

HEINONLINE

Citation: 40 Ariz. St. L.J. 173 2008

Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Wed Jun 22 07:24:54 2011

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/ccc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=0164-4297](https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0164-4297)

THE PASSIONATE DISCUSSION AMONG COMMON LAWYERS ABOUT POSTBELLUM AMERICAN CODIFICATION: An Approach to Its Legal Argumentation

Aniceto Masferrer[†]

It has been stated that “[c]odification was a perennial issue in American legal history.”¹ This is true indeed. However, the codification movement does not just belong to the 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, if not impossible, to find another topic in American legal history with so many and different implications and consequences for the development of American law and jurisprudence.

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). While the former constituted “the first sustained challenge to the democratic legitimacy of the common law,”² in the latter “the American legal profession engaged in a heated debate about the wisdom of replacing the substantive common law with a written civil code.”³ Although some scholars have preferred to show this general

[†] Professor of Legal History, University of Valencia, Spain; Visiting Scholar at Harvard Law School (2006–2007); 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, 2000–2002); Associate Professor of Legal History, University of Girona, Spain (2000–2003); 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 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, Mark DeWolf Howe Fund) for its generous financial support throughout this project. I am also grateful to Jonathan Rose, who showed great interest in publishing this paper. I also thank *Arizona State Law Journal* for publishing this Article. An earlier version of this paper has been presented at a *Colloquium of the Graduate Program* (Harvard Law School, January 2007), and within *RCC Fellows’ Lectures* (Harvard University, February 2007).

1. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 117 (1992).

2. *Id.* at 10.

3. Lewis A. Grossman, *Langdell Upside-Down: The Anticlassical Jurisprudence of Anticodification*, 19 *YALE J. L. & HUMAN.* 145, 145 (2007).

development in the whole nineteenth century,⁴ 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,⁵ especially in the last two decades.⁶

The codification efforts persisted in the last century. The Uniform Code⁷ and Restatement⁸ projects show to what extent some of the reasons maintained by the codification proponents were genuine. Nevertheless, theoretically, at least apparently, these efforts do not seem to intend to codify the whole common law.⁹

This paper will concentrate on the debate which arose with the Field Civil Code.¹⁰ New York's 1846 Constitution required the establishment of a

4. See MAURICE EUGEN LANG, *CODIFICATION IN THE BRITISH EMPIRE AND AMERICA* 114–96 (1924); 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).

5. On the American codification movement before the Civil War, see 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).

6. On the American codification movement after the Civil War, see LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 293–308 (3d ed. 2005); HORWITZ, *supra* note 1, at 117–23; 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*]; Andrew P. Morriss, *Codification and Right Answers*, 74 *CHI.-KENT L. REV.* 355 (1999); 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).

7. See, e.g., Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 *STAN. L. REV.* 621 (1975); Mitchell Franklin, *On the Legal Method of the Uniform Commercial Code*, 16 *LAW & CONTEMP. PROBS.* 330 (1951).

8. Nathan M. Crystal, *Codification and the Rise of the Restatement Movement*, 54 *WASH. L. REV.* 239, 239–40 (1979); see also William D. Lewis, *The First Restatement of the Law and How We Did It*, 25 *NEB. L. REV.* 206 (1946); William D. Lewis, *The Restatement of the Law: An Address Before the Wisconsin Bar Association*, 3 *WIS. L. REV.* 1 (1924); Hessel E. Yntema, *Comparative Research and Unification of Law*, 41 *MICH. L. REV.* 261 (1942); Hessel E. Yntema, *The Restatement of the Law of Conflict of Laws*, 36 *COLUM. L. REV.* 183 (1936); Hessel E. Yntema, *What Should the American Law Institute Do*, 34 *MICH. L. REV.* 461 (1936).

9. Grossman, *supra* note 3, at 145 (“The codification impulse lasted into the twentieth century, as reflected in the Uniform Code and Restatement projects. But there were no further major campaigns to abandon the common law wholesale in favor of a code.”). Other authors maintain, however, that the Restatement constituted a provisional step toward a definite codification. See, e.g., Mitchell Franklin, *The Historic Function of the American Law Institute: Restatement as Transitional to Codification*, 47 *HARV. L. REV.* 1367 (1934).

10. David Dudley Field assumed membership on a New York State commission created “to revise, reform, simplify, and abridge the rules and practice, pleadings, forms and proceedings of the courts of record of this State.” N.Y. CONST. art. VI, § 24 (1846). The three-

commission “to reduce into a written and systematic code the whole body of the law of this state, or so much and such parts thereof as to the said commissioners shall seem practicable and expedient.”¹¹ After the first commission’s failure, in 1857 the legislature established a new code commission, appointing David Dudley Field as one of its three members.¹² The commission presented the final draft of the Civil Code to the legislature in 1865. Field summarized in the introduction to the code the advantages of codification,¹³ and characterized the code as a “complete digest of our existing law, common and statute, dissected and analyzed, avoiding repetitions and rejecting contradictions, moulded into distinct propositions, and arranged in scientific order, with proper amendments, and in this form sanctioned by the Legislature.”¹⁴

Field did not attempt to codify the law in order to undertake deep reforms in his content, “but rather to embody existing law in an orderly

man commission framed a Code of Civil Procedure, which New York enacted in 1848. In 1849, the commission also produced a Code of Criminal Procedure, which was finally enacted in 1881. Field’s protagonism was so clear in the drafting of Code of Civil Procedure that it became known as “the Field Code.” Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311, 317 (1988). The Field Code abolished the complex scheme of common law writ pleading, as well as the independent system of equity procedure, and replaced both with a simplified, uniform procedural system. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 933–35, 938 (1987). According to Grossman, “the procedural code was Field’s most successful codification effort.” Grossman, *supra* note 3, at 148–49. In fact, the majority of states ultimately embraced the Field Code or some revised version of it. Furthermore, the Code served to some extent as a model for the Federal Rules of Civil Procedure, enacted in 1938. See Charles E. Clark, *Code Pleading and Practice Today*, in DAVID DUDLEY FIELD, CENTENARY ESSAYS: CELEBRATING ONE HUNDRED YEARS OF LEGAL REFORM 55, 64 (Alison Reppy ed., 1949).

11. N.Y. CONST. art. I, § 17 (1846).

12. Grossman, *supra* note 3, at 149 (citing Daun van Ee, David Dudley Field and the Reconstruction of the Law 49 (1974) (unpublished Ph.D. dissertation, Johns Hopkins University) (on file with author)) (“Field was primarily responsible for writing the resulting substantive Civil Code.”).

13. David D. Field, *Introduction* to THE CIVIL CODE OF THE STATE OF NEW YORK xxix-xxx (Albany, Weed, Parsons, & Co. 1865) (“In the first place, it will enable the lawyer to dispense with a great number of books which now [e]ncumber the shelves of his library. In the next place, it will thus save a vast amount of labor, now forced upon lawyers and judges, in searching through the reports, examining and collecting cases, and drawing inferences from decisions In the third place, it will afford an opportunity for settling, by legislative enactment, many disputed questions, which the courts have never been able to settle. In the fourth place, it will enable the Legislature to effect reforms in different branches of the law, which can only be effected by simultaneous and comprehensive legislation. . . . 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 any other manner.”).

14. *Id.* at xv.

statutory form.”¹⁵ In terms of substantive law, relevant reforms were made in matters such as the rights of married women, the adoption of children, and the assimilation of the law of real property and personal property. In fact, there were only 119 other changes, all “of less importance.”¹⁶

It is not our purpose to describe here the fate of the Field’s Project Civil Code. Field’s efforts to urge the adoption of his Civil Code are already well known. He did not succeed in New York. Although both the Assembly and the Senate of New York voted to enact the Civil Code in 1879 and 1882, the governor vetoed it each time.¹⁷ In effect, it never became part of New York law. However, he succeeded with the Code of Civil Procedure enacted in 1848 (and 1851) and the Penal Code (drafted in 1865) that was enacted by the New York Legislature in 1881.¹⁸ He also succeeded in other states, where some of his codes were enacted.¹⁹

Field’s tireless efforts to urge the Civil Code’s enactment faced tough opposition from an influential practicing lawyer who served as president of the American Bar Association (“ABA”), the New York State Bar Association, and the Association of the Bar of the City of New York (“ABCNY”): James Coolidge Carter.²⁰ It is probable that the Field Civil Code was not eventually enacted in New York because of “Carter’s successful fight against Field’s efforts to replace New York State’s decisional private law with a civil code.”²¹ In fact, “[d]uring the 1880s,

15. Grossman, *supra* note 3, at 150.

16. Field, *supra* note 13, at xxx-xxxi; *see also* Grossman, *supra* note 3, at 150.

17. Grossman, *supra* note 3, at 150.

18. *Id.* at 148, 150 n.33.

19. Both California and Montana enacted versions of four of the codes that Field drafted for New York: the Code of Civil Procedure, the Civil Code, the Political Code, and the Penal Code. *See* 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). Montana enacted a revised version of the code in 1895 (Political Code, Code of Civil Procedure, Penal Code and Civil Code), and California did the same in 1872. *Id.* at 396 n.197; *see* Grossman, *supra* note 3, at 150 n.33. Furthermore, the Dakota Territory enacted its Civil Code with almost no changes in 1865, and the Dakotas (North and South) continued to use it when they became states in 1889. Grossman, *supra* note 3, at 150 n.34. Georgia enacted in 1860 the first Code in the United States, being the first codification of the substantive common law. *See* Marion Smith, *The First Codification of the Substantive Common Law*, 4 TUL. L. REV. 178, 184 (1930).

20. For a detailed discussion of Carter’s career, *see* Grossman, *supra* note 3, at 151–52, and Lewis A. Grossman, *The Ideal and the Actual of James Coolidge Carter: Morality and Law in the Gilded Age 389–97* (May 2005) (unpublished Ph.D. dissertation, Yale University) (on file with author).

21. Grossman, *supra* note 3, at 151 (citing GEORGE MARTIN, *CAUSES AND CONFLICTS: THE CENTENNIAL HISTORY OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK* 173 (1970), and JAMES GRAFTON ROGERS, *AMERICAN BAR LEADERS: BIOGRAPHIES OF THE PRESIDENTS OF THE AMERICAN BAR ASSOCIATION, 1878–1928*, at 80–85 (1932)). “Field’s codification campaign failed in New York State largely because of the energy, passion, and talent of the opponents of

Carter's name became almost synonymous with the anticodification position.²²

Carter wrote an emotionally charged pamphlet against the Civil Code with the title *The Proposed Codification of Our Common Law*, and, five years later, another entitled *The Provinces of the Written and the Unwritten Law*, at the helm of the New York City Bar Association, and in testimony before the New York Senate. In 1884, Field answered with a pamphlet entitled *A Short Response to a Long Discourse*. Other scholars joined the debate on both sides, Albert Mathews on Carter's behalf,²³ Ludlow Fowler on Field's behalf,²⁴ among others.²⁵

Five years later, Carter delivered an address at the annual meeting of the Virginia State Bar Association entitled *The Provinces of the Written and the Unwritten Law*; 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*, and in a posthumously published work titled *Law: Its Origin, Growth, and Function*.²⁶

In the 1880s and 1890s, both the American law and jurisprudence underwent a lively debate whose legal and political consequences influenced the whole 20th Century American legal development. Nobody

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." *Id.*

22. *Id.* at 151–52 (“Under Carter’s direction, ABCNY attorneys issued a series of pamphlets excoriating the code for failing to reflect the actual state of the common law in particular substantive areas, even when it was intended to do so. In some instances, these pamphlets suggested that Field had manipulated the law to favor his plutocratic clients. Carter assigned himself . . . the task of framing the broader jurisprudential and practical arguments against codification and in favor of the common law.”).

23. ALBERT MATHEWS, THOUGHTS ON CODIFICATION OF THE COMMON (4th ed. 1887).

24. ROBERT LUDLOW FOWLER, CODIFICATION IN THE STATE OF NEW YORK (2d ed. 1884).

25. R. FLOYD CLARKE, THE SCIENCE OF LAW AND LAWMAKING (1898); George Hoadly, Codification of the Common Law: Address at the Convention of the American Bar Association (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].

26. JAMES C. CARTER, LAW: ITS ORIGIN, GROWTH AND FUNCTION (1907) [hereinafter CARTER, ORIGIN]; JAMES C. CARTER, THE PROPOSED CODIFICATION OF OUR COMMON LAW (1884) [hereinafter CARTER, PROPOSED CODIFICATION]; JAMES C. CARTER, THE PROVINCES OF THE WRITTEN AND THE UNWRITTEN LAW (1889) [hereinafter CARTER, PROVINCES]; 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).

denies it. Some scholars, who have dealt with that subject, have shown how the nineteenth-century debate remains relevant.²⁷

During the last two decades, scholars have offered different approaches to the codification debate of the late nineteenth century, starting from different points and coming to diverse conclusions.

In 1989, Mathias Reimann showed to what extent Friedrich von Savigny influenced Carter, explaining why Savigny's ideas were so appealing to Carter and those who tried to defeat the codification movement.²⁸ He detected a peculiar kinship of personal, professional and political interests between them. He concluded that "[b]oth Savigny and Carter presented their objections to codification in the form of legal theories beneath which personal interests and biases were hidden."²⁹

Andrew Morriss published in 1999 an interesting article where he presented the main arguments used by both code proponents and opponents, concluding with two suggestive considerations: "First, the code opponents' vision of the common law is largely lost from the American legal system today."³⁰ Second, "statutes and administrative regulations increasingly dominate the landscape"; however, "[i]nstead of creating a coherent framework for resolving similar issues, statutes today employ ad hoc approaches, treating each problem as distinct."³¹

In 2000, Gunther Weiss approached the topic with the clear purpose of showing the historical falsity of the thesis that the idea of codification is anomalous or alien to common-law systems.³² Trying to contribute to the discussion regarding a possible, future European civil code, he explored the role of codification in the common-law world. Dealing with Carter's arguments, Weiss maintained Carter's hostility to any legislation in private law was not hostility towards codification, but rather the rejection of the content of such codification. He concluded, quoting Reimann, that "consequently, it seems to be most proper to assess the various reasons by concluding that there was a strong preponderance of political reasons."³³

In 2003, John Head analyzed what he thought to be the key conditions and factors that contribute to a successful effort within a political unit to create a new legal code. According to his opinion, following Nathan

27. Morriss, *supra* note 6, at 358–60.

28. Reimann, *supra* note 6, at 118.

29. *Id.*

30. Morriss, *supra* note 6, at 389.

31. *Id.*

32. *See generally* Weiss, *supra* note 4.

33. *Id.* at 511.

Crystal's,³⁴ "the main reason for the failure of Field's Civil Code was the strong opposition within the legal profession, especially by the New York Bar, to the reform of substantive law through general codification."³⁵ In fact, Head regarded concentrated political power and will as the main necessary conditions for codifying the law. Consequently, he considered in his final conclusions "that a legal system that exhibits all or nearly all of those five factors would still remain uncodified if the system lacks a central concentration of political authority . . . and a strong will to codify."³⁶

Recently, Lewis Grossman also dealt with the New York Civil Code debate, particularly with the anticodification literature, asserting that its jurisprudence should be labeled as "anticlassical," which advanced some of the typical features of the early-twentieth century legal realism.³⁷ As he pointed out:

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.³⁸

34. Crystal, *supra* note 8, at 256 (pointing out that "[t]he major reason for the defeat of codification in New York was the opposition of the New York Bar; the Association of the Bar of the City of New York lobbied extensively to defeat codification").

35. Head, *supra* note 4, at 82.

36. *Id.* at 89.

37. See Grossman, *supra* note 3, at 147.

38. *Id.* at 172. According to Grossman, the literature "powerfully supports the rising consensus among revisionist legal historians that Gilded Age jurists generally viewed morality as an essential component of the common law. Indeed, the anticodifiers argued that the common law's ethical content was one of its main advantages over a code system." *Id.* at 147. He continued:

This Article goes further than the current revisionist scholarship, however, by suggesting that at least some late-nineteenth century jurists so devalued formal conceptual order, at least when it came into conflict with case-specific justice, that they can hardly be characterized as "classical" at all. The anticodifiers, most notably James Coolidge Carter, their leading intellectual voice, explicitly minimized the role of formality and conceptual order in common law decision making. This Article will explore how the battle against codification drove Carter and others to formulate a common law method that largely rejected the formal and conceptual aspects of legal reasoning that dominated Langdell's system. Indeed, in trumpeting the advantages of the common law, Carter, an almost exact contemporary of Langdell, manifested a rule skepticism that foreshadowed that of the legal realists a half century later.

Id. at 147-48.

Taking into account all these conclusions and reading carefully the abundant literature that arose in the context of the debate, 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 Grossman as “anticlassical”) undertaken by Carter, but also his contradictory position in some aspects, his paradoxical argumentation, and his denial of principles which are on the base of 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 best powerful legal theory 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’. For example, 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.”³⁹ This is probably the wrong question “because 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.”⁴⁰

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.”⁴¹ As Grossman asserted, Carter articulated a different vision of the common law, since he was “[i]mpelled by his opposition to codification.”⁴² In this regard, it is understandable that such 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.”⁴³ Consequently, Grossman—and other scholars—have tended to overlook the role that the political and self-

39. Reimann, *supra* note 6, at 119.

40. *Id.*

41. Grossman, *supra* note 3, at 172.

42. *Id.*

43. *Id.* at 147; *see supra* note 38 and accompanying text.

interested reasons played in the nineteenth-century controversy on the convenience and expediency of codifying the American law.⁴⁴

This Article, on the contrary, will take them into account as a starting point and try to show to what extent these reasons led the code opponents to construct a paradoxical argumentation in some aspects. That “paradoxical argumentation” against codification, whose main purpose consisted of defending the common law system, was based on the use of some arguments which paradoxically contradicted some of the most remarkable features of the common law tradition. Some arguments adopted and used by code opponents—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 incurred by code opponents. In order to avoid misunderstandings, let me add two additional comments.

First, this does not mean to deny that the discussion of codification was either 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.⁴⁵

Second, because it is clear to me that the discussion on codification was impassioned rather than 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 precisely the legal tradition they were trying to protect.

44. Reimann was probably the first author who showed more clearly the importance of the political and self-interested reasons in the legal theory discussion that arose in the context of the New York Civil Code debate. *See generally* Reimann, *supra* note 6. However, until today, the most recent and best explanation of the political and self-interest reasons of Carter’s legal theory held in the codification context has been written by Grossman. *See generally* Grossman, *Carter*, *supra* note 6.

45. *See* Grossman, *supra* note 3, at 151 (“Field’s codification campaign failed in New York State largely because of the energy, passion, and talent of the opponents of codification there.”); Reimann, *supra* note 6, at 115–16 (“[B]ehind the proffered jurisprudential reasons (mainly the ‘legal science’ argument) lurk manifest political preferences. For both Savigny and Carter, legislation suggested social change. While the change each feared and fought was of a different nature, they shared a conservative attitude and dreaded social and political innovation. Both Savigny’s and Carter’s aversion to legislation rested ultimately on political conservatism.”); *supra* text accompanying note 40; *see also* Crystal, *supra* note 8, at 256; Weiss, *supra* note 4, at 511;

This Article will be divided into two parts. Part I will contain first a brief survey of the main features of the common law tradition, at least as they have been explained by the majority of the common law scholarship. On the other hand, I will show briefly some of the shortcomings and pitfalls of the American common law in the second half of the nineteenth century. In Part II, I will concentrate on some of the most remarkable features of the argumentation for codification, considering both parties to the debate. In another occasion, I will analyze the concrete, paradoxical arguments given by scholars engaged in codification, particularly those used by the code opponents.

I. BRIEF CHARACTERIZATION OF THE AMERICAN COMMON LAW IN THE NINETEENTH CENTURY

Although the common law tradition has undergone important changes and transformations along its historical development,⁴⁶ it still presents some characteristic features that reveal its essence as a legal tradition, distinguishable from civil law. In order to demonstrate the paradoxical nature of the code opponents' argumentation, since they tried to defend the common law against codification by using arguments which undervalued some of the most important features of the legal tradition, it is convenient to outline the main features of that legal tradition.

A. *Main Features of the Common Law Tradition*

Without attempting to give an exhaustive definition, it could be stated that common law is a legal tradition which, based on custom from its very origins, has developed basically by judicial precedent. The common law's development through judicial precedent ("case law") constitutes the most remarkable feature of this legal tradition, which has also been known as "judge-made law."

Judge-made law or judicial legislation does not mean that judges enjoy complete discretion in their judicial task, since they are bound to previous judgments in substantially similar cases. This binding to previous judicial judgments has been called *stare decisis*, a doctrine whose nature and

46. On the historical development of American law, see, for example, DANIEL R. COQUILLETTE, *THE ANGLO-AMERICAN LEGAL HERITAGE: INTRODUCTORY MATERIALS* (1999); FRIEDMAN, *supra* note 6; KERMIT L. HALL, WILLIAM M. WIECEK & PAUL FINKELMAN, *AMERICAN LEGAL HISTORY: CASES AND MATERIALS* (2d ed. 1996); HORWITZ, *supra* note 1.

development has been carefully analyzed by scholars.⁴⁷ In traditional common law, then, the law is to a great extent based on custom and judge-made law, which is what the *stare decisis* doctrine entails. It is precisely the doctrine of *stare decisis* that confers certainty to the common law tradition; in effect, in this legal system, certainty is achieved by giving the force of law to judicial decisions.

The development of the common law through judicial precedent reveals another characteristic feature, which is the absence of systematization and deductive reasoning. The common-law tradition shows little concern with these methodological aims, because the judicial adjudication begins with and focuses on the facts of the case, rather than on general principles or rules. Moreover, a judge's main concern is to achieve a fair outcome in each case, to reach justice in the concrete case presented before him. In order to achieve justice, a judge does not believe in pre-established rules that look at hypothetical cases, but in rules formulated only in the face of an actual situation that arises before the court. It would be mostly true to say that "[o]utside of the judicial process there is hardly any law, since the law is a prediction of what will be the decision of the judge in a given situation."⁴⁸

Since the common law is a court-centered legal system, the legal development and progress depend basically on judges, who are doubtless the main protagonists of the common law tradition. In this regard, "[m]any of the great names of the common law are those of judges: Coke, Mansfield, Marshall, Story, Holmes, Brandeis, Cardozo."⁴⁹ Traditionally, the common law is, then, a legal system in which legislators and scholars do not play any special role. As Merryman stated:

47. On the *stare decisis* doctrine, 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); *Stare Decisis*, 30 *ME. L. REV.* 55 (1978).

48. 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).

49. JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEM OF WESTERN EUROPE AND LATIN AMERICA* 34 (2d ed. 1985) ("We know that our legal tradition was originally created and has grown and developed in the hands of judges, reasoning closely from case to case and building a body of law that binds subsequent judges, through the doctrine of *stare decisis*, to decide similar cases similarly.").

We know that there is an abundance of legislation in force, and we recognize that there is a legislative function. But to us the common law means the law created and molded by the judges, and we still think (often quite inaccurately) of legislation as serving a kind of supplementary function.⁵⁰

B. Shortcomings and Pitfalls of the American Common Law in the Nineteenth Century

The codification movement emerged in the United States as a possible tool to face the needed legal reform in the nineteenth century;⁵¹ it happened in England, as well as in several countries that belong to the civil law tradition.⁵² The main problem of the common law in the nineteenth century could be summed up in three words: uncertainty, complexity and inaccessibility.

In the antebellum codification movement some complained about the English character of the law, in both form and content. Sometimes these complaints were not separated or unconnected grievances. For instance, the uncertain and complex nature of the law was often considered to be a result of its alien identity.⁵³ A remarkable member of the South Carolina Bar Association delivered a well-known address in 1827 precisely *On the Practicability and Expediency of Reducing the Whole Body of the Law to the Simplicity and Order of a Code*:

All are deeply sensible of the exceedingly confused and imperfect state of our laws: and none can be more thoroughly convinced of these truths, than the Judges and the members of our profession. Hence has arisen the question, so much and so anxiously considered of late, "Is it practicable and expedient to reduce the whole body of our Law, to the simplicity and order of a code?"

