 ("The judicial treatment of section 1714, which intended to constitute the central provision in torts (*Obligations imposed by law* [title of the Part 3 of Division Third of the Code]), serves as typical illustration of the entire Code's fate.".

424. Fisch, *Dakota Civil Code, supra* note 15, at 54 ("It has been suggested that the Code provisions have been ignored, in many respects at least in California, but only a single instance is cited without identifying details, and the proposition is one inherently very difficult to prove.").