LANGDELL UPSIDE-DOWN: THE ANTICLASSICAL JURISPRUDENCE OF ANTICODIFICATION

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I. INTRODUCTION

In the decades following the Civil War, the American legal profession engaged in a heated debate about the wisdom of replacing the substantive common law with a written civil code. During the dispute's most intense period, in the 1880s, discussions of the benefits and shortcomings of codification appeared regularly in legal publications, as well as in general-interest newspapers and magazines. Professional organizations and state legislatures devoted countless hours to the question. Ultimately, the postbellum codification movement achieved little. David Dudley Field's tireless efforts to persuade New York State to enact the Civil Code he drafted came tantalizingly close to fruition, but finally failed. California embraced a revised version Field's Civil Code in 1872, but the courts of that state soon adopted a mode of code interpretation that rendered their approach to legal decision making little different from that of courts in common law states. By the 1890s, it was apparent that the American defenders of the common law had won the battle. 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.[1]

The late nineteenth-century codification debate generated a profusion of jurisprudential literature. Although modern scholars have not totally ignored this rich body of writing,[2] they have devoted surprisingly little attention to it. Strikingly, only a few articles have analyzed the portrait of the common law

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[1] *See infra* pp. [ ].

[2] See, e.g., Andrew P. Morriss, *Codification and the 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); LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 403-07 (2d ed. 1985); Lewis Grossman, *Codification and the California Mentality*, 45 HASTINGS L.J. 617 (1995). On the American codification movement preceding the Civil War, see CHARLES M. COOK, AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM (1981); PERRY MILLER, THE LIFE OF THE MIND IN AMERICA 239-65 (1965).

painted by Gilded Age jurists who fought codification.[3] This neglect is surprising, for the common law jurisprudence of that period has engaged the attention of legal scholars for more than a century. The writings of those who resisted the common law's elimination are an obvious source of insight into the era's conception of the common law.

Importantly, much anticodification literature described the common law in a manner greatly different from what standard twentieth-century depictions of Gilded Age private law jurisprudence would lead one to expect. Legal scholars have long viewed Christopher Columbus Langdell, the Dean of Harvard Law School from 1870 to 1895, as the prototypical American jurist of the late nineteenth century. He portrayed the common law as a conceptually-ordered scientific system in which rigorous logical reasoning trumped concerns about the just resolution of particular cases. In "Langdell's Orthodoxy," probably the most influential modern article on Langdell, Thomas Grey dubbed this system of legal thought "classical orthodoxy."[4] Others have labeled it "mechanical jurisprudence,"[5] "classical legal thought,"[6] "liberal legal science,"[7] or "Langdellian formalism."[8] Whatever term they have preferred, scholars have long agreed that Gilded Age legal thinkers viewed the common law as a rigidly logical, amoral system.

In recent years, some have begun to challenge the notion that soulless formalism typified Gilded Age common law jurisprudence.[9] Stephen Siegel, for example, has successfully demonstrated that Langdell's supposed amorality was not characteristic of late nineteenth-century legal thought. He

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[3] Morriss, *supra* note 2; Reimann, *supra* note 2; Lewis A. Grossman, *James Coolidge Carter and Mugwump Jurisprudence*, 20 LAW & HIST. REV. 577, 602-11 (2002).

[4] Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983). A search of the LEXIS "Law Reviews and Journals" database resulted in 298 articles citing to this article (LEXIS search conducted February 15, 2005).

[5] Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

[6] Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America*, 1850-1940, 3 RES. L. & SOC. 3 (1980). MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 9-31 (1992).

[7] Robert W. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920*, *in* PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA 88-89 (Gerald L. Gerson ed.) (1983).

[8] At least 91 law review articles have used this phrase. (LEXIS search conducted February 15, 2005).

[9] *See*, *e.g.*, Grossman, *supra* note 3; William P. LaPiana, *Jurisprudence of History and Truth*, 23 RUTGERS L.J. 519 (1992); Stephen A. Siegel, *Joel Bishops's Orthodoxy*, 13 LAW & HIST. REV. 215 (1995) [hereinafter Siegel, *Joel Bishops's Orthodoxy*]; *Francis Wharton's Orthodoxy: God, Historical Jurisprudence, and Classical Legal Thought*, 46 J. LEGAL HIST. 422 (2004) [hereinafter Siegel, *Francis Wharton's Orthodoxy*]; Stephen A. Siegel, *John Chipman Gray and the Moral Basis of Classical Legal Thought*, 86 IOWA L. REV. 1513 (2001) [hereinafter Siegel, *John Chipman Gray*]; Bruce Kimball, *Langdell on Contracts and Legal Reasoning: Correcting the Holmesian Caricature*, 27 LAW & HIST. REV. (forthcoming 2007) (production draft obtained from journal editor-in-chief).

has closely analyzed the work of other leading jurists of the era, both religious scholars such as Joel Bishop and Francis Wharton and secular scholars such as John Chipman Gray, and has shown that they believed the common law had a moral basis.[10] Nevertheless, Siegel retains the label *classical* in describing these men because, like Langdell, they firmly embraced the common law's formal conceptual order. Indeed, Siegel's central thesis is that moral classicism was the standard jurisprudential approach of the late nineteenth century. Strikingly, one scholar has recently contended that even Langdell himself was not "Langdellian," as that term has long been understood. [11] Bruce Kimball challenges the familiar portrait of Langdell as an amoral logician. Instead, he depicts Langdell as a flexible thinker concerned with justice and policy. Kimball does not, however, deny that Langdell was classicist, but only that he was an amoral one.[12]

The anticodification literature explored in this article 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. 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.[13] Indeed, in trumpeting the advantages of the common law, Carter, an almost exact contemporary of Langdell,[14] manifested a rule skepticism that foreshadowed that of the legal realists a half century later.

Can a legal system be both classical and moral? Siegel argues not only that such a combination is possible, but that it epitomized Gilded Age jurisprudence. He fails, however, to acknowledge that there is, at bottom, an unavoidable tension between classicism and justice, between formal

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[10] Siegel, *Joel Bishops's Orthodoxy*, supra note 9; Siegel, *Francis Wharton's Orthodoxy*, supra note 9; Siegel, *John Chipman Gray*, supra note 9.

[11] Bruce A. Kimball, *"Warn Students that I Entertain Heretical Opinions, Which They Are Not to Take as Law": The Inception of Case Method Teaching in the Classroom of Early C. C. Langdell, 1870-1883*, 17 LAW & HIST. REV. 57 (1999); Bruce A. Kimball, *The Langdell Problem: Historicizing the Century of Historiography, 1906-2000s*, 22 LAW & HIST. REV. 277 (2004) [hereinafter Kimball, *The Langdell Problem*]; Kimball, supra note 9.

[12] *See infra* p. [ ].

[13] Andrew Morriss, interestingly, reads Carter and reaches the opposite conclusion. Morriss, *supra* note 2 at 389 (describing the anticodifiers as having "a shared sense of the common law as a system of rules that, at least, is striving toward internal consistency . . .")

[14] Langdell lived from 1826 to 1906. Carter lived from 1827 to 1905.

conceptual order and equity. Morality undoubtedly shaped the classical legal system's general principles, and it may have helped guide the reasoning process by which legal scientists derived lower-level rules from these general principles. Nevertheless, a jurist applying lower-level rules to actual affairs simply has to choose occasionally between the deductive application of a rule and the equitable resolution of a particular case. Carter and Langdell both recognized this phenomenon, but they diverged on the appropriate solution. When forced to choose between formal deductive reasoning and a fair outcome, Langdell favored the former whereas Carter opted for the latter.

II. THE BATTLE OVER THE CIVIL CODE: FIELD VERSUS CARTER

A. The Codification Movement

David Dudley Field made his first major foray into the world of codification in 1847, when he assumed membership on a New York State commission created, pursuant to the state's 1846 constitution, "to revise, reform, simplify, and abridge the rules and practice, pleadings, forms and proceedings of the courts of record of this State."[15] This three-man commission produced a Code of Civil Procedure, which New York enacted in 1848.[16] Field so dominated the drafting of this instrument that it became commonly known as "the Field Code."[17] It 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.[18] The procedural code was Field's most successful codification effort; the majority of states ultimately embraced the Field Code or some revised version

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[15] FRIEDMAN, *supra* note 2 at 391 (quoting N.Y. Const. art. VI, § 24 (1847)). *See id.* at 391 (describing the formation of the commission and Field's participation on it).

[16] In 1849, this commission also completed a Code of Criminal Procedure, which New York finally enacted in 1881.

[17] 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).

[18] At least on the surface, code procedure, with its single form of action, fact pleading, joinder, and discovery, borrowed more from equity than from the common law. Subrin, *supra* note 17, at 337. Subrin, however, contends that despite the indisputable commonalities between the Field Code and equity practice, "Field . . . leaned as much, or more, toward the view of common law procedure, as to equity." Stephen N. Subrin, *How Equity Conquered the Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 939 (1987). According to Subrin, Field rejected the flexibility and judicial discretion of equity, because he wanted the legal system to be efficient and predictable. He thus designed a procedure that was, despite its surface similarities to equity procedure, more confining and formalistic. *Id.* at 934-36; Subrin, *supra* note 17, at 327-34.

of it.[19] Moreover, the code eventually served, in some important ways, as a model for the Federal Rules of Civil Procedure, enacted in 1938.[20]

Even after 1848, however, the substantive private law of New York—its law of torts, contracts, property, domestic relations, wills, and agency, for example—remained mostly uncodified. Lawyers and judges had to extract these rules from countless reported judicial decisions and some poorly organized statutes. New York was hardly alone in this respect; despite the efforts of many fervent and eloquent codification proponents in antebellum America,[21] substantive private law development was still court-centered throughout the country at the time of the Civil War. In other words, the United States remained, from a substantive rather than a procedural perspective, almost uniformly a common law country.[22]

In addition to mandating procedural reform, New York's 1846 constitution also required the establishment of a 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."[23] The first such commission failed to produce a code, but in 1857 the legislature established a new code commission and named David Dudley Field one of its three members. Field was primarily responsible for writing the resulting substantive Civil Code.[24]

The commission presented the final draft of the Civil Code to the legislature in 1865. In the introduction to the code, Field described it 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 . . . ."[25] Field also explained what benefits codification offered:

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[19] Charles E. Clark, *Code Pleading and Practice Today*, *in* DAVID DUDLEY FIELD: CENTENARY ESSAYS CELEBRATING ONE HUNDRED YEARS OF LEGAL REFORM 55 (Alison Reppy ed.) (1949).

[20] *See id.* at 64 ("[T]here can be no question but that [the Federal Rules of Civil Procedure] represent a present-day interpretation and execution of what are at bottom the Field principles.")

[21] *See generally*, COOK, *supra* note 2.

[22] Louisiana was the major exception. Essentially a civil law state, it enacted, in 1825, a general, substantive Civil Code, drafted by Edward Livingston. FRIEDMAN, *supra* note 2, at 173-74, 403. In 1860, Georgia became the first common law state to enact a civil code. *Id.* at 405-06; Gunther A. Weiss, *The Enchantment of Codification in the Common Law World,* 25 YALE J. INT'L L. 435, 511-12 (2000).

[23] Morriss, *supra* note 2 (quoting N.Y. CONST. art. I, § 17 (1847)).

[24] Daun van Ee, David Dudley Field and the Reconstruction of the Law 49 (1974) (unpublished Ph.D. dissertation, Johns Hopkins University).

[25] *Introduction*, THE CIVIL CODE OF THE STATE OF NEW YORK xv (Albany, Weed, Parsons 1865) [hereinafter *Introduction*, CIVIL CODE].

> In the first place, it will enable the lawyer to dispense with a great number of books which now incumber [sic] 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, a 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.[26]

Despite Field's references to the Civil Code's substantive reforms and resolution of disputed questions, his primary goal in drafting the code was not to revolutionize the content of New York's law, but rather to embody existing law in an organized statutory form. In his view, the only significant reforms contained in the code concerned the rights of married women, the adoption of children, and the assimilation of the law of real property and personal property. By Field's own count, there were only about 120 other changes, all "of less importance," in the code's 1,998 sections.[27]

Field spent many years doggedly urging the adoption of his Civil Code. Both the Assembly and the Senate of New York voted to enact the Civil Code in 1879 and 1882, but each time the governor vetoed it. Undaunted, Field lobbied for the passage of the Civil Code annually throughout the 1880s.[28] Nonetheless, it never became part of New York law. Field's successes in the area of substantive codification were confined to a few western states. The Dakota Territory enacted his Civil Code with almost no changes in 1865, and both North and South Dakota continued to use it when they became states in 1889.[29] Montana enacted a revised version of the code in 1895.[30] Field's greatest triumph occurred in 1872, when California adopted a modified version of his Civil Code.[31] As will be discussed below, however, the state's judiciary soon minimized the significance of this event by embracing a method

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[26] *Introduction*, CIVIL CODE, *supra* note 26, at xxix-xxx.

[27] *Id*. at xxx-xxxi.

[28] Alison Reppy, *The Field Codification Concept*, *in* DAVID DUDLEY FIELD: CENTENARY ESSAYS CELEBRATING ONE HUNDRED YEARS OF LEGAL REFORM 36-42 (Alison Reppy ed.) (1949); van Eee, *supra* note 24, at 331-32. This later code commission drafted not only the substantive Civil Code, but also a Political Code (1860) and a Penal Code (1865). The New York legislature never enacted the former, but it enacted the latter in 1881.

[29] Weiss, *supra* note 22, at 512.

[30] *Id*. at 513. Both California and Montana enacted versions of four of the codes Field drafted for New York; the code of civil procedure, the civil code, the political code, and the penal code. *Id.* at 512-13.

[31] Grossman, *supra* note 2.

of code interpretation that rendered California's approach to legal decision making little different from that of the traditional common law states.[32]

B. The Anticodification Response

Field's codification campaign failed in New York State largely because of the energy, passion, and talent of the opponents of codification there. The leader of this opposition was James Coolidge Carter, an extremely prominent legal figure in the late nineteenth-century—perhaps the most famous lawyer of his era.[33] As I have discussed elsewhere, Carter was one of the nation's leading appellate advocates, and he argued some of the most important Supreme Court cases of the Gilded Age.[34] President Grover Cleveland likely would have appointed him Chief Justice of the United States if not for concerns about his health.[35] Carter was also an influential figure in New York City politics and one of the country's foremost municipal reformers.[36] In addition, he served as president of the American Bar Association, the New York State Bar Association, and the Association of the Bar of the City of New York (ABCNY).

From within the last of these organizations, Carter led the successful fight against Field's efforts to replace New York State's decisional private law with a civil code. 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.[37] Carter assigned himself (and Albert

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[32] *Infra* pp. [ ].

[33] *See* GEORGE MARTIN, CAUSES AND CONFLICTS; THE CENTENNIAL HISTORY OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 173 (1970); James Grafton Rogers, AMERICAN BAR LEADERS: BIOGRAPHIES OF THE PRESIDENTS OF THE AMERICAN BAR ASSOCIATION, 1878-1928, at 80-85 (1932). For detailed discussions of Carter's career, *see* Grossman, *supra* note 3, and Lewis A. Grossman, The Ideal and the Actual of James Coolidge Carter: Morality and Law in the Gilded Age 389-97 (2005) (unpublished Ph.D. dissertation, Yale University) (on file with author).

[34] Among the prominent cases Carter argued were The Chinese Exclusion Case, 130 U.S. 581 (1889), U.S. v. Trans-Missouri Freight Association, 166 U.S. 290 (1896), U.S. v. Joint Traffic Association, 171 U.S. 505 (1897), Smyth v. Ames, 169 U.S. 466 (1898), and Hyde v. Continental Trust Co., 157 U.S. 654 (1895) (companion case to Pollock v. Farmer's Loan & Trust Co., 157 U.S. 429 (1895)).