50. *Id.* at 34. Merryman added:

We know that our judges exercise very broad interpretative powers, even where the applicable statute or administrative action is found to be legally valid. We do not like to use such dramatic phrases as "judicial supremacy," but when pushed to it we admit that this is a fair description of the common law system, particularly in the United States.

Id.

51. See COOK, *supra* note 5, at 46–66.

52. On the Spanish case, although from a European perspective, see ANICETO MASFERRER, *TRADICION Y REFORMISMO EN LA CODIFICACIÓN PENAL ESPAÑOLA* (2003). On France, see Aniceto Masferrer, *Continuismo, reformismo y ruptura en la Codificación penal francesa: contribución al estudio de una controversia historiográfica actual de alcance europeo*, 73 *ANUARIO DE HISTORIA DEL DERECHO ESPAÑOL* 403–20 (2003).

53. COOK, *supra* note 5, at 5.

That it is expedient, will be denied by none. That it is practicable, has been doubted by many, perhaps by most, at the Bar and in the Legislature. If practicable, it is not only expedient, but a duty of the highest order—It is a duty which the rulers owe to the people, the people to themselves, and both to their posterity.⁵⁴

After 1830, the codification movement became even stronger in many states. Jacksonianism, whose main aim was to pervade the whole political structure with a higher degree of democracy, contributed enormously to strengthen the cause for codification.⁵⁵ At the time, the attitude of criticizing the law came not only from lawyers, but also from laymen who contemplated the complexity of the law as the lawyers' way of controlling the law by excluding ordinary people from its knowledge. In this regard, "[m]any more lawyers and non-lawyers supported codification in the 1830s and 1840s."⁵⁶

In fact, after the Civil War, the main causes of dissatisfaction were undoubtedly the uncertainty and inaccessibility of the law, which caused delay in the administration of justice⁵⁷ in both state courts and the Supreme Court.⁵⁸ The ABA debated different kinds of proposals, which consisted in either restructuring the Supreme Court or creating courts of appeal.⁵⁹ Because of the excessive delays, some cities began to make use of arbitration as an alternative of the judicial system to solve legal disputes.⁶⁰ The slowness of the legal system was generally acknowledged.⁶¹

The uncertainty of the law constituted, however, probably the gravest problem. It is well known, in fact, that approximately fifty percent of the cases brought to appellate courts were being reversed, which produced logical complaints from judges and writers who stressed that it was really

54. THOMAS S. GRIMKÉ, AN ORATION ON THE PRACTICABILITY AND EXPEDIENCY OF REDUCING THE WHOLE BODY OF THE LAW TO THE SIMPLICITY AND ORDER OF A CODE 7 (1827).

55. See ANTHONY M. BERTELLI & LAURENCE E. LYNN, JR., MADISON'S MANAGERS: PUBLIC ADMINISTRATION AND THE CONSTITUTION 183 (2006).

56. Weiss, *supra* note 4, at 502–03; see also COOK, *supra* note 5, at 158; PETER J. KING, UTILITARIAN JURISPRUDENCE IN AMERICA: THE INFLUENCE OF BENTHAM AND AUSTIN ON AMERICAN LEGAL THOUGHT IN THE NINETEENTH CENTURY 295–302 (1986).

57. Crystal, *supra* note 8, at 248.

58. See generally *Report of the Special Committee Appointed to Consider and Report Whether the Present Delay and Uncertainty in Judicial Administration Can Be Lessened, and If So, By What Means*, 8 A.B.A. REP. 323 (1885) [hereinafter *1885 Special Committee Report*].

59. See *Report of the Sixth Annual Meeting of the American Bar Association*, 6 A.B.A. REP. 61, 62–64 (1883); Crystal, *supra* note 8, at 248–49.

60. *1885 Special Committee Report*, *supra* note 58, at 324; Crystal, *supra* note 8, at 249.

61. See *A Consequence of the Law's Delay*, 11 VA. L.J. 638 (1887); see also *The Law's Delay*, 21 AM. L. REV. 965, 965–66 (1887).

difficult to determine what the law was.⁶² In 1887, a contributor to the *Albany Law Journal* wrote:

The uncertainty of the common law has long since become a proverb. There is hardly a legal question that has not been decided in every conceivable way until fixed by statute. On many of the commonest principles of law there is even at this day the greatest conflict of adjudication among the various States of our country; nay, even in the same State, in the same court, and with the very same judge As it now stands, not only is it uncertain what the law is, but it is uncertain what it will be when a case gets to the ultimate court. The law is continually fluctuating, and although courts talk much about *stare decisis*, the only decisions they invariably stick to are those which ought never to have been made, and which have nothing but precedent to recommend them.⁶³

The complexity of the law contributed to make the legal system even more uncertain. The fact that states differed on specific legal questions such as the formation of contracts, grounds for divorce, and procedures governing default on negotiable instruments, also caused what Leonard A. Jones referred to as “great inconveniences.”⁶⁴ According to Jones, a remarkable Boston Bar Association member, “[d]iversity in these rules causes needless misunderstandings, annoyances and litigation. This diversity comes in part from discordant State legislation and in part from conflicting interpretations of the common law.”⁶⁵

The complex nature of the law contributed to some extent to its inaccessibility. However, this negative aspect came above all from the tremendous increase of cases deriving from courts. In 1931, Harvard Law professor Samuel Williston published the accounts he made at three different periods of the American Law Reports (1885, 1914 and 1928), and reported the results: “In 1928 there were something over 11,100 American law reports. . . . In 1914 there were 8,600. In 1885 there were 3,500. Chancellor Kent’s working library, which presumably contained substantially all the English Reports, as well as the American, contained 180 volumes.”⁶⁶

62. 1885 *Special Committee Report*, *supra* note 58, at 329–31; see also *Legal Principles Lost in a Maze of Cases*, 21 AM. L. REV. 605, 605 (1887).

63. *The Codes and the Governor*, 19 ALB. L.J. 348, 348 (1879).

64. Leonard A. Jones, *Uniformity of Laws Through National and Interstate Codification*, 28 AM. L. REV. 547, 552 (1894) (“[T]hey have found great inconveniences arising from diversities in legislation and in common law rules.”).

65. *Id.* Jones went on to add that “[o]ur dual system of government with national and State courts having jurisdiction of the same class of cases is another element of discord.” *Id.*

66. Samuel Williston, *Written and Unwritten Law*, 17 A.B.A. J. 39, 40 (1931).

This large increase in the number of law reports was partly due to the admission of new states, and because states like Washington, Oregon and New York considerably increased their number of reports.⁶⁷ On the other hand, “[t]he American Digest, without which we have no reference to what is in the reports, contains digest decisions to 1890, fifty volumes of enormous size.”⁶⁸ With these accounts, Williston stressed: “Now, consider the growth of reports for 100 years or 200 years, if you like, and see what you are coming to. That number of years is not a great period in the life of any country.”⁶⁹

As we see, increased legislation,⁷⁰ a growing number of reported decisions,⁷¹ and greater interstate travel and commerce⁷² laid at the root of the three legal evils: uncertainty, complexity and inaccessibility.⁷³

Although these evils were present in the antebellum period, Crystal maintained that in the last quarter of the century they went from bad to worse, “because of the failure of the methods by which the legal system traditionally met new challenges, treatise writing and equity jurisprudence.”⁷⁴ The fact that the treatises no longer had sufficient

67. *Id.* (“Washington, in 1885, had five reports. It now has about 160. Oregon had 13. It now has 130. But the growth in some of our middle and eastern states has been hardly less noticeable. Illinois had 126, and it now has nearly 600. New York had 586; it now has nearly 1,500.”).

68. *Id.* (“In the next twenty years it took as many volumes to cover all that the first Digest covered from the beginning of law reporting in the country to 1890. The Digest for the following twenty years will undoubtedly be equally voluminous.”).

69. *Id.*

70. John Dos Passos, *Codes*, 9 ALB. L.J. 33, 55 (1874) (“We have, including Congress and the United States courts, some forty legislative bodies building up, altering and tearing down our systems of statute law, and as many courts busy in construing these statutes, and declaring the common law, giving us some forty volumes of statute law, and an hundred volumes, yearly, of judicial decisions. We have, already, at least two thousand volumes of American reports, and nearly as many of those of the English courts. If the present condition of the Law is so appalling to the student and the practicing lawyer, what condition is the next generation to be in, when another two thousand volumes have been added to the mass?”); John W. Stevenson, *Address at the Eighth Annual Meeting of the American Bar Association*, 8 A.B.A. REP. 149, 150 (1885) (“Increasing legislation in the States seems rapidly to be becoming one of the evils of the hour.”).

71. JOHN R. DOS PASSOS, *THE AMERICAN LAWYER* 15 (1907) (“When the law reports were few, and the precedents shone like bright stars, in the legal firmament, and the lawyers knew and followed them, as astronomers do the particular planets, the application of *stare decisis* was easy and simple. But now—it flitters between the thousands of decisions as a phantom of the law—not as a vital principle.”).

72. Henry C. Tompkins, *The Necessity for Uniformity in the Laws Governing Commercial Paper*, 13 A.B.A. REP. 247, 261 (1890).

73. Crystal, *supra* note 8, at 250 nn.68–70.

74. *Id.* at 250–51.

authority as an effective tool of reform,⁷⁵ and that the *Reformed Procedure*—adopted by various states—diminished the application of equitable principles in the administration of justice,⁷⁶ explains why legal problems intensified during that period.⁷⁷

There is still another factor which made the mentioned legal evils (uncertainty, complexity, and inaccessibility) in the late nineteenth century even worse: the necessity—or at least great convenience—of unifying the law, particularly the commercial and trade matters. Although this concern was indeed present after the Civil War, it should be recognized that it was claimed in the 1890s,⁷⁸ and especially in the early twentieth century.⁷⁹

In this regard, in 1902 Francis B. James, member of the ABA's Committee on Uniform Laws, delivered before the American Warehousemen's Association an address that put the evils all together in order to emphasize the main legal features to the merchants: it should be—just the opposite as it is “under the present system”⁸⁰—certain,⁸¹ speedy,⁸²

75. See John F. Dillon, *Codification*, 20 AM. L. REV. 22, 23 (1886).

76. JOHN N. POMEROY, *EQUITY JURISPRUDENCE* xxiv (5th ed. 1941) (1881). On equity, see also Leonard J. Emmerglick, *A Century of the New Equity*, 23 TEX. L. REV. 244 (1945), and Roscoe Pound, *The Decadence of the Equity*, 5 COLUM. L. REV. 20 (1905).

77. Crystal, *supra* note 8, at 251.

78. See Jones, *supra* note 64, at 552 (“Conflicting laws tend to hinder interstate trade, to render contracts uncertain and to occasion needless litigation. This diversity of law is a serious impediment to the prosperity of the country. It hampers ordinary mercantile transactions with countless trifling distinctions and forms. It leads to contradictory judgments upon a person's domestic relations, making them to vary with a change of his domicile. While our country is large, there is, with exceptions that need not be considered, a common jurisprudence and a common civilization, and there is no good reason for any diversity of law on subjects where diversity is an evil or an annoyance.”).

79. Probably for this reason, the Field Civil Code debate did not pay much attention—at least directly—to this aspect, which would play a decisive role later, for example, in the Restatement project.

80. FRANCIS BACON JAMES, *CODIFICATION OF BRANCHES OF COMMERCIAL LAW* 3 (1902).

81. *Id.* at 3–4 (“[I]f a case has not yet been decided in the state where the commercial paper was issued, on the particular phase of the business in hand, there is no means of knowing with certainty its legal effect. If the instrument be issued in New Jersey and a lawyer be consulted, he may say that by the decisions in Massachusetts the transaction is invalid, by those of New York it is valid, and he does not know which view, if either, the Courts of New Jersey will adopt. Or if the Courts in New Jersey have decided that the transfer of the commercial paper is valid, but the Supreme Court of the United States has declared it invalid, he will tell his client that if by chance it should be litigated in the State Courts of New Jersey he will win, but if in the United States Courts he will lose. If the merchant has taken no legal advice before negotiating for the commercial paper, he may or may not have a remedy, depending on the accident whether the matter is litigated in a State Court or Federal Court—the judges of each professing, under their oaths of office, to administer the law of New Jersey, and not the law of the United States.”).

82. *Id.* at 4 (“To this great uncertainty is added infinite delay. The tradesman of today knows not time or space, and has become accustomed to the shorthand writer, the electric car,

and economically ascertained⁸³ and uniform throughout the commercial world.⁸⁴ He then described most of these traits, regarding the uniform attribute the most important.

This complaint was not new. In 1894, an outstanding lawyer of Boston had complained for the same reason.⁸⁵ The American Bar Association, created in 1877, and whose constitution declared the promotion of the uniformity of legislation as one of its main objects, in 1889 appointed a committee of one of each state to promote the cause of uniform laws.⁸⁶

II. FEATURES OF THE CODIFICATION ARGUMENTATION

It is undeniable that “[t]he codification movement is one of the set pieces of American legal history. It has its hero, Field; its villain is James C. Carter of New York, who fought the idea of codification with as much vigor as

the cannon-ball express, the telegraph and the long distance telephone. His opportunities are gone if he waits days and weeks for a lawyer to hunt through tons of musty dust covered reports, digests, abridgments, encyclopaedias and ill-digested statutes. The merchant must have an answer at once without ‘ifs, ands, buts and perhapses.’”)

83. *Id.* at 4–5 (“The law should be furnished economically. These are days of specialties; specialties mean economy, and economy is the secret of commercial success. The present manner of ascertaining the law is for a lawyer or judge to tediously ascertain a legal principle by induction from the decided cases, which cases he has found by laborious research. Each time a case is litigated, the litigant pays court costs and lawyer’s fees to make the induction and thus the individual bears the expense of giving law to the State when the State should at its own expense furnish law to all the people. It is a great evil that a few individuals are put to the expense of establishing a principle of law for the community, which principle is liable to be overthrown in the next case decided in even the same court. In theory, law is made by the state; in practice, it is made by the litigant, and the cost of the law-making, instead of being borne by all the people, is defrayed by a few. It is *ex post facto* justice, and as litigants frequently die before a case can be finally decided in its long journey through the courts, it may also be termed *post mortem* justice.”)

84. *Id.* at 5 (“For commercial purposes the people of the United States are one and the United States but one country. State lines are, commercially speaking, obliterated. It is, therefore, a great hardship that a merchant about to deal with a piece of commercial paper must take great chances or go to the expense and suffer much delay to find out, with any degree of certainty, the laws of the State where the commercial paper is issued. For commercial purposes there should be one rule clearly expressed governing all commercial transactions.”)

85. Jones, *supra* note 64, at 552 (“But by way of illustration the rules of commercial law should be uniform throughout the country. Diversity in these rules causes needless misunderstandings, annoyances and litigation. This diversity comes in part from discordant State legislation and in part from conflicting interpretations of the common law.”)

86. Even in the antebellum period complaints were made for the same reason: “The evil to be feared in our country is, that so many sovereign legislatures, and so many Supreme courts, will produce too much law, and in too great a variety; so much and so various that any general revision will become impracticable.” NATHAN DANE, A GENERAL ABRIDGEMENT AND DIGEST OF AMERICAN LAW xiv (1823); see also JAMES KENT, COMMENTARIES ON AMERICAN LAW (1896).

Field fought for it.”⁸⁷ However, it would be false to hold that they did not agree about anything. Friedman stated that they

agreed about ends, but disagreed about means. They both wanted rationality. They both wanted a workable system of law, a system that business could rely on. Both distrusted the role of laymen, in the making of law. Carter preferred common-law judges, as philosopher-kings, and looked on codes as straitjackets. Field took the opposite view.⁸⁸

Nevertheless, it seems to me that at least their argumentation showed a deeper disagreement than Friedman’s statement. Moreover, it is not easy to find points in common in their debate, although theoretically they could agree about some important aspects, as Friedman stated. This does not surprise me at all. It reveals a reality which pervaded the whole debate, and which led Carter to avoid recognizing any possible points of agreement between them. In this regard, it could be said that in their debate Carter and Field were simply talking past each other.⁸⁹ Frequently they both pretended not to hear one another to such an extent that it could be said that “there are none so deaf as those who will not hear.”⁹⁰ This lack of sincere disposition to pay real attention to the arguments given by them both, especially by the code opponents’ side, enabled them to avoid some possible agreements which could have led them to recognize the expediency of codifying the private law to some degree. Because opponents of the Field code envisaged neither the expediency nor the practicability of codifying the private law to any degree at all, it cannot be said the Field’s failure was due to his conservative, moderate, or radical proposal. Moreover, code opponents’ argumentation did not emphasize as much the Field proposed code’s pitfalls and shortcomings as just the idea of codification.⁹¹ In doing so, however, they tried to make good use of arguments and statements given by scholars

87. FRIEDMAN, *supra* note 6, at 302.

88. *Id.* at 303.

89. European historiography on feudalism was labeled by one Spanish scholar with a similar expression, because the ideological and political interests of those who dealt with feudalism were so strong that they also did not want to listen to each other. See Aniceto Masferrer & Dirk Heirbaut, *La contribución de F.L. Ganshof a la historiografía feudal europea: Una revisión crítica a la historiografía española en torno al feudalismo Ganshofiano*, 75 ANUARIO DE HISTORIA DEL DERECHO ESPAÑOL 641 (2005).

90. ROBERT MAYO, POLITICAL SKETCHES OF EIGHT YEARS IN WASHINGTON 99 (Baltimore, Fielding Lucas, Jr., 1834).

91. I disagree with Reimann’s statement that “the German debate concerned merely the idea of a code, the New York struggle a concrete draft ready for enactment,” since in fact both the German and New York debates dealt with the idea of codification. Reimann, *supra* note 6, at 101 n.37. Although it is true that the New York code was ready for enactment, the code opponents struggled above all with the very idea of codification. *Id.*

who were not against the idea of codification, as we will see. In this regard, the code opponents displayed a much more intelligent strategy than code proponents, whose position was theoretically favored by the legal chaos and the need for legal reform.

As a result, contradictions and paradoxes emerged frequently in a debate, which, to some extent, was more ideological or political than properly scientific. In order to understand that debate, and before showing these contradictions and paradoxes, it is helpful to begin by keeping in mind the opposite starting points of the theories, and presenting the most relevant features of both arguments.

A. *Different Starting Points and Most Relevant Features of Both Sides' Argumentation*

1. Personal Rivalry and Mutual Resentment Between Carter and Field

Any careful reader of the debate's sources could realize the mutual distrust between the main protagonists of the code proponents and opponents. Reimann made this point clear by showing Carter's ad hominem attacks on Field, and suggesting they had real differences, some of them "fairly obvious."⁹² As we know, they both had represented opposite sides in the charged Tweed dispute, which produced a high degree of tension between them.⁹³ So much so, that it seems to me completely true that "[t]o fully understand the animus with which Carter and his allies from the Association of the Bar of the City of New York attacked the civil code, it is necessary to understand their feelings about David Dudley Field, the primary author."⁹⁴

First of all, it is necessary to take into account the Erie Railroad episode that occurred in the 1860s, which involved both Carter and Field, and led the former to organize, in 1869, the Association of the Bar of the City of New York, with the purpose of improving the moral character of lawyers

92. *Id.* at 113.

93. This litigation against Tweed for corruption took place in the 1870s, when Carter was special counsel to the city of New York, and while Field defended Tweed in the civil and criminal proceedings. George A. Miller, *James Coolidge Carter*, in VIII GREAT AMERICAN LAWYERS 3, 9–11 (William D. Lewis ed., 1908); see also Helen H. Hoy, *David Dudley Field*, in V GREAT AMERICAN LAWYERS 125, 138 (William D. Lewis ed., 1908); Grossman, *Carter*, *supra* note 6, at 589–90; Reimann, *supra* note 6, at 113 n.99.

94. Grossman, *Carter*, *supra* note 6, at 589.

and judges.⁹⁵ Some years later, their first direct confrontation in 1875 in the context of the Tweed litigation showed that “[t]here was clearly no love lost between the two lawyers.”⁹⁶

The differences between them were publicly well known. In fact, Carter published an article in the *New York Times*, where he accused Field of using “every device of technicality for the purpose of obstructing the progress of justice and leading to an erroneous result,” associating him with “the great frauds which have disgraced the civilization of our time,” as well as with “the person mainly and chiefly responsible for them [Tweed].”⁹⁷

It is not surprising at all, then, the degree of tension and animosity in which the Field code debate developed, including personal attacks and mutual insults, which frequently appeared in the *New York Times*.⁹⁸ I agree with Reimann’s opinion, that “[t]he role of personal motives is more obvious in Carter’s case.”⁹⁹ Indeed, Carter’s ad hominem attacks on Field prove it clearly.¹⁰⁰

In this regard, Carter warned, from precedent experience, against the danger of vanity for those who undertake a legal reform in order to improve the law theoretically, and put Field’s purpose under suspicion: “But the danger is that the gratification of the ambition or the vanity will become a motive greatly superior to the wish to effect a solid improvement—a danger to which the law has been in almost every age exposed.”¹⁰¹

In other words, Field, according to Carter, probably was more interested in satisfying his own vanity rather than improving the law.

Carter’s criticism against Field’s framework emphasized and depicted the proposed Civil Code as the mere result of Field’s discretionary will or interest, as an enterprise which belonged to Field almost exclusively:

But Mr. Field demands by his *Civil Code* that his statement of the law, in every instance, right or wrong, be *made* the law, so that upon its enactment it shall supersede the existing law, and itself become the last arbiter over the rights, duties and property of men. Thereafter no appeal can be taken from it to the decisions of courts, however illustrious, nor can the rules of right reason or the venerable name of Justice herself be invoked against it . . . [Mr. Field] has frequently asserted, and the assertion is true, that the

95. *Id.*; see also *id.* at 589 n.32 (listing several works discussing Carter’s efforts to organize the New York ABA).

96. *Id.* at 590.

97. *Id.* (quoting *The Suit Against Tweed*, N.Y. TIMES, Mar. 8, 1876).

98. See Morriss, *supra* note 6, at 366 n.64.

99. Reimann, *supra* note 6, at 113.

100. *Id.*

101. CARTER, PROPOSED CODIFICATION, *supra* note 26, at 11.

Legislature “can no more make a Code than it can paint a picture.” He asks that the Legislature *accept* it upon the authority of the two names subscribed to it. If accepted and adopted, the laws under which we live will be those ascertained, declared—*made*—by Messrs. D. D. Field and A. W. Bradford, and mainly, as I suppose it would not be invidious or incorrect to say, by the gentleman first named.¹⁰²

Furthermore, Carter linked Field’s proposed code with the New York Elevated Railroad dispute, suggesting that the economic interest of powerful law firms impelled them to protect their own clients.¹⁰³ His depiction of Field, before the Judiciary Senate Committee, suggested Field’s incompetence and, above all, arrogance:

[Y]ou are asked upon the authority of those three gentlemen, to which is added about the score or two of letters which Mr. Field has read, to abrogate the law under which you have lived, you and your ancestors for centuries. You are asked to abrogate that, and to start out upon this new and unknown path. That is the request which is made of you, and I think I do not exaggerate it.¹⁰⁴

Field’s response came later and was more self-defensive in nature, rather than reflective of a pure hostility or strategy against leader’s code opponents. In fact, Field regarded the fifth part of the Carter’s pamphlet as a “vilification of me.”¹⁰⁵

Field lamented, “The animadversions of Mr. Carter upon all former codes,”¹⁰⁶ and referred to Carter with these terms:

102. *Id.* at 22–23. Insisting in the same point, Carter wrote: “The Commissioners appointed . . . were Messrs. William Curtis Noyes, A. D. Bradford, and D. D. Field; but the gentleman last named is understood to have had far the largest share in its preparation.” *Id.* at 94.

103. Carter, *Argument*, *supra* note 26, at 9–11. Although he then pointed out: “Well, I won’t stop here to inquire whether their position about this code springs from bias, or what other cause.” *Id.* at 11; *see also* Grossman, *Carter*, *supra* note 6, at 588–89.

104. Carter, *Argument*, *supra* note 26, at 14. Later he made exactly the same point, saying: [T]his code is full of errors, and yet you are asked to pass that law and to abrogate the system under which you and your ancestors have lived for a hundred years, and which has been the theme of a thousand eulogies, and which is ordinarily supposed to be that part of our governmental system most worthy of admiration. You are asked to abrogate this system upon the instant, and to substitute another in place of it which you do not know, have no time to study, and which is said upon high authority to be full of mischief.

Id. at 14–15.

105. DAVID DUDLEY FIELD, *A SHORT RESPONSE TO A LONG DISCOURSE: AN ANSWER TO MR. JAMES C. CARTER’S PAMPHLET ON THE PROPOSED CODIFICATION OF OUR COMMON LAW* 1 (1884).

106. *Id.* at 7.

He seems to care nothing, however, for the experience, or for the matter of that, the opinions of other men. He knows what is good for them better than they know themselves. He has made up his mind and it is unfavorable to Codes. He may, for aught I know, reject the [T]en [C]ommandments, at least until revised by him. He is harder to please than anybody else.¹⁰⁷

He finished his *Short Response* by pointing out:

Why Mr. Carter should vilify me I do not know, except it be from habit. I have done nothing that I was not commissioned by the state to do, as any one may see who will look at chapter 266 of the Laws of 1857, and read it by the light of the Constitution; and I have done the best I could. It is hardly a misdemeanor to take a commission from the lawgivers of the land; nor yet felony to lay before them the fruits of obedience. But no matter. His censure does not in the least disturb me, and in the language of the lawyers, I submit it, without argument, to the judges of good taste and good manners.¹⁰⁸

It is hard to deny that “Carter’s opposition to codification was thus in part driven by professional and personal interests,” and that his “struggle against codification was also part of a larger, highly political, issue.”¹⁰⁹ In other words, “their fight over codification was only one battle in a broader war between [Carter and Field].”¹¹⁰

2. Meaning of Codification: Codification vs. Common Law? Civil-Law Tradition vs. Common-Law Tradition?

The personal rivalry between Carter and Field pervaded the whole debate over whether or not to codify the American law. One of the most striking aspects of this debate was the very meaning of “codification,” on which they never agreed. The lack of agreement on this starting point reveals the extent to which they mistrusted one another, not even willing to define seriously what they were really talking about. Partly as strategy, partly for mutual mistrust, the fact is that their argumentation showed over and over again the different kind of “codification” they discussed. In this regard, they hardly paid attention to what their counterpart was discussing, confident

107. *Id.* at 8.

108. *Id.* at 13; see also DAVID DUDLEY FIELD, CODIFICATION: AN ADDRESS DELIVERED BEFORE THE LAW ACADEMY OF PHILADELPHIA (1886) (dealing with the distinction between written and unwritten law without any mention of Carter’s name).

109. Reimann, *supra* note 6, at 114.

110. Grossman, *Carter*, *supra* note 6, at 589.

that they already knew his position, although maybe that personal prejudice did not fit with what he was stressing. From this point of view, the discussion was indeed more passionate than scientific, because both were convinced that they possessed the jurisprudential truth and neither was willing to change his mind. In order to defend more comfortably their own legal theory, each preferred to maintain as a starting point that meaning of codification which could be better presented or defended, in itself and also from his adversary's argumentation.

While Field maintained that codification would be compatible with common law, Carter presented Field's proposed code as the complete abrogation of the common law system "upon the instant, and to substitute another in place of it which you do not know."¹¹¹ The truth, however, seems to be in between Field's and Carter's assertions.

Field's statement establishing the continuing authority of the common law was remarkably clear. His introduction to the code, where he directly addressed the phenomenon of gaps, explained:

[I]f there be an existing rule of law omitted from this Code, and not inconsistent with it, that rule will continue to exist in the same form in which it now exists; . . . and if new cases arise, as they will, which have not been foreseen, they may be decided, if decided at all, precisely as they would now be decided, that is to say, by analogy to some rule in the Code, or to some rule omitted from the Code and therefore still existing, or by the dictates of natural justice.¹¹²

On the one hand, by rules "omitted from this Code,"¹¹³ Field seemed to mean common law doctrines developed by the courts. On the other, that principle seemed to be then negated by two other provisions, which could be interpreted as if the code would sweep away all judicial precedents: "In this State there is no common law, in any case, where the law is declared by the five Codes."¹¹⁴

"The rule that statutes in derogation of the common law are to be strictly construed, has no application to this Code."¹¹⁵

Furthermore, Field allowed courts to continue to refer to the common law, considered as a body of rules derived exclusively from judicial precedents.¹¹⁶

111. Carter, Argument, *supra* note 26, at 15.

112. Field, *supra* note 13, at xix.

113. *Id.*

114. COMMISSIONERS ON PRACTICE AND PLEADINGS, THE CODE OF CIVIL PROCEDURE OF THE STATE OF NEW-YORK § 6 (Albany, Weed, Parsons & Co. 1850).

115. *Id.* § 2032.

In this regard, Robert Ludlow Fowler, the author who wrote the best pamphlet supporting Field's code, also made clear this point by asserting that codification would not "arrest the spontaneous development of the common law."¹¹⁷

However, Carter did not seem to want to take seriously any statement that could resolve his preconceived incompatibility between codification and common law. That primary premise could neither be put under doubt nor discussed at all. According to his mind, unlike the digest,¹¹⁸ the idea of codification and the common law were irreconcilable, no matter what kind of codification one was discussing.¹¹⁹

From this perspective, his persistent criticism of some aspects which do not seem to fit with the content of Field's proposed code, can be better understood. Carter's assertion that the Civil Code's text alone would dictate the result of almost every case constitutes a good example of it.

He reproached Field for pretending to provide the sole basis for deciding every single case. In doing so, Carter asserted that "the code would supplant decisional law more completely than Field acknowledged and would reduce judges' role to the mechanical application of statutory language. In short, Carter attempted to portray Field's Civil Code as an arrogant, grand scheme

116. Field, *supra* note 13, at xviii ("In cases where the law is not declared by the Code . . . [and] an analogy cannot be found, nor any [common law] rule which has been overlooked and omitted, then the courts will have either to decide, as at present, without reference to any settled rule of law, or to leave the case undecided, as was done by Lord Mansfield, in *King v. Hay* . . . trusting to future legislation for future cases.").

117. FOWLER, *supra* note 24, at 52. He added that "writers on codification agree that the development of new law beyond and in addition to that expressed in a code is inevitable." *Id.*

118. According to Carter, the "Digest" did not purport any trouble for the common law development, as we will see:

A book containing a statement in the manner of a Digest, and in analytical and systematic form of the whole unwritten law, expressed in accurate, scientific language, is indeed a thing which the legal profession has yearned after. . . . It would refresh the failing memory, reproduce in the mind its forgotten acquisitions, exhibit the body of the law, so as to enable a view to be had of the whole, and of the relation of the several parts.

CARTER, PROPOSED CODIFICATION, *supra* note 26, at 96-97.

119. Grossman, *supra* note 3, at 152-55. Indeed, Grossman pointed out clearly that Carter needed:

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.

Id. at 166.

that would render New York's legal system indistinguishable from that of Napoleon's."¹²⁰

No matter whether or not Field's argumentation said what Carter suggested to be Field's intentions, this was the best way to confront codification of the common law or, even more drastically, to present the debate as a struggle between the common-law tradition and the foreign civil-law tradition. By connecting as much as possible the meaning of codification with the civil-law tradition he pretended to identify both realities completely, so he could present himself as a guardian of the American legal heritage, and blame his opponents for his pretension to introduce foreign legal ideas, which would sweep away the best legal tradition in the world: the American one.

This perspective makes sense of Carter's fierce criticism and comments against the codes, which were characteristic of despotic states, whereas the common law typified democracies and free societies.¹²¹ What is surprising is his persistent insistence on this aspect, on which, according to Carter's view, there was no possible discussion.

It was remarkably clear to Carter that, while the common-law system is "characteristic of States of popular origin, . . . [the civil-law system] is a characteristic feature in those which have a despotic origin, or in which despotic power, absolute or qualified, is, or has been, predominant."¹²² In this regard, he distinguished between "free, popular States, [in which] the law springs from, and is made by, the people," and "despotic countries," in which "the interests of the reigning dynasty are supreme; and no reigning dynasty could long be maintained in the exercise of anything like absolute power, if the making of the laws and the building up of the jurisprudence were entrusted, in any form, to the popular will."¹²³

In fact, he displayed broadly this kind of idea in the first pages of his *Proposed Codification*. In his opinion, while:

The fundamental maxim in the jurisprudence of popular States is, that whatever is in consonance with justice as applied to human affairs, should have the force of law, [the principle] *Quod principi placuit legis habet vigorem* (the will of the sovereign has the force of the law), is the contrasted maxim despotism.¹²⁴

Carter used comparison to emphasize the positive aspects of the common-law system and sneer at the civil-law system in which context the

120. *Id.* at 166.

121. *Id.* at 154.

122. *Id.*

123. CARTER, PROPOSED CODIFICATION, *supra* note 26, at 6.

124. *Id.* at 7.

codification movement succeeded. Frequently, after praising many aspects of the Anglo-Saxon tradition, he showed the absurdity of intending “to substitute the methods of despotic nations in the place of those through which their own system has been built up,”¹²⁵ or “to substitute in its place a scheme of codification borrowed from the systems of despotic nations.”¹²⁶

In Carter’s view, no lawyer should “stand indifferent spectators of an attempt to eliminate from our jurisprudence those features which have made it what it is, and which distinguish it to its advantage from the systems of other nations.”¹²⁷ Because of this, he explained what he meant in writing and publishing his *Proposed Codification*: “My object is to show that such an attempt to subject the growth and development of popular institutions to forms borrowed from countries despotic in present character, or historical origin, is unscientific in theory, a false move in practical statesmanship, and sure to produce, if successful, the gravest evils.”¹²⁸

According to Carter, there was no doubt about the despotic character of such countries, either in their historical origins or in the present, and all succeeded in codifying the law, sharing the same legal system. In this regard, as he examined some historical instances of codification, he made clear the point that “political or dynastic” reasons constituted the most important purpose. With the Prussian code (1794), he pointed out that “this, of course, proves only that codification may be useful for attaining political or dynastic objects; it has no tendency to show that it is an improvement.”¹²⁹ And the same conclusion drew from the French code, whose “leading motive with the Emperor Napoleon was political and dynastic,”¹³⁰ not the improvement of the law, because “in the way of establishing a system of law certain, easy to be learned, and easy to be administered, it must be pronounced a failure. In neither of these respects will it bear comparison with the system of our Common Law.”¹³¹

Summing up his own inquiry, he also concluded that, “notwithstanding the arguments adduced to show the falsity of the theory upon which the scheme of codification is based,” it would not make any sense to sweep away the common-law system “for that of foreign and monarchical States, originally adopted from political and dynastic reasons, and which in its practical operation falls far short, in point of excellence, of their own.”¹³²

125. *Id.* at 8.

126. *Id.* at 9.

127. *Id.* at 10.

128. *Id.* at 24.

129. *Id.* at 60.

130. *Id.* at 61.

131. *Id.* at 62.

132. *Id.* at 69.

As the reader can see, once Carter had defined and delineated this mark of the debate, the different location of the two positions were clear: popular custom-democracy-common law against foreign, despotic political regimes-codification-civil law system. There was no other option. White or black? With me or against me? For our tradition (which is the best one), or for a foreign one of despotic character? The field of the debate had been notably restricted, and the code proponents were located where Carter wanted them to be: purporting a foreign legal tradition, which was characteristic of despotic states, instead of appreciating the American legal system, “which has been the theme of a thousand eulogies, and which is ordinarily supposed to be that part of our governmental system most worthy of admiration.”¹³³

3. Meaning of the Code’s Completeness

As we will see, many disagreements between code opponents and proponents on different aspects of Field’s proposed code flowed from the diverse meanings of codification they used in their argumentations. Let us now examine the most important one: the assertion that Field’s proposed code was intended to be a complete system of law.

This was probably Carter’s most important reproach. In his view, Field’s proposed code pretended to constitute the sole basis for deciding every single case. However, Field never asserted such a statement. In fact, he acknowledged precisely the opposite:

What do we mean by codification? Not that which many lawyers imagine it to be. They conjure up a phantom and then proceed to curse it and to fight it. Their imaginations portray it as a body of enactments governing and intended to govern every transaction in human affairs, present and future, seen and unforseen [sic], universal, unchangeable and exclusive. That is not our meaning.¹³⁴

Field stated that a code should be coherent and clear, but not complete. In fact, he vigorously disclaimed any pretension of enacting a complete code, as an exclusive source of law. Because of this, Field was willing to allow courts to continue to develop the common law from judicial precedents.¹³⁵

Grossman pointed out that “[t]he New York codifiers seem to have concluded that they had to frame their proposal as a moderate one to win support from at least some members of the state’s relatively conservative

133. Carter, *Argument*, *supra* note 26, at 14–15.

134. Grossman, *supra* note 3, at 162 (quoting David Dudley Field, *Codification*, 20 AM. L. REV. 1, 2 (1886)).

135. *Id.* at 162–63 n.109.

bar. Therefore, they usually presented the prospect of codification in evolutionary rather than revolutionary terms.”¹³⁶

Nevertheless, any pretension to moderate any attempt of codification was doomed to fail before Carter’s strategy,¹³⁷ which did not pay attention to such a degree of moderation.

Carter, taking no consideration of Field’s efforts to combine, as much as possible, the codification with the common law system,¹³⁸ centered his argumentation on saying that a complete code was simply incompatible with justice, for no code could ever contain a sufficient number of rules to fairly resolve every dispute that might arise:

Codification . . . consists in enacting rules, and such rules must, . . . from their very nature, cover future and unknown, as well as past and known cases; and so far as it covers future and unknown cases, it is no law that deserves the name. It does not embody justice; it is a mere *jump in the dark*; it is a *violent* framing of rules without reference to justice, which may or may not rightly dispose of the cases which may fall under them.¹³⁹

Carter accepted no other concept of codification but his own. No matter what specific kind of codification was proposed by Field or other authors, he simply ignored their point of view by insisting on the absurdity of intending to enact general rules for future and unknown cases:

136. *Id.* at 162 (adding that “[t]he New York codifiers’ approach was thus very different from that of their counterparts in California. The latter, in light of California’s youth and its desire to achieve respect in other states and in foreign nations, decided that it was strategically wise to present codification as a revolutionary advance”); *see also* Grossman, *California, supra* note 6, at n.109.

137. According to Grossman:

Field and his supporters frequently pointed out that the Civil Code was made up primarily of principles and rules already settled by common law judges. Moreover, . . . they suggested that the code would play a less dominant role in New York’s legal system than it did in civil law jurisdictions. Common law precedent would remain in force where not directly displaced by code provisions, and judges would continue to serve a vital function. Field’s proposal . . . would thus make the law of the state more certain and accessible while retaining the common law’s flexibility.

Grossman, *supra* note 3, 162–63. Field’s decision to grant the courts an important role in filling the Civil Code’s gaps “likely reflected not only political calculation, but also Field and his allies’ own common law breeding.” *Id.* at 163 n.111.

138. In his introduction to the proposed civil code, Field had disclaimed expressly any intent to offer a rule for every case, writing that a code “cannot provide for all possible cases which the future may disclose. It does not profess to provide for them. All that it professes is, to give the general rules upon the subjects to which it relates, which are now known and recognized.” Field, *supra* note 13, at xviii.

139. CARTER, PROPOSED CODIFICATION, *supra* note 26, at 33.

Every one must see that the more general an enacted rule is, the more of future unknown cases it will cover. Suppose a general rule were enacted that promises made upon consideration were binding. This, if it is made to mean anything, means that all such promises are binding, and the rule would cover a multitude of invalid promises, such as those made by infants or insane persons, or fraudulent promises, or promises against public policy.¹⁴⁰

Not satisfied by simply ignoring Field's claim, Carter sneered at Field's statement that the code did not profess to provide for all future cases.¹⁴¹ While Field claimed to intend solely "to give the general rules upon the subjects to which it relates, which are now known and recognized,"¹⁴² Carter replied that Field could have put such an explicit limitation in the code itself, but he did not do so, since "this would have utterly destroyed his code, *qua* code, by converting it into a ridiculous digest."¹⁴³

Carter did not trust Field's claims at all. His distrust appeared again as he, not believing Field's affirmation on the extent of general rules, figured out two possible explanations: "he either did not mean that his code should have the limited operation he asserts for it, or he intended to conceal his meaning while he was urging its adoption."¹⁴⁴

B. Bases of Argumentation

Although scholarly literature has analyzed the main arguments propounded by both code proponents and opponents, scholars have hardly paid attention to the methods of argumentation used in the codification debate. The sources dealing with codification's controversy reveal the bases on which the arguments were usually founded. In this regard, we can deduce three bases: reasoning, authorities, and the historical interpretation of preceding experiences. In other words, the argumentation of those who took part in the codification debate was based not primarily on reasoning, but rather on passion, the opinion of influential lawyers both American and foreign, and the interpretation of codification's historical experiences undertaken in a remarkable variety of places and periods of time.

140. CARTER, ORIGIN, *supra* note 26, at 274.

141. Field did not make his point patiently or with kind words; he once said, referring to Carter: "Nobody but an idiot supposes that." Grossman, *supra* note 3, at 162.

142. Field, *supra* note 13, at xviii.

143. CARTER, ORIGIN, *supra* note 26, at 274.

144. *Id.*

1. Reasons, Legal Reasoning, and Science

It would be erroneous to deny the scientific character of the codification debate. In fact, reason and legal reasoning played an important role for both sides. In the late nineteenth century nobody dared to attempt to develop legal theory without seeking support in the “legal science” or the German concept of “Rechtswissenschaft,” a “science of law,” known by American legal scholarship.¹⁴⁵

As we already know, American scholars used this expression with a remarkable variety of meanings, some of them opposed, which demonstrated the two main ways of reasoning in the nineteenth century: romanticism, from which came legal historicism, and rationalism, which maintained the need for codifying the law, and which became the legal positivism of the past century.¹⁴⁶

In this regard, while code opponents tried to make good use of the arguments upheld by Savigny and the “German Historical School,”¹⁴⁷ code proponents did the same with the legal rationalism. Both Carter and Field, as well as other scholars, were deeply aware of their status as developers of American jurisprudence, and although most were practitioners rather than academics, they engaged in a legal theory discussion with which they probably had never imagined to deal.

Moreover, they used quite frequently expressions like “legal science” and “jurisprudence” in an attempt to bestow theoretical reasons which supported their particular viewpoints on the codification discussion.

Even though the most heated period of the debate originated with Carter’s pamphlet published in 1884,¹⁴⁸ in the earlier Field works the convenience of codifying the law appeared in terms of jurisprudence’s scientific improvement or progress.

In order to respond to the criticism against codification, Field pointed out that the first and main thing would be to agree about what is meant by a code, because not everything deserves the name. According to Field, “the

145. Reimann, *supra* note 6, at 108–10.

146. See Aniceto Masferrer, *Codification of Spanish Criminal Law in the Nineteenth Century* (forthcoming).

147. Although the literature contains some references to the German Historical School, the modern scholarship did not pay much attention to this aspect until 1989, when one article was published dealing with this interesting topic. Matthias Reimann, *Nineteenth Century German Legal Science*, 31 B.C. L. REV. 837 (1990); see also Matthias Reimann, *Continental Imports: The Influence of European Law and Jurisprudence in the United States*, 64 TIDSCHRIFT VOOR RECHTSGESCHIEDENIS 391 (1996).

148. CARTER, PROPOSED CODIFICATION, *supra* note 26.

true idea of it is a digest of all the general rules of law upon a given subject, arranged in distinct propositions according to a scientific method.”¹⁴⁹

Field treated the law as a science many years before his fierce debate with Carter. In his view, law reform should be undertaken in a scientific method, since law was a real science. He had no doubt at all about the very scientific nature of the law itself:

The science of the law is so vast in its extent, that they alone can master it who make it their principal study. Only a few men, set apart for that particular calling, and devoting themselves to it the best part of their lives, can learn or apply all the rules which govern the legal relations of men with each other.¹⁵⁰

In order to know the law as the law deserves to be learned, Field asserted that one “must have studied it as a science, long and well.”¹⁵¹ The knowledge of the law, then, was supposed “to be acquired by long, systematic, patient study.”¹⁵² The scientific treatment of the law required, according to his point of view, to arrange and systematize it. Hence, science meant arrangement and system. Because of this, he praised “hav[ing] the . . . body of . . . laws in a written and systematic form,” and defended the possibility of having “a body of written law in a convenient form, and in scientific order.”¹⁵³ By equating “science” (and therefore, legal science) with “system,” he called for a legal reform, since the “present condition of our law is anomalous” and therefore “it can hardly be called a system at all.”¹⁵⁴ He proposed the code as the best legal tool to satisfy the systematic requirement of the law as a legal science: “The age is ripe for a code of the whole of our American law [W]e must now have a system of our own, symmetrical, eclectic, framed on purpose.”¹⁵⁵

In fact, the 1846 constitutional commandment mentioned explicitly the relationship between system and code by encouraging them “to reduce into a written and systematic code the whole body of the law of this state.”¹⁵⁶

Indeed, the idea of codifying the law in order to achieve a scientific jurisprudence was quite widespread among scholars at the late nineteenth

149. DAVID DUDLEY FIELD, *The Codes of New York and Codification in General: Address to the Law Students of Buffalo*, in 1 SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS 374, 376 (A. P. Sprague ed., 1884).

150. DAVID DUDLEY FIELD, LEGAL REFORM: AN ADDRESS TO THE GRADUATING CLASS OF THE LAW SCHOOL OF THE UNIVERSITY OF ALBANY 11–12 (1855).

151. *Id.* at 12.

152. *Id.* at 15.

153. Field, *supra* note 13, at ix & xxix.

154. FIELD, *supra* note 150, at 16–17.

155. *Id.* at 30.

156. N.Y. CONST. art. I, § 17 (1846).

century. In this regard, Pomeroy praised California's legal achievement of having enacted a code, for which he thought that the state "has embodied the important and controlling doctrines of her jurisprudence in the form of a scientific code."¹⁵⁷ He was convinced that other states would follow the same footsteps, so much so that this measure would "spread with ever increasing rapidity, until its effect shall be shown throughout the entire extent of our common law."¹⁵⁸

In the Californian context, a member of the 1870 Code Commission that drafted the codes, Charles Lindley, showed to what extent codification and science were regarded as the same thing.¹⁵⁹ Governor Newton Booth pointed out that the object of codifying the law had been "to generalize the statutes and principles of common law into a science."¹⁶⁰ These and other statements led Grossman to explain the close relationship between classification, arrangement and scientific order, so that many Californians "saw codification—the arrangement of the law—as a way to prove that they had created an intelligent, sophisticated civilization," and that "[t]he primary impetus for scientific classification was the same as that for legal codification."¹⁶¹

The identification between classification and science was not, however, a singularity of the Californian mentality, but a common belief among American scientists.¹⁶² Even though the classification's stature diminished during the nineteenth century, in 1894, code proponents continued to boast the goal of making "the codes absolutely harmonious, to create a system of laws," and "to have a classified system of laws."¹⁶³

Statements on the code's scientific character were not infrequent in the literature, by which the code proponents tried to show codification as something really reasonable and, of course, more scientific than the common law decision making. Fowler, for example, asserted that, taking into account the distinction between the *ratio decidendi* (reasons given by the judge which are independent of the particular facts) and the dicta (unauthoritative special references to facts), the adherents of codification

157. JOHN NORTON POMEROY, INAUGURAL ADDRESS 11 (1878).

158. *Id.*

159. CHARLES LINDLEY, CALIFORNIA CODE COMMENTARIES 11 (1872).

160. Governor Newton Booth, Inaugural Address (Dec. 8, 1871), available at http://www.californiagovernors.ca.gov/h/documents/inaugural_11.html (last visited Mar. 20, 2008).