[35] *See* THERON G. STRONG, LANDMARKS OF A LAWYER'S LIFETIME 281 (1914); GEORGE MARTIN, CAUSES AND CONFLICTS; THE CENTENNIAL HISTORY OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 173 (1970); James Coolidge Carter 9 (unattributed speech in the Irving Club Collection, Special Collections, Hoskins Library, Univ. of Tennessee Knoxville). *See also The Man for Chief Justice*, N.Y. TIMES, Apr. 10, 1888.

[36] Grossman, *supra* note 3, at 579-80.

[37] *Id.* at 588-89.

Mathews, whose work is also discussed below[38]) the task of framing the broader jurisprudential and practical arguments against codification and in favor of the common law. He did so in two major pamphlets, titled *The Proposed Codification of Our Common Law* and *The Provinces of the Written and the Unwritten Law*, and in testimony before the New York Senate.[39] During the 1880s, Carter's name became almost synonymous with the anticodification position.

Carter set forth a detailed portrait of the common law in these anticode polemics, in a renowned 1890 presidential address to the American Bar Association called *The Ideal and the Actual in the Law*, and in a posthumously published book titled *Law: Its Origin, Growth, and Function*.[40] Through these writings, he became the most prominent representative of the American school of historical jurisprudence. Like Friedrich Karl von Savigny, the leader of the German historical school, Carter equated the unwritten law with the evolving customs of the people. He argued that common law judges, instead of making law, found the basis for their decisions in "the social standard of justice, or from the habits and customs from which that standard itself has been derived."[41] Statutory enactments, by contrast, often conflicted with custom, or came to do so as custom changed while the written law remained static. In Carter's view, legislation contrary to custom was not only futile, but promoted grave mischief as the people strove to evade its enforcement. He thus contended that the regulation of private affairs should remain primarily the province of the unwritten law.[42]

By equating the common law with custom, Carter acknowledged that the law would change along with the habits and manners of the people. Nonetheless, Carter clung to a form of moral objectivism even while recognizing social flux. His simultaneous embrace of natural law notions and historical evolutionism represented a coherent, if not always clearly expressed, melding of the two approaches.[43] Carter believed that the evolution of custom was characterized by the gradual unfolding of eternal moral principles. Therefore, the common law, by reflecting customary standards of justice, embodied elements of natural law. As Carter explained, "[The law] possesses

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[38] *See infra* p. [ ].

[39] JAMES COOLIDGE CARTER, THE PROPOSED CODIFICATION OF OUR COMMON LAW (1884) [hereinafter CARTER, PROPOSED CODIFICATION]; JAMES COOLIDGE CARTER, THE PROVINCES OF THE WRITTEN AND THE UNWRITTEN LAW (1889) [hereinafter CARTER, PROVINCES]; JAMES COOLIDGE 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].

[40] James Coolidge Carter, *The Ideal and the Actual in the Law*, *in* REP. THIRTEENTH ANN. MEETING A.B.A. 225 (1890) [hereinafter Carter, *Ideal and Actual*]; JAMES COOLIDGE CARTER, LAW: ITS ORIGIN, GROWTH, AND FUNCTION (1907) [hereinafter CARTER, ORIGIN, GROWTH & FUNCTION] .

[41] Carter, *Ideal and Actual*, *supra* note 40, at 228.

[42] Grossman, *supra* note 3, at 602-19.

[43] *Id.* at 606-09.

as an essential feature a *moral* character; . . . it springs from and reposes upon that everlasting and infinite Justice which is one of the attributes of Divinity; and . . . it is so much of that attribute as each particular society is able to comprehend and willing to apply to human affairs."[44] Because Anglo-American civilization was highly advanced, its customs, and hence its law, were approaching the ideal.[45] Carter asserted, "I have sought to discover those rules only which *actually* regulate conduct, not those which *ought* to regulate it." Tellingly, however, he then remarked, "I imagine that the rule which will be found in fact to exist, is the best."[46]

Carter's reference to "finding" a legal rule points to another essential aspect of his jurisprudence. He steadfastly denied that judges "made" law. Rather, they "declared" already existing law, which they "found" among the "habits, customs, business and manners of the people, and those previously declared rules which have sprung out of previous similar inquiries into habits, customs, business and manners."[47] This assertion was a critical feature of Carter's defense of the common law against the codifiers' attacks. Advocates of codification often protested that judges did not "find" the unwritten law, but rather "made" it themselves. Field, for example, argued: "[T]he legislative and judicial departments should be kept distinct. . . . [W]e violate [this maxim] every hour that we allow judges to participate in the making of the laws."[48] In response, Carter maintained that custom was an objective, nondiscretionary basis for judicial decisions.

Proponents of codification also frequently condemned the common law's *ex post facto* quality. Because the common law was inaccessible to nonlawyers, they argued, citizens were not aware of their legal obligations until a judge issued his decision. A code, by contrast, would allow any person to determine his duties and responsibilities before taking action. David Dudley Field declared, "[T]hat only is truly law which has been provided beforehand."[49] In response, Carter contended that it was fair to presume that people were familiar with common law rules, because the common law was based on custom, and "[t]he term [*custom*] itself imports that it is known to *all*." He explained: "A man can hardly live in society without knowing how

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[44] CARTER, PROVINCES, *supra* note 39, at 13.

[45] Stephen Siegel has identified a parallel impulse among other legal thinkers of the time. Stephen A. Siegel, *Historism in Late Nineteenth-Century Constitutional Thought*, 1990 WIS. L. REV. 1431, 1438.

[46] CARTER, ORIGIN, GROWTH & FUNCTION, *supra* note 40, at 145.

[47] Carter, *Ideal and Actual*, *supra* note 40, at 224. He often asserted that judges were society's "experts" at ascertaining these customs, although he never offered any real support for this assertion. *See*, *e.g.*, CARTER, PROPOSED CODIFICATION, *supra* note 39, at 1; CARTER, PROVINCES, *supra* note 39, at 11; CARTER, ORIGIN, GROWTH & FUNCTION, *supra* note 40, at 327.

[48] David Dudley Field, *Codification*, 20 AM. L. REV. 1, 2 (1886).

[49] David Dudley Field, *Codification, An Address Delivered before the Law Academy of Philadelphia* 22 (1886).

men act—that is, what custom is. . . . Custom is of all things the one most universally known."[50]

Carter's contention that judges and citizens in a common law system could determine the single, correct resolution to any legal question depended on the uniformity of custom. If Carter had conceded the existence of multiple, competing customs, he also would have had to acknowledge that judges simply selected which custom to follow, and therefore that a citizen could not know the law before a judge declared it. Carter thus frequently declared that the customs of the people were "universal" and that there was a uniform "national standard of justice."[51] Because judges themselves were "part of the community," they "knew" and "felt" the common standard of justice and relied on it when deciding cases.[52] The notion of universal custom also allowed Carter to suggest that the common law was actually more democratic than legislation, particularly when the legislature was dominated by corrupt and plutocratic interests. "Customs . . . being common modes of action, are the unerring evidence of common thought and belief, and as they are the joint product of the thoughts of all, each one has his own share in forming them. In the enforcement of a rule thus formed no one can complain, for it is the only rule which can be framed which gives equal expression to the voice of each."[53]

Carter acknowledged that parties often disagreed about the specific rule to be derived from custom in a particular case, but he rarely conceded that such clashing positions might be rooted in conflicting customs within the community itself.[54] Carter could not, of course, deny that there were variations in conduct among individuals.[55] He argued, however, that such differences had largely disappeared as American society had progressed toward universal norms of behavior embodying fair dealing and cooperative self-restraint.[56] When confronting examples of widespread conduct that conflicted with these supposedly uniform habits and values, Carter played semantic games, terming them "bad practices" rather than "customs."[57]

In sum, Carter's argument, brewed in the cauldron of the codification wars, was that there was an absolute identity between the common law and "the social standard of justice," or "custom." "*[C]ustom* is not simply *one* of the *sources* of law from which selections may be made and converted into law by the independent and arbitrary *fiat* of a legislature or a court, but . . . law, with

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[50] CARTER, ORIGIN, GROWTH & FUNCTION, *supra* note 40, at 255, 277-78. For an extended discussion by Carter on these points, *see id.* at 225-28.

[51] *See*, *e.g.*, Carter, *Ideal and Actual*, *supra* note 40, at 229; CARTER, PROPOSED CODIFICATION, *supra* note 39, at 41.

[52] CARTER, PROVINCES, *supra* note 39, at 48. Because New York judges were directly elected, it was not quite as audacious to wrap them in the cloak of democracy as it would have been if they were appointed.

[53] CARTER, ORIGIN, GROWTH & FUNCTION, *supra* note 40, at 143.

[54] *Id.* at 78.

[55] *Id.* at 123.

[56] *See generally* Grossman, *supra* note 3, at 602-14.

[57] *Id.*, at 613-14.

the narrow exception of legislation, *is* custom."[58] Carter's view that each and every decision by a common law judge reflected shared ethical standards required him to describe the decision-making process in a manner strikingly different from Langdell.

III. LANGDELL'S CLASSICAL ORTHODOXY

Before examining the contrasts between Carter's and Langdell's common law methodologies, it is necessary to review the contours of Langdell's "classical orthodoxy." Professor Thomas Grey, the author of *Langdell's Orthodoxy*, argues that "legal theories are defined by the relations they establish among five possible goals of legal systems: comprehensiveness, completeness, formality, conceptual order and acceptability."[59] According to Grey's scheme, *comprehensiveness* concerns the ability a legal system, from a procedural perspective, to provide one and only one resolution of every dispute within its jurisdiction. The *completeness* of a legal system describes the degree to which the system's substantive norms provide a single "right" answer for every matter arising under it. Legal systems fall short of completeness if they contain (as perhaps they inevitably do) substantive gaps or inconsistencies that require decision makers to exercise discretion. *Formality* concerns the extent to which a legal system dictates the correct resolution of cases according to "demonstrative (rationally compelling) reasoning."[60] *Conceptual order* refers to a legal system's quality of having a limited body of coherently-related general principles that themselves generate substantive bottom-level rules. Finally, the goal of *acceptability* is the pursuit of justice and wise policy. A legal system is *acceptable* "to the extent that it fulfills the ideals and desires of those under its jurisdiction."[61]

Comprehensiveness is the least important element in Grey's discussion of Langdell's jurisprudence, for it is a procedural factor with no obvious relationship to the other four, substantive goals. According to Grey, the foundation for classical orthodoxy was the mutually reinforcing interplay of the next three goals on his list: completeness, formality, and conceptual order.[62] "The heart of classical theory was its aspiration that the legal system be made complete through universal formality, and universally formal through conceptual order."[63] The goal of acceptability was, in Grey's view, irreducibly in tension with the logically-ordered system represented by the previous three

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[58] CARTER, ORIGIN, GROWTH & FUNCTION, *supra* note 40, at 173.

[59] Grey, *supra* note 4, at 6.

[60] *Id.* at 8.

[61] *Id.* at 10.

[62] These qualities are not necessarily dependent on each other. For example, informality does not in and of itself prevent a legal system from being complete or conceptually ordered. *Id.* at 7-8, 8 n. 27. Moreover, a lack of conceptual order does not invariably mean that a system is informal. *Id.* at 9 n. 29.

[63] *Id.* at 11.

goals. "To let considerations of acceptability directly justify a bottom-level rule or individual decision would violate the requirement of conceptual order, on which the universal formality and completeness of the system depended."[64]

According to Grey, Langdell's response to this tension was to push acceptability to the margins of his jurisprudence. In classical orthodox thought, considerations of policy and morality were allowed into the system at the level of general principles, but they influenced lower-level rules and specific decisions only so long as they did not undermine universally formal conceptual order.[65] Consider, for example, the situation in which one person promises another a reward for performing some task. Should the promisor be able to revoke his offer if the promisee has almost, but not entirely, completed the task? Langdell argued yes. He thought the systematic order of contract law, based on the principle of bargained-for consideration, demanded this result even though it "may cause great hardship and practical injustice."[66]

Bruce Kimball's recent work takes issue with Grey's portrait of Langdell. In a historiographic study of scholarship about Langdell, Kimball criticizes Grey's heavy focus on Langdell's *Summary of the Law of Contracts*, to the exclusion of his work in the fields of procedure, equity, and commercial law and his law school casebooks.[67] Kimball concludes, "'[C]lassical orthodoxy does not fully comprehend the complexity of Langdell's jurisprudence, which needs to be reassessed in light of a broader and deeper review of Langdell's writings, both published and archival."[68]

In a subsequent article, Kimball conducts such a reassessment of Langdell's contracts scholarship. He concludes: "Far from conforming to a closed, formal system modeled on deductive logic or geometry, Langdell's mode of reasoning . . . is three dimensional, exhibiting a comprehensive yet contradictory integration of induction from authority, deduction from principle, and analysis of acceptability, including justice and policy."[69] Although Kimball adds important texture to Grey's depiction of Langdell, he does not remove the Harvard dean from the rank of classicists. First of all, Kimball's own list of Langdell's significant contributions to contract doctrine includes several foundational features of classical contract law: the movement toward abstraction; the identification of offer, acceptance, and consideration as the primary dimensions of contract; and the introduction of the bargain theory of contract.[70] Moreover, Kimball ultimately makes quite tentative and modest claims about the role of justice and policy in Langdell's jurisprudence. Although he points to examples in which Langdell appealed to acceptability to

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[64] *Id.* at 15.

[65] *Id.* at 15.

[66] CHRISTOPHER COLUMBUS LANGDELL, SUMMARY OF THE LAW OF CONTRACTS 3-4 (2d ed., Rothman 1980) (1890).

[67] Kimball, *The Langdell Problem*, *supra* note 11, at 316-22.

[68] *Id.* at 323.

[69] Kimball, *supra* note 9.

[70] *Id*.

supplement his logical derivation of bottom-level rules,[71] Kimball never goes so far as to suggest that Langdell was willing to sacrifice formal conceptual reasoning to reach a preferred result in a particular case. To the contrary, Kimball acknowledges that Langdell "wanted to be, or felt he should be, a pure legal formalist,"[72] that he "remained committed to . . . inductive and parsimonious abstraction,"[73] and that he thought the formal legal system "provides procedural consistency and evenhandedness, but does not aim at substantive justice in the particular dispute."[74]

In short, even after Kimball's revision, Langdell remains firmly a classicist, at least in his contracts scholarship. Indeed, Kimball himself appears to conclude that Langdell was a "moral classicist" of the type identified by Siegel.[75] Grey's scheme thus remains a useful tool for analyzing Langdell's jurisprudence.[76] And the application of this scheme to Langdell and Carter illuminates the stark contrast between them.

III. CODE FORMALISM AND ITS ALTERNATIVES

There were striking similarities between Langdell's classical common law vision and David Dudley Field's proposed system of codification, at least as Carter portrayed it. Carter's writings against the Civil Code thus indirectly demonstrate the difference between his own jurisprudence and that of Langdell.[77]

Carter depicted Field's code as striving for completeness, formality, and conceptual order at the expense of equitable outcomes. Indeed, Carter's crusade against codification was, above all, a battle against deductive reasoning. In his eyes, the primary advantage of the common law approach over code systems was the power common law judges had to resolve individual cases according to the demands of justice. Whereas codification

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[71] *Id*.
[72] *Id*.
[73] *Id*.
[74] *Id*.
[75] *Id*.
[76] As Siegel has demonstrated, Thomas Grey's scheme is useful for describing all classical legal thought, not just the sterile, amoral variety Langdell has long been thought to embody. Siegel, *Joel Bishops's Orthodoxy, supra* note 9, at 220-23; Siegel, *John Chipman Gray*, *supra* note 9, at 1518-27.
[77] Carter himself never remarked on the similarities between code formalism and Langdell's jurisprudence. Oliver Wendell Holmes did, however. In 1887, he remarked, "It has long seemed to me that the ablest of the agitators for codification, [Englishman] Sir James Stephen, and the originator of the present mode of teaching, Mr. Langdell, start from the same premises to reach seemingly opposite conclusions. The number of legal principles is small, says, in effect, Sir James Stephen, therefore codify them. The number of legal principles is small, says Mr. Langdell, therefore they may be taught through the cases which have developed and established them." Oliver Wendell Holmes, *The Harvard Law School: Judge Holmes' Oration*, 3 L. Q. REV. 118, 121 (1887).

would compel courts to decide particular matters by mechanical deduction from the principles and rules set forth in the code, the common law achieved case-specific fairness by avoiding such rigid formality. Although Carter mounted this justice-based defense of the common law against Field, not Langdell, he might as well have been arguing with the Harvard dean himself.