161. Grossman, *California*, supra note 6, at 629.

162. See generally George H. Daniels, *Science in American Society: A Social History* (1971).

163. Andrew P. Morriss, *Decius S. Wade's Necessity for Codification*, 61 MONT. L. REV. 407, 426–27 (2000).

simply insisted that the former “are susceptible of being selected by skillful and logical persons, and when selected of being classified, their inconsistencies and redundancies being first expunged.”¹⁶⁴ Replying to Carter’s criticism on the theoretical and unscientific character of the codification, Fowler held that this “depends much on what is meant by scientific. Science is most commonly referable to a body of knowledge arranged in an orderly manner.”¹⁶⁵

The emergence of the professional law teacher contributed clearly to regard the law as a science. Crystal has shown that the introduction of the case method in legal education was based partly on an evolutionary, empirical conception of science, and how this new legal scholarship has a “desire to solve the problems of the legal system,” regarding “uncertainty and complexity in doctrine as an affront to conceptual purity.”¹⁶⁶ It is not surprising, then, that even in the past century the identification between law, science, and system persisted in the legal reform’s landscape. In this regard, Professor Beale reported in 1914 that “the general scientific law remains unchanged in spite of these errors; the same throughout all common law jurisdictions. This is the science we teach, and this is the science which requires systematic statement in order that progress and reform may be possible.”¹⁶⁷

The relationship between “legal science” and “system” came also from the German jurisprudence, whose most outstanding scholar and leader of the Legal Historical School, Savigny, had published an influent and well-known work titled *System des heutigen Römischen Rechts*.¹⁶⁸

Carter and code opponents in general, in addition to denying the scientific character of the codification in theory,¹⁶⁹ claimed that the common law system was a real legal science which had originated precisely as a response of the antebellum codification movement.¹⁷⁰ In fact, the reasoning

164. FOWLER, *supra* note 24, at 16.

165. *Id.* at 44. *See generally id.* at 44–50.

166. Crystal, *supra* note 8, at 254.

167. *Id.* at 254–55 (quoting Joseph H. Beale, *The Necessity for a Study of Legal System*, 14 AALS PROCEEDINGS 31, 38 (1914)).

168. FREDERICH K. VON SAVIGNY, *SYSTEM OF THE MODERN ROMAN LAW, 1840–1848* (Ed J. Higginbotham ed., William Holloway trans., 1867).

169. In fact, Carter invested most of his *Proposed Codification of Our Common Law* “to show that the scheme of codification, assuming, as it does, to reduce into statutory forms the rights, duties, and obligations of men in their ordinary relations and dealings with each other, is *unscientific in theory*.” CARTER, *PROPOSED CODIFICATION*, *supra* note 26, at 24.

170. HORWITZ, *supra* note 1, at 253–66; *see also* MILLER, *supra* note 5, at 117–85, 239–65; G. EDWARD WHITE, III–IV *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE MARSHALL COURT AND CULTURAL CHANGE 1815–1835*, at 143–56 (1991).

code opponents tried to emphasize the scientific character of the common law was regarded from then onwards as “The Other Science.”¹⁷¹

Even though Christopher Columbus Langdell tried, by introducing in legal education the case method, to show the common law as a science,¹⁷² James C. Carter was probably the common-law lawyer who made more efforts in the nineteenth century to present the common law system as a science.¹⁷³ In his first work he paid little attention to this matter: distinguishing the two main provinces of the law, the written law enacted by the legislature and concerning public law, and the unwritten law flowing from judges dealing with private law, he stated clearly and expressly that “[t]hese are the dictates of science. This is the natural order; and all attempts to contravene it, while certain to be fruitful in mischief, will as certainly fail of success.”¹⁷⁴

Three years later, as he explored the distinction between those provinces, his concern about the relationship between common law, identified particularly with unwritten law and science had increased. In his view, in order to administer justice, there was only one rule to be found and applied, and “[t]o find out this rule and apply it is *a matter of science*, and the work can be successfully performed only by following scientific methods.”¹⁷⁵ However, he did not explain anything else about those scientific methods.

This would be developed two years later, when he published *The Provinces of the Written and the Unwritten Law*, where he tried to explain the scientific character of the common law. In that work he argued that the law governing private transactions (private law), which cannot be made by human enactment, “is consequently a science depending upon the observation of *facts*, and not *contrivance* to be established by legislation, that being a method directly antagonistic to science.”¹⁷⁶ He added:

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.¹⁷⁷

171. Grossman, *California*, *supra* note 6, at 634–35.

172. Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 5 (1984).

173. Grossman, *California*, *supra* note 6, at 634–35.

174. CARTER, PROPOSED CODIFICATION, *supra* note 26, at 42.

175. Carter, *Argument*, *supra* note 26, at 26.

176. CARTER, PROVINCES, *supra* note 26, at 4 (emphasis omitted).

177. *Id.* (emphasis omitted).

Having made clear this point in *Prefatory Note*, he tried to answer what he thought was the main question: “whether the *private* law, now unwritten, should be reduced to writing.”¹⁷⁸ According to him, “[t]he *fact must always come before the law*,” so much so that “[a]part from known, existing facts, present to the mind of the judge, or the codifier, he cannot even ask, and still less answer, the question, what is the law?”¹⁷⁹ Answering the main question, he maintained that:

[P]rivate law does not consist in a series of logical deductions drawn from original definitions and capable of existing independently of the material, or moral world, but is simply the arrangement and classification of facts—that is to say, it is a *science* founded upon the observation of facts, and subject to the conditions which attach to such sciences.¹⁸⁰

Moreover, Carter perceived the law as an empirical and natural science, with the “power to subject objects to a scientific classification being necessarily limited to those which are submitted to observation.”¹⁸¹

He thought that the main difficulty consisted not on ascertaining the rules of law, but on applying them to the facts. And in applying the law, the problem was that the facts were not sufficiently apprehended. Because the most relevant aspects were the facts of transactions:

[T]he law is a *science* consisting in the observation and classification of human transactions. The *principles of the classification—the scientific order*—that is, the *law*, already exist[s]; the task is to ascertain the true features of the fact, or groupings of fact, and when this is done, the transaction seems, as it were, to arrange itself in its appropriate class.¹⁸²

178. *Id.* at 17.

179. *Id.* at 28.

180. *Id.*

181. *Id.* at 29. He added that “the jurist, or the codifier, can no more classify future human transactions, and, consequently, can no more frame the law concerning them, than the naturalist can classify the *fauna* and *flora* of unknown world.” *Id.*

182. *Id.* at 43–44. Field, on the contrary, maintained:

The true function of the judge is to apply the law to the facts. All lawsuits deal with facts first and with the law afterwards. But that only is truly law which has been provided beforehand. The suitor, whose case is to be adjudged, should have been able to know, before he acted, how to conform his acts to the law, that is to the known law. One of the gravest objections to the law of precedents is that it is or has been made always after the fact; after the fact of the present case, or after the fact in a previous case cited for authority in the present.

FIELD, *supra* note 108, at 22.

In other words, “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*.”¹⁸³ While emphasizing the empirical aspect of the relations that the law tries to regulate, he prevented the legal science from any kind of codification.

As with any scientific undertaking that can only be done by experts, he pointed out that:

The members of the legal profession alone are able to contrive the methods by which the administration of justice can be best secured. Sciences can be advanced only by the labor of experts, and we are the experts in the science of the law. The work must be done by us, or not done at all; and it will be well or ill done as we shall well or ill play the part which the legal profession ought to fill in a democratic State.¹⁸⁴

The conclusion of his conception of law as a legal science by distinguishing between legislation and judicial precedent, was clear from its very starting point: “Written law would be confined to its true province. We should meet with no attempts to accomplish by legislation what science only can effect.”¹⁸⁵ At the end of his reasoning he concluded that the authentic legal science came from judges, not from the legislature, who are concerned with judicial precedent, not legislation. However, it was difficult for him to combine his emphasis on the facts—rather on the law or legal rules—with the common conception of the science as a logic and systematic system. Moreover, at the end of his life, Carter recognized that “whoever aspires to be a thoroughly accomplished lawyer” should “comprehend those rules . . . as parts of a classified and orderly system [that exhibits] the law as a science.”¹⁸⁶

Even though Carter’s jurisprudence received criticism from some scholars,¹⁸⁷ code opponents followed Carter’s position maintaining the

183. CARTER, PROPOSED CODIFICATION, *supra* note 26, at 26.

184. CARTER, PROVINCES, *supra* note 26, at 60.

185. *Id.* at 61.

186. CARTER, ORIGIN, *supra* note 26, at 1.

187. Grossman, *supra* note 3, at 172–74. Grossman noted that Ezra Thayer identified Carter’s neglect of principles and rules as the weakest aspect of his jurisprudence. In fact, after criticizing Bentham for focusing only on abstract rules and overlooking their application to facts, Thayer added:

Some of [Bentham’s] opponents, on the other hand, lay hold of what may be called the *fact end* of the process, the end which is especially emphasized by common-law methods, and forget the rule. . . . Mr. Carter . . . seems especially open to this charge of considering only the facts on the one hand and the source of law that is [custom] on the other, and of

scientific character of the common law, and particularly, the development of the law through judicial precedent. Mathews, for example, boasted the precedent of the judicial adjudication as a “practical system.”¹⁸⁸ In his view, “legislation and law must not be confounded; law is logic, legislation is merely [*dicta*]. It would seem to be more philosophical that the law should grow by gradual accretion, and real expansion, rather than by blind projection into the obscure regions of the remotely possible.”¹⁸⁹ His notion of legal science undermined the legislation and exalted the civil law based on judicial precedent, in accordance to the logic and common sense.¹⁹⁰

Hornblower extolled the same kind of science, when he argued that “[t]he 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 w[e] approach to a scientific and civilized jurisprudence.”¹⁹¹

Field’s followers, in their turn, praised the codification as a science. In this regard, Fowler stated that “[c]odification is a science, a science of the form of the law, possessing a literature of its own, quite apart from ordinary juristic literature,”¹⁹² referring to the science of legislation. Facing criticism from those who asserted that this kind of legal science undervalued the teachings of experience, he replied that “the theoretical codifiers undervalue the teachings of experience, no doubt, but to the same extent only that the empirical practitioner undervalues the teachings of science and philosophy.”¹⁹³ He recognized that “the natural opposition between these widely opposed schools of lawyers is not new,”¹⁹⁴ and that “the dispute

squeezing out, so to speak, the *tertium quid*, the rule itself, which lies between.

Id. at 176 (quoting Ezra R. Thayer, *Judicial Legislation: Its Legitimate Function in the Development of the Common Law*, 5 HARV. L. REV. 172, 198 (1891)).

188. MATHEWS, *supra* note 23, at 10.

189. *Id.* at 27.

190. On one hand, Mathews maintained that the law “cannot be created by the *fiat* of an autocrat, nor improvised by the forecast of a suppositious codifier,” on the other, he argued:

In its intrinsic essence, . . . civil law is neither more nor less than the result of the principles of natural justice and good morals, modified by custom, analyzed and applied, under public policy, by logic and common sense, through a series of years, to the practical affairs of mankind.

Id. at 36.

191. William B. Hornblower, *Is Codification of the Law Expedient?: An Address Delivered Before the American Social Science Association* 8 (Sept. 6, 1888), available at http://www.constitution.org/cmt/hornblower/cod_law_over.pdf. Hornblower added: “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.” *Id.*

192. FOWLER, *supra* note 24, at 63–64.

193. *Id.* at 64.

194. *Id.*

between the historical school of law and the philosophical school of law is the creature of no age or clime.”¹⁹⁵

Other common law lawyers, and particularly scholars, who did not engage in the codification debate, emphasized the scientific character of the law in the late nineteenth century. Langdell, for example, defined the law in these terms: “Law, considered as a science, consists of certain principles or doctrines . . .”¹⁹⁶ In his view, it was “indispensable to establish at least two things—that law is a science, and that all the available materials of that science are contained in printed books.”¹⁹⁷

It is not necessary to go more into detail about the different positions to come to the conclusion that the discussion which emerged in the codification debate context was scientific, and, consequently, that their protagonists, although most of them were practicing lawyers, developed jurisprudential notions through legal reasoning. Both code opponents and proponents tried to make use of the two main theoretical approaches to the law as a science, the historical and the philosophical schools of law, respectively, the former seeking the legal foundation on the judicial precedent (history and tradition),¹⁹⁸ the latter on the legislation (legal rationalism or iusnaturalism).¹⁹⁹ Therefore, it would not be true, either to deny the scientific character of that discussion, or to undermine the role of the reason and legal reasoning in the codification debate. In order to show that truth, it is not now necessary to expose the different reasons they gave to support their own legal position. They both offered different reasons they supposed to be the right answers to legal questions.²⁰⁰

195. *Id.* at 65.

196. CHRISTOPHER C. LANGDELL, *CASES ON CONTRACTS* vi (1871).

197. Christopher C. Langdell, Address at the Meeting of the Harvard Law School Association on the 250th Anniversary of the Founding of Harvard University (Nov. 5, 1886), reprinted in 3 L.Q. REV. 118, 124 (1887).

198. Grossman is the scholar who has studied more exhaustively the jurisprudence of anticodification, and, in particular, Carter's legal theory. Grossman labeled that theory “anticlassical,” because, in trying to defeat any attempt of codification of the common law, Carter developed a jurisprudence that contradicted the then-classical legal theory defended by Langdell, in which formalism, logic, and deduction played an important role. See generally Grossman, *supra* note 3.

199. Although I use these expressions, it is worthy to note that it is not completely accurate to maintain that Field's legal theory followed legal rationalism or iusnaturalism, or, at least, the jurisprudence that argued that the law should be based basically on that reason, and that the main content of the codes should spring from a pure speculative reasoning disconnected with legal tradition. In this regard, Field's jurisprudence fell far away from the French legal school of exegesis or Bentham's legal theory.

200. For the reasons given by code opponents and proponents, see Morriss, *supra* note 6. Later we will deal with and discuss these reasons.

Nevertheless, it would not be true either to think that any of the codification debate's arguments were based mainly or exclusively on these reasons or legal reasoning they articulated in support of their legal understanding. On the contrary, their legal argumentation was based on two more elements whose careful consideration constitutes a *conditio sine qua non* to understand not only the codification debate's argumentation, but also the legal reasoning which supported their views. In this regard, and leaving aside now the expression of their own feelings and passion, the frequent use of authorities and the interpretation of history or precedent experiences on their behalf, constituted a remarkable part of the codification discussion which give us a more complete understanding of the argumentation used by both code opponent and proponents.

2. Authorities

Codification discussion in the postbellum period contains numerous references to authorities, whom scholars quoted and used to support their argumentation, means which have been used and abused by European civil law lawyers—called commentators in the modern age—as they have dealt with their legal methods.²⁰¹ This resort, then, was not new at all. As the reader will see, it is interesting and revealing indeed to look at the authorities they relied upon to reinforce their legal theory.

As we will see, it should be said first of all that this resort was used commonly by both sides. Secondly, by examining who cited whom, I will show that sometimes they cited the same authorities on their behalf. Although at the first glance it could seem contradictory, in doing so, they differently interpreted authorities' statements in order to fit them in their legal thoughts. Some interpretations of legal authorities' thoughts are so surprising that they seem to be little of what authorities had affirmed. In fact, they accused the counterparts of having misunderstood and manipulated the cited authorities. Finally, we will consider how both code opponents and proponents used this means to reinforce their views, and why the former took more advantage of it than the latter in order to gain support.

A surprising test of the contrast between codification opponents and proponents is Carter's frequent use of Bentham. Even though it would seem to be the opposite, at least theoretically, Field's references to Bentham are rare indeed. Field cited Bentham very scarcely. Carter, in his turn, did it quite frequently. That Field did not understand and propose codification as

201. The three principles on which commentators' based their legal argumentation were: *leges, rationes et auctoritates* (laws, reasons, and authorities).

Bentham understood and proposed it, seems clear.²⁰² It is, then, understandable from this point of view that Field, trying to make clear the difference between his codification proposition and Bentham's one, did not quote him as a reference on his behalf. Carter, on the contrary, intending to show Field's legal theory as radical and extreme as possible, used Bentham's references to this purpose, trying to present Field as the American Bentham. To a considerable extent, Carter's attempt succeeded.

According to Carter, Jeremy Bentham, who personified the devil for disregarding judge-made law, was "the great apostle of codification."²⁰³ While Field maintained that his code did not pretend to cover future cases and, consequently, new cases would be decided as they were then being decided, Carter responded that this would be "the *reductio ad absurdum* of codification," and furthermore was false, because "their great apostle Jeremy Bentham . . . clearly perceived that a code of private law could not co-exist with any permission to a judge to look outside of the Code for a rule, even when deciding novel cases."²⁰⁴ Although this was not Field's view of codification, Carter took advantage of each opportunity he had to put in evidence Bentham's hatred for common law as if Field possessed the same feelings as Bentham, which obviously hurt Field's reputation and legal argument considerably.²⁰⁵ On purpose, then, Carter usually talked about "Bentham and the codifiers" without any kind of distinction, as if all of them purported the same sort of codification.²⁰⁶ Carter was astonished that a man like Bentham, who had once perceived "the intrinsic excellence of English jurisprudence, pre-eminent over that of any other civilized State," eventually called for codification.²⁰⁷

202. JOHN F. DILLON, *Lecture VI: Our Law in Its New Home*, in THE LAWS AND JURISPRUDENCE OF ENGLAND AND AMERICA 169, 181 (1894) ("There are, I think, few advocates of codification who share in Bentham's extreme views; but there are many who believe, myself among them, that a far less radical scheme—one more suited 'to human nature's daily food'—is not only feasible, but desirable.").

203. CARTER, PROPOSED CODIFICATION, *supra* note 26, at 39; CARTER, PROVINCES, *supra* note 26, at 32.

204. CARTER, PROVINCES, *supra* note 26, at 32.

205. *Id.* at 32–33 ("His view was, hit or miss, to force a statutory rule upon mankind and compel submission to that. His notion was that if he could only get rid of that disposition to decide controversies as the common law decides them, a written Code would work and be a blessing. In his own language, 'All plain reading; no guess work; no argumentation; your rule of action—your lot under it lies before you.' He addressed a long letter to the People of the United States and advised them thus: 'Yes, my friends, if you love one another—if you love each one of you his own security—shut your ports against our common law as you would shut them against the plague. Leave us to be ruled—us who love to be thus ruled—by that tissue of imposture.'").

206. *Id.* at 33.

207. *Id.* at 48.

On the contrary—as noted—Field did not use Bentham’s authority as a reference to support his call to codify the common law. Nevertheless, Field mentioned Bentham once to argue the proximity of thinking between Bentham and Carter. According to Field, the latter “unconsciously no doubt, when writing that ‘the fact must always come before the law,’ fell into agreement with Bentham’s homely apologue.”²⁰⁸

Code proponents were chronologically the first who quoted outstanding scholars to reinforce their argumentation for codification. Field cited many lawyers, both American and foreign: Mr. Justice Willes,²⁰⁹ the Chancellor of England,²¹⁰ Judge Chalmers,²¹¹ Macaulay,²¹² Gibbon,²¹³ Mr. James F.

208. David Dudley Field, *Codification: Mr. Field’s Answer to Mr. Carter*, 24 AM. L. REV. 255, 265 (1890). He added Bentham’s text which, in Field’s view, shows that Carter fell into agreement with Bentham:

It is the judges . . . that make the common law. Do you know how they make it? Just as a man makes law for his dog. When your dog does any thing you want to break him of, you wait until he does it, and then beat him for it. And this is the way the judges make the law for you and for me.

Id. As it has been well remarked, “Field saw legal codification in distinctively American terms, not as an imitation of a French style or even in imitation of a Benthamite style, but as an independent production and in opposition to the English law.” Gruning, *supra* note 4, at 177.

209. DAVID DUDLEY FIELD, *Codification of the Law*, in 1 SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS, *supra* note 149, at 349, 351. Field quoted Mr. Justice Willes, who wrote a dissent from the second report of the English digest of law commission, to show the difference between code and digest. According to Willes’s view:

[A] code is preferable to a digest in many points of view. . . . It seems even possible that a really well-considered code, not restricted to a digest of our own jurisprudence, but embodying improvements suggested by a comparison of our own laws with those of other countries, might contribute something to a great object—the gradual formation of international mercantile and maritime law.

Id. Field added: “This short statement is, to my thinking, an unanswerable argument.” *Id.*

210. FIELD, *supra* note 150, at 31.

211. FIELD, *supra* note 108, at 10. Field copied Chalmers’ text to prove that the law could be codified, as Chalmers thought:

[I]f every branch of the law were taken in hand and dealt with in the same way the result would be similar. I have not worked out the percentage, but I should think you would get the law stated in about one-five-thousandth part of the space in which it was formerly stated, and all in one book, and in one place, instead of being scattered about, as it is now, like stones on the seashore.

Id. at 11.

212. FIELD, *supra* note 209, at 355. Field, in order to defend himself from those who criticized the code’s errors, referred to Macaulay’s statement “that the best codes extant, if malignantly criticized, will be found to furnish matter for censure in every page.” *Id.* at 355–56 (spelling modernized). He quoted the same statement some years later. See FIELD, *supra* note 105, at 11.

213. FIELD, *supra* note 105, at 11.

Stephen,²¹⁴ Joseph Story,²¹⁵ some Chancellors like Walworth²¹⁶ and Kent,²¹⁷ some Commissioners of Massachusetts,²¹⁸ Amos,²¹⁹ Pollock,²²⁰ as well as some jurists of California²²¹ and Dakota,²²² where civil codes had been enacted, among others.

Some of them were quoted because they either supported some degree of legal codification, or criticized the excessive power of judges. Others, however, were cited for other specific purposes, generally related to Carter's previous argumentation or quotation. In fact, Carter's strategy in seeking support from authorities did not consist solely in conjoining Bentham's and Field's positions as effectively as possible, but also to make biased use of other scholars and lawyers who, although they declared themselves in favor of codification, could fall in disagreement with some aspects of Field's proposed codification, or even with what Carter understood (or was willing to understand) to be Field's codification, which—as we saw—could not coincide (somehow or at all) with Field's true codification theory. This explains why both code opponents and proponents cited sometimes the same authorities, although their interpretation of them could be not only different but even antagonistic.

In this regard, it is most interesting to pay attention to how Carter made use of authorities' quotations, with which he intended to further dismantle Field's theory than to legitimate or to prove the consistency of his own legal position. This can be established in the evidence when we look carefully at his quotations: Amos,²²³ Pollock,²²⁴ Austin,²²⁵ Justice Yost,²²⁶ Mr. James F.

214. DAVID DUDLEY FIELD, *Reasons for the Adoption of the Codes*, in 1 SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS, *supra* note 149, at 361, 373.

215. FIELD, *supra* note 105, at 2. When Field tried to reply to Carter's criticism that some parts of the law could not be codified, he asked Carter what part of the law could not be codified—"is it the law of commercial contracts in general?"—and pointed out that "[t]hese contracts are precisely the subjects on which Judge Story and his colleagues most strongly insist." *Id.*; see also Field, *supra* note 208, at 264.

216. FIELD, *supra* note 105, at 4–5; Field, *supra* note 208, at 264 ("Walworth, the last chancellor of New York, declared himself in favor of general codification.").

217. FIELD, *supra* note 105, at 8; Field, *supra* note 208, at 262.

218. FIELD, *supra* note 105, at 5–7.

219. *Id.* at 11–12.

220. *Id.* at 12.

221. *Id.*; David Dudley Field, *Codification in the United States*, 1 JURID. REV. 18, 24–25 (1889).

222. Field, *supra* note 221, at 24–25.

223. CARTER, PROPOSED CODIFICATION, *supra* note 26, at 62–63, 67, 71–72, 111–13; Carter, Argument, *supra* note 26, at 17–18, 22–23.

224. Carter, Argument, *supra* note 26, at 22.

225. CARTER, PROPOSED CODIFICATION, *supra* note 26, at 62–63, 71–72.

226. *Id.* at 66.

Stephen,²²⁷ the English Justices Coleridge, Talfourd and Westbury,²²⁸ the Lord Chief Justice Cockburn,²²⁹ as well as members of the Bar,²³⁰ among others.

Carter took advantage of each opportunity he had to cite on his behalf testimonies from those who were somehow supporters of codification:

Upon this point the testimony, not of an enemy, but of a distinguished supporter, of the theory of codification may be invoked. . . . And we may also call as a witness a still more distinguished jurist, who was a thorough believer in the feasibility and expediency of codification, although he confesses his inability to find anywhere in human experience a successful example of it.²³¹

Field also, in his turn, tried to show Carter's radicalism, by which he rejected to accept the existence of any good code:

The stoutest adversary of the theory of codification can find now and then a good Code. Even Chancellor Kent says in a note to his excellent commentaries:

"The *Partidas* is the principal code of the Spanish law, compiled in Spain under the reign of Alphonso the Wise, in the middle of the thirteenth century, and it is declared by the translators to excel every other body of law, in simplicity of style and clearness of expression. It is essentially an abridgement of the civil law, and it appears to be a code of legal principles, which is at once plain, simple, concise, just and unostentatious to an eminent degree."²³²

While Field adduced support for the codification from statements given by scholars who lived in places where codification had already succeeded,²³³ Carter, in his turn, always selected the most charged statements against specific codes given by codification's supporters; for instance, when they referred to the experiences of other countries with codification, like France,

227. *Id.* at 71–72, 79–80.

228. *Id.* at 77–79.

229. *Id.* at 80–81.

230. Carter, *Argument*, *supra* note 26, at 14 (“[M]any members of the Bar, of entire respectability and high position, have charged that this code is full of errors.”).

231. CARTER, *PROPOSED CODIFICATION*, *supra* note 26, at 62 (referring first to Sheldon Amos, and secondly to the late John Austin); *see also* Carter, *Argument*, *supra* note 26, at 22 (referring to Frederick Pollock).

232. FIELD, *supra* note 105, at 8; Field, *supra* note 208, at 261–62 (copying Kent's statement again, Field says that Kent's *Commentaries* was probably one of Carter's first readings when he entered law school).

233. FIELD, *supra* note 105, at 12, 14–21.

of which they had no special esteem: “The greatest possible uncertainty and vacillation that have ever been charged against English law are little more than insignificant aberrations, when compared with what a French advocate has to prepare himself for when called upon to advise a client.”²³⁴

Field countered Carter’s biased use of authorities like Frederick Pollock and Sheldon Amos by saying that “[a]n English writer is rather slow to find good out of England, and even Pollock could say nothing better of the French Codes, than their showing [sic] that an imperfect Code was far better than no Code at all.”²³⁵

Frequently, then, the same authorities were used by both Field and Carter. That is the case, for example, with Gibbon, Pollock, Amos, and Stephen. The authority of the historian Gibbon was used firstly by Carter to boast of the “peculiar feature of Roman policy by which the *unwritten law* became supreme in the administration of private justice,”²³⁶ and later by Field to prove, reproducing Gibbon’s words, “[t]hat the discretion of the judge is the first engine of tyranny; and that the laws of a free people should foresee and determine every question that may possibly arise in the exercise of power and the transactions of industry.”²³⁷

Unlike Field’s use of Stephen’s quotation,²³⁸ Carter cited this outstanding English lawyer in a rather different way, intending to prove the impracticability or inexpediency of codifying the law. According to Carter’s view, if James F. Stephen, who was “one of the most distinguished . . . and capable of constructing a Code,” did not succeed in England, then “[w]hat he cannot do in this direction may better be let alone as an impracticable endeavor.”²³⁹

With the same purpose Carter cited John Austin, “a thorough believer in the feasibility and expediency of codification, although he confesses his

234. CARTER, PROPOSED CODIFICATION, *supra* note 26, at 62 (quoting SHELDON AMOS, AN ENGLISH CODE: ITS DIFFICULTIES AND THE MODES OF OVERCOMING THEM 125–26 (1873)). Similarly, Carter brought up Frederick Pollock’s opinion on the New York Civil Code, whose thinking was that “the present state of the law [was] better than that code or anything much like it.” Carter, Argument, *supra* note 26, at 22.

235. FIELD, *supra* note 105, at 12; *see also* FOWLER, *supra* note 24, at 68 (quoting Pollock’s same statement to emphasize that, “conceding that the Civil Code is not perfect, and it may safely be assumed that no perfect code will ever be constructed, yet a poor code is better than no code. Mr. Frederick Pollock has well said ‘[t]hat the principal lesson to be learnt from the French codes is that even a very defective code is far better than none’”).

236. CARTER, PROPOSED CODIFICATION, *supra* note 26, at 49 n.1; *see also id.* at 50–52.

237. FIELD, *supra* note 105, at 11; *see also* Field, *supra* note 208, at 264 (similar language).

238. *See* FIELD, *supra* note 214, at 373.

239. CARTER, PROPOSED CODIFICATION, *supra* note 26, at 79–80.

inability to find anywhere in human experience a successful example of it.”²⁴⁰

As Field recognized, Carter referred, “with great satisfaction, to the hasty criticism of Mr. Amos.”²⁴¹ Indeed, Carter’s references to Amos are not few. Amos’s first criticism of the Field civil code was tough,²⁴² and even tougher taking into account that Amos was well-known as a codification advocate. Carter took advantage of it without any compassion. He cited each negative reference to any attempt at codification stated by Amos, no matter whether he criticized the French code,²⁴³ or “deprecate[d] any resort to the example of the Indian Codes for light in relation to the problem of codifying the laws of civilized nations.”²⁴⁴ However, Carter emphasized in particular Amos’s criticism against Field’s civil code. After introducing Amos as a “distinguished advocate of codification who has given a very close examination to this code,” and as a scholar who “produced a work on codification and . . . consider[ed] this proposed code, and [spoke] of it,” he transcribed two critical fragments in his *Argument* delivered before the Senate Judiciary Committee in 1887.²⁴⁵

Field responded to Carter’s quotations of Amos with these words:

I may be pardoned for adding, that since Mr. Amos’[s] work was published, I have had the good fortune to make his acquaintance, and have seen much of him, and though I cannot say that he has told me so, I am led to think that he has changed his opinion.²⁴⁶

Robert L. Fowler also mentioned Amos’s change of opinion in the same year: “It is fair to Professor Amos’[s] qualification as a critic to add that he has lately, in answer to an inquiry of one of Mr. Field’s opponents, expressed himself as having entirely changed his former opinion of Mr. Field’s codes.”²⁴⁷

Had Amos been aware in advance of the use and impact which his affirmations were going to have in the American jurisprudence, it seems to

240. *Id.* at 62; *see also id.* at 63, 71–72.

241. FIELD, *supra* note 105, at 11.

242. SHELDON AMOS, CODIFICATION IN ENGLAND AND IN THE STATE OF NEW YORK 28–35 (1867). *See generally* SHELDON AMOS, AN ENGLISH CODE: ITS DIFFICULTIES AND THE MODES OF OVERCOMING THEM (1873) [hereinafter AMOS, ENGLISH CODE].

243. CARTER, PROPOSED CODIFICATION, *supra* note 26, at 62–63; Carter, *Argument*, *supra* note 26, at 17–18; *see also* AMOS, ENGLISH CODE, *supra* note 242, at 125 (describing Amos’s view on the French code).

244. CARTER, PROPOSED CODIFICATION, *supra* note 26, at 67.

245. Carter, *Argument*, *supra* note 26, at 22–23; *see also* CARTER, PROPOSED CODIFICATION, *supra* note 26, at 111–13.

246. FIELD, *supra* note 105, at 12.

247. FOWLER, *supra* note 24, at 43 n.2.

me he would probably have expressed his personal opinion on New York codes more cautiously or, at least, with other terms. However, it was too late since Carter had already taken advantage of it in a very intelligent way. Moreover, Carter, paying no attention at all to Field's and Fowler's claims, continued to maintain Amos's first statements on Field's civil code,²⁴⁸ which led Field to reproach Carter's attitude:

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.²⁴⁹

In other words, Field accused Carter of biased use of authorities. He was not completely right when he said that Carter omitted 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. Carter always regarded and recognized Amos as a "distinguished advocate of codification."²⁵⁰ On the contrary, he looked for this kind of authority to reinforce his own argumentation. Moreover, even though Carter would have wanted to misinterpret Amos' legal theory, Amos himself would not have allowed him to, at least until he died in 1886, and, from then onwards, it would have been difficult because of Amos's remarkable reputation as codification's advocate in the English jurisprudence. It seems to me, however, that Field was probably right with respect to Pomeroy, as we will see later.

Furthermore, Carter, by using codification's advocates as authorities to support his legal position on Field's proposed civil code, achieved another goal he pursued: to show somehow the division and diversity of opinions among those who called for codification. "What reliance is to be placed upon the opinions of the supporters of a scheme [of codification], when they differ so widely as to what the nature of the project should be and denounce each other's attempts to carry it into effect?"²⁵¹

248. Carter, *Argument*, *supra* note 26, at 22–23.

249. Field, *supra* note 208, at 265.

250. Carter, *Argument*, *supra* note 26, at 22; *see also* CARTER, PROPOSED CODIFICATION, *supra* note 26, at 62 (calling Amos "a distinguished supporter"); *id.* at 71 ("advocates . . . for codification"); *id.* at 111 ("one the most distinguished supporters of codification in England"); CARTER, PROVINCES, *supra* note 26, at 23 ("an eminent advocate of codification").

251. CARTER, PROPOSED CODIFICATION, *supra* note 26, at 81.

In fact, he regarded John Austin, Sheldon Amos, and James F. Stephen as the few advocates of codification whose deliberate opinions deserved great respect.²⁵² Nevertheless, he added that “there are some circumstances which must be kept in mind in estimating the value which should be attached to their opinions upon the subject of codification.”²⁵³ Carter was willing to make clear some aspects of their opinions in order to show their strong and weak points.

Among their strengths, Carter envisioned their recognition of the superiority of the common law of England in terms of “scientific excellence and certainty” before “any [other] nation where codification has been adopted,” and that they admitted “that no argument in favor of codification can be found in the practical experience of any nation.”²⁵⁴ In this regard, although “the experiment was a hazardous one,” they were convinced it could succeed “only by securing for the difficult task the devotion of the highest legal ability in the several branches of the law which the Profession can supply.”²⁵⁵

Carter regarded, though, as their weaknesses their complaint of the present condition of the law, and their criticism of the common law as “destitute of *system*,” not set down “in any book in *orderly and scientific form*,” which could be cured through codification.²⁵⁶ Once he had presented what he considered their weak point, he needed to explain the origin of such a weakness, and why the recognition of the lack of system, order and scientific form could be regarded as a weakness. According to Carter’s opinion, their view on this aspect reflected their theoretical approach, disconnected with the practice of the law:

They are the views of professors of law, whose lives are devoted, not like those of lawyers and judges, to the practical administration of the law, but to teaching it, and lecturing about it. Minds thus engaged naturally desire to see their science set down in books in the arranged and orderly forms in which other sciences are found; and the want of such an arrangement is regarded by them as a serious defect.²⁵⁷

Furthermore, the defect adduced by them, in Carter’s view, was “in a practical point of view, of but a moderate degree of importance.”²⁵⁸

252. *Id.* at 71.

253. *Id.*

254. *Id.*

255. *Id.* at 71–72.

256. *Id.* at 72.

257. *Id.*

258. *Id.*; *see also id.* at 73.

Other lawyers, who supported Carter and Field's legal theory, made use of authorities to reassure their own positions, although to a considerably lesser extent. Fowler was the lawyer who quoted more authorities on Field's behalf; most of them were cited in order to give an opposite interpretation to Carter's of the historical experiences of codification—in particular, of the Roman law and its influence on American law,²⁵⁹ the French codification,²⁶⁰ as well as the Anglo-American one.²⁶¹

Fowler mocked Carter for having quoted Professor Hadley to reinforce his own opinions about the *Corpus iuris civilis*, as Hadley “never published his lectures and was not regarded as a high authority upon Roman law.”²⁶² Then Fowler added ironically:

But if he is adequate authority, he is not confirmed . . . by Savigny, Mackeldey, Ortolan, deFerriere, Cumins, or Tomkins, still higher authorities upon this branch of the history of Roman law. By these last-named writers it is asserted that the *Corpus iuris* of Justinian maintained its legal effect with very little variation for at least six hundred years after its promulgation.²⁶³

Fowler lamented that English-speaking lawyers had been “tardy” in paying attention to the civil law as a scientific source of the common law, and mentioned some authors who had emphasized the relationship between *Corpus iuris* and common law.²⁶⁴ Because Carter had described the French codification's failure making use of Austin and Amos' statements, Fowler criticized Carter, arguing “it is not safe to rely, as Mr. Carter does, upon isolated English opinion.”²⁶⁵ Then he mentioned, instead of them, other authorities: Edward Everett, minister of France for some time, and John Rodman, prominent member of the metropolitan bar and translator of the French codes.²⁶⁶

Fowler distinguished between those authorities who dealt with the region of the theory and those who moved in the region of practical codification.

259. FOWLER, *supra* note 24, at 30–31.

260. *Id.* at 32–33.

261. *Id.* at 43, 51–52, 55, 61, 66.

262. *Id.* at 30.

263. *Id.* (“The manner in which it finally became the basis of the modern law of Europe, Savigny has fully revealed to students of jurisprudence and many lay-writers to the world at large.”).

264. *Id.* at 30–31 (discussing, among others: Duck, who published a work in 1649; William Jones; the late edition of Bracton's Commentaries published under the direction of the Master of the Rolls; and Güterbock, who published a work on Bracton's relations to the Roman law).

265. *Id.* at 33.

266. *Id.*

Among the former, he mentioned Holland,²⁶⁷ Bentham,²⁶⁸ Austin,²⁶⁹ and Amos.²⁷⁰ Among the latter, he quoted all those who had engaged in some kind of codification, namely Field, Livingston, Macaulay, James F. Stephen, John Romilly, Justice Willes, Edward Ryan, etc.²⁷¹

In dealing with the “theoretical figures,” he explicitly made the point that “[a]s it is easy to misconceive Bentham’s relation to codification, so it is easy to misconceive the positions of Austin and other legal writers.”²⁷²

According to Fowler, without intending to ignore the great contribution rendered by the scientific and speculative writers, it should be kept in mind that “[t]he practical work of codification has always been performed by practical lawyers, those familiar with the needs of practical lawyers.”²⁷³ In this respect, he agreed with Carter,²⁷⁴ although the latter did not admit the feasibility of any kind of codification, even if it were going to be undertaken by practical lawyers. In this regard, James F. Stephen, whose reputation among American scholars was beyond debate, personified the right balance between theoretical knowledge and practical skills to codify the law. Nobody denied it, not even Carter.²⁷⁵ It is logical that Fowler, who rejected extreme positions between merely theoretical codifiers and empirical practitioners,²⁷⁶ sought support from Stephen.²⁷⁷

For some specific matters, Fowler also sought support from other authorities like Kent²⁷⁸ or Pollock.²⁷⁹ In other cases, he tended to emphasize

267. *Id.* at 41 (calling Holland “in some respects the most distinguished scientific jurist now living”); *see also id.* at 55 (reproducing Holland’s statement that Field’s Civil Code was “one of the best codes of modern times”).

268. *Id.* at 42.

269. *Id.*

270. *Id.* at 42–43.

271. *Id.* at 43.

272. *Id.* at 42.

273. *Id.* at 41 (“They have generally been men with a scientific bent, but above all possessed of some knowledge of the science of legislation upon which successful codification most depends.”).

274. *See supra* text accompanying note 257.

275. *See supra* text accompanying note 239. Not surprisingly, Carter cited Stephen, intending precisely to prove the impracticability of codifying the law.

276. FOWLER, *supra* note 24, at 64 (“The theoretical codifiers undervalue the teachings of experience, no doubt, but to the same extent only that the empirical practitioners undervalue the teachings of science and philosophy. If the purely legal scientist is too much engrossed with his abstractions to be a wise legislator for the wants of law-men, certainly the purely practical lawyer is too much engrossed with his docket, too apt to gaze at public questions from his office window, to be a safe criterion of the true legislative policy of a state.”).

277. *Id.* at 61 (describing Fowler’s view on codification).

278. *Id.* at 34 (quoting Kent to support the idea of containing the law in as few books as possible: “Chancellor Kent when asked what made him a great lawyer is said to have

those authors who had paid attention to foreign legal traditions in order to enrich the American legal one. In this regard, he mentioned Mosely, an English barrister who lamented “that in carrying on the amendments of our law (in England) too little regard has hitherto been paid to those systems which prevail amongst continental nations, and in this respect our legal reformers have justly laid themselves open to comment.”²⁸⁰ With this purpose, he quoted Tompkins and Jencken, whose collective treatise on Modern Roman Law had contributed to the knowledge of the condition of the law in Germany.²⁸¹ He appeared to be very interested in the German jurisprudence and, particularly, in the dispute between Savigny and Thibaut, with which he dealt more deeply, extensively, and explicitly than Carter.²⁸²

He also quoted F. Vaughan Hawkins for support in facing Carter’s reproach that a civil code, a law of language, would turn the common law of New York, then a law of principles, into a legal system based mainly on language. Hawkins stated that “[w]hen case-law becomes elaborated to a high degree of detail, the function of the judge becomes more and more circumscribed, until at last it ceases altogether to be so much the application of principles as a law of precedents.”²⁸³ Fowler, elaborating on Hawkins’s statement, concluded that “a law of principles must become expressed in words in order to be practically applied, and the superiority of the case-law vanishes before the claims of a well expressed code.”²⁸⁴

Unlike Field, Carter, and Fowler, Mathews made little use of authorities in his *Thoughts on Codification of the Common Law*.²⁸⁵ Other authorities quoted by lawyers engaged in the codification debate were Miller,²⁸⁶ Dillon,²⁸⁷ and Bacon.²⁸⁸ Oliver Wendell Holmes went unnoticed.²⁸⁹

epigrammatically replied ‘lack of law books.’ When his career began books were comparatively few but these he knew well”).

279. *Id.* at 34, 68; *see supra* note 235 and accompanying text.

280. FOWLER, *supra* note 24, at 33.

281. *Id.* at 35.

282. *Id.* at 35–36, 52, 62–63.

283. *Id.* at 51.

284. *Id.* at 52.

285. *See, e.g.,* MATHEWS, *supra* note 23, at 16 (quoting Swinburne, on legal definitions’ danger and uncertainty); *id.* at 31–35 (quoting Sanders, Hammond, and Gibbon, on the history of the codification of Roman law).

286. *See* Morriss, *supra* note 163, at 416. Samuel F. Miller was Associate Justice of the U.S. Supreme Court from 1862 to 1890, and he declared himself in favor of codification. *See* Samuel F. Miller et al., *Codification*, 20 AM. L. REV. 315, 322 (1886).

287. Jones, *supra* note 64, at 560; Morriss, *supra* note 163, at 416 n.30.

288. *See* Morriss, *supra* note 163, at 417.

289. *See generally* Oliver Wendell Holmes, *Codes, and the Arrangement of the Law*, 5 AM. L. REV. 1 (1870).

As Jones said in an article published in the *American Law Review*, both code opponents and proponents were glad to quote and follow distinguished lawyers on behalf of their own legal ideas,²⁹⁰ although they did not agree with them to some extent, or, in some cases, even at all. Anyway, there was always a possible interpretation of authorities' legal thought which enabled them to reinforce their personal views and to weaken opponents' ones. It was a fierce debate, in which it seems there was no real will to come to an agreement for any kind of codification, no matter how convenient it could appear to be for the then present condition of the common law.

3. Interpretation of Historical Experiences

Argumentation of codification's debaters was not only based on reasons and authorities. They all wanted to give empirical evidence which verified their own position. No matter what their legal thought was, the best way to demonstrate the truth of their affirmations was to contrast them with the reality, namely with the various attempts of codification undertaken both inside and outside of common law countries.

The relationship between the resort to authorities and historical experiences is remarkable, since—as we saw—the debaters used authorities precisely to evaluate and interpret past codification experiences: opponents of codification referred to authorities to prove their failure, while proponents of codification cited authorities to show their success in terms of legal reform and improvement of the legal system. Moreover, a considerable part of the argumentation of both code opponents and proponents revolved around the historical experiences of codification, wherever and whenever they had taken place, from the Roman Empire and the fate of the *Corpus iuris civilis*, to the current development of the recently enacted codes of California.

Taking into account the diversity of the sort of codes they examined, the different codification visions of code proponents, and the code opponents' strategy, which practically—though not theoretically—entailed the utter denying of the practicability of legal codification, the reader can foresee the antagonistic pictures which debaters drew from the observation of the same historical experiences. Furthermore, if we consider that the code opponents' argumentation was based mainly on the failure of all prior attempts at

290. Jones, *supra* note 64, at 559–60 (“The codification that I believe in is one that will still leave very much to the common law to be declared by the courts. It is a code of principles and general rules, and not one of particulars applicable to all the minute details of daily transactions, countless in number and variation. I am glad to follow that distinguished jurist, Judge Dillon, in his views of what a code should be.”).

codification, and the fact that they could not admit any of codification's success, it is easy to imagine the degree of subjectivity with which such historical experiences were regarded.

Even though American lawyers might have lacked a complete knowledge of the codification experiences of other countries, they easily associated the codification enterprise with Justinian's *Corpus iuris civilis*, French codes, different attempts made—and going on—in England, Louisiana's Civil Code, and some of the achievements in the American context, particularly with the California Civil Code enacted in 1872. Whatever knowledge American lawyers in general possessed on this matter, those who engaged in the codification debate examined all these experiences very carefully in order to present them as clear and empirical evidence of their legal position. Having a look at the main literature of codification discussion, it is enough to realize that Carter,²⁹¹ Field,²⁹² Mathews,²⁹³ and Fowler,²⁹⁴ among others,²⁹⁵ dealt with it extensively, and used those statements' authorities that better fit with their legal thought.

The debaters, most of them practicing lawyers, were aware that, leaving aside their theoretical reasons for and against codification, the empirical evidence was the most persuasive argument. In this regard, the statement of the code proponents' leader was neatly articulated: "The best test of the value of laws is experience, and I will give you not merely the opinion but the experience of others who, having opposed these Codes, have adopted them and found them useful."²⁹⁶

Field did not see why it should be inconvenient to codify the law in New York "if in Holland, or in Germany, or France, a Civil Code has been found beneficial."²⁹⁷ After Carter's work on *The Proposed Codification*, Field continued to argue the same point:

The animadversions of Mr. Carter upon all former codes are answered and disproved by a single test, which may be applied in the form of a question: Has any Code heretofore enacted, ever been repealed in order to go back to a pre-existing common law?

291. CARTER, PROPOSED CODIFICATION, *supra* note 26, at 43–92; CARTER, PROVINCES, *supra* note 26, at 22–24, 55–56.

292. FIELD, *supra* note 214, at 365; FIELD, *supra* note 105, at 7–8; Field, *supra* note 13, at xv–xvi, xxx; Field, *supra* note 208, at 261–62.

293. MATHEWS, *supra* note 23, at 25–30.

294. FOWLER, *supra* note 24, at 20–39.

295. See, e.g., Morriss, *supra* note 163, at 416; W. H. H. Russel, *California System of Codes*, 2 MICH. L. REV. 279, 281 (1893); Hoadly, Codification USA, *supra* note 25, at 25–30; Hornblower, *supra* note 191, at 15–18.