A. Formal Conceptualism in the Civil Law Tradition

Carter had good reason to equate codification with mechanical formalism, for such logical rigidity characterized the legal systems of the many civil law countries that had adopted codes over the previous hundred years. The drafters of the Prussian Landrecht, enacted in 1794 under Frederick the Great, intended their enormous code to be complete—that is, to serve as the sole basis of decision for every case.[78] The jurists who prepared the French Civil Code of 1804 (the Code Napoléon) were aware of the Prussians' utter failure to articulate a rule for every fact situation. They thus embraced the much more modest goal of setting forth general principles and maxims to be developed and applied by judges and jurists. Nevertheless, the revolutionary impulses and rationalist tendencies of the early nineteenth century shaped the reception of the Code Napoléon in France and in the many other European and Latin American countries that adopted it. In all these jurisdictions, the Code tended to be viewed as a clear and complete source of all law.[79]

In an influential work, *The Civil Law Tradition*, John Henry Merryman describes the general views shared by civil law countries about the nature, source, and role of law.[80] The reality in civil law jurisdictions has always, inevitably, strayed from these ideals. Nonetheless, nineteenth-century jurists clung to these core principles stubbornly, even when violating them in practice. Modern civil law theorists, by contrast, have assumed an

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[78] JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA 29 (2d ed. 1987).

[79] *Id.* at 32-33. Jeremy Bentham and John Austin, influential nineteenth-century legal philosophers in Great Britain, also shared the vision of a complete code, although they did not succeed in persuading their countrymen to enact one. MAURICE EUGEN LANG, CODIFICATION IN THE BRITISH EMPIRE AND AMERICA 28-58 (1924). German jurists quarreled about the possible adoption of a unified national code throughout much of the nineteenth century. The debate commenced with a famous 1814 exchange between Thibaut and Savigny over the advisability of codification. Savigny, who opposed codification, prevailed in this dispute, and his arguments gave birth to the historical school of jurisprudence. *See* Reimann, *supra* 2. Nevertheless, a body of German jurists continued to push for codification, and they ultimately succeeded with the adoption of the German Civil Code of 1896, which went into effect in 1900.

[80] Merryman defines a legal "tradition" as "a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied perfected, and taught." MERRYMAN, *supra* note 78, at 2.

increasingly flexible attitude toward traditional civil law principles, although Merryman contends that the pure model continues to shape their mindset as a kind of "folklore."[81]

At the center of the civil law tradition lay notions of legislative positivism and the separation of powers. Judges were meant to perform only the relatively minor function of mechanically applying statutory provisions to the facts at hand.[82] The lawmaking power lay solely in the legislature and, to the degree the legislature delegated it, in the executive and the administrative organs of the state.[83] In a codified legal system, such legislative positivism demanded that the code be totally coherent, consistent, and complete, so that judges had no room to make law themselves.[84] The insistence that judges not make law was joined to a related emphasis on the importance of legal certainty. Civil law jurists believed that certainty was best ensured by a decision-making process insulated from judicial discretion.

Another central feature of the civil law approach was its rejection of the authority of judicial precedent. Stare decisis was flatly inconsistent with civil law theorists' legislative positivism. Because judicial decisions were not themselves sources of law, courts could not be bound by prior decisions. Moreover, while many common law jurists viewed the doctrine of stare decisis as a foundation for certainty, their civil law counterparts, as noted above, tended to see any judicial power over legal development as fostering uncertainty. Therefore, in civil law countries, unlike in common law jurisdictions, there was no official judge-created body of law. Moreover, civil law judges felt freer than their English and American counterparts to depart from prior judicial interpretations of statutory provisions, even interpretations by higher courts.[85]

If the code was supposed to be the sole basis for deciding every case, how did civil law jurists deal with situations in which there were gaps (*lacuanae*) in

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[81] *See*, *e.g.*, *id.* at 46-47. By presenting my discussion of the civil law tradition in the past tense, I thus do not intend to imply that the tradition is dead today.

[82] *Id.* at 34-38; JOHN P. DAWSON, ORACLES OF THE LAW 392 (1968). For similar views of the judicial role among English and American codifiers, *see* Jeremy Bentham, *General View of the Complete Code of Laws*, *in* THE WORKS OF JEREMY BENTHAM, 155, 210 (vol. 3, John Borwing ed.) (1962); COOK, *supra* note 2, at 83-87.

[83] Civil law jurists also recognized, through various intellectual contortions, that custom was a source of law, although a subsidiary and not especially significant one. MERRYMAN note 83, at 23. Supporters of codification in America tended to downplay the importance of custom even in the common law system they sought to replace. New York Civil Code supporter Robert Ludlow Fowler remarked, "Even if Mr. Carter intended to refer to custom as a source of law, his reference entirely overlooks the fact that custom has never, in this State, been in any way a fertile source of law." ROBERT LUDLOW FOWLER, CODIFICATION IN THE STATE OF NEW YORK 9 (1884).

[84] MERRYMAN, *supra* note 78, at 29; DAWSON, *supra* note 82, at 393-94.

[85] MERRYMAN, *supra* note 78, at 22, 36. Merryman notes that in modern practice, civil law judges are in fact influenced by prior decisions, even though *stare decisis* is not central to the civil law approach, as it is to the common law system. *Id.* at 47. *See also* DAWSON, *supra* note 82, at 400-31.

the code, or in which the strict application of code provisions produced clearly inequitable results? In short, they adopted an approach to code interpretation similar to the conceptual logical formalism of Langdell's common law jurisprudence. James Herget and Stephen Wallace explain the dominant nineteenth-century civil law view concerning statutory gaps:

> For the positivists there was no gap problem. The positive laws, including the authorized rules of construction and interpretation, were the only sources to which a judge could resort in deciding a case. . . . In this view, the law could not logically have any gaps. Law was autonomous, a closed universe of given rules. To admit of gaps would be to admit that judges could decide cases according to something other than law! Positivists would concede that there could be and were problems of legal construction and interpretation, and the application of law to a particular case could sometimes be difficult. But the problem was one of logic and the meaning of words.[86]

Civil law thinkers manifested a similarly formalist attitude toward the problem of unfair outcomes. They recognized that resolving matters through the mechanical application of code provisions could sacrifice case-specific fairness, but the dominant view in the civil law tradition was (and remains today) that the interest of certainty outweighs that of equity.[87] Merryman explains:

> In its general sense, equity refers to the power of the judge to mitigate the harshness of strict application of a statute, or to allocate property or responsibility according to the facts of the individual case. . . . It is a recognition that broad rules, such as those commonly encountered in statutes, occasionally work harshly or inadequately, and that some problems are so complex that it is not possible for the legislature to dictate the consequences of all possible permutations of the facts. . . . It clearly implies a grant of discretionary power to the judge. But in the civil law tradition, to give discretionary power to the judge threatens the certainty of the law. As a matter of legal theory, the position has been taken that judges have no *inherent* equitable power. They may from time to time be granted authority to use equity in the disposition of a case, but this grant of power will be expressly made and carefully circumscribed in a statute enacted by the legislature.[88]

Because equity was a legislative prerogative rather than a judicial one, a judge was not free to pursue justice in an individual case by departing from the

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[86] James E. Herget & Stephen Wallace, *The German Free Law Movement as the Source of American Legal Realism*, 73 VA. L. REV. 399, 404 (1987). Civil law jurisdictions have gradually accepted the inevitability of lacunae and the appropriateness of judicial interpretation when they occur. However, to preserve the illusion that courts do not make law, many writers have extensively expounded on the supposedly nondiscretionary bases for such interpretation. *See* MERRYMAN, *supra* note 78, at 43-46.

[87] *See generally* MERRYMAN, *supra* note 78, at 48-55.

[88] *Id.* at 49.

clear application of an unambiguous provision. Describing the attitude of the dominant "exegetical school" of French jurists in the latter part of the nineteenth century, John P. Dawson writes, "It was improper to mention 'equity,' to assess the weight of competing interests, or make estimates of consequences."[89] Jaro Mayda terms the prevailing approach to codes among nineteenth-century civil law jurists "exegetic positivism." In his words, these jurists combined "the positivist myth that legislated law is exclusive and self-sufficient" with the "exegetic method . . . of erecting upon the legislative text a system of concepts handled in closed circuit by means of formal logic, independently of the changing world of facts."[90]

At the end of the century, some French scholars challenged this dominant mode of code interpretation. They recognized that "a mere self-contained body of logical rules failed before the infinite variety of problems which progressing industrialisation [sic] in particular raised in France as everywhere else."[91] By far the most important such jurist was Francois Gény, who, in his influential *Méthode d'Interprétation et Sources en Droit Privé Positif* (1899), argued that a judge confronted with a gap in the law must freely search for the rule of decision among the needs and values of society.[92]

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

The debate between Carter and Field took place in the 1880s, however, without the benefit of these later insights by Gény and the free law theorists. In civil law countries that had embraced codes by that time, the vision of law as a logically deductive, self-contained system remained largely unchallenged. Therefore, Carter and his allies naturally assumed that codification would bring the same characteristics to New York law. Because they saw the

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[89] DAWSON, *supra* note 82, at 392, 394. Modern civil law jurists generally agree that courts can properly reinterpret statutory provisions to produce acceptable resolutions of cases in light of changing social circumstances. MERRYMAN, *supra* note 78, at 45-46. It is important to recognize, however, that such "evolutive interpretation" is deemed appropriate only when there is some ambiguity in the statute requiring interpretation in the first place. Much of the scholarship regarding "evolutive interpretation" is dedicated to establishing that such interpretation does not constitute judicial lawmaking. *Id.*

[90] JARO MAYDA, FRANCOIS GÉNY AND MODERN JURISPRUDENCE 5 (1978).

[91] WOLFGANG GASTON FRIEDMANN, LEGAL THEORY 161 (1953).

[92] *See* MAYDA, *supra* note 90*, at* 5-6; Herget & Wallace, *supra* note 86, at 409-11.

[93] On the free law movement, *see* Herget & Wallace, *supra* note 86, at 411-17. On its influence on Pound and the realists, *see id.* at 422-34.

common law as flexible and equitable, and valued it for these qualities, they were thus predisposed to oppose Field's efforts.

B. The Contest Over the Significance of American Codification

1. Field's Modest Claims.—Although Field and his allies eagerly trumpeted the proposed New York Civil Code's coherence and clarity, they vigorously disclaimed any ambition of enacting a complete code that would be the exclusive source of law, as were the codes of continental Europe. Field remarked: "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, universal, unchangeable and exclusive. That is not our meaning."[94] Field frequently reiterated this point, on one occasion punctuating it with a direct dig at Carter: "Nobody but an idiot supposes that."[95]

The 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 bar. Therefore, they usually presented the prospect of codification in evolutionary rather than revolutionary terms.[96] 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 argued that his proposal would thus make the law of the state more certain and accessible while preserving the common law's flexibility. 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 his own common law breeding.

In his introduction to the code, Field directly addressed the phenomenon of gaps. He 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

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[94] Field, *supra* note 48, at 1-2.

[95] REP. NINTH ANN. MEETING A.B.A. 68-69 (1886).

[96] The 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. Grossman, *supra* note 2.

> 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.[97]

By rules "omitted from this Code," Field meant common law doctrines developed by the courts.

Civil law theorists would have agreed with Field so far as he asserted that courts should decide cases not directly addressed by the code by using analogies to code provisions or, as a last resort, the principles of natural law.[98] Field diverged from his continental counterparts, however, by also allowing courts to continue to refer to the common law, a body of rules derived solely from judicial precedents.[99] Robert Ludlow Fowler, the author of a major pamphlet supporting Field's code, reassured his readers that codification would not "arrest the spontaneous development of the common law." He declared, "All writers on codification agree that the development of new law beyond and in addition to that expressed in a code is inevitable . . . ."[100]

Field and his allies thus maintained that the common law would live on to fill gaps in the code. Lacunae were not the only problem intrinsic to codification, however; there was also the dilemma of inequitable outcomes resulting from the direct application of clearly applicable code provisions. As discussed above, civil law theorists generally thought it was better to accept the occasional unfair result than to sacrifice certainty or compromise legislative supremacy. In the paragraph from the introduction to the Civil Code quoted above, Field seemed to manifest a similar reluctance to permit courts to stray from the direct application of statutory provisions; he allowed the continuation of common law rules only when those rules were "not inconsistent with" code provisions. Fowler, however, suggested that courts might look to common law precedents to modify an unjust result clearly dictated by the language of the Civil Code. He asserted that the anticodifiers erred by "assuming that the Code provides for all cases and that new difficulties, clearly beyond the equity of the statute, will be dealt with improperly. If codification were, in fact, to put an end to the proper solution

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[97] *Introduction*, CIVIL CODE, *supra* note 26, at xix.

[98] MERRYMAN, *supra* note 78, at 44-45.

[99] Interestingly, Field suggested that even if common law precedents were preserved to supplement the code, his system still would not be complete, that is, it would not provide a solution for every case. He noted, "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." *Introduction*, CIVIL CODE, *supra* note 26, at xviii. See Grey, *supra* note 4, at 7 n. 20; MERRYMAN, *supra* note 78, at 39-40 (discussing similar approaches in France and Germany). Field thus indicated that the legal system he proposed for New York was not only incomplete, but also not comprehensive—certain matters would simply remain unresolved.

[100] FOWLER, *supra* note 83, at 51.

of new difficulties or to circumscribe the common law judicial powers, we might well pause before entering upon systematic codification."[101]

The proposed Civil Code itself contained language demonstrating that Field was not quite a purist with regard to legislative positivism. The code was consistent with civil law theory so far as it declared: "Law is a rule of property and of conduct, prescribed by the sovereign power of the state." Civil law jurists would not, however, have agreed with the next provision, which stated that "the will of the sovereign" was expressed not only by the Constitution and by acts of the legislature and subordinate legislative bodies, but also by "the judgments of the tribunals enforcing those rules, which, though not enacted, form what is known as the customary or common law."[102]

Field thus enshrined the authority of judicial precedent in a manner totally alien to the civil law. He did not clearly explain in either his writings or in the code itself whether court decisions interpreting code provisions should be treated as binding precedent. He left no doubt, however, that cases not covered by the code would be decided "precisely as they would now be decided,"[103] that is, based on prior court decisions and the doctrine of stare decisis (as well as by reference to other code provisions and natural justice).

Field's affirmation that the common law would survive codification, at least in the code's interstices, seems curious in light of his repeated attacks on the common law's "judge-made" character.[104] After all, one of Field's primary arguments in favor of codification was that it would preserve the separation of powers.[105] There is obvious tension between Field's acknowledgment of the continuing authority of judicial precedent and his argument that judicial lawmaking "will commend itself to no one in this country of popular institutions where it is a fundamental idea that the functions of government should be devolved upon distinct departments . . . ."[106]

Perhaps, as an intellectual matter, Field resolved this dissonance by adopting John Austin's view that the legislature tacitly delegated its sovereign power to the courts for limited purposes.[107] Field himself does not appear to have articulated this theory in writing. But Fowler, one of his more jurisprudentially sophisticated supporters, referred to Austin's argument,

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[101] *Id.* at 17.

[102] CIVIL CODE, *supra* note 26, at §§ 2, 3. The code then explicitly provided, "The evidence of the common law is found in the decisions of the tribunals." *Id.* at § 5.

[103] *Id.* at xix.

[104] *See, e.g.*, *Introduction*, CIVIL CODE, *supra* note 26, at xxx; David Dudley Field, *Reasons for the Adoption of the Codes*, *in* 1 SPEECHES, ARGUMENTS AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 361, 368 (A. P. Sprague ed., 1884) [hereinafter Field, *Reasons for Adoption*]..

[105] *Infra* p. [ ]. *See also Introduction*, CIVIL CODE, *supra* note 26, at xxi-xiii, xxx-xxxi (other articulations of the separation of powers point).

[106] Field, *Reasons for Adoption*, *supra* note 104, at 369.

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

remarking: "The analytical jurists have demonstrated that under any advanced type of government laws are evolved in two modes, by the legislature proper, and by the various subordinate persons possessing law-making powers. Among the latter are the judges . . . ."[108]

By denying that his code was meant to be a complete system of law, Field was resisting his opponents' charge that he was a grandiose idealist, dedicated, like England's Jeremy Bentham, to extirpating the common law and making the law judge-proof. The political advantages of Field's modest pose were clear. It allowed code supporters to present Field's scheme as an incremental, pragmatic step rather than a wholesale rejection of Anglo-American jurisprudence. Fowler observed, "Mr. Field has always, [with respect to the issue of completeness,] rejected the notions of his scientific allies, thereby giving . . . evidence of the eminently practical direction of his labors."[109]

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

As mentioned previously, Carter and his allies frequently pointed accusingly to substantive alterations in state law contained in Field's Civil Code. The anticodifiers argued not only that these unacknowledged changes would foster general confusion, but also that many of the particular changes were unwise, or even corrupt.[110] But in Carter's view, the real radicalism of Field's code lay not in its substantive content, but in its ambition to provide the sole basis for deciding every single case. He contended 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 that would render New York's legal system indistinguishable from that of Napoleon's France.[111] The legal realist Karl Llewellyn later observed that Carter attacked "not codification as . . . a fresh and fertile start for case law, which at its best already incorporates existing tendencies . . . but the

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[108] FOWLER, *supra* note 83, at 9.

[109] *Id*. at 52. Fowler makes clear that by "scientific" codifiers, he means Bentham and Austin, among others. *Id.* at 40-41

[110] *See supra* p. [ ].

[111] Carter frequently emphasized that codes were characteristic of despotic states, whereas the common law typified democracies and free societies. *See*, *e.g.*, CARTER, PROPOSED CODIFICATION, *supra* note 39, at 6-9.

utopian ideal of the blinder advocates of codification: a closed system, 'certain'—and dead."[112]

Carter's portrait of Field as a jurisprudential revolutionary hinged on his assertion that Field intended the Civil Code to be a complete system of law. Carter sneered at his rival's claim that the code did not profess to provide for all future cases, but only "to give the general rules upon the subjects to which it relates, which are now known and recognized."[113] Field could have put such an explicit limitation in the code itself, Carter observed, but he did not do so, because "this would have utterly destroyed his code, *qua* code, by converting it into a ridiculous digest."[114] Carter concluded that Field "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."[115]

Carter argued 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. He summarized the problem as follows:

> 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.[116]

In the introduction to his Civil Code, Field disclaimed any intent to offer a rule for every case. He asserted that the 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 recognised."[117] Carter pointedly responded that the code's generality was in fact its most insidious feature.

> This notion that the operation of a rule may be restricted by making it more general, seems highly absurd. 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.[118]

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[112] Karl N. Llewellyn, *Carter, James Coolidge*, *in* ENCYCLOPEDIA OF THE SOCIAL SCIENCES (1931).

[113] *Introduction*, CIVIL CODE, *supra* note 26, at xviii.

[114] CARTER, ORIGIN, GROWTH & FUNCTION, *supra* note 40, at 274

[115] *Id.* at 274.

[116] CARTER, PROPOSED CODIFICATION, *supra* note 39, at 33.

[117] *Introduction*, CIVIL CODE, *supra* note 26, at xviii.

[118] CARTER, ORIGIN, GROWTH & FUNCTION, *supra* note 40, at 274.

A code could be universally fair only by setting forth every exception to every rule, and then every exception to every exception. As Carter observed, drafting such a code was an impossible task, because the complex affairs of society generated an innumerable variety of disputes and thus an innumerable variety of ethical problems.[119] In short, Carter concluded that because the very process of reasoning from the general to the particular conflicted with the demands of justice, codification would inevitably produce unfair outcomes.

3. The Derogation Rule and the Example of California—Carter's assertion that the Civil Code's text alone would dictate the result of almost every case had a firm basis in the language of the draft code itself. The provision affirming the continuing authority of the common law, discussed above,[120] seemed to be largely negated by two other provisions. One of these stated, "In this State there is no common law, in any case, where the law is declared by the five Codes."[121] In other words, the code would sweep away all judicial precedents in its path. Another section ensured that this path would be a wide one. It declared, "The rule that statutes in derogation of the common law are to be strictly construed, has no application to this Code."[122] This provision was critical, for the completeness of the code hinged on it.

The Civil Code's provision regarding derogation abandoned a canon of statutory construction generally observed by American courts. As one late nineteenth-century treatise writer wrote, "[I]n this country, the rule has assumed the form of a dogma, that all statutes in derogation of the common law, or out of the course of the common law, are to be construed strictly."[123] Another scholar elaborated, "It is not presumed that the legislature intended to make any innovation upon the common law further than the necessity of the case required."[124] Roscoe Pound later condemned the derogation rule as an obstacle to necessary legislative innovation. He researched its history and acidly concluded that "this wise and ancient rule of the common law is, in substance, an American product of the nineteenth century," rooted in judicial antipathy toward legislative intrusion.[125]

In the context of the codification debate, however, the derogation rule was embraced not to undermine progressive legislation, but to preserve for codified jurisdictions the flexibility and fairness of common law decision making. In

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[119] CARTER, PROPOSED CODIFICATION, *supra* note 39, at 36.

[120] *Supra* p. [ ].

[121] CIVIL CODE, *supra* note 26, at § 6.

[122] *Id.* at § 2032. Interestingly, sections 6 and 2032 appeared almost as far apart in the Civil Code as possible; the latter was the third-to-last section. It is possible that Field separated them to obscure their combined impact.

[123] G. A. ENDLICH, A COMMENTARY ON THE INTERPRETATION OF STATUTES 174 (1888).

[124] JOHN LEWIS, SUTHERLAND'S STATUTES AND STATUTORY CONSTRUCTION 862 (2d ed., vol. II 1904). This appears to be a paraphrase of 1 Kent, Comm. 464.

[125] Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 402 (1908).

1872, California had enacted its own Civil Code, which was largely a copy of Field's proposed code for New York.[126] In 1884, John Norton Pomeroy, an eminent treatise writer and the first dean of the Hastings College of Law, published an influential multipart article entitled *The True Method of Interpreting the Civil Code*, in which he opposed making the Civil Code the sole, or even the primary, source of California law. He argued that judges should instead view the Civil Code, whenever possible, as merely a declaration of existing common law rules and interpret it using common law precedents.

> 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 interpretations.[127]

As one scholar has observed, Pomeroy's purpose was to establish a method by which the code would be read "as completely as possible as if it did not change a thing."[128]

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[126] The legislature enacted the Civil Code as one element of a four-part California Code. The other segments were a Criminal Code, a Political Code, and a revised Code of Civil Procedure, all of which were also based on Field's work. *See* Grossman, *supra* note 2, at 617. The Civil Code as first enacted was identical to Field's New York draft, except for some revisions to accommodate earlier California legislation. In 1874, however, the California code was extensively amended to resolve the many additional conflicts between the code and prior statutes and decisions that had become apparent during the code's first two years of operation. Maurice E. Harrison, *The First Half-Century of the California Civil Code*, 10 CAL. L. REV. 185, 187-88 (1922).

[127] JOHN NORTON POMEROY, THE 'CIVIL CODE' IN CALIFORNIA 51 (1885) (reprint of John Norton Pomeroy, *The True Method of Interpreting the Civil Code*, 3 WEST COAST REP. 585, 657, 691, 717 (1884); 4 WEST COAST REP. 1, 49, 109, 145 (1884)) [hereinafter POMEROY, CIVIL CODE].

[128] William B. Fisch, *The Dakota Civil Code: More Notes for an Uncelebrated Centennial*, 45 N.D. L. REV. 9, 29 (1969). Although the language of the California Civil Code offered a somewhat better basis for Pomeroy's interpretive approach than did Field's New York draft, it was hardly clear what method of interpretation the California version called for. The California Code Commissioners had added a section to Field's code stating, "The provisions of this Code, so far as they are substantially the same as . . . the common law, must be construed as continuations thereof, and not as new enactments." CAL. CIV. CODE § 5 (1872). However, this section, which seemed to support the application of the derogation doctrine championed by Pomeroy, was paired with one revoking the doctrine in language equivalent to that in the Field code. CAL. CIV. CODE § 4 (1872). The relationship between these apparently inconsistent provisions was perplexing. Not surprisingly, Pomeroy did not refer to them at all in setting forth his argument. For a general discussion of the complicated relationship between the California Civil Code and the common law, see

In 1885, shortly after Pomeroy's death, the Association of the Bar of the City of New York's Special Committee to Urge the Rejection of the Proposed Civil Code resolved that Pomeroy's article be reprinted and circulated in New York to illustrate the dangers of enacting Field's code. The ABCNY issued it as a pamphlet titled *The "Civil Code" in California*. Because the Civil Code enacted in California was largely identical to the New York draft, Pomeroy's criticisms were especially useful to the New Yorkers' anticodification campaign.[129] He blasted Field's work as a bramble of "defects, imperfections, omissions, and . . . inconsistencies," the uncertainty of which was exacerbated by the drafters' "unnecessary practice of abandoning well-known legal terms and phrases . . . and of adopting instead thereof an unknown and hitherto unused language and terminology."[130] Pomeroy argued that the theory of interpretation he recommended would ameliorate the confusion caused by these flaws.[131]

More important, for purposes of this discussion, Pomeroy also criticized the overgenerality of the Civil Code's provisions.

> In considering the language of the civil code, the fact must be constantly remembered that it 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 few very special rules. The great mass of the special rules of the law, applicable to particular circumstances, may be to some extent inferences from the doctrines which *are* formulated, but they are certainly not expressed in the text of the code.[132]

Pomeroy argued that because the Civil Code omitted most rules governing particular fact situations, it engendered unfair outcomes. He explained, "Statutory rules once enacted cannot be readily modified and expanded by the courts so as to cover new facts and relations not included within their expressed terms."[133] Pomeroy asserted that this rigidity was a major flaw, for an ideal legal system "should be flexible, containing provisions for exceptions to [its] general requirements, so that when a case does not fall within the

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Izhak Englard, *Li v. Yellow Cab Co.—A Belated and Inglorious Centennial of the California Civil Code*, 65 CAL. L. REV. 4 (1977).

[129] In a prefatory note to the pamphlet, the special committee remarked that because the California code was "for the most part, a copy" of Field's proposed Civil Code for New York, Pomeroy's conclusions were "of peculiar value to the legislators of New York, and to all others whose duty or curiosity may excite in them an interest in the question of Codification of the Common Law." Special Committee of the New York City Bar Association to Urge the Rejection of the Proposed Civil Code*, Introduction* to POMEROY, *supra* note 127*,* at 3.

[130] POMEROY, *supra* note 127*,* at 6-7.

[131] *Id.* at 7.

[132] *Id.* at 32.

[133] *Id.* at 53.

reason, although it may within the letter, of a regulation, it shall not be controlled by such rule contrary to justice and equity."[134]

In Pomeroy's view, if a codified doctrine were "interpreted textually, with no reference to the pre-existing law," it would be "rigid and inflexible in its operation, and capable of applying to one condition of fact alone." Consequently, "[a]ll the flexibility, justice, and equity of the common law doctrine would be lost at one blow."[135] Pomeroy contended that the only way to solve this problem was by embracing a strong version of the derogation rule, that is, "by interpreting all the provisions of the code as declaratory of the common law or equitable doctrines and rules, unless the intent to make a change clearly appears from the unequivocal language of the text."[136] In other words, judges should reject a direct textual approach and instead read each code provision as "simply declaratory of the established common law general doctrine, without modification," so that "all the special rules on the subject, laid down by the courts, by which persons are declared to be liable under a great variety of special circumstances, would still remain in full force . . . ."[137]

In short, Pomeroy maintained that the Civil Code should play an extremely minimal role in California's legal system. He urged judges to turn to the common law, not only to clarify ambiguities and resolve conflicts in the code, but also to derive lower-level rules that were flatly inconsistent with the code's general language. He asserted that courts should not "interpret *each* provision of the code textually, according to its literal terms, without reference to the pre-existing law or equity."[138] Pomeroy's court-centered vision of code interpretation stood in stark contrast to the legislative positivism of civil law jurists.[139]

Pomeroy's denunciation of the California Civil Code's vague and unfamiliar language was an attack on that instrument in particular, but his condemnation of the way the code's general provisions produced unfair outcomes in specific cases posed a challenge to all European-style codification. The former problem might be corrected through redrafting, but the latter seemed intrinsic to codification itself, unless Pomeroy's mode of interpretation were adopted. After all, no code could directly address every

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[134] *Id.* (quoting from his own treatise, MUNICIPAL LAW).
[135] *Id.* at 55.
[136] *Id.* at 62.
[137] *Id.* at 63.
[138] *Id.* at 62.
[139] In 1888, the California Supreme Court explicitly adopted Pomeroy's interpretive method in Sharon v. Sharon, 16 P. 345 (Cal. 1888). The *Sharon* court's embrace of Pomeroy's mode of interpretation was, however, apparently limited to unclear code provisions, like the one at issue in that case. The court did not consider Pomeroy's contention that even an unambiguous code provision should be construed as a continuation of the common law, including subordinate common law rules inconsistent with the code's text.

concatenation of facts that might emerge.[140] Surprisingly, Pomeroy did not reject the theoretical possibility of pure codification.[141] Nevertheless, he indicated that it would be extraordinarily difficult to draft a code clear, complete, and flexible enough to make his nonderogation approach unnecessary.

Although Pomeroy and Carter, working on opposite coasts, appear to have arrived at their conclusions independently, they offered many parallel arguments.[142] Carter echoed Pomeroy's criticisms of the Civil Code's ambiguities and gaps.[143] More important, Carter voiced similar concerns about the code's excessive generality. He, too, believed that the instrument's broadly-stated provisions were ill-equipped to address the manifold variety of factual circumstances confronted by courts. Indeed, Carter took this argument farther than Pomeroy; he argued that justice was so fact-specific that no code could, even in theory, resolve every case fairly. In other words, because the very notion of codification implied some degree of generalization, codification was incompatible with justice.

Carter, like Pomeroy, believed that the liberal application of the derogation doctrine would help assuage the problems caused by codification, and he highlighted the Civil Code's express abrogation of the derogation rule as evidence of Field's jurisprudential imperialism.[144] Nevertheless, Roscoe Pound was wrong when he caustically identified Carter as one of the leading proponents of the derogation rule.[145] In contrast to Pomeroy, Carter did not

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[140] Most codifiers have recognized the impossibility of spelling out in detail the rules governing all fact situations that might arise. The most notable exception was Frederick the Great, whose Prussian Landrecht of 1794 contained over seventeen thousand provisions intended to resolve every possible dispute without any need for judicial interpretation. This quixotic effort was, of course, a failure, as uncertainties arose and courts were forced to interpret the code rather than apply it mechanistically. MERRYMAN, *supra* note 78, at 29, 39. Field himself, as noted above, acknowledged that he did not strive to provide for every possible case, but rather to provide "general rules."

[141] *See* POMEROY, *supra* note 127, at 67 ("It may be possible to draw up a code of the private civil jurisprudence, to which the principle of interpretation which I have thus advocated would not necessarily apply.")

[142] Carter apparently wrote his first anticodification pamphlet, THE PROPOSED CODIFICATION OF OUR COMMON LAW, in late 1883, and it was published in early 1884. Pomeroy's series of articles appeared in the WEST COAST REPORTER shortly afterward, in September and October 1884. Neither author mentioned the other in these works.

[143] *See, e.g.*, CARTER, PROPOSED CODIFICATION, *supra* note 39, at 104 (the Civil Code's provisions on the Law of General Averages are "heavily charged with both mischievous uncertainty and with positive error."); CARTER, ARGUMENT, *supra* note 29, at 24 (quoting Pomeroy's assertion that the code was "full of defects, imperfections, omissions, and even inconsistencies").

[144] CARTER, ORIGIN, GROWTH & FUNCTION, *supra* note 40, at 308.

[145] Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV. L. REV. 591, 601 (1911). Pound intimated that Carter's support of the doctrine was part of a general attack on progressive legislation. In fact, however, Carter discussed the derogation rule in a context wholly unrelated to progressive reform. He pointed to the Civil Code's explicit renunciation of the rule simply to support his contention that Field was a

discuss the rule extensively. Their difference in emphasis can be explained largely by the contrasting situations they confronted. Pomeroy was attempting to minimize the negative effects of an already-enacted code. Carter, by contrast, was fighting to prevent codification from occurring in the first place. He would not have advanced this cause by dwelling on an interpretive method that might ameliorate the inequities of a code system. Instead, Carter shrewdly contended that under Field's plan, the common law would simply cease to exist in New York, and each case would be resolved, based not on the justice of the particular situation, but on cold deduction from codified principles and rules.[146]

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

V. CARTER'S UN-LANGDELLIAN COMMON LAW METHODOLOGY

Both Langdell and Carter recognized that deducing the solution to specific cases from general rules was sometimes incompatible with justice. They responded to this tension in opposite ways, however. Langdell, in Thomas Grey's terms, permitted "acceptability . . . to influence decision only subject to the constraint of universally formal conceptual order."[147] Carter, by contrast, in a reversal of this formula, believed that formal conceptual order should affect the resolution of particular cases only subject to the constraint of acceptability.

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jurisprudential imperialist who intended to totally uproot the common law. CARTER, ORIGIN, GROWTH & FUNCTION, *supra* note 40, at 308-10.

[146] If the New York legislature had adopted Field's code, New York courts would in fact have had more trouble than California courts concluding that the derogation principle should guide code interpretation. As noted above, while both the California Civil Code and Field's New York draft contained explicit rejections of the derogation principle, the California version, unlike the New York one, counterbalanced this provision with another declaring, "The provisions of this Code, so far as they are substantially the same as . . . the common law, must be construed as continuations thereof, and not as new enactments." *See supra* note 128.

[147] Grey, *supra* note 4, at 15. The same could be said of Langdell's classical disciple on the Harvard faculty, Samuel Williston. Williston observed, "[I]n trying to do justice between parties to a litigation . . . the law may suffer in consequence of a distinction whose only validity is that in the case before the court, justice happens to be with one party." SAMUEL J. WILLISTON, SOME MODERN TENDENCIES IN THE LAW 85 (1986). Williston, however, expressed more ambivalence than Langdell about the desirability of sacrificing equity for formal order. He remarked, "[L]ogic is likely to be followed at least to the point that it produces practically undesirable results. Sometimes certainly it has been followed beyond this point." *Id.* at 155.

Impelled by his opposition to codification, Carter thus articulated a vision of the common law that is difficult to characterize as classical at all. In Grey's terms, "[T]he heart of classical theory was its aspiration that the legal system be made complete through universal formality, and universally formal through conceptual order."[148] Carter certainly viewed the common law as a complete legal system, that is, one that provided a correct solution for each and every case. In his mind, however, neither conceptual order nor formal reasoning was a significant factor in the common law's completeness. Allusions to the conceptual and formal aspects of the common law occasionally appeared in Carter's writings, just as references to justice sometimes showed up in Langdell's. But for Carter, conceptual and formal considerations were never especially important and were always strictly subsidiary to the goal of resolving each case equitably. Carter was not an amoral classicist, or even a moral classicist, but a nonclassical moralist.

Carter's portrait of common law decision making is, in critical respects, one that most modern scholars would not associate with Gilded Age jurists. It is, instead, reminiscent of the legal realists who rebelled against Langdell's legacy in the twentieth century. When reading the following examination of Carter's common law method, it is interesting to keep in mind that many aspects of his approach—his anticonceptualism, his antiformalism and rule skepticism, his restrictive approach to stare decisis, his belief in the importance of extralegal sources—anticipated trends usually thought not to have flowered in the United States until after his death. Later in this article, I will address in detail the similarities between Carter and these later jurists.

A. Carter's Rejection of Conceptualist Formalism

Thomas Grey explains, "A legal system is conceptually ordered to the extent that its substantive bottom-level rules can be derived from a small number of relatively abstract principles and concepts, which themselves form a coherent system."[149] By this definition, Carter's common law was an almost entirely nonconceptualist system.

Carter sometimes paid lip service to the benefits of systematic order in law. For example, even as he rejected codification, he acknowledged: "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."[150] On another occasion, Carter observed that "whoever aspires to be a thoroughly accomplished

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[148] Grey, *supra* note 4, at 11.
[149] *Id.* at 8.
[150] CARTER, PROPOSED CODIFICATION, *supra* note 39, at 96-97.

lawyer" must "comprehend [legal] rules as parts of a classified and orderly system exhibiting the law as a science."[151]

However, Carter never viewed the systematic presentation of law as more than a somewhat useful mneumonic device and research aid for practicing lawyers. He did not believe that a desire for conceptual order had shaped the common law in the past, and he vigorously rejected any attempt to allow such an aspiration to guide its development in the future. He sneered at English codifiers, like Jeremy Bentham, John Austin, and James Fitzjames Stephen, for complaining that the common law was "destitute of *system*."[152]

> Their views . . . are the views of professors of law, whose lives are devoted, not like those of lawyers and judges, to the practical administration of law, but to teaching it, and lecturing about it. . . . The defect thus suggested is, in a practical point of view, of but a moderate degree of importance. If justice is, in fact, in any nation well administered, if the affairs of men are regulated by a wise and cultivated body of legal rules, and if these can be learned by the professional class with such certainty as to enable it to furnish trustworthy advice and guidance, the mere circumstance that such rules cannot be found set down in words and arranged in orderly and systematic form, is not, of itself, a very serious matter.[153]

Carter rejected the notion that rules of decision were logically deduced from a coherent system of abstract principles. He mocked Bentham for "imagin[ing] that a system of law could be created *per saltum* by spinning out through purely logical processes the consequences of a series of original intellectual conceptions."[154]

The lack of conceptualism in Carter's common law jurisprudence emerges clearly from his descriptions of how courts resolved cases for which there was no direct precedent. Classicists suggested that judges addressed such situations by determining the appropriate top-level general principle and then deductively deriving a lower-level rule for the case at hand from that principle. In 1891, Ezra Thayer (who would later become Dean of Harvard Law School) described the process as follows:

> If the present facts do not directly fall within any case, or any hard-and-fast rule already settled, the first inquiry of the judge is for decided cases similar to this. Instances are produced, each showing the law on a particular state of facts, and presenting an analogy to the case in hand more or less direct. These cases are scrutinized, classified, distinguished; the wider principles which they illustrate, and which are claimed by the contending parties to include the present case, are

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[151] CARTER, ORIGIN, GROWTH & FUNCTION, *supra* note 40, at 1.
[152] CARTER, PROPOSED CODIFICATION, *supra* note 39, at 71.
[153] *Id.* at 72-73.
[154] *Id.* at 70.

> determined and tested by a comparison with other branches of the law; and thus a decision is finally reached.[155]

Thayer thought that this entire process—both the "extraction" of the broader principle from the precedents and the correct resolution of the case at hand by deduction from that principle—were formal and nondiscretionary. "It is true that with a new state of facts it is in a sense impossible to say, under our system, that the law exists before the case is decided. Yet if principles exist which make it certain how the case will be decided, it is the same, from a practical point of view, as if the law previously existed."[156]

Carter occasionally described the common law method for deciding new cases in a way that, on the surface, seemed somewhat similar to the classical approach. For example, he wrote: "Judges and advocates—all together—engage in the *search*. Cases more or less nearly approaching the one in controversy are adduced. Analogies are referred to. The custom and habits of men are appealed to. Principles already settled as fundamental are invoked and run out to their consequences; and finally a rule is deduced which is declared to be the one which the existing law requires to be applied to the case."[157]

Carter's references to "rules" and "analogies" and "deduction" give a formal veneer to this passage, the most classical account of common law decision making he ever articulated. But even here, his allusion to "customs and habits" hints at the profound difference between his approach and that of Langdell, who denied considerations of "acceptability" any determinative force in the lower levels of his system. Indeed, immediately following this passage, Carter elaborated on his description in a way that further manifested the contrast between him and the classicists.

> In all this, the things which are plain and palpable are, (1) that the whole process consists in a *search* to find a rule; (2) that the rule thus sought for is the *just* rule—that is to say, the rule most in accordance with the *sense of justice* of those engaged in the search; (3) that it is tacitly assumed that the sense of justice is the *same* in all those who are thus engaged—that is to say, that they have a *common standard of justice* from which they can argue with, and endeavor to persuade each other; (4) that the field of search is the habits, customs, business and manners of the people, and those previously declared rules which have sprung out of previous similar inquiries into habits, customs, business and manners.[158]

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[155] Ezra R. Thayer, *Judicial Legislation: Its Legitimate Function in the Development of the Common Law*, 5 HARV. L. REV. 172, 182 (1891).

[156] *Id*. at 181 n. 2. Thayer repeatedly uses the word "extract" to describe the first stage of the process. *Id.* at 182-84.

[157] Carter, *Ideal and Actual*, *supra* note 44, at 224.

[158] *Id*.

As Thomas Grey observes, Langdell excluded fairness concerns from the lower levels of his system because "to let considerations of acceptability directly justify a bottom-level rule or individual decision would violate the requirement of conceptual order, on which the universal formality and completeness of the system depended."[159] By contrast, Carter welcomed direct considerations of the customary standard of justice into the lower levels of his system—conceptual order be damned.

Carter often seemed to omit higher-level abstract concepts from his common law jurisprudence altogether. In the classical orthodox approach, there were relatively few general principles (concepts such as consideration in contract and proximate cause in tort), but they were numerous enough to form a coherent system unto themselves and occupy law students for three full years.[160] Carter, by contrast, reasoned down from just one broad principle: be fair. In his own 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*."[161]

The classicist Ezra Thayer identified Carter's neglect of principles and rules as the chief flaw in his jurisprudence. After criticizing Bentham for focusing only on abstract rules and overlooking their application to facts, Thayer continued:

> 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 squeezing out, so to speak, the *tertium quid*, the rule itself, which lies between.[162]

The difference in how Carter and Langdell discussed the one legal problem they both addressed at some length exemplifies the contrast between them. Under the common law, a minor (an "infant" in legal parlance) lacks capacity to contract, and any contract he enters into is therefore voidable. In other words, if an individual enters into a contract with a minor and then sues under the contract, the minor can successfully defend himself by pleading the defense of infancy. What is the correct result, however, if the defendant, out of the goodness of his heart, reaffirms his contractual obligation after he reaches the age of majority and is *then* sued under the contract? In general, promises made without consideration are not actionable. Nevertheless, since 1586, the common law has treated such ratified infant contracts as binding.[163] Langdell's and Carter's explanations for this result were strikingly different.

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[159] Grey, *supra* note 4, at 15.
[160] *See id.* at 9 (identifying consideration and proximate cause as classical concepts).
[161] CARTER, PROPOSED CODIFICATION, *supra* note 39, at 26.
[162] Thayer, *supra* note 160, at 198.
[163] Edmonds v. Barton, 3 Leon. 164, 74 Eng. Rep. 608 (K.B. 1586).

Langdell derived almost all of contract law from the principle of bargained-for consideration. Consequently, he embraced the common law's longstanding view that a promise is not binding if the promisor is simply affirming the existence of a moral obligation to perform.[164] In such an instance, even if the promisee previously provided the promisor with something of value, no contract exists because the current (renewed) promise did not induce the consideration.[165] Langdell criticized the contrary position, adopted by the great English jurist Lord Mansfield.

> Whether [Mansfield's] theory was that the antecedent moral obligation furnished a sufficient consideration for the promise, or that such a promise was binding without a consideration, may not be clear; but the former theory is the one that has commonly been attributed to him, and hence the moral obligation which was supposed to make the promise binding has acquired the name of moral consideration. The other theory, however, would have been less untenable, and less mischievous in its tendency. It would indeed have been liable to the serious objection of involving judicial legislation, but the theory of moral consideration was liable to the much greater objection, at least in a scientific point of view, that it could only succeed at the expense of involving a fundamental legal doctrine in infinite confusion.[166]

In Langdell's eyes, Mansfield was not only wrong, but wrong in a way that undermined the conceptual order of the common law of contracts.

Still, Langdell had to confront the inconvenient fact that courts, in Mansfield's time and since, actually did enforce various types of gratuitous promises to do what the promisor was already under a moral obligation to do—including, for example, promises to pay debts contracted during infancy.[167] Langdell struggled to justify the courts' recognition of ratified infant contracts in a manner consistent with his scientific approach. In other words, he sought to explain the doctrine in a way that neither violated the principle of bargained-for consideration nor depended on the courts' moral judgment. He arrived at the following rationalization: "The contract of an infant, not being void, but merely voidable, can be ratified by the infant after he comes of age, and a new promise operates as a ratification. The action, however, must be brought on the original contract, and the new promise must be used simply to repel the defence of infancy in the event of its being pleaded."[168] Langdell thus unpersuasively suggested that the upholding of

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[164] LANGDELL, *supra* note 66, at 89-90.

[165] *See* Val D. Ricks, *The Sophisticated Doctrine of Consideration*, 9 GEO. MASON L. REV. 99, 118-21 (2000).

[166] LANGDELL, *supra* note 66, at 89.

[167] Other examples provided by Mansfield and noted by Langdell were promises to pay debts barred by the statute of limitations and promises by bankrupt individuals to pay debts from which they had been discharged. *Id.*

[168] *Id.* at 91.

ratified infant contracts was the inexorable result of logical deduction from higher principles.

Carter, by contrast, felt no impulse to force this problem into a conceptual scheme. It is worth quoting Carter's analysis at length to highlight the difference between him and Langdell.

> What did the judge do to whom the case was first submitted of a contract made by an infant and ratified after he became of age? He observed that it was an infant's contract, and therefore at first it seemed assignable to [that] excepted class; but he noticed the new feature of ratification after full age. He recurred to the instances which made up the class of infants' contracts. He found that none of them exhibited this feature. He then inquired whether that feature was a *material* one; that is to say, whether the case ought to go into the same class with the others, or into a new class to be made for it with different legal consequences for its characteristic. In this inquiry the action of his predecessors supplied him with no controlling guide. He was obliged to determine for himself. And what was the real problem which he had to solve? Simply this: what does justice require? He was to apply to this case the social standard of justice; not simply to repeat what had been done before, but to make an original application of it. He was not, however, without aids which his existing knowledge supplied. He found indeed that there was no new consideration for the ratification; but he also found that, in prior cases, the courts had enforced promises in the nature of ratification. He found that the original consideration was perfect, and the subsequent ratification sufficient evidence that the original contract was not tainted with any unfairness or imposition. *Justice*, as he understood it (and his understanding presumably represented that of the society in which he lived), required that this contract should be performed; in other words, that a new class be made for such cases.[169]

In this passage, Carter makes nods to formal reasoning, and even conceptual reasoning, but these elements ultimately bend to the needs of justice—not, as for Langdell, the other way around.

B. "Rules Are Made For Fools"

Carter often traveled overseas with John Cadwalader, a prominent New York City lawyer and perhaps his closest friend. On one such occasion, when they were vacationing together at a hunting lodge in Scotland, Cadwalader wrote a letter home in which he remarked, "Carter says—who plays Bridge according to his own rules—that Rules were made for fools."[170]

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[169] CARTER, PROVINCES, *supra* note 39, at 26-27.

[170] Letter from Cadwalader to S. Weir Mitchell (Sept. 28, 1902?) (College of Physicians of Philadelphia, S. Weir Mitchell Papers, Box 6, Item # 14).

In law, as in card games. Carter frequently exhibited a striking degree of skepticism about legal rules. In other words, he rejected not only conceptualist formalism, but even nonconceptualist formalism. A legal system does not have to conceptualist to be formal. A jurist may embrace concrete bottom-level rules without demanding that they be derived from a coherent system of higher level principles. As Thomas Grey remarks, "Non-conceptualist formalism is a common attitude among lawyers; they want clear rules, but place little importance on more abstract doctrinal formulations."[171] Carter, however, often seemed to deny the very possibility of determinate legal rules.

As discussed above, Carter argued that the main problem with codification was the injustice that inevitably resulted when courts applied general rules to particular circumstances. Carter sometimes followed this line of reasoning to its ultimate conclusion—a rejection of legal rules themselves.

> It is of the essence of a . . . rule that it creates, or supposes, a *class* of instances to which it is to be applied. The class may be narrowly and cautiously limited; but within its scope it embraces future and unknown, as well as present and known cases. The essential nature of classification consists of *selecting* qualities of objects, and declaring that all which possess such qualities, whatever others they may exhibit, belong to the class. When, therefore, any case arises for disposition under a Code, if it present the features belonging to a class created by it, it must be dealt with the same as other instances in that class, no matter what additional and theretofore unknown features it may present, which ought to subject, and would have subjected, it to a wholly different disposition, had the new features been present to the mind of the codifier. . . . No *rule* whatever can be framed which will not do this.[172]

Carter maintained that the common law was superior to a code system precisely because it could resolve every matter equitably, in light of the particular facts. Because the very notion of a rule implies some degree of generalization, Carter sometimes depicted the common law as avoiding rules altogether.

It was difficult, however, for Carter to square his rule skepticism with the common law doctrine of stare decisis. After all, the vast body of judicial precedents set forth innumerable bottom-level rules that supposedly provided an uncontroversial basis for resolving many cases. If a judge hearing a matter found a prior case with essentially identical facts, stare decisis ordinarily demanded that he decide the case at hand the same way. Carter, a successful practitioner, recognized the power of precedent. Indeed, at times, he discussed the role of precedent in a manner that made him sound like a rule-bound formalist.

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[171] Grey, *supra* note 4, at 9 n. 29.

[172] CARTER, PROPOSED CODIFICATION, *supra* note 39, at 31-32.

> [A] large number of [judgments] declare that the particular transactions described are like, or substantially like, some other transactions which had previously engaged the attention of the courts and had been decided in a particular way, and the like decision is therefore made in the particular case under consideration; in other words, the case is decided by an appeal to known precedent, or to known precedents. . . . The operation . . . of the tribunals has consisted simply in scrutinising the features of the transactions and placing them in some already determined class in which they belonged, the judgment pronounced being nothing but the legal consequence of the fact that they belonged to a particular class.[173]

Carter acknowledged that the doctrine of stare decisis sometimes denied common law judges the flexibility they needed to keep the law in line with changing social norms. Indeed, he maintained that legislation was warranted in such situations. "[S]ociety in its progress and development outgrows its old usages and essays to form new ones. The uniformity and persistency at which the judicial office always aims, become a barrier to this development; and the need is felt of an agency less fettered by precedent and clothed with a power somewhat resembling the creative function. It is the office of legislation to supply this need."[174]

Nevertheless, if Carter had adopted a strict version of stare decisis, he would have undermined his own primary argument for the superiority of the common law over a code—namely, that the former, unlike the latter, was capable of resolving each case according to the dictates of justice. The common law's embrace of binding precedent potentially made it just as vulnerable as a code to the charge of sacrificing fairness for certainty. Field and his allies frequently made precisely this assertion. Field pointed out that "the Courts have not greater liberty to decide right without a code than with it. The rules which govern the Judges in their decisions are contained in precedents."[175] To emphasize the contrast between the common law and codification, Carter thus had to downplay the significance of stare decisis.

Consequently, Carter whittled away the doctrine into insignificance. First, he argued that the only relevant data emerging from a precedent were the facts and the result.

> The judge never undertakes to decide anything more than the precise case brought before him for judgment. He considers the facts of *that case*, and . . .

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[173] CARTER, ORIGIN, GROWTH & FUNCTION, *supra* note 40, at 68-69.

[174] Carter, *Ideal and Actual*, supra note 40, at 232.

[175] Letter from David Dudley Field to the California Bar, *in* 1 SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 354 (A. P. Sprague ed., 1884). Robert Fowler similarly argued: "Another great objection to case-law is that the vast agglomeration of decisions tends to make the law one of precedent and not one of principle; judges and lawyers are so overwhelmed and confounded by the array of authority that in desperation they shield themselves behind some ill-considered precedent without regard to substantial justice in the given case. FOWLER, *supra* note 83, at 49.

> he pronounces judgment, and there stops. He does not even declare, at least not as a necessary part of his function, what the law is. He is not bound to write an opinion. He usually does write one, stating his views upon the legal questions. But this is of no binding force. The strictest doctrine of *stare decisis* requires subordinate tribunals to follow, not the opinion, but the *judgment*; and the obligation is of no force in a future case presenting materially different aspects. If the court in its opinion lays down rules in general terms which *might* embrace cases differing from the one decided, such declaration of rules is *provisional* only, and subject to modification in any future case presenting materially different features.[176]

As Carter noted in the last sentence of this quotation, a common law judge is not bound by a precedent if the case at hand presents facts "materially different" from the prior decision. The second critical feature of Carter's effort to cabin stare decisis was his embrace of an extremely liberal view of what constituted "material" distinctions. In his eyes, virtually every case heard by a court was a "new" case. He recognized that the "great mass of the transactions of life are . . . repetitions of what has before happened—not exact repetitions, for such never occur—but repetitions of all substantial features." But such transactions rarely generated legal disputes, because "they have once or oftener been subjected to judicial scrutiny and the rules which govern them are [therefore] known. They arise and pass away without engaging the attention of lawyers or the courts." Those cases that reached a courtroom were, for the most part, "exceptional" cases. "The great bulk of . . . litigation springs out of transactions which present material features never before exhibited, or new combinations and groupings of facts."[177]

Carter emphasized that the "infinite number of diversities" in human affairs generated countless new questions of fairness. "In the State of New York, each successive day witnesses acts, millions in number, each one of which may, by possibility, become the source of dispute, and call for judicial decision, and no two of them be alike!"[178] And because society constantly evolved, there would never be a shortage of fresh problems for courts to address. "The notion that society ever has reached, or ever will reach, a state of equilibrium and rest, so that the transactions of tomorrow will be mere repetitions in substance of the transactions of to-day [sic] is a vain illusion. There is no part of the universe which is not forever under the dominion of change, and no where [sic] does it proceed with such activity as in the realm of man."[179]

If virtually all cases heard by the courts exhibited novel material features, the significance of stare decisis was limited indeed. Carter asserted that a judge hoping to decide a case solely by reference to reported precedents would

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[176] CARTER, PROPOSED CODIFICATION, *supra* note 39, at 27.

[177] CARTER, PROVINCES, *supra* note 39, at 34-35; Carter, *Ideal and Actual*, *supra* note 40, at 227 ("exceptional cases").

[178] CARTER, PROVINCES, *supra* note 39, at 36.

[179] *Id*.

almost always discover that "there is no rule truly *'known'* which governs it."[180] The rules pronounced by judges in prior cases "are to be taken in reference to the facts which have elicited the opinions . . . and whenever a case arises presenting different aspects, the rule is subject to modification and adaptation as justice or expediency may dictate."[181]

Carter viewed justice as so fact-specific that at times he seemed to challenge the very notion of framing legal rules in advance. He virtually sneered at the "vast body of so-called rules found in our digests and treatises and mentioned in the reports of decided cases. . . . None of them are absolute. They are all provisional and subject to modification."[182] He declared: "*The fact must always come before the law*. Apart from known, existing facts, present to the mind of the judge . . . he cannot even ask, and still less answer, the question, what is the law? . . . [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."[183] Carter pithily summed up his rule skepticism as follows: "all *just* law . . . can have, in human apprehension, no existence apart from the facts."[184]

It bears repeating that Carter did not deny that judicial precedents were relevant to common law decision making. They provided analogies and helped guide the court's inquiry. In Carter's words, the judge's task was "to apply the existing *standard of justice* to the new exhibition of fact, and to do this by ascertaining the conclusion to which right reason, aided by rules already established, leads."[185] Carter's antiformalism lay in his conviction that precedents, though useful, did not ordinarily provide an indisputable rule of decision for the case at hand. He explained:

> It is not that no rule is known which is applicable to the transaction; there may be many which have a bearing on it. Several different rules—all just in their proper sphere—are competing with each other for supremacy. The question is not whether the rules are right or wrong; they may all be right; but which must give way to the other; or whether a modified and partial operation must not be given to all, or some. It would be a fatal error to force upon such transactions a rule which had arisen out of different ones. It would be sacrificing justice for the sake of uniformity, whereas diversity is everywhere the characteristic of justice.[186]

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[180] CARTER, PROPOSED CODIFICATION, *supra* note 39, at 29.
[181] *Id.* at 25-26.
[182] CARTER, ORIGIN, GROWTH & FUNCTION, *supra* note 40, at 233.
[183] CARTER, PROVINCES, *supra* note 39, at 28.
[184] CODIFICATION, *supra* note 39, at 32.
[185] *Id.* at 29-30.
[186] CARTER, PROVINCES, *supra* note 39, at 35.

This discussion anticipated, by almost half a century, legal realist Walter Wheeler Cook's well-known assertion that "legal principles—and rules as well—are in the habit of hunting in pairs."[187]

C. The Question of Certainty

Carter's depiction of the common law seemed to sacrifice certainty for the sake of fairness. This was a risky strategy, for the uncertainty of the common law was one of the main themes of codification proponents. According to code advocates, this uncertainty was caused primarily by the obscurity of common law reasoning and the uncontrolled proliferation of precedents.[188] Carter's contention that the fact-specific common law did not establish clear rules in advance of actual disputes provided his opponents yet another basis for maintaining that the existing system was too uncertain. Robert Fowler, for example, acknowledged that the common law might more flexibly resolve problems raised by peculiar constellations of facts, but he denied that codification "increases the proportion of injustice in the given case . . . to such an extent as to outweigh the benefits to be derived from the added certainty and the compactness of expression found in a code."[189]

Carter did not view the issue of certainty as a vulnerability, however. First, he argued that regardless of codification's effect on certainty, the "necessity of enforcing *justice* in particular instances . . . is imperative, and can be subordinated to no other object."[190] Then he went further, attacking the codifiers' premise that statutory law offered greater certainty than the common law. Indeed, he confidently asserted that the common law was *more* certain than a codified system.

Carter did not hold up the common law as an absolute guarantor of legal certainty. Rather, he asserted that uncertainty was unavoidable in any legal system because it "proceeds from causes quite beyond human control."[191] It was not "the fault of lawyers or judges, or of the system of our jurisprudence" but rather "inherent in the order of nature."[192] Uncertainty was inevitable because the endless emergence of unique factual circumstances constantly raised new ethical problems. "It should [be] remembered, that the questions with which the law deals, and consequently the law itself, are incessantly changing. Most of the uncertainty and doubt does not arise in consequence of any failure to settle old questions, but from the perpetual birth of new points of

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[187] Walter Wheeler Cook, Book Review, 38 YALE L. J. 405, 406 (1929). For a further discussion of this parallel, see *infra* p. [ ].

[188] Morriss, *supra* note 2, at 369.

[189] FOWLER, *supra* note 83, at 13.

[190] CARTER, PROPOSED CODIFICATION, *supra* note 39, at 36-37.

[191] *Id.* at 114.

[192] CARTER, PROVINCES, *supra* note 39, at 36-37.

controversy."[193] Carter urged his readers not only to acknowledge this uncertainty, but to embrace it.

> Nor is this uncertainty to be deprecated. It is rather to be welcomed, met, and surmounted. It is the discipline of human nature. It furnishes the conditions upon which moral and intellectual progress are made. "Progress is the child of struggle, and struggle is the child of difficulty." What would become of science, reason, and morals, if new problems were not incessantly presenting themselves for solution. What progress would be possible in law, if justice could be frozen into a rigid body of unchangeable rules?[194]

Carter readily acknowledged that under the common law, the answer to novel questions was sometimes unclear to the citizenry until judges, the experts on the application of the social standard of justice, resolved them. Nevertheless, the common law provided the people with a solid ground of day-to-day certainty, because it was based on their own customary morality. They could conduct their affairs with "ordinary prudence . . . in the full confidence that the rules of law which govern their transactions, should they ever be challenged, would be the simple dictates of justice and common sense intelligently ascertained and applied."[195]

In a code system, by contrast, courts' decisions were based not on the social standard of justice, but on the words of a statute. Carter argued, first, that this approach engendered uncertainty because "human language is, at best, so inaccurate an instrument, there being often numerous different senses in which the same word is understood that there are, and always will be, a multitude of doubts concerning the meaning of the best drawn statutes."[196] An even more important cause of uncertainty in a code system, according to Carter, was the irresistible tendency of law to conform to the social standard of justice, even in the face of unambiguously contrary statutory language.

> Whenever a statute is found to work injustice in consequence of the failure of its framers to suitably provide for cases which they could not foresee, an opposition arises against the operation of the law. If the injustice be gross, the moral sense is shocked. . . . The courts recoil from the office of enforcing the law. Doubts are entertained concerning the *meaning* of the statute. The plain sense of the words is insisted upon by one side, the improbability that such injustice could have been intended, by the other. The difficulty is usually resolved by the employment of the subtle arts of interpretation, and the obvious meaning of the language is *expounded* away in the favor of the interests of justice. Who does not know that of all the manifold sources of *uncertainty* in law none is so fruitful as the attempt to apply a statute to a case falling within

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[193] CARTER, PROPOSED CODIFICATION, *supra* note 39, at 114.
[194] CARTER, PROVINCES, *supra* note 39, at 37.
[195] CARTER, PROPOSED CODIFICATION, *supra* note 39, at 37.
[196] *Id.* at 83.

> its terms, but which, not having been foreseen by its framers, does not fall within its spirit?[197]

In short, Carter asserted that the common law's embodiment of customary morality did not make it less certain than a codified system. To the contrary, the common law's reflection of the social standard of justice was the very source of its superiority in this respect.

D. Law Outside the Books

Carter's conviction that justice ("acceptability" in Thomas Grey's terms) should be the ultimate determinant of every case required not only that he relegate, and sometimes entirely reject, classical ideals such as conceptualism and formalism, but also that he embrace a very un-Langdellian view of the sources of law. Langdell asserted that "law is a science, and . . . all the available materials of that science are contained in printed books." For the Harvard dean, the common law decisions stored in the law library were "the ultimate sources of all legal knowledge."[198] Carter, by contrast, did not believe that law could autonomously generate a correct solution to every case. He thus recognized, at least by the end of his career, that judges often had to look outside the law books.

Interestingly, Carter initially seemed to embrace what legal realist Jerome Frank would later (in reference to Langdell) deride as "library law."[199] Carter's early attitude may have been related to his role as the first president of the Harvard Law School Association, the institution's alumni organization. Langdell's innovative case method, premised on the theory that the common law was a self-sufficient coherent system, was a great point of pride for the school.[200] At the Association's first meeting, in 1886, Carter delivered an address in which he praised the case method and thus articulated a book-centered vision of law.

> I think that the methods that are now pursued, so far as I understand them, are a vast improvement over those with which I was acquainted when I was a member of the School. What is it that students go to a law school to learn? . . . What is this thing which we call "law," and with the administration of which we have to deal? Where is it found? . . . It is found, and it is alone found, in those adjudications, those judgments, which from time to time its ministers and its magistrates are called upon to make in determining the actual rights of men. . . . The purpose of [the case method] is to study the great and principal cases

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[197] *Id.* at 37-38.

[198] Christopher Columbus Langdell, *The Harvard Law School: Professor Langdell's Oration*, 3 L. Q. REV. 123, 124 (1887).

[199] Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907, 908 (1933).

[200] For Langdell's introduction of the case method and its influence at Harvard and other institutions, *see generally* WILLIAM P. LAPIANA, LOGIC AND EXPERIENCE (1994).

> in which are the real sources of the law, and to extract from them the rule which, when discovered, is found to be superior to all cases.[201]

How did Carter reconcile his assertion that law was found only in reported cases with his belief that judges resolved cases according to the social standard of justice? Ultimately, he could not do so, but it took him a while to recognize the tension. In *The Provinces of the Written and the Unwritten Law* (1889), Carter maintained that by linking the law to the social standard of justice, he did "not, of course, mean to imply that the judge . . . makes any direct inquiry into public opinion." He continued: "The fabric of the national law is a vast system of rules which are the product of that opinion, gathered from time to time by the labors of his predecessors, aided by the skill and learning of a numerous professional body . . . . It is here that the social standard of justice stands ascertained and declared; and the function of the judge is to apply it, as it has been applied before, or, when new questions arise, to determine them according to the analogies which the system reveals to him."[202]

Even in this case-centered description of judicial decision making, Carter acknowledged, if only indirectly, that the common law was not entirely autonomous. After all, if judicial precedents reflected the social standard of justice, principles external to "law in the books" must have entered the common law system somehow. In *Provinces*, Carter suggested that judicial decisions reflected the social standard of justice as an inevitable consequence of the fact that judges were "in close intercourse and sympathy with the mass of the people."[203] In other words, popular customs shaped the law even if judges looked only at case reports. Carter explained that the social standard of justice "is ascertained and made effective by the judges, who know it and feel it because they are part of the community."[204]

The next year, Carter started explicitly to back away from his suggestion that the common law was simultaneously autonomous and a product of the social standard of justice. As noted previously, in *The Ideal and the Actual in the Law* (1890), Carter asserted that the "field of search" in which judges looked for the law was "the habits, customs, business and manners of the people, and those previously declared rules which have sprung out of previous similar inquiries into habits, customs, business and manner."[205] Carter now apparently recognized that judges purposively examined not only law books, but also society itself.

Near the end of the final lecture of *Law: Its Origin, Growth, and Function* (1907), his posthumously-published book, Carter revisited the topic of

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[201] James Coolidge Carter, *President's Address*, REPORT OF THE ORGANIZATION AND OF THE FIRST GENERAL MEETING OF THE HARVARD LAW SCHOOL ASSOCIATION, AT CAMBRIDGE, NOVEMBER 5, 1886, at 26 (1887).

[202] CARTER, PROVINCES, *supra* note 39, at 12-13.

[203] *Id.* at 13.

[204] *Id.* at 48.

[205] Carter, *Ideal and Actual*, supra note 40, at 224.

Harvard Law School's case method. This time, he qualified his praise of the method in a way that illustrates how far he had traveled from Langdell's "library law." Perhaps out of loyalty to his alma mater, which had offered to host the (never-delivered) series of lectures the book comprised, Carter acknowledged that Harvard's case method was the "correct" approach for teaching law students. But now, in stark contrast to his 1886 speech, and in terms that foreshadowed legal realism, he emphasized how little a purely case-educated law school graduate really knew about law.

> These volumes [of reported cases] . . . are but a part of the great territory of fact which it is the business of the lawyer and jurist to explore. Life itself is a moving spectacle of numberless forms of conduct the study of which is necessary to the full equipment of the lawyer or the judge. . . . Herein we find the reason why lawyers of sound practical sense and knowledge of affairs so often acquit themselves both at the Bar and on the Bench better than others who may be much more accomplished in the learning of books. They have been studying diligently and to good purpose the facts of human conduct as they are displayed in the great book of life. The actual methods and systems of trade, commerce, and finance embrace great realms of fact in which legal principles lie implicit and disclose themselves to careful investigation. All the actions of men . . . are the proper theme of the lawyer's study. And then too there is the internal world, the realm of consciousness, equally necessary to be studied and equally fruitful in results, for it is here that the secret springs, the real causes of all conduct are discerned.[206]

Carter's critique of the case method echoes in interesting ways his assessment of Langdell himself. In 1869, when Harvard president Charles Eliot was considering appointing Langdell as the dean of the law school, he sought and received Carter's opinion. Carter, who had known Langdell since they attended college and law school together at Harvard, praised him as a "scholar of the first order." He then, however, remarked on Langdell's limited success as a practitioner and ascribed it to Langdell's idealistic refusal to soil himself with the muck of "the world as he found it." Carter observed that "if [Langdell] is wanting in any of the qualities, which you are seeking to secure, it will be found to be in aptitude of affairs and the skill and resources to deal with society and men as he finds them."[207]

Carter's portrait of Langdell as a detached intellectual, ill-suited for practice, raises the question of whether Carter's own jurisprudence was shaped in part by his long experience as a practicing lawyer. As I will discuss later in this article,[208] Carter's career as a litigator may have instilled in him an anticonceptualist and antiformalist outlook on law that undergirded his

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[206] CARTER, ORIGIN, GROWTH & FUNCTION, *supra* note 40, at 338-39.

[207] Letter from Carter to Eliot (Dec. 20, 1869) (quoted in LAPIANA, *supra* note 200, at 12-13).

[208] *See infra* p. [ ].

jurisprudential arguments against the Civil Code. Interestingly, the anticodification writings of other practicing attorneys show similar qualities.

VI. ALBERT MATHEWS

Albert Mathews was a lawyer who helped Carter organize the Association of the Bar of the City of New York in 1869.[209] In 1881 (two years before Carter wrote his first anticodification pamphlet), Mathews prepared *Thoughts on Codification of the Common Law*, a tract that the ABCNY printed and circulated as part of its campaign against Field's Civil Code. In this piece, Mathews explored the sources and nature of the common law in order to explain its superiority to a code system. In doing so, he, like Carter, drew a picture of the common law in which conceptual order was largely absent and formal reasoning was, at most, a minor feature.

Mathews placed justice at the center of his jurisprudence. He defined the *unwritten law* (that is, the common law) as "the recognized will of [a] community . . . based upon its notions of natural justice, good morals, and good policy."[210] Mathews' chief argument against codification, like Carter's, was that justice was too fact-specific to be embodied in generally applicable rules. He, too, was concerned about the "single additional, or omitted circumstance" that might make the application of a rule unfair in a new case.[211]

> To attempt to create a code of laws out of abstract notions of justice . . . would not be very likely to be successful. It might be comparatively easy to lay down a few simple abstract rules, but so soon as the law-giver descended to particulars, in the absence of concrete facts to guide his judgment, the laws of his imaginary empire would be, necessarily, either tyrannical or abortive. It seems to be a task beyond the wit of man to forsee [sic] what special cases may arise, or thus to provide for contingencies that he cannot anticipate.[212]

Mathews, sounding strikingly like Carter, concluded that "when [a] rule is to be found only in the Procrustean Bed of a written Code, the letter of the statute must prevail over any fitting modification of that rule which unforeseen circumstances may come to require, and justice may be thus surely defeated."[213]

According to Mathews, the common law, in contrast to a codified system, could resolve each matter fairly. It could "be adapted, by wise administration, to the exigencies of particular cases of conflict as they arise."[214] Mathews'

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[209] MARTIN, *supra* note 33, at 15.

[210] ALBERT MATHEWS, THOUGHTS ON CODIFICATION OF THE COMMON LAW 9-10 (4th ed. 1887).

[211] *Id.* at 16.

[212] *Id.* at 13-14.

[213] *Id.* at 16.

[214] *Id*.

stress on the "plastic" nature of the common law impelled him, like Carter, to narrow the doctrine of stare decisis into practical insignificance. He argued that each precedent was "necessarily limited to the precise concatenation of facts. . . . It is the duty of a court of justice to ascertain and apply [the unwritten law] so far only as respects the particular concrete combinations of facts properly presented to it requires. . . . [I]t is no part of its province to formulate general rules, or even principles, beyond what the particular case before it demands."[215]

Mathews' de-emphasis of the force of precedent also provided him with a response to the codifiers' claim that the vast, unorganized body of common law cases was enormously burdensome for practicing lawyers. He explained that he was untroubled by the accumulation of precedents because they themselves did not constitute the law. "Cases are not principles; they are only valuable as illustrations. If they are not beneficial no one is compelled to use them; and, whoever wastes his time on them, may blame none but himself."[216]

Mathews vigorously denied that common law judges "made" law.[217] He did not, however, devote much effort to explaining where judges "found" the law, if they did not make it. Mathews clearly did not believe that courts used inexorable logical deduction to decide cases, for he did not think the common law was characterized by formal conceptual order. Indeed, he expressly denied that the common law was "an exact science."[218] Nor did Mathews assert, as Carter would, that the "social standard of justice" or "custom" provided the objectively correct answer for every case. Ultimately, Mathews' answer to the code proponents' charges of common law judicial lawmaking boiled down to a meek, "You, too." He argued, "Whether formulated by a Code, or illustrated by a precedent, such rules must still be applied to cases as they arise, according to judicial 'notions of reason and justice.'"[219] Mathews would leave it to Carter to construct a detailed theory as to how common law decision making could be both nondiscretionary and invariably fair.

VII. R. FLOYD CLARKE

In 1898, another New York practitioner, R. Floyd Clarke, published a lengthy book titled *The Science of Law and Lawmaking*. This volume, written for laymen, was, in essence, an extended jurisprudential attack on codification.[220]

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[215] *Id.* at 15.
[216] *Id.* at 22.
[217] *Id.* at 23-26.
[218] *Id.* at 21.
[219] *Id.* at 25.
[220] R. FLOYD CLARKE, THE SCIENCE OF LAW AND LAWMAKING: BEING AN INTRODUCTION TO LAW, A GENERAL VIEW OF ITS FORMS AND SUBSTANCE, AND A DISCUSSION OF THE QUESTION OF CODIFICATION (1898). It is unclear why Clarke published such a book

Like Carter, Clarke maintained that justice should be the central value of law. He contended that law "involves politics, political economy, and ethics."[221] Clarke also echoed Carter's argument that codification would undermine the law's moral basis. He described code decision making as a process of deductive reasoning, from general rules to specific facts. He explained: "Under the Code System the rule prescribed deals with something which is never found in actual life. The Code rule deals with a certain combination of facts which never occurs solely, or alone, in the outside world. The Code rule deals, therefore, with an abstraction of the human mind, and not with the facts as they exist."[222] The problem with this type of reasoning, for Clarke as for Carter, was that it inevitably led to unjust decisions. "Where . . . questions of equity or inequity arise, dependent upon different combinations of fact, it is not always easy to lay down beforehand a rule which will produce a correct decision of all the possible cases that may arise."[223]

Clarke, a strikingly mediocre thinker, tried awkwardly to impose an almost Langdellian language of logic over his justice-centered vision. This attempt, unsurprisingly, dissolved into nonsense. Clarke stressed that the common law approach was "inductive," in contrast to the "deductive" reasoning that characterized a codified system.[224] His characterization of the common law as inductive occasionally made some sense—for example, when he described how in some fields of law, "numerous decisions based on almost all possible particular combinations of material facts have established all the general principles governing such cases."[225] Nevertheless, despite Clarke's use of logical terminology, his view of common law decision making differed significantly from Langdell's.

As explained by Thomas Grey, the first phase of Langdell's reasoning process—the phase in which the jurist derived general principles from precedents—was inductive.[226] But in Langdell's system, the process of induction was followed by an equally rigorous process of deduction from these derived general principles to lower-level rules of law and, finally, from these rules of law to the decisions of individual cases.[227] Langdell was committed to the logical integrity of these later, deductive steps, and he thus preferred inequitable results in particular matters to fair decisions inconsistent with higher principles and rules.

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when he did, more than a decade after Field's effort to codify New York's private law had gasped its final breath in the state legislature.

[221] *Id.* at 24.

[222] *Id.* at 255.

[223] *Id.* at 25. *Induction* describes reasoning from the particular to the general; *deduction* describes reasoning from the general to the particular.

[224] *Id.* at 238.

[225] *Id.* at 249-250.

[226] Grey, *supra* note 4, at 16-20.

[227] *Id.* at 19.

For Clarke, by contrast, the just resolution of every matter was the motivating force of the common law. "[T]he Court attempts to arrive at a fair and just result in the particular case."[228] Consequently, Clarke excluded rigid deduction from his portrait altogether and attempted to describe the entire common law decision-making process as inductive. "The first and most important investigation is into the facts of the particular case—facts which have already happened and are now presented for observation and decision. Given the facts, the attempt is made to decide the case so that justice will result."[229] How did the judge make this decision? "The decision necessarily involves the creation of some new general rule, or the acceptance of some old general rule underlying and involved in the facts of the case. The enunciation of this reason for the decision, postulating as it does the existence and application of such general truth, is in itself a creation and prescription of such rule of conduct."[230] In other words, Clarke essentially argued that the case a judge was deciding was itself the source of the rule the judge used to decide it.[231]

For Clarke, as for Carter, the driving principle behind every common law decision was "Let justice be done in this case."[232] And, as Ezra Thayer pointed out in criticizing Carter, this principle cannot be the basis for a coherent system of logically derived rules. Indeed, Clarke explicitly downplayed the benefits of "formal organization." He acknowledged that codes were superior to the common law in this respect, but he continued:

> The advantage to be derived from scientific excellence in this particular may, however, be obtained at too great a cost.
>
> For it must ever be borne in mind that the phenomena a system of justice deals with, are the special disputes among men; not the abstract conceptions of general principles. The excellence of a system depends upon whether, in effect, justice is done between man and man.[233]

Despite his muddled talk of induction and deduction, of rules and principles, Clarke ultimately manifested little concern for either conceptual

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[228] CLARKE, *supra* note 220, at 239.

[229] *Id.* at 249.

[230] *Id.* at 238.

[231] Clarke acknowledged that in the majority of cases, the judicial method seemed deductive on the surface, because the court used previously established general principles. But he continued: "Even in these instances, however, the true inductive nature of a common law decision is manifest; for the selection of the general rule which shall be applied to the facts of the given case is not dependent on a hard and fast interpretation of the language in which such general truth has been expressed, as including or not including the case in question, but rather upon a process of classing the individual case by its facts with cases of like combinations of fact, and so bringing it under a general principle which, when applied to the facts, will produce substantial justice." *Id.* at 250.

[232] *Id.* at 240.

[233] *Id.* at 309-310.

order or formality. For him, as for Carter, these values were subsidiary to achieving an acceptable decision in each case. Clarke made this point clear in summarizing the common law method of judging: "The great mass of existing rules and exceptions established by decided cases, and apparently affecting the decision to be made, are sifted and explained, limited and followed, with a view, upon the principles of logic, equity and political economy applicable, to make those apply which will produce the desired just result in the case at hand."[234]

Carter clung to the notion that common law decisions were nondiscretionary because judges derived them from a homogenous social standard of justice. Clarke, writing two years before the turn of the century, took the modernist step of portraying the common law as almost entirely untethered. He bluntly spoke of judges "creating" legal rules[235] and freely described the common law as "judge-made law."[236]

The codification debate, more than any other issue of the late nineteenth century, forced practicing lawyers to grapple publicly with large jurisprudential questions. The struggle against codification thus inspired an extraordinary flowering of literature in which attorneys defending the common law, such as Carter, Mathews, and Clarke, thoughtfully examined their role, and that of judges, in the existing legal system. The resulting portrait of the common law painted by these lawyer-jurists was resoundingly different from that offered by Christopher Columbus Langdell. Instead, the anticodifiers' vision of the common law foreshadowed, by several decades, the views of the aggressively anti-Langdellian legal realists.

VIII. CARTER AND LEGAL REALISM

After World War I, the assault on legal classicism in general, and on Langdell in particular, was advanced by a group of scholars commonly known as the legal realists.[237] The realists, who were particularly dominant at Yale and Columbia Law Schools, played a critical role in shaping legal academic discourse during the 1920s and 1930s.[238] Although the realists largely ignored

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[234] *Id.* at 239.

[235] *See*, *e.g.*, *id.* at 238.

[236] *See*, *e.g.*, *id.* at 98, 238.

[237] *See* Kimball, *The Langdell Problem*, *supra* note 11, at 303-11 (discussing the realists' portrait of Langdell). The term "Realism" was apparently first applied to this strand of legal thought by Karl Llewellyn, in 1925. *See* N. E. H. HULL, ROSCOE POUND AND KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE 144 (1997).

[238] As Morton Horwitz has pointed out, "defining Legal Realism with precision is not all that easy." HORWITZ, *supra* note 6, at 169. The term l*egal realist* has most commonly been applied to antiformalist law professors, especially those with a social-scientific

Carter in their own writings, there were striking similarities between his jurisprudence and theirs. The question of why the realists neglected Carter is an interesting and complex one that I have examined elsewhere.[239] Here, I will limit my discussion to the ways in which Carter prefigured legal realism, regardless of the extent of actual influence he had over them.

A. Antiformalist Legal Reasoning

Consider, for example, Carter's and the realists' respective views on the significance of legal rules. The realists insisted on the indeterminacy of rules, at least in those cases where the law was unclear enough to warrant litigation and appeal.[240] If the realists had paid attention to Carter, they would have realized that his work anticipated their own in this respect. As explored above, a visceral resistance to generalization lay at the core of Carter's jurisprudence. In his view, the application of general rules to concrete cases "does not embody justice; it is a mere *jump in the dark*; it is a *violent* framing of rules without reference to justice."[241] The fact that common law judges did not decide cases through the deductive application of rules was, Carter argued, the basis for the common law's superiority to codified systems.

Like Carter, the realists thought that deduction from general concepts and rules was an unwise and unjust method of decision making. Laura Kalman explains: "The realists did not place their faith in the rules and concepts the conceptualists derived. For these were formed by classifying disparate fact situations under the same rubric, and an opposition to the search for unity implicit in conceptualistic abstractions lay at the core of Legal Realism."[242] Karl Llewellyn, a leading reaslist, declared that one central aspect of the realist creed was the "belief in the worthwhileness of grouping cases and legal situations into narrower categories than has been the practice in the past. This is connected with the distrust of verbally simple rules—which so often cover dissimilar and non-simple fact situations."[243]

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orientation, during the 1920s and 1930s. *See*, *e.g.*, JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE (1995); LAURA KALMAN, LEGAL REALISM AT YALE: 1927-1960 (1986). Morton Horwitz urges that the definition be expanded to include earlier critical thinkers (including Pound and Holmes), sophisticated doctrinal writers, administrative law scholars, and various scholars in related non-law disciplines. HORWITZ, *supra* note 6, at 182-85. For purposes of this discussion, I use the term l*egal realist* in the prior, more limited sense.

[239] Grossman, *supra* note 33, at 389-97.

[240] *See* WILFRID E. RUMBLE, JR., AMERICAN LEGAL REALISM: SKEPTICISM, REFORM, AND THE JUDICIAL PROCESS 48-106 (1968). Rumble observes that although a few realists were almost entirely nihilistic with regard to legal rules, the majority limited their rule skepticism to the application of rules in contested cases. *Id.* at 96-97.

[241] CARTER, PROPOSED CODIFICATION, *supra* note 39, at 33.

[242] KALMAN, *supra* note 238, at 22.

[243] Karl Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1237 (1931).

The realists' attitude toward the doctrine of stare decisis echoed Carter's and reflected their similar fact-specific approach to legal reasoning. As discussed above, Carter minimized the force of stare decisis in two ways: (1) by contending that the only relevant data contained in a precedent were the facts and the result, and (2) by claiming that most cases that reached litigation presented the court with materially distinguishable facts.[244] Legal realist Herman Oliphant tried to cabin precedent in an almost equivalent manner. In "A Return to Stare Decisis," he argued that the only aspect of precedents that was "susceptible of sound and satisfying study" was "what courts have done in response to the stimuli of the facts of the concrete cases before them."[245] He observed that a precedent could be deemed to govern a very narrow range of fact situations, a very broad range, or any gradation between, depending on how tightly it was tied to its particular circumstances. Like Carter, Oliphant wanted jurists to lean toward the pole of factual precision and thus to avoid excessive generalization in the application of precedents.[246]

Oliphant perceived a lamentable historical trend in the opposite direction.[247] Interestingly, however, he did not contend that the embrace of abstraction actually impelled courts to make unfair decisions. Like Carter, he believed that common law judges, regardless of legal formalities, tended to resolve cases in accordance with their sense of justice.

> Judges are men, and men respond to human situations. When the facts stimulating them to the action taken are studied from a particular and a current point of view, which our present classification prevents, we acquire a new faith in stare decisis. From this viewpoint we see that courts are dominantly coerced, not by the essays of their predecessors, but by a surer thing, by an intuition of fitness of solution to problem, and a renewed confidence in judicial government is engendered.[248]

Oliphant's ultimate goal was not to prevent general propositions from deciding concrete cases, for, in his mind, courts rarely actually resolved matters in this way. His true aim was to convince judges to embrace a "conscious and methodological empiricism" that would help them accomplish their practical ends.[249]

Other realists had a similarly limited view of the importance of stare decisis. Llewellyn, for example, sounded quite like Carter when he expressed skepticism about the "rules" created by judicial precedents.

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[244] *See supra* p. [ ].

[245] Herman Oliphant, *A Return to Stare Decisis*, 6 AM. L. SCH. REV. 215, 225 (1928).

[246] *Id.*

[247] *Id.* at 220-22. He remarked, "While the law was thus grouping the transactions of life into larger and larger piles, held together by common attributes more and more accidental, life rolled on, always concrete, always specific, but becoming more and more diversified with ominous speed." *Id.* at 221.

[248] *Id.* at 225-26.

[249] *Id.* at 228.

> Every case lays down a rule, the rule of the case. The express ratio decidendi is prima facie the rule of the case, since it is the group upon which the court chose to rest its decision. But a later court can reexamine the case and can invoke the canon that no judge has power to decide what is not before him, can, through examination of the facts or the procedural issue, narrow the picture of what was actually before the court and can hold that the ruling made requires to be understood as thus restricted. In the extreme form this results in what is known as expressly "confining the case to its particular facts." This rule holds only of redheaded Walpoles in pale magenta Buick cars.[250]

Realists stressed not only the manipulability of the process by which courts drew rules from precedents, but also the indeterminacy of the process by which judges deductively applied these rules to new facts. Realist literature emphasized the point that more than one rule was frequently available for the same fact situation. Oliphant, for example, asserted, "The choice between the legal principles competing to control the new human situations involved in the cases we pass upon is not dictated by logic."[251] Llewellyn similarly argued that "in any case doubtful enough to make litigation respectable the available authoritative premises—*i.e.*, premises legitimate and impeccable under the traditional legal techniques—are at least two, and . . . the two are mutually contradictory as applied to the case at hand."[252] Most memorably, Walter Wheeler Cook declared: "Legal principles—and rules as well—are in the habit of hunting in pairs."[253]

In modern scholarship, the realists of the 1920s and the 1930s receive most of the credit for developing these assaults on the logical pretensions of the classicists. As noted above, however, Carter used almost identical language in 1889 when he described the common law method for deciding new cases: "It is not that no rule is known which is applicable to the transaction; there may be many which have a bearing on it. Several different rules—all just in their proper sphere—are competing with each other for supremacy."[254]

B. Custom

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[250] KARL N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 72 (Oceana Publications 1960) (originally published 1930). Llewellyn also emphasized how judges often used a "loose view" of precedent to take advantage of prior rulings that supported the result they were trying to reach. *Id.* at 74. The combination of these two techniques made it "possible to void the past mistakes of courts, and yet to make use of every happy insight for which a judge in writing may have found expression." *Id.* at 75.

[251] Oliphant, *supra* note 245, at 228.

[252] Llewellyn, *supra* note 243, at 1239.

[253] Cook, *supra* note 187, at 406.

[254] CARTER, PROVINCES, *supra* note 39, at 35. *See supra* p. [ ].

The oft-repeated adage that the legal realists believed "the law is determined by what the judge had for breakfast" is an absurd caricature.[255] The realists did not think court decisions were simply arbitrary. After all, they viewed the legal scholar's role as largely a predictive one, and the very possibility of prediction implies some degree of order and regularity. The realists unanimously agreed, however, that formal rules and logical reasoning did not dictate legal results. They therefore sought to identify explanations external to the law itself for judicial decisions.[256] One of these explanations was custom. Modern scholars disagree on just how central the notion of custom was to the realist jurisprudence of the 1920s and 1930s.[257] It seems fair to state, however, that anticlassicist legal thinkers of that era were generally interested in the relationship between law and custom, broadly conceived.

Moreover, there was a particular strand of realism that focused intensively on custom, in a way strikingly reminiscent of Carter. The preferred term among these realists, however, was not *custom*, but *mores*. This word choice reflected the impact of William Graham Sumner (1840-1910), a tremendously popular and influential Professor of Political and Social Science at Yale.[258] Sumner's most widely-read work, *Folkways: A Study of the Sociological Importance of Usages, Manners, Customs, Mores, and Morals* (1906), introduced the term *mores* into the everyday vocabulary of American academia.[259] Sumner used the word *folkways* generally to refer to all naturally

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[255] At least one scholar has attempted, unsuccessfully, to trace the origins of this saying. *See* Charles M. Yablon, *Justifying the Judge's Hunch: An Essay on Discretion*, 41 HASTINGS L.J. 231, 236 n. 16 (1990).

[256] Llewellyn, in his 1931 description and defense of the Legal Realism movement, stated that the realists agreed "*there is less possibility of accurate prediction of what courts will do than the traditional rules would lead us to suppose* (and what possibility there is must be found in good measure outside these same traditional rules)." But he adamantly denied that the realists embraced uncertainty. He explained, "The immediate result of the preliminary work thus far described has been a further, varied series of endeavors; *the focussing* [sic] *of conscious attack on discovering the factors thus far unpredictable, in good part with a view to their control.*" Llewellyn, *supra* note 243, at 1241-42.

[257] *Cf.* Thomas C. Grey, Book Review, 106 Yale L.J. 493, 503 (1996) (the realists saw adjudication as "intuitive dispute resolution in light of unconsciously absorbed custom."); G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999, 1015 (1972) (the realists' view of human behavior as idiosyncratic "was subversive of collective behavior standards based on external phenomena. . . ."); and AMERICAN LEGAL REALISM 233 (William W. Fisher III et al. eds., 1993) ("While most Realists debunked the notion of legal doctrine working independently as a motive force in social life, it was only extremists among them such as Underhill Moore who considered that legal rules were wholly determined by custom or culture, having no gravitational power of their own.")

[258] *See* RICHARD HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT 53, 55 (1955); HARRIS E. STARR, WILLIAM GRAHAM SUMNER 373-82 (1925); Grossman, *supra* note 33, at 376-77.

[259] WILLIAM GRAHAM SUMNER, FOLKWAYS: A STUDY OF THE SOCIOLOGICAL IMPORTANCE OF USAGES, MANNERS, CUSTOMS, MORES, AND MORALS (1940).

evolving, unconsciously followed patterns of behavior within a group.[260] Those folkways with the most directive force over society were, according to Sumner, *mores*, which he defined as "folkways with the connotations of right and truth in respect to welfare, embodied in them."[261] Mores were folkways "raised to a different plane," because they were "capable of producing inferences, developing into new forms, and extending their constructive influence over men and society."[262] Sumner contended that all laws, indeed all societal institutions, were "produced out of mores."[263] Similarly to Carter, he asserted, "Legislation . . . has to seek standing ground on the existing mores, and it soon becomes apparent that legislation, to be strong, must be consistent with the mores."[264] Despite the obvious parallels between Sumner's work and Carter's, there is no evidence that either scholar directly influenced the other.[265]

Sumner's impact on legal scholarship became evident in the 1910s, particularly in the pages of the *Yale Law Journal*, which printed a number of pieces discussing the relationship between mores and law. In 1917, for example, the *Journal* published "The Dead Hand of the Common Law," by Yale Law School Professor and legal realist Arthur Corbin. In this piece, Corbin praised common law decision making in language strikingly like Carter's.

> A very large part of legislation must always be *ex post facto* and it is this sort of judicial legislation [common law decision making] that gives satisfaction. In spite of occasional outcry, it *works*. It may sometimes be difficult to decide a concrete case after it has occurred, but it is far easier than to decide it in advance in the form of a general rule. By this process we get better law, law more nearly in harmony with prevailing custom and desire and with the *justice* of the present day. A litigant is less likely to be surprised and pained by a decision based upon rules thus established than he is by decisions based on statutes. Judicial rules, in new cases as well as in old cases, are drawn from the *mores* of society as the judges know them; and they are stated anew in each case with specific reference to a case the facts of which are historically

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[260] *Id.* at 2-3.

[261] *Id.* at 38.

[262] *Id.* at 30.

[263] *Id.* at 53. For Sumner's discussion of the relationship between mores and law, see *id.* at 53-57.

[264] *Id.* at 55.

[265] Sumner almost certainly cannot have inspired Carter, for FOLKWAYS, the first piece in which Sumner articulated his theories in a manner similar to Carter, was not published until the year after Carter's death. It also seems unlikely that Carter's work inspired Sumner; FOLKWAYS does not include a single citation to Carter's work. M. J. Aronson ascribed the similarity between the ideas of Carter and Sumner to the fact that each represented "the culmination of a current of thought which permeated the intellectual life of the last quarter of the nineteenth century"—the "naturalistic evolutionism" of Charles Darwin and Herbert Spencer. M. J. Aronson, *The Juridicial Evolutionism of James Coolidge Carter*, 10 U. TORONTO L. J. 1, 1 (1953).

> complete. The litigant will not be greatly surprised at the *mores*, because his daily life is ordered by them and he has helped, generally unconsciously, to make them.[266]

The subsequent volume of the *Yale Law Journal* included an article by Sumner's disciple, A.G. Keller, analyzing how law "is a sort of crystallization of the mores."[267]

Sumner's influence on the legal academy became especially manifest in 1919, when the editors of the *Yale Law Journal* placed an unsigned note titled "Social Mores, Legal Analysis, and the Journal" at the start of an issue. In this note, the editors remarked that the *Journal*, under the inspiration of the late Yale Law School Professor Wesley Hohfeld, had recently been concentrating on the classification of legal concepts and on "the necessity of a more exact terminology leading to a more accurate legal analysis."[268] Now was the time, the editors suggested, to shift the *Journal*'s attention to another critical matter: the fact that "law forms but a part of our ever-changing social *mores*, and that it is the function of lawyers, of jurists, and of law schools to cause the statement and the application of our legal rules to be in harmony with the *mores* of the present instead of those of an outgrown past."[269] The editors acknowledged that Hohfeld's conceptions were indispensable to the creation of any restatement or reclassification of the law, but they continued: "[W]e must realize and confess that no restatement or classification is final. If our ancestors supposed 'justice' to be eternal and 'law' to be a series of unchangeable *a priori* rules from which decisions of all special cases could be deduced, so also they supposed the world to be flat and to be the fixed center about which the firmament revolved."[270]

The *Journal*'s editors thus considered an examination of the relationship between law and mores to be a necessary counterbalance to conceptualism