296. FIELD, *supra* note 214, at 365.

297. Field, *supra* note 13, at xxx.

If he can show us one such instance, he will show what I have not seen, and what I believe does not exist. If he cannot show it, he stands condemned by the experience of mankind.²⁹⁸

With these few words, Field intended to dismantle Carter's fifty-page attempt to show that:

[I]t is not true that any nation, ancient or modern, has successfully undertaken to subject the whole body of private law to statutory forms; and it is true that, so far as any attempt has been made, it has, in every instance, been attended by the confusion and mischief which have been pointed out as the inevitable consequences of such a policy.²⁹⁹

While for code proponents, "[t]he practicability of codification has been established beyond successful dispute,"³⁰⁰ code opponents came to the opposite conclusion, rejoicing in the "lamentable failure in practical codifying."³⁰¹ Although Carter theoretically agreed with the codification of the public law, he hardly referred to this undertaking, perhaps trying to avoid any kind of praise directed to the codification movement. In practice, he rejected any scheme of codification, since in the province of private law he conceived it as a theoretical error, and, in the realm of public law, he always found several aspects for criticism. On the other hand, code proponents usually did not want to admit any failure in historical experiences of codification; whatever the actual case, they lamented only the failed attempts at codification. As the reader can see, their positions (and, above all, the predispositions)—at least, for most of the debaters—were simply irreconcilable.

Field, in his introduction to the New York Civil Code, mentioned the Roman law case as a reference to keep in mind throughout the code. In particular he praised the Code of Justinian with these words:

The law of Rome in the time of Justinian was, to say the least, as difficult of reduction into a Code as is our own law at the present day. Yet it was reduced, though, no doubt, to the disgust and dismay of many a lawyer of that period. The concurring judgment of thirteen centuries since, has, however, pronounced the Code of

298. FIELD, *supra* note 105, at 7–8.

299. CARTER, PROPOSED CODIFICATION, *supra* note 26, at 43.

300. Hoadly, Codification USA, *supra* note 25, at 25. Hoadly added: "The work done by Justinian, Alfonso the Wise, Napoleon, Livingston, Macaulay's Penal Code for India, the codes of California and Dakota, and Mr. Field's great work in New York prove this Romans, Spaniards, Frenchmen have succeeded. Only among English-speaking lawyers is doubt entertained." *Id.* at 25–26.

301. Hornblower, *supra* note 191, at 18.

Justinian one of the noblest benefactions to the human race, as it was one of the greatest achievements of human genius.³⁰²

Probably no one had imagined the energetic—and sometimes even fierce—reaction such an affirmation would produce. Indeed the reactions emerged rapidly among code opponents, suggesting Field's misconception of the Roman law.

Mathews was the first code opponent to respond to Field's remarks. According to Mathews, the best part of Justinian's compilation was the Digest, rather than the Code, and since the former was a "text-book," it "[does] not seem to justify codification such as is now in contemplation in this State."³⁰³ Regarding the Code, he then asserted that "perhaps a brief epitome of the history of that imperial legislation" may be helpful to show "how illogical is the analogy drawn from that source."³⁰⁴ Along three pages, seeking support from Roman law's authorities like Sanders and Hammond, he concluded that "Roman codification had thus been elaborated out of a system of judicature which had itself been slowly forming, for ages prior to the Christian era, and for more than four centuries thereafter."³⁰⁵ In other words, if the Justinian Code "began with the accumulated growth of more than twelve centuries of experience as its capital stock, and had proximately matured only after employing the labor of a vast number of most learned jurists for more than an hundred years, and by being finally dictated by imperial power,"³⁰⁶ one could come to the conclusion that the analogy between the Roman and New York case was rather inappropriate or, as he said, illogical.

Carter, however, undertook a much more sophisticated interpretation of the Roman law, writing more than fifteen pages on this matter in his *Proposed Codification of Our Common Law*.³⁰⁷

He began by showing his disregard for Field's comment on Justinian's Code as "achievements of human genius," by saying that "these sounding phrases must excite the smile of the civilians."³⁰⁸ As we see, Carter kept in mind constantly and vividly the opposition between common law and civil law systems. Then Carter identified the Code of Justinian with the statutory law and asserted that, "instead of being one of the 'highest achievements of

302. Field, *supra* note 13, at xv. Field's other references to Roman law can be seen, for instance, in FIELD, *supra* note 209, at 360. See also FIELD, *supra* note 150, at 26, 30.

303. MATHEWS, *supra* note 23, at 27.

304. *Id.*

305. *Id.* at 34.

306. *Id.* at 30.

307. CARTER, PROPOSED CODIFICATION, *supra* note 26, at 44–60.

308. *Id.* at 45.

human genius,' it is a work certainly not superior to any one of a hundred similar ones which have been executed from time to time in other nations, our own State included."³⁰⁹

Concerning Justinian's Digest, whose content, in Carter's view, covered the domain of private law (or unwritten law), he pointed out that "the design was noble, although the execution was exceedingly imperfect."³¹⁰ In trying to prove this, he reviewed the history of the Roman law, in which he regarded the juriconsults of the classical period as the "masters of the art of applying the standard of justice to the ordinary relations and business of men."³¹¹ There he quoted Gibbon, who "sketched in a few master strokes this peculiar feature of Roman policy by which the unwritten law became supreme in the administration of private justice."³¹² According to Carter's view, up until the Emperor of Adrian, "the just boundary between the provinces of written and unwritten law was preserved."³¹³ Then he explained that the Empire's fall coincided with the decline of the jurisprudence, whose main feature was the extension of the province of legislation over the proper domain of the unwritten law.³¹⁴ And he apparently modestly added: "Whether this extension of legislative power over the domain of private law was the cause, or the consequence, or simply an accompaniment of the decline in the juristic literature, we will not undertake to pronounce; but upon either the view, the fact is significant."³¹⁵

Only after having considered carefully the Roman law's historical development, are we "now in a situation to understand and appreciate the nature of Justinian's work."³¹⁶ Once he equated the Code with public unwritten law, the Digest with private unwritten law, and Institutes with a manual for the instruction of students, it was clear he was going to focus on interpreting and evaluating the Digest extensively, as he indeed did.³¹⁷

Summing up, it could be said that Carter regarded Justinian's Code as a treatise because, "[c]omposed from scientific treatises, it preserved many of

309. *Id.* He added: "[I]nstead of being properly described as 'one the noblest benefactions to the human race,' it is something which very few individuals of the human race know or care, or need to know or care, anything about." *Id.* Of course, Carter was not speaking of himself, even though he probably wished not to know or care about it.

310. *Id.* at 46.

311. *Id.* at 49.

312. *Id.* at 49 n.1 (emphasis omitted).

313. *Id.* at 50–51.

314. *Id.* at 57.

315. *Id.*

316. *Id.* at 53.

317. *Id.* at 54–59. "[F]or it is this which is really intended when the work of Justinian is appealed to as supporting an argument in favor of codification." *Id.* at 54.

the features of a scientific treatise,³¹⁸ being “still a law of principles more than a law of words,”³¹⁹ and denying any resemblance with the Code, whose “idea is of modern origin altogether.”³²⁰ In this regard, Carter maintained that Justinian, “after a degeneracy of three centuries,” did his best given the circumstances.³²¹ He then stated: “Had the judicial system of Rome provided that its judges should be selected from the ranks of the best lawyers, and the maxim of *stare decisis* been recognized, and the art of printing known, there would have been no occasion for a work like *The Pandects*.”³²²

Although Carter was dealing with the purpose of Justinian Digest, it is quite clear that he was thinking within the common law system’s ideal, and even explicitly so when he added that “[t]he judges would then, as with us, have been the real experts and true oracles, and their recorded opinions would have supplied the sources and the standards from which the law was to be sought, and by which it was to be tested.”³²³ It was clear, at least to

318. *Id.* at 55. In Carter’s view, “[t]he stamp of imperial recognition added no new element to the authority of the writers whose works were thus abridged. They possessed the authority of law before. The effect of the codification was simply to make the Digest the only book in which these precepts could be sought.” *Id.* He added: “Another thing which the advocates of codification thus affected by the literary excellence of the Roman jurisprudence do not seem to perceive, is that this excellence did not in any sense, or degree, proceed from legislation. The roman jurists never asked for their treatises the sanction of a statute.” *Id.* at 74 (emphasis omitted).

319. *Id.* at 55 (emphasis omitted). He explained why with these words: “It was plastic, susceptible of interpretation and application which would suit the infinite variety of aspects exhibited by human affairs.” *Id.*; see also Carter, Argument, *supra* note 26, at 27 (“[T]he thing which alone makes progress in jurisprudence possible, the true excellence of your jurisprudence will be lost on the day when you pass any measure which will have the effect of converting the contentions in your courts into disputes about the meanings of words, in place of manly discussion as to the true principles of justice.”).

320. CARTER, PROPOSED CODIFICATION, *supra* note 26, at 55. This was the final conclusion to which he came after pointing out that “[i]t was, indeed, no part of the design of Justinian to change in any respect the essential nature of Roman jurisprudence as a system of unwritten law. The idea of a Code in the modern sense, as a legislative republication of the whole system of law in the imperative form of statute, was not present to the minds of Justinian and his advisers.” *Id.*

321. *Id.* at 56 (“He sought to correct this evil; and his method was to gather together the authentic remains of the earlier and better jurists, to attach to them selections from later writers which were necessary to accommodate them to the practical needs of the present time, and to add to the whole work his imperial declaration that it alone should be appealed to as authoritative.”).

322. *Id.*

323. *Id.* (emphasis omitted). Referring to the Roman praetors, but also keeping in mind the New York context and his own view on the role of politicians in the process of law making, he added: “But ambitious politicians, tarrying for a single year in judicial office, on their way to consulship, could not become authorities in jurisprudence. These will ever be sought, where alone they can be found, among those who devote their lives to the cultivation of the science.”

Carter, that “the actual and practical administration of justice in Rome was far inferior to what it is with us.”³²⁴

Concluding, Carter denied any merit of the Digest in terms of codification, since it did not impart “a new value or efficacy to the law.”³²⁵ The compilers’ merit and glory rather was due to the fact that “they preserved from the decay of time a system of private jurisprudence which had been carefully elaborated by a long succession of acknowledged masters of the art, so that it could be transmitted to after ages for the benefit of human race.”³²⁶

Carter’s conclusions tried to preclude any attempt to use Justinian’s Digest to support codification. On the one hand, he made the point clear that the Digest “was not strictly a codification, or conversion unto written statutory forms of such private law, but preserved, in large measure, the plastic character of unwritten law, and left it susceptible of modification and adaptation to the exigencies of human society.”³²⁷ On the other, he concluded that, although Justinian’s Compilation “was of little, if any, practical advantage to the people and age for which it was designed,” it succeeded in preserving and transmitting “to modern times an elaborate system of jurisprudence which attained its perfection without the aid of legislation, as a body of purely unwritten law.”³²⁸ Finally, he emphasized that while in the greatest period of the Roman law the exercise of legislative power was weak, the subsequent decline “was marked by the frequent extension of statutory law over the field of private jurisprudence.”³²⁹

As the reader can expect, Carter’s interpretation of the Roman law and Justinian’s *Corpus iuris civilis* was subject to considerable criticism by code

Id.; see also *id.* at 73–74 (“But what these writers do not seem to perceive is, that this excellence of the literature of the Roman law—this perfection of systematic arrangement—sprang out of a great weakness in the Roman State. It arose from the fact that the Roman judges were not themselves experts in the law, but, as already pointed, ambitious politicians, running through the course of public honors, which ended in consulship. They were not, as the judges are with us, the real students and authoritative expounders of the law; and as these must necessarily exist somewhere in every civilized State, they were supplied in Rome by a class of professional jurisconsults, who made such work their occupation, their ambition and their road to renown.”).

324. *Id.* at 74. Carter added: “[A]t the same time, a body of private jurisconsults—of scientific lawyers— . . . was produced probably superior to any which can be found in other age or nation. Had the Scaevolas, or Papinian or Ulpian, actually sat to administer justice, the condition of the Roman State would have been greatly improved, though the world might have lost the benefit of their laborious treatises.” *Id.*

325. *Id.* at 56.

326. *Id.* (emphasis omitted).

327. *Id.* at 59.

328. *Id.*

329. *Id.*

proponents. Remarkable and clear were Fowler's comments about this matter.³³⁰

Fowler's criticism of Carter's interpretation of the Roman law was explicit and direct from his starting point, as he reported that "the highest modern authorities do not coincide with Mr. Carter's deductions from the example of Rome."³³¹ In fact, Fowler rewrote the history of the Roman law, relying on the authority of many more authors than Carter, coming to rather different conclusions.

To begin with, Fowler criticized Carter, asserting that "[i]t is hardly possible in any rapid survey of the development of Roman private law during so long a period as one thousand years, to summarize, as Mr. Carter has done, conditions by general statement of fact. What is true of today fails to be true of tomorrow."³³²

Carter's historical fact, now mentioned by Fowler, referred to the statement "that the greatest development of Roman private law was due to an unofficial lawyer-class, and not the usual law-making or legislative powers of government,"³³³ which Fowler considered to be based on a misconception of the modes in which the development of the private law of Rome actually occurred. Fowler did not deny the important role of the Roman juriconsults in the jurisprudence's development, but he emphasized that "they were an element which the State ultimately converted into a legislative element, nurturing and directing it so as to adapt it to public purposes."³³⁴

Fowler showed the falsity of Carter's affirmation of the neat distinction between juriconsults and politicians, pointing out that in the classic period of Roman law "there were jurists who were praetors, just as there were praetors who were both politicians and jurists."³³⁵ In addition, Fowler also

330. See FOWLER, *supra* note 24, at 20–31.

331. *Id.* at 20. Fowler later classified Carter's views as "extreme deductions." *Id.*

332. *Id.* at 24 (spelling modernized).

333. *Id.* Of Carter, he added:

He regards the Roman magistrates as ephemeral politicians, dominated by the lawyers of the day, and in these respects he recognizes a likeness to the unsystematic development of the private division of the jurisprudence of English-speaking peoples. If this hypothesis is true, any systematic improvement in the law of Rome was due not to the State but to the chance interference of the juriconsults, an unofficial class of law-makers as Mr. Carter would have us believe.

Id.

334. *Id.* ("Nor, is it more true that the regular law-making power of the Roman State was in any considerable degree in the hands of evanescent or incompetent politicians who were dominated wholly by lawyers.")

335. *Id.* at 25. Fowler then mentioned that, according to the opinion of one authority, Sir H. Maine, a praetor was generally a jurist. *Id.* Furthermore, he explained that "Papinian held high

denounced Carter's oversight of "the extraordinary legislative power transferred by the Roman State to the juriconsults."³³⁶

According to him, Augustus, after realizing that sweeping away the influence of the juriconsults was impossible, found "a way in which this powerful order might be allied to the new imperial system."³³⁷ From that time onward, opinions of the juriconsults (or *responsa*), which hitherto possessed only authority, acquired binding force as law.³³⁸ Some time later, when the contrariety of so many individual lawgivers began to be confusing to legal administration, some measures were taken. The best one was the law called "citation law," enacted in 426 AD by Emperors Theodosius II and Valentinian III, declaring that the majority of the opinions of the authorized jurists should thereafter determine the law, and when they were equal, Papinianus should prevail.³³⁹

Concerning the *Corpus iuris civilis*, it was the result of Justinian's reform, whereby he "intended to remedy the confusion in both branches of the *ius scriptum* and to harmonize the Constitutions with that system of pseudo-statutes which had been promulgated through the medium of the *responsa* and *sententiae* of the jurists."³⁴⁰

After this explanation, in which Fowler had dealt with all of Carter's historical deviations,³⁴¹ the way was paved to criticize Carter's conclusions. Regarding Justinian's supposed imperialistic purpose, Fowler concluded: "To attribute to Justinian any imperialistic scheme in the law reform which he completed is to be at variance with opposite deductions which may be made from the same state of facts."³⁴²

Concerning the authoritative character of the Digest, Fowler concluded: "The Pandects did embrace the private law of the Eastern empire in an

public office under Marcus Aurelius," and that "both Ulpian and Paulus were . . . praetorian prefects when that office was largely civil in character." *Id.* He also noted that Quintus Mucio Scaevola, the founder of scientific jurisprudence, held a consulship in 95 BC. *Id.* Carter's argument in this respect collapsed indeed.

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.* at 26–27.

340. *Id.* at 28.

341. *Id.* ("Enough has, perhaps, been stated to base a conclusion quite at variance with that which the reader must arrive at after a perusal of Mr. Carter's survey of the same work, and no more has been attempted.")

342. *Id.* Fowler added: "Theodosius and others had designed to undertake this very reform in a spirit which cannot be questioned; so that we must always postulate the necessity of reform even when we imagine the motive of Justinian in executing it to have been sinister." *Id.* at 28–29.

authoritative legislative version and to this extent it is illustrative of the present purpose in New York.”³⁴³

Regarding the supposed coincidence between the Roman Empire’s fall and the decline of the jurisprudence, his conclusion also included this opposing view: “[T]here is no connection between the fall of Rome and the redaction and consolidation of the Roman law under Justinian.”³⁴⁴

Concerning Carter’s affirmation that “*Corpus iuris civilis* was soon either ignored or superseded by its contemporaries and their successors,” Fowler also showed this to be false: “*Corpus iuris* of Justinian maintained its legal effect with very little variation for at least six hundred years after its promulgation.”³⁴⁵

Furthermore, Fowler reproached Carter, arguing that it was “too late to maintain that any mere arrangement of a private law of a civilized nation contains more political danger than another arrangement of the same law.”³⁴⁶ In asserting this, he was facing more than Carter’s one argument, but above all uncovering Carter’s main fear: placing the private law into the legislator’s hands, namely, into the politicians, whose corruption, according to Carter’s mind, would result in private jurisprudence being lost. He added: “Danger lies below surface. If any lesson whatever is to be drawn by us in New York from the consolidation of the Roman law under Justinian, it is, as Mr. Field has asserted, favorable to a codification of the law of New York.”³⁴⁷

Since he did not want to leave any of Carter’s questions without reply, he agreed with Carter “[t]hat the compilations of Justinian differ wholly from modern English conceptions of codification.”³⁴⁸ However, Fowler maintained that this was due to their lack of scientific arrangement, which led Leibnitz and Pothier to desire their rearrangement.³⁴⁹ Moreover, he recognized that “it would be extremely curious if the codal legislation of another age and nation could serve as a model for this country of today.”³⁵⁰ They agreed indeed on that point. However, Fowler then added: “Yet, . . . Mr. Field has not substituted novel arrangements where several ages and nations have demonstrated the utility of a particular model. In this respect he is at variance with the radical notions of several amateur codifiers.”³⁵¹

343. *Id.* at 29.

344. *Id.*

345. *Id.* at 30; *see also supra* note 263 and accompanying text.

346. FOWLER, *supra* note 24, at 31.

347. *Id.*

348. *Id.*

349. *Id.*

350. *Id.* (spelling modernized).

351. *Id.*

Both Carter and Fowler had presented two opposite versions of the same history of Roman law. The reader could not remain indifferent by accepting both of them without any criticism, since they are contradictory in so many respects. In Fowler's view, the explanation of such astonishing and paradoxical interpretations was clear: "all the arguments which those in favor of codification draw from the Justinian compilations are quite opposed to those Mr. Carter would wish to draw."³⁵²

Other lawyers, who engaged the discussion, mentioned the Roman law case. Depending on their own positions in the debate, they either underestimated that historical experience,³⁵³ or regarded it as highly worthwhile.³⁵⁴

Chronologically, Prussia was the second "great example[]" cited by the codifiers,³⁵⁵ which led anticodifiers, in turn, to show their own view on the Prussian General Legal Code (*Das Allgemeine Preussische Landrecht*), enacted by Frederick the Great in 1794.³⁵⁶ This code drew considerably less attention than both Justinian's *Corpus* and French codes.

Field hardly mentioned the Prussian code, and Carter wrote little about it. As a way to show that the enactment of that law "had its origin in political and dynastic motives," Carter took advantage of this code to explain that such enactment "proves only that codification may be useful for attaining political or dynastic objects." He then added that this object did not necessarily achieve "an improvement of the law."³⁵⁷

Even though he admitted "that sovereign's motive for codification was dynastic," Fowler argued that motive was inconsequential.³⁵⁸ Then he criticized ironically Carter's view, as he stated that friends of law reform "cannot believe that any dynast in his senses would tie down the judges of his own creation to philosophic laws arranged in a code and thus put it out of his power to dictate judicial decisions in some concealed fashion."³⁵⁹

French codes were the subject of more analysis by codification debaters than were the Prussian. French codification, which personified and

352. *Id.* at 29.

353. Hornblower, *supra* note 191, at 15–16 ("The so-called Code of Justinian, however, is, as has been frequently pointed out, in no proper sense a code at all. To call it so, and to cite it as an example in favor of . . . codification is simply juggling with words.")

354. Morriss, *supra* note 163, at 416 ("The Roman law . . . had, before Justinian, attained to such proportions that it was said to be the load of many camels. The Roman situation was tolerable compared with ours.")

355. Hornblower, *supra* note 191, at 15.

356. *See id.*

357. CARTER, PROPOSED CODIFICATION, *supra* note 26, at 60; *see also* Hornblower, *supra* note 191, at 16; *infra* note 384.

358. FOWLER, *supra* note 24, at 36.

359. *Id.*

represented European codes as well as civil law systems, generated opposite feelings among code opponents and proponents. While code opponents talked about Roman law with a certain degree of esteem, despite their biased interpretation, the same could not be said of the French historical experience of codification.³⁶⁰ They seemed to hate and detest it strongly. Considering that even English-speaking strong codifiers, like Sheldon Amos, criticized it bitterly,³⁶¹ we can imagine the feelings of those who disliked any scheme of codification, and hence saw France as the European leader in reference to such legal enterprise, proper of “dynastic and despotic countries.” The reader could hold that I am exaggerating. I am not. I am solely referring to what the main literature on Field New York Civil Code contained.

Although Field’s works contained numerous references to France,³⁶² he mentioned the French code less frequently as an historical example of codification’s success. He pointed out:

France, at the beginning of her revolution, was governed partly by Roman and partly by customary law. The French Codes made one uniform system for the whole country, supplanting the former laws, and forming a model by which half of Europe has since fashioned its legislation. It should seem, therefore, to be quite beyond dispute, that a general Code of the law is possible.³⁶³

According to Field, this proved that it was possible to enact a code. Additionally, from his perspective, French reference went further: “If in

360. See, e.g., CARTER, ORIGIN, *supra* note 26, at 303 (“[L]ooking to what the code Napoleon may have accomplished . . . it must be pronounced a failure.”).

361. See *supra* text accompanying note 234.

362. FIELD, *supra* note 209, at 358–59 (comparing the New York Codes with the most famous codes of the modern world, including, among others, the codes of France); FIELD, *supra* note 214, 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 to all.”); *id.* 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.”); see also FIELD, *supra* note 150, at 23, 30 (arguing that the codification seemed to be the natural result of a certain advanced state of civilization, by stating, that “[t]he 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”); FIELD, *supra* note 108, at 7, 17, 18 (pointing out the disproportion between population and number advocates in several countries, suggesting it was due to American law’s complexity, which required more lawyers than in other countries, stating “[t]here are in the United States, it is supposed, 70,000 lawyers for 55,000,000 of people; in France, according to the best information I can get, there are 6,000 lawyers for 40,000,000 of people; in the German Empire, 5,000 for 41,000,000”).

363. Field, *supra* note 13, at xvi.

Holland, or in Germany, or in France, a Civil Code has been found beneficial, much more it is likely to be beneficial to us.”³⁶⁴

Given such description of the French Code, code opponents had to prove mainly that, precisely because of the French codification’s failure, it did not make any sense to follow that path of legal reform. Alternatively, in a less radical way, they could suggest that while it may be convenient for France, it might not work in the American legal system. In practice, rather than theoretically, most of the code opponents took the radical position, following in Carter’s footsteps. Perhaps, because they thought it was the most drastic way to show the impracticability of any civil code.

Carter began by recognizing that, although Field and others presented the French example as proof of the success and utility of codifying the law, “none of the strictly scientific supporters of codification have ventured to employ so unfortunate an illustration.”³⁶⁵ With this first comment, Carter achieved his main purpose by resorting to an authoritative argument, while at the same time, suggesting that Field lacked scientific skills.

First, Carter argued that “the natural development of the law of France had, for many centuries, in some degree followed the direction of codification.”³⁶⁶ He went on to hold that in this case, “[t]he process was more in accordance with the law of its growth than could be the case with any nation inheriting the methods of the English Common Law.”³⁶⁷

Examining the reality of that process, Carter emphasized two aspects. First, “the leading motive with the Emperor Napoleon was political and dynastic.”³⁶⁸ Second, he concluded the intent of the French Code with regard to “establishing a system of law certain, easy to be learned, and easy to be administered, . . . must be pronounced a failure. In neither of these

364. *Id.* at xxx; see also FIELD, *supra* note 150, at 26–27 (“How then stands the question of practicability? Is a civil code practicable? The best answer to this question should seem to be the fact that civil codes have been established in nearly all the countries of the world, from the time of the Lower Empire to the present day. Are we not as capable of performing a great act of legislation as Romans or Germans, as Frenchmen or Italians? The very doubt supposes either that our abilities are inferior or our law more difficult. The suggestion of inferior abilities would be resented as a national insult; and who that knows anything of it, believes that Roman, French or Italian law is easier to express or explain than our own?”); FIELD, *supra* note 108, at 17 (“Not possible to form a Code of American common law! Are we inferior to Frenchmen, Germans, or Italians? Or will it be said that what was possible with Roman and Feudal law is not possible with the Anglo-American, which is, after all, but a mixture of the other two?”).

365. CARTER, PROPOSED CODIFICATION, *supra* note 26, at 61.

366. *Id.*

367. *Id.*

368. *Id.* (“[I]t was the ambition of the Emperor to consolidate these different elements into one harmonious State, and to strengthen his dynasty by the consequences which would flow from such an achievement.”). In other words, it was the ambition—and not the improvement of the law—that led Napoleon to enact the French codes.

respects will it bear comparison with the system of our Common Law.”³⁶⁹ Such an affirmation needed to be supported either through reason or authority, and Carter sought support from Sheldon Amos³⁷⁰ and John Austin,³⁷¹ “two distinguished authors,” who possess “the candor to acknowledge that all experiments in codification, hitherto attempted, have proved to be failures.”³⁷² Pothier then “wholly failed to secure any of the fancied benefits which codification seemed theoretically to promise,” which led Carter to deduce “with a certainty which should satisfy all practical minds, that there is some error in the theory which views such an enterprise as feasible and expedient.”³⁷³

As the reader can see, although Carter began admitting the theoretical accordance of the French codification with its historical legal development, he concluded that, in fact, it did not succeed. This enabled him to maintain the existence of erroneous theoretical views that explain why all the practical attempts finished in failure. According to Carter, the theoretical error injured the just provinces of written and unwritten law. Consequently, considering that any civil code necessarily entailed the embodiment of the unwritten law under a written statutory form, Carter could not consider any civil code as a success at all. To him, all civil codes needed to be a failure, otherwise, his argumentative strategy simply would collapse. Furthermore, denying any code’s success, he could argue that this was due to the distinction between the provinces of unwritten (private) and written (public) law:

These theoretic views readily explain the failure of all practical attempts in the way of codification; and it seems quite remarkable that the distinction referred to [written and unwritten law] seems never to have occurred to the eminent advocates of codification to whom reference is above made [Amos and Austin].³⁷⁴

369. *Id.* at 62.

370. *Id.*; see also AMOS, ENGLISH CODE, *supra* note 242, at 125–26 (where the principal text contained a fragment of Carter’s quoted text).

371. CARTER, PROPOSED CODIFICATION, *supra* note 26, at 62–63 (“In France the Code is buried under a heap of subsequent enactments, and of judiciary law subsequently introduced by the tribunals.” (quoting JOHN AUSTIN, 2 LECTURES ON JURISPRUDENCE 121 (R. Campbell ed., Thoemmes Press 2002) (1879))).

372. *Id.* at 63; see also CARTER, PROVINCES, *supra* note 26, at 22–23 (“Not one of the advantages which I have enumerated as being those asserted for codification by its advocates has been gained in France; 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 of certainty.” (emphasis omitted)).

373. CARTER, PROPOSED CODIFICATION, *supra* note 26, at 64.

374. *Id.*

On the other hand, it sometimes appears that Carter links the practicability of any code with the superiority of the common law tradition over the civil law one.³⁷⁵ In Carter's view, the failure of any codification seems to be observed from the perspective of the common law lawyer, whose prejudice about the superiority of his own legal tradition prevents him from recognizing any successful result concerning codification, perhaps as a sincere conviction, or maybe as a mere strategy to keep codification away as much as possible from the common law system.

Fowler, in turn, responded comprehensively to Carter's view, offering quite a different picture on the French codification experience. Leaving aside the scattered references to France in his work,³⁷⁶ Fowler argued that it was "unnecessary to attempt to refute in detail . . . that the modern specimens of codification, adopted by France and Germany, are practical failures, and that the motive which led to their adoption was purely dynastic or imperialistic but not reformatory."³⁷⁷ Fowler, relying on the opinion of various authorities,³⁷⁸ demonstrated not only the falsity of Carter's affirmation that the French codes were imperialistic in design, a thesis "long ago made and refuted in this State,"³⁷⁹ but also that these "codes have proved most satisfactory in the actual administration of the French system of laws."³⁸⁰ Otherwise, they would have "taken deep hold in most of the European countries adjacent to France."³⁸¹ Finally, concerning Carter's complaint that the French codification damaged the state of juristic literature, he considered logical:

[T]he fact that when any body of law is systematized the inevitable tendency of juristic literature is to take the form of a commentary on the code. The motive for the great number of

375. *Id.* at 62; *see supra* notes 369 & 372 and accompanying text.

376. FOWLER, *supra* note 24, at 13 ("If it were even true that codification and despotism and non-codification and freedom, are so invariably associated as to convey the idea of cause and effect, a free nation on the eve of codification might well hesitate. But it is not true. Switzerland and France are republics, and well-ordered examples of enlightened and prosperous States, and there codification flourishes. It is unnecessary to call attention to the invalidity of arguments which fail to be true when applied to like facts.")

377. *Id.* at 31.

378. *See supra* text accompanying notes 266 & 280 (mentioning John Rodman, Edward Everett, and Mosely).

379. FOWLER, *supra* note 24, at 32.

380. *Id.* at 33.

381. *Id.*

special treatises on various topics ceases, and literary activity naturally addresses itself to the actual state of the law.³⁸²

Other debaters also seemed to make little efforts to hold an equitable position, in which the discussion could be more fruitfully developed scientifically rather than so passionately. Because code opponents had no disposition at all to admit any kind of success in historic experiences, code proponents were constantly trying to dismantle anticodifiers' extreme interpretation. In doing so, they also were unwilling to recognize the codification aspects' failure. Positions for³⁸³ and against³⁸⁴ the French experience reflected clearly how authors regarded the convenience of whether or not to codify the common law.

Code opponents were aware that "the great question after all is, not what has been done in other nations and under other systems of jurisprudence, but what is the best for us in this age of the world and in this country and under our present conditions."³⁸⁵ However, since they were unwilling to admit any scheme of codification of the private law, they also were unwilling to recognize any positive aspects of the codification's past experiences, whatever, wherever and whenever they developed. Because of their lack of expertise, arguments from advocates of codification like Sheldon Amos or John Austin became the best weapon to fight against codification.³⁸⁶

382. *Id.* at 34. (noting then that "[w]riters in favor of codification see in this literary tendency a very great advantage and not the disadvantage prophesied by Mr. Carter, the extinction of the 'gladsome light of jurisprudence' as he poetically phrases it").

383. Hoadly, *Codification USA*, *supra* note 25, at 26 ("The Code Napoleon did not spring *ex machina* from the brain of the master or any of his disciples. It is the adaptation to French society and the modern life, of the *Corpus juris civilis* and the commentaries of Pothier, and other teachers and glossarists."); *see also* Russel, *supra* note 295, at 281.

384. Hornblower, *supra* note 191, at 16–17 (relying on Austin's opinion, he copied his severest statements against Prussian and French codes: "unsuccessful to a considerable extent," "because its failure is the most remarkable," "glaring deficiency" in the "total want of definitions of its technical terms, and explanations of the leading principles and distinctions upon which it is founded," "in the details of the code they (the compilers) display a monstrous ignorance of the principles and distinctions of the Roman law which they tacitly assumed"). After such quotations, Hornblower commented:

I do not pretend to be qualified to give an opinion of [my] own on the merits or demerits of these codes, but when the champions of codification point to these codes as conclusive arguments in their favor, I have a right to summon a witness who certainly is not prejudiced against them, since he is himself an advocate of codified law and a severe critic of "judge-made" law. I might call other witnesses, but I forbear.

Id.

385. *Id.* at 17.

386. *See, e.g., supra* note 384.

Codification's experiences in England and in British India were also mentioned in this respect. What had been done concerning codification in both India and, in particular, England, was carefully examined by debaters on both sides, opponents and proponents.³⁸⁷

Of the codes then recently compiled for the British possessions in India, Carter asserted the need to say only a couple of things. First, that the "utter confusion" existing in that territory "rendered a resort to statutory enactments a necessity."³⁸⁸ This affirmation seemed to be the first acknowledgement of any positive aspect of codification. However, the second comment diminished somewhat the first one, as he, relying on Amos' opinion, "deprecates any resort to the example of the Indian Codes for light in relation to the problem of codifying the laws of civilized nations,"³⁸⁹ whereby he seemed to equate pseudo-developed civilizations with codification on the one hand, and developed ones with no codification at all on the other, although Amos did not mean that.

Regarding the English codification's experiences and attempts, he mentioned Lord Cranworth, who in 1853, as Lord Chancellor of England, submitted to the whole body of the judges of the superior courts a bill designed to codify the whole criminal law, written and unwritten. According to Carter's view, there was nothing wrong about that, since that branch of the law "falls within the just province of written law. If, therefore, the conversion of unwritten into written law be not expedient so far as relates to this subject, it cannot be expedient in reference to any other."³⁹⁰ He knew in advance the English judges' reaction, as he then reported: "they all unite in condemning the codification of the unwritten law even to the limited extent proposed."³⁹¹ They made good use of this opportunity to reproduce the opinion of two judges against the proposed legal measure (Justices Coleridge and Talfourd). It was ten years later when Lord Westbury, in a "great speech" in the House of the Lords, gave his opinion about codification, asserting that although "he inclined to the view that a Code should be the object ultimately arrived at, . . . he admitted that the Common Law at present was by no means ripe for such measure."³⁹² Consequently, a royal commission was established in 1866 in order to inquire into the expediency of a digest of law, not of a code. Ultimately,

387. FIELD, *supra* note 214, at 372–73 (quoting Mr. Fitzames Stephen's opinion on the codification's success, as legal adviser of council in India, and successor of Macaulay in that office).

388. CARTER, PROPOSED CODIFICATION, *supra* note 26, at 67.

389. *Id.*

390. *Id.* at 77–78.

391. *Id.* at 77.

392. *Id.* at 78.

“these eminent men reached no conclusion in favor of a Code. They recommended an attempt to compile a Digest only.”³⁹³

In addition to this, after reviewing the failure of Stephen’s attempts to codify the criminal law, Carter emphasized “the irreconcilable difference of opinion among the advocates of codification concerning the most important questions,” although they were not dealing with the codification of the whole common law, but only of the criminal branch. At this point, Carter brought up the fierce opposition from the Lord Chief Justice Cockburn, who, having declared himself in favor of codification of the common law, wrote a powerful letter opposing Stephen’s entire measure, “for the very reason that it sought to retain all of the unwritten law which it did not expressly do away with, would only *make confusion worse confounded*.”³⁹⁴ As the reader can see, Carter was benefited from an authority’s statement, which, although Carter disagreed with it, helped him to show both the lack of unity among codifiers, which make them unreliable,³⁹⁵ and a remarkable example of codification’s failure in the Anglo-American context.

Field, in contrast, was confident, like other scholars, about the English penal code’s enactment.³⁹⁶

Carter’s general argumentation, in particular regarding codification’s precedent experiences, tried to preclude any possible interpretation from which a historic lesson for codification could be drawn. In this regard, his argument about the Bills of Exchange and Promisory Notes, an English Act passed in 1882, is revealing. According to his view, it was too early to evaluate this legal measure: “only after a sufficient experience of the effects of its operation” will a judgment be formed. He added that even if the judgment “be favorable, it would prove nothing in support of general codification such as is attempted in the proposed Civil Code,” for two reasons.³⁹⁷ Firstly, because it deals with a part of the law which consists basically “of formal technical rules, such . . . as may with some propriety be made the subject of written law.” Secondly, because “it does not purport to codify the whole of that law.”³⁹⁸ Nevertheless, he showed his disregard,

393. *Id.* at 79.

394. *Id.* at 81.

395. *See supra* text accompanying note 251.

396. FIELD, *supra* note 150, at 25 (“[A] penal code or code of crimes and punishments . . . is on the point of being established in England, and will of course be imitated here.”); *see also* JOHN NORTON POMEROY, THE “CIVIL CODE” IN CALIFORNIA 50 (1885); *infra* note 458 and accompanying text.

397. CARTER, PROPOSED CODIFICATION, *supra* note 26, at 81 (emphasis omitted).

398. *Id.* (“It does not aim to exclude the unwritten Common Law, but expressly retains it, by a provision that such law shall continue in force wherever it is not inconsistent with the statute.”).

pointing out that no particular advantage to be expected is manifested, particularly when “the law upon the points covered by it was already well settled,” and suggesting that it would have been better to present it “in the shape of a Digest” rather than as a code, because “it would have furnished to the public and the Profession all the aid which can now be derived from it.”³⁹⁹ As can be seen, his argumentation is rather complicated, since he tried to bar any possible ways the codifiers might try to support any scheme of codification.

Field seemed not so optimistic about the enactment of an English code of private law, and recognized that that “question is most open.”⁴⁰⁰

Interestingly, Carter did not pay any attention to the codification experiences of other European countries like Germany. Field and Fowler, on the contrary, did the latter much more exhaustively than the former.⁴⁰¹ As described above, Fowler knew quite well the dispute between Savigny and Thibaut.⁴⁰² Furthermore, it seems he felt attraction towards German legal literature and read it critically. He was aware that the Savigny-Thibaut’s dispute had “afforded to English and American opponents [of codification] some of their best material. . . . Yet little accurate information can be afforded by the consideration of the extreme views of either of these parties; both views are now conceded to contain elements of profound truth and of profound error.”⁴⁰³ However, he summed up the paradox between Savigny’s opposition to codification and the final success in codifying the German law in such a way that reflects some lack of true knowledge: “the very obscurity in which Savigny enveloped his arguments has been a successful hindrance to complete codification in Germany, although, at last, the spell of his mighty name has, by the persistent refutation of his opponents, been broken.”⁴⁰⁴

Both Code opponents and proponents knew that in Germany a civil code was about to be enacted. However, it seems that they felt uncomfortable referring to the German case. For code opponents, whose basic legal argumentation had been borrowed from the German Historical School, it

399. *Id.* at 81–82.

400. FIELD, *supra* note 150, at 25; Field, *supra* note 208, at 262.

401. *See, e.g.*, FIELD, *supra* note 150, at 26 (“Are we not as capable of performing a great act of legislation as Romans or Germans, as Frenchmen or Italians?”); Field, *supra* note 13, at xxx (“If in Holland, or in Germany, or France, a Civil Code has been found beneficial, much more is it likely to be beneficial to us.”); FIELD, *supra* note 105, at 17 (“Not possible to form a Code of American Law! Are we inferior to Frenchmen, Germans, or Italians?”); *see also id.* at 18–19; Field, *supra* note 208, at 262.

402. *See supra* text accompanying note 282.

403. FOWLER, *supra* note 24, at 35.

404. *Id.* at 36.

was not comfortable, considering that eventually a code was about to be enacted, to mention this codification experience. For code proponents, whose main concern had been to face and overcome the historic argument, it was not pleasant to consider such experience. Fowler's behavior was not common at all.

American experiences of codification were brought up by debaters. While Carter focused on Louisiana, New York and California, others also mentioned Dakota⁴⁰⁵ and Georgia.⁴⁰⁶

Concerning Louisiana, Carter first tried to justify the civil code, asserting that his enactment was "a political necessity for an extension of the province of legislation over the field of private law, arising from the circumstance that Spanish, French and American law in many cases competed with each other for supremacy."⁴⁰⁷ Then, he added that although it had plenty of defects because "[t]he Code actually adopted was substantially borrowed from the Code Napoleon," in practice the legal system was working considerably well, since, "imbued with the principles and methods of the English Common Law," the Code permitted and has "fully adopted its maxim of *stare decisis*."⁴⁰⁸ However, in Carter's view, this did not show the expediency of the codification at all, for a code will necessarily entail some problems. In the Louisiana case, a problem was evident concerning definitions, a deficiency clearly denounced by Austin regarding the French Code, and also by a Louisiana judge, Mr. Justice Yost. He stated that "[d]efinitions are at best unsafe guides in the administration of justice, and their frequent recurrence in the Louisiana Code is the greatest defect in that body of laws."⁴⁰⁹ Carter took advantage of this opportunity to claim that "the extent to which this difficulty is lost sight of by the advocates of codification is indeed marvelous."⁴¹⁰

Carter's picture of Louisiana Code was neat: enacted by a political necessity, it possessed the French Code's defects, although it worked well thanks to the influence of common law, particularly to the *stare decisis*

405. FIELD, *supra* note 108, at 27; Hornblower, *supra* note 191, at 17; *see also* Hoadly, *Codification USA*, *supra* note 25, at 30.

406. FIELD, *supra* note 108, at 27; Hornblower, *supra* note 191, at 17.

407. CARTER, PROPOSED CODIFICATION, *supra* note 26, at 65.

408. *Id.* ("Nothing is more observable than the extent to which the English and American reports and text books are cited as authoritative in that State. It would seem that the courts, except when there is some provision of the Code directly in point, and except in those cases where the Civil Law, which lies at the basis of the legal system of Louisiana, notoriously differs from the Common Law, seek the rule in any given case in the same quarters from which it is sought by us, and then inquire, if occasion arises, whether there is anything in the Code inconsistent with the rule thus found.")

409. *Id.* at 66.

410. *Id.*; *see also* Hornblower, *supra* note 191, at 17.

principle. Nevertheless, he eventually criticized the Code again in order to make clear his main purpose and thesis, namely, the general inexpediency of any scheme of codification.

On the contrary, Fowler replied to Carter's view by trying to show merely tangible facts:

That it has not failed is perceived by the persistent retention of a code, largely foreign in composition and origin, by the now dominant American element in Louisiana. Had this element not perceived the advantage of a lucid and simple form of the law, they would long since, in accordance with the law of the nations, have substituted the law of the dominant people . . . The truth is that the people of Louisiana are better satisfied with the law contained in their code than with the law which is not in accord with it.⁴¹¹

If Carter had reinforced his view with a Louisiana authority, Fowler followed in his same footsteps to reassure this opposite view, quoting Gustavus Schmitt, "a Louisiana lawyer of great erudition," who, writing a short history of the jurisprudence of Louisiana, praised the French legal reform.⁴¹²

The New York Civil Code of Procedure was also the subject of both praise and criticism. Field had presented it as "a great and beneficent scheme," which carried the fame of New York State around the world. Carter, in his turn, first underestimated the influence of the Code on other countries and American states, saying that "[t]here are constantly changes and improvements going on . . . in the system of legal procedure in all countries," concluding in this respect that "these changes would have been reached notwithstanding the enactment of the Code of Procedure of New York."⁴¹³ Carter not only did not feel at all proud of the worldly impact of the Code as a New York citizen and lawyer, but also was not afraid to criticize it as strongly as possible. According to his view, "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."⁴¹⁴

411. FOWLER, *supra* note 24, at 37–38.

412. *Id.* at 38. Gustavus Schmitt's quotation says:

France, whatever may be thought of the rank which it occupies as an agricultural, commercial and manufacturing country, is unquestionably, so far as it relates to the theory and practice of its civil jurisprudence, in advance of the age, and can afford useful lessons to the rest of the civilized world.

Id. at 38.

413. Carter, *Argument*, *supra* note 26, at 5.

414. *Id.*

What evil did such Code bring? Carter answered clearly and expressly that question with these terms:

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.⁴¹⁵

Carter was right indeed in this regard. An unfortunate revision of Field's version had produced a confused text, which, once enacted, was subject to several amendments. In Carter's view, making good use of any opportunity to blame codification for any arising evil, "the purpose of making amendments to the mode of procedure in courts had its origin in his codification of the law of procedure. He threw that subject into the hands of the Legislature."⁴¹⁶ For him, the consequence presented no doubt at all:

Therefore I assert that we should be infinitely better off, all things considered, if the original Code of Procedure had never been adopted, and the old system had been left to be reformed by the true method—rules framed by the courts. Of that, I think there is no reasonable doubt in the mind of any man competent to form an opinion. Just look at the fact.⁴¹⁷

Mathews and Hornblower also maintained that the New York Code of Civil Procedure did "not furnish an entirely fortunate illustration of the theory of codification,"⁴¹⁸ and had caused an increase of litigation.⁴¹⁹

415. *Id.* ("And those are the consequences of this unwise method of amending the law of procedure. It is not right to throw these questions of procedure into the hands of the Legislature. They should have been left under the control of the courts. It is the courts who apply the rules by which controversies are carried on before them, and, of course, those who are to apply the rules are the best able to understand them, best able to enunciate them, and best able to reshape them if they need it."); see CARTER, PROVINCES, *supra* note 26, at 55 (recognizing that the law of civil procedure belonged to public law, but arguing that "the power to frame the great body of the rules of procedure should be delegated by the legislature to the courts. They who exercise the function of administering justice best know what rules are necessary to the efficient performance of that function").

416. Carter, Argument, *supra* note 26, at 6; see CARTER, PROVINCES, *supra* note 26, at 55 ("The effect of the passage of the Code referred to was to throw the whole subject into the hands of the legislature. Amendment, change, and revision have been the constant phenomena since . . .").

417. Carter, Argument, *supra* note 26, at 6.

418. MATHEWS, *supra* note 23, at 29.

419. Hornblower, *supra* note 191, at 9–10 ("Statutes brood litigation. Experience demonstrates this. Whatever other merits codification may have, the diminution of litigation is certainly not one of them. Look at our New York Code of Civil Procedure (our Code of

Fowler faced directly such critical argumentation, “often repeated against the adoption of the Civil Code, to the effect that the reforms of procedure . . . have not simplified procedure but have been provocative of much litigation upon insignificant points of practice.”⁴²⁰ He admitted that a complete answer to that negative argument would require a long explanation, and argued that the apparent faults which later invested it, were not attributable to Mr. Field, which obviously led him to come to a rather opposite conclusion. According to his opinion, the Code was, “taking all things into consideration, a very wonderful piece of legislation, simple, concise and comprehensive.”⁴²¹

John Norton Pomeroy also appreciated that Code of Civil Procedure, since he confessed it to be “the greatest achievement in the history of legal reform.”⁴²²

However, it can be stated that the experience of codification most debated among both code proponents and opponents was the Civil Code of California. In this regard, the role of such Code in terms of argumentation for and against codification underwent a remarkable shift in 1885, the year in which the New York Bar Association reprinted a work written and published one year earlier by Pomeroy,⁴²³ a distinguished professor at the University of California, Hastings College of Law, who died some months before the reprinting.⁴²⁴

practice), with the two bulky volumes of Bliss’ Annotations of Decisions construing it, each volume as large as a volume of the Encyclopaedia Britannica, if not larger.”).

420. FOWLER, *supra* note 24, at 54.

421. *Id.* See generally *id.* at 53–55.

422. JOHN NORTON POMEROY, THE CODE OF REMEDIAL JUSTICE, REVIEWED AND CRITICISED 20 (1877). Pomeroy later added, referring to a new legal reform:

It is the case, hitherto unknown, of a great reform which has been fully accomplished, which has triumphed over all opposition, which for more than a generation has promoted right and equity in the administration of justice, and which it is now sought to turn backward and to defeat under the guise of a general codification.

Id. at 21.

423. POMEROY, *supra* note 396. That work was originally published in a different series of articles, *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).

424. Pomeroy died on February 15, 1885. Univ. of Cal., Hastings Coll. of Law, *John Norton Pomeroy Display*, <http://library.uchastings.edu/library/Library%20Collections/Displays/pomeroy.htm> (last visited Mar. 20, 2008). The Special Committee appointed by the New York Bar Association to “Urge the Rejection of the Proposed Civil Code” reprinted Pomeroy’s work in April, 1885. See POMEROY, *supra* note 396, at 3–4.

Although it was very well known that California was the first state to enact a complete code in 1872,⁴²⁵ until 1885 there was no controversy about the California Civil Code in the context of New York's codification debate, which is remarkably odd, since that code could also have been the subject of criticism from code opponents. It would be interesting to figure out why Carter and Mathews hardly mentioned it before 1885.⁴²⁶ Perhaps it was due at least partly to the professional and personal authority of Pomeroy, who would not have admitted biased interpretations on a Civil Code, which he probably knew better than anyone else from both the theoretical and the practical point of view. Perhaps, it was because recent testimony of the Californian judges had been published, in which they declared "the practical success of a code of private law in their State."⁴²⁷ Whatever the reason, the fact remains that the California Civil Code escaped Carter's and Mathews's criticism until 1885.

It is also a fact that after the reprinting of Pomeroy's work, the California Civil Code became the most controversial codification experience. Code opponents, who had preferred not to mention it hitherto, used the California Civil Code to show the mischievous consequences that the proposed Civil Code for New York had already produced in another State. In this regard, code opponents presented, from then onward, the California Civil Code as a clear example of a State which, having enacted such a Code, had decided to return as much as possible to the traditional common law system in terms of decision law making and interpretation, regarding the Civil Code as a secondary legal source. Furthermore, code opponents took advantage of that particular supposed mischief to exalt Pomeroy's figure, who, according to their views, had changed his mind on codification after witnessing the problems caused by such a Code in California.

The prefatory note to Pomeroy's reprinted work was written by the Special Committee appointed by the New York Bar Association to "urge the rejection of the proposed Civil Code."⁴²⁸ The prefatory note pursued the

425. The California Code was based considerably on Field's codes framed for New York. Hoadly, *Codification USA*, *supra* note 25, at 30 ("The experiment of complete codification has been twelve years on trial in California. . . . [T]he experiment is a success.").

426. Carter and Mathews hardly dealt with the California Civil Code prior to 1885, at least in their main works. *See, e.g.*, CARTER, *PROPOSED CODIFICATION*, *supra* note 26, at 67 (referencing in passing the California Civil Code); MATHEWS, *supra* note 23 (discussing New York's codification without mentioning California).

427. FOWLER, *supra* note 24, at 38. Fowler, after comparing the social conditions of California with England and Europe, concluded: "If a code of private law works well in California, where everything is commercial and contractual, it will, with some modifications, work well here [in New York], where everything is also commercial and contractual. . . ." *Id.* at 39.

428. POMEROY, *supra* note 396, at 3-4.

Special Committee's appointed purpose. In addition to exalting Pomeroy's figure, it asserted that the California Code:

[I]s understood to be, for the most part, a copy of the draft reported to the Legislature of New York in 1865, by the Code Commissioners, and therefore substantially identical with the one which has been and still is so persistently urged upon the attention of the Legislature of New York.⁴²⁹

Then Pomeroy's conclusions which, according to the Special Committee, could be drawn from such work revealed the mentioned purpose:

1. That the Code of California is replete with errors, uncertainties and inconsistencies, and that nearly every important section will demand judicial interpretation before its true meaning can be ascertained;
2. That under its operation the administration of the law in that State is threatened with a wide-spread deterioration, which will compel (unless in some manner arrested) an abandonment of all the Code legislation;
3. That for this portentous mischief no remedy can be expected from legislative action;
4. That the sole remedy lies in some deliberate adoption by the Courts of a method of interpretation different from that hitherto applied to statutory law.⁴³⁰

Summing up, it could be said that the Special Committee presented Pomeroy's opinion on the California Civil Code as a clear and unquestionable failure, since it needed to be permanently interpreted by the judges, and its reform could not be undertaken by the legislature. Consequently, it altogether suggested the abandonment, as much as possible, of "all the Code legislation."⁴³¹

It is not clear to me whether Pomeroy would have admitted the prefatory note's content, if he had still been alive when it was written and published. I am not sure whether he would have agreed not only with the content, but also with the purpose pursued by code opponents. Leaving aside this point for now, what is clear is that code opponents used Pomeroy's work to hurt and criticize fiercely codification as a legal tool and source. That in doing so they succeeded is actually unquestionable.

429. *Id.* at 3.

430. *Id.* at 4 (emphasis omitted).

431. *Id.*

After 1885, Carter made good use of each opportunity he had to show Pomeroy's opinion on the California Civil Code. Presenting Pomeroy as a "distinguished jurist," whose "authority and ability will nowhere be denied,"⁴³² Carter stated that Pomeroy, after experiencing the operation of the Code in actual practice in California:

[B]ecame so impressed with the pernicious effect which its operation was having upon the law of California that he published a series of articles in the *West Coast Reporter*, calling attention to the objections to it, the perils which it threatened to the administration of law, and pointing out what he conceived to be the only remedy.⁴³³

After quoting probably one of the most critical paragraphs of Pomeroy's work on the California Civil Code,⁴³⁴ and presenting Pomeroy's proposed rule interpretation to "prevent the mischiefs which this [C]ode threatened and was producing in California,"⁴³⁵ Carter came to the following conclusion:

Now, gentlemen, you can judge of the uncertainties and confusion which would spring up in the administration of this code. Mr. Pomeroy says that the inconsistencies and imperfections in this

432. Carter, Argument, *supra* note 26, at 24.

433. *Id.*

434. *Id.* ("The Civil Code of California, among all other instances of similar legislation, pre-eminently needs judicial interpretation. There is hardly a section, whether it embodies only a definition, or whether it contains the utterance of some broad principle, or some general doctrine, or some single special rule, which does not require to be judicially interpreted in order to ascertain with certainty its full meaning and effect. Upon this great work of construction and interpretation, the Supreme Court has, in reality, but just entered.

Our Civil Code, regarded as a comprehensive system of statutory legislation, covering the entire private jurisprudence of the State, as a scientific or practical arrangement and statement of the principles, doctrines, and rules constituting that jurisprudence—in other words, as an example of *true codification*—is, even in the estimation of its original authors, full of defects, imperfections, omissions, and even inconsistencies, which must, so far as possible, be supplied, removed, and harmonized by the courts, for it is useless to expect any real aid from the Legislature." (quoting POMEROY, *supra* note 396, at 6)).

435. *Id.* at 25. According to Carter, Pomeroy's proposed remedy was:

[T]hat the courts come together and adopt what he considered a somewhat extraordinary and unusual rule of interpretation; and his proposed rule of interpretation was this: To view the code as an attempt to codify and put into statutory form a pre-existing law; to start with the assumption that there was, prior to the enactment of the code, a pre-existing law, and next to assume that it was the design of the authors of the code not to change that law, but to leave it just as it stood, only to put it in writing, except where it most clearly appeared by the language employed that there was a special intention to *change* the law.

Id.

measure are such that substantially every section of it demands judicial interpretation. What does that mean? It means that nearly every section of this code, in his opinion, is so vague, that the meaning of it cannot be intelligently arrived at until it has passed through the crucible of the courts in the shape of a lawsuit from the highest to the lowest. . . . The adoption of this code simply means the dumping into the body of your jurisprudence cartloads of errors and uncertainties at a single stroke. That is what it means. The adoption of this code means that and nothing else⁴³⁶

Two years later, when he wrote *The Provinces of the Written and the Unwritten Law* in 1889, he repeated the same ideas with similar—and sometimes, even identical—words,⁴³⁷ maintaining, or even increasing, the dramatic charge of his statements.⁴³⁸

It is apparently surprising that Carter here was using as an argument against this Code that the Code precisely assumed a pre-existing law in force, did not attempt to change it in any respect, and needed permanent judicial interpretation, which in fact meant a clear continuity with the common law both as a legal system and as a substantive law. The paradox is only apparent though, since it is clear that what Carter intended was to fight any kind of codification, no matter whether the code respected the common law. In his view, common private law was not compatible with codification, and although he admitted—at least, theoretically—the codification of the public law, in practice he looked at it with charged and passionate disregard.

In fact, he did not agree at all with Pomeroy in this respect, since the latter firmly believed in the compatibility between common law and codification.⁴³⁹ 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,

436. *Id.*

437. See CARTER, PROVINCES, *supra* note 26, at 24–25.

438. *Id.* at 24 (stating that Pomeroy “became persuaded from actual experience that this Code was having a most pernicious effect upon the integrity and certainty of the law, and in a series of articles published . . . , he sounded the note of alarm. He pointed out that . . . the consequences would be very grave unless some corrective should be applied”).

439. POMEROY, *supra* note 396, at 52–59 (“All the really able jurists of the highest authority in England and in this country, who have advocated the system of codification, have expressly recognized and fully admitted this peculiar excellence of our common law. They have insisted that the same excellence can be preserved in a code; and that a national code, in order to accomplish its beneficial design, should be drawn up by its authors, and interpreted by the courts, so as to preserve this distinctive feature of the common law, in connection with the element of certainty belonging especially to codification.” (emphasis omitted)).

these distinguishing excellencies of the common law should be preserved and maintained in connection with the “certainty” which, it is claimed, accompanies statutory legislation.⁴⁴⁰

According to his view, the problem was that the authors of the California Civil Code had done little to retain the positive features of the common law. In order to preserve them, a method of judicial interpretation should be applied, regarding the code as being declaratory of the common law’s definitions, doctrines, and rules.⁴⁴¹

Furthermore, he lamented that the Civil Code did “not embody the whole law concerning private and civil relations, right, and duties; it is incomplete, imperfect, and partial.”⁴⁴² In his view, following in Holmes’ footsteps,⁴⁴³ a code should “embody the complete existing civil jurisprudence of the State, absolutely all of the legal rules which are recognized as operative, whether originally created by statute or by judicial decision. . . . The civil code is at most only an outline.”⁴⁴⁴

However, Pomeroy did not deny the practicability of codification in general, nor change his mind about the convenience of its adoption,⁴⁴⁵ as Carter strived to understand it and make others understand it.⁴⁴⁶ In fact,

440. *Id.* at 54.

441. *Id.* at 54–55.

442. *Id.* at 58.

443. Holmes, *supra* note 289, at 2 (“Another mistake . . . is that a code is to be short. . . . A code will not get rid of lawyers, and should be written for them much more than for the laity. It should therefore contain the whole body of the law in an authentic form.”).

444. POMEROY, *supra* note 396, at 58. “It does not purport to embody the entire jurisprudence of the State; it contains only portions of that jurisprudence, and even those portions are given in a fragmentary manner.” *Id.* at 58–59. According to Pomeroy’s view, this constituted a clear defect of the code, which required constant support from the courts:

[The code] does not purport to embody in a statutory form all of the existing rules of the law upon any subject whatsoever. It contains only general definitions, the statements of general doctrines, and a very few special rules. The great mass of the special rules of the law . . . are certainly not expressed in the text of the code. There must always, therefore, be more or less uncertainty as to which of these special rules are contained in and implied by the more general provisions of the code, and what of them must be sought for by the courts, independently of the code, in reported decisions, text-books, and other common law authorities.

Id. at 32.

445. *Id.* 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.”).

446. CARTER, PROVINCES, *supra* note 26, at 24 (“Professor Pomeroy, . . . although originally inclined to give his assent to the project of codification, he became persuaded from actual experience that this Code was having a most pernicious effect upon the integrity and certainty of the law. . . .”).

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 unquestionable a legal statement for or against codification, as Carter did. Even if he had declared himself as a codification supporter, this would not have prevented him at all from criticizing those specific schemes of codification he regarded as inappropriate, such as California's.

Nevertheless, paying attention to Pomeroy's words one cannot deduce what Carter deduced. In this regard, Pomeroy lamented and regarded as a "misfortune" that, having precedents of better codes, California Civil Code's authors "adopted . . . the work proposed by the New York commission, which was, at best, the mere outline of a civil code."⁴⁴⁷ To judge such fact as a "misfortune" seems to reveal Pomeroy's belief in codification. Hence, Pomeroy criticized the California Civil Code for its "extreme conciseness of language," since "it destroys one of the chief excellencies or benefits claimed for the system of codification."⁴⁴⁸ Pomeroy felt that a truly complete code would "bring the rules of the law within the easy cognizance of all ordinarily intelligent laymen," but he lamented that the conciseness of the code's language "has completely prevented or destroyed this benefit."⁴⁴⁹

Although Pomeroy did not seem to include himself among advocates of codification, it is worthwhile to note that he considered codification, and particularly, a good code, as a beneficial legal source to regulate the province of the private law.⁴⁵⁰ In this regard, he boasted the French and British India Codes,⁴⁵¹ and he never suggested nor proposed to derogate the Civil Code. Rather, he did the opposite.⁴⁵² Hence, although he regarded the California Civil Code as a bad one, he sought a method of interpretation

447. POMEROY, *supra* note 396, at 68.

448. *Id.*

449. *Id.*

450. *See id.* "[A]s claimed by the ablest advocates of this system," referring to codification, "[t]his supreme advantage of a code is constantly asserted by the advocates of codification." *Id.* It is not clear to me whether he talked about the codification enterprise from the outside as a sign of personal modesty (in fact, he never had written specifically on codification as a legal tool to regulate the law), or as a way to maintain himself outside of the heated codification debate, which he probably knew well as he wrote his series of articles in 1884.

451. *See id.* at 18–20.

452. *Id.* at 68 ("[T]he civil code must be accepted and acted upon as it is.").

which made it possible to take advantage of codification's benefits.⁴⁵³ In other words, he did not seem to pretend to criticize codification in general, but that specific code, proposing a method of interpretation to remove its defects:

[I]t is not at all my main purpose to criticize the civil code as a work of legislation . . . The highest interests of the State require that these defects should be removed, and that the code should, as far as possible, be rendered clear, certain, and comprehensible, not only to judges and lawyers, but to all intelligent laymen.⁴⁵⁴

He regarded his method of interpretation as the best way to ensure, as far as possible, the benefits of codification. Because “[t]o reconstruct and perfect the civil code according to the highest type of codification” would be really difficult, and he believed “[t]here is no reason to expect any interference by the legislature; and if it should interfere, there is no reason to anticipate any real improvement as the result.”⁴⁵⁵ He concluded, “The only practicable method, therefore, of removing ambiguity from the text of the code, of ascertaining the meaning of its provisions and determining their effect with certainty, is by the process of judicial interpretation.”⁴⁵⁶

After a careful exploration of the different manners of judicial interpretation that could secure the benefits of that civil code, he envisaged only two possible systems of interpretation which were general, fixed and uniform. First, that the court, in construing every provision of the code, “should regard the text alone as the ultimate and only authority”;⁴⁵⁷ and secondly, that the court would “regard the code as primarily and mainly a declaration and enactment of common law rules.”⁴⁵⁸ He came to a

453. References to the “benefits of codification” are common in Pomeroy’s works. *See id.* at 32 (describing “the principles of interpretation which ought to be followed in order that the benefits of codification may be realized by the citizens of California from their system of legislation”); *id.* at 34 (describing “the most important and peculiar excellency of codification”); *id.* at 68–69 (suggesting that implementing a uniform system of interpretation is the only manner by which “the benefits of codification” will be realized).

454. *Id.* at 44 (spelling modernized).

455. *Id.* at 44–45 (emphasis omitted). “Our civil code . . . is . . . full of defects, imperfections, omissions and even inconsistencies, which must, so far as possible, be supplied, removed and harmonized by the courts, for it is useless to expect any real aid from the legislature.” *Id.* at 6.

456. *Id.* at 45.

457. *Id.* at 49–50.

458. *Id.* at 50 (“They might interpret every provision as intended to be a mere statement of the common law doctrines unchanged, with all its consequences, unless from the unequivocal language of the provision a clear and certain intent appeared to alter the common law rule.”). Pomeroy saw in the Penal Code for England drafted by James F. Stephen a clear example of a legal text “mainly declaratory of the existing rules of the law,” which he expected to “be

conclusion which he presented as his “fundamental proposition” with these words:

Except in the comparatively few instances where the language is so clear and unequivocal as to leave no doubt of an intention to depart from, alter, or abrogate the common law rule concerning the subject-matter, the courts should avowedly adopt and follow without deviation the uniform principle of interpreting all the definitions, statements of doctrines, and rules contained in the code in complete conformity with the common law definitions, doctrines, and rules, and as to all the subordinate effects resulting from such interpretation.⁴⁵⁹

The main purpose of this “fundamental proposition” consisted in granting a method of interpretation which made civil code’s application clearer, safer, and more uniform. Thanks to this system of interpretation, judges “might construe all new, hitherto unused, and ambiguous phraseology, as not designed to work a change in the pre-existing settled rules, unless the intent to work such a change was clear and unmistakable.”⁴⁶⁰

Summing up, it can be said that Pomeroy confirmed that some of the civil code’s defects and shortcomings were producing interpretation problems for lawyers and judges, rendering the code remarkably uncertain.⁴⁶¹ Seeking to solve that problem, he proposed to adopt “some certain and consistent principles in the work of judicial interpretation.”⁴⁶² Finally, he admitted that it would be possible to draw up a code of private law, to which his proposed method of interpretation would not be necessary to be applied; however, it was not the case of the California Civil Code, whose errors, uncertainties and inconsistencies made the aforementioned interpretation’s principles indispensable.⁴⁶³

Pomeroy’s thesis, unlike Carter’s, does not seem to be led by self-interested or biased reasons. As we said, although he regarded the codes as a worthy legal tool, this did not prevent him from recognizing the shortcomings of that Code. In order to justify and explain the necessity of adopting a method of interpretation,⁴⁶⁴ he did not hesitate to criticize the

enacted and become the criminal law of England.” *Id.* at 19 n.*. But, as it is very well known, that was not case.

459. *Id.* at 51.

460. *Id.* at 50.

461. *Id.* at 17–18, 26, 31.

462. *Id.* at 21 (emphasis omitted).

463. *See id.* at 67–68.

464. *Id.* at 6 (explaining that his position as a teacher of law allows him to more clearly perceive “the defects and imperfections of the code, and to appreciate the imperative necessity

Code.⁴⁶⁵ However, it does not seem to me he changed his mind concerning codification.

As we saw, code opponents, and particularly Carter, made good use of Pomeroy's work. Code proponents did not agree with Carter's interpretation of Pomeroy's work. Field kept on showing California codes as an example of successful codification,⁴⁶⁶ but expressed his complaint regarding Carter's interpretation of Pomeroy's codification position. He lamented, as we said, that Carter omitted to state that Pomeroy and Amos were "most pronounced advocates of the codification of private law, and continued to be so to the end of their lives."⁴⁶⁷

As we can see, historic experiences on codification played a remarkable role in the debaters' argumentation. Both code proponents and opponents tried to show them as a matter of fact, the former as a success, the latter as a failure. Both, by analyzing the same experiences, came to opposite conclusions. The main problem probably lay, as we saw, in the starting point. In this regard, Carter asserted, "The examples of Rome, of France, of Prussia, or of Louisiana, are frequently cited as proof that Codes of private law should everywhere be adopted."⁴⁶⁸ He also thought, nonetheless, that such arguments had no force unless two other things were proven:

[F]irst, that the judicial administration of private law in the countries referred to has actually been under the control of written Codes; and second, that such judicial administration is superior to our own. But such proof is not even attempted. It would be impossible to make it; the argument, however, tacitly and falsely assumes the fact.⁴⁶⁹

This starting point made it really difficult to achieve any agreement about codification's historic experiences, since, at least from code opponents' view, it would entail admitting and recognizing that the American common law system was not the superior one, and that something

of adopting some uniform method or principle in its construction and interpretation . . . so that the results of [judges'] decisions may constitute a harmonious, and consistent, and just system, and may determine the rights and duties of citizens with clearness and certainty. The civil code of California, among all other instances of similar legislation, pre-eminently needs judicial interpretation").

465. On Pomeroy's explanation on such imperfections and defects, see *id.* at 7-44 (describing language, arrangement, and uncertainty and its sources: too general definitions, extreme condensation of language, etc.); see also *supra* note 455.

466. See FIELD, *supra* note 108, at 7 ("[T]he Codes of California, Political, Civil, Penal, and Procedure, are complete Codes of the different branches of the law of the Golden State.").

467. Field, *supra* note 208, at 265; see also *supra* text accompanying note 249.

468. CARTER, PROPOSED CODIFICATION, *supra* note 26, at 44.

469. *Id.* (emphasis omitted).

could be learned and adopted from another country's legal system. As Carter firmly maintained, the conclusion was clear and unquestionable: code proponents' argumentation is wrong for it "tacitly and falsely assumes the fact" that the American judicial administration is not necessarily the best one.⁴⁷⁰

Other code opponents preferred not to go further into this way of reasoning, but to face the main question directly: "The great question after all is, not what has been done in other nations and under other systems of jurisprudence, but what is best for us in this age of the world and in this country and under our present conditions."⁴⁷¹

No matter how, what really mattered was to come to the conclusion one wanted to. Consequently, Hornblower came to the same conclusion as Carter,⁴⁷² without having to look for an original—sometimes, even odd—historic interpretation to prove the failure of each codification's attempt or undertaking. In this regard, Carter's argumentation was much more sophisticated. Relying first on codification supporters' authorities (Sheldon Amos or John Austin), he confirmed that "all experiments in codification, hitherto attempted, have proved to be failures."⁴⁷³ Then, since "these authors themselves protest that the failure of all attempts at codification, hitherto made, does not, of itself, disprove the feasibility, or the expediency, of that policy,"⁴⁷⁴ he tried to demonstrate that such practical attempts failed indeed because of a theoretic error which made any practical attempt of codification impossible, infeasible, or inexpedient.⁴⁷⁵

Field, on the contrary, tried to prove, first of all, the convenience of codification. Secondly, he made efforts to present all the historic codification enterprises as successes. In doing so, he tried to demonstrate codification's expediency. Finally, he encouraged to undertake it, and to stimulate American pride by referring the foreign achievements: "Not

470. *Id.*

471. Hornblower, *supra* note 191, at 17.

472. *Id.* ("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.")

473. CARTER, PROPOSED CODIFICATION, *supra* note 26, at 63.

474. *Id.*

475. *See id.* at 64 (discussing that the error consists in disregarding "the boundary line heretofore drawn between the just provinces of written and unwritten law . . . which make it forever impossible that private law can be adequately dealt with and embraced under written statutory forms. These theoretic views readily explain the failure of all practical attempts in the way of codification; and it seems quite remarkable that the distinction referred to seems never to have occurred to the eminent advocates of codification to whom reference is above made").

possible to form a Code of American common law! Are we inferior to Frenchmen, Germans, or Italians?"⁴⁷⁶

In this regard, Field's references to Europe and European legal tradition were not rare,⁴⁷⁷ which, on the one hand, annoyed Carter at most, but, on the other, they helped code opponents to present the codification debate as a controversy between the civil-law (European) system and the common-law (Anglo-American) system, between a foreign legal tradition and the American legal heritage.

476. FIELD, *supra* note 108, at 17; *see also supra* notes 364 & 401. Field also praised the experiences of Sardinia, Austria, and Russia. FIELD, *supra* note 209, at 359.

477. FIELD, *supra* note 214, at 23 (referring to "the codes of France and other nations of continental Europe"). For example, he stated:

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.

Id. at 30; *see* FIELD, *supra* note 149, 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 to all."); FIELD, *supra* note 108, at 26–27 (referring to the codification that had taken place in "continental Europe, from the Mediterranean to the frozen sea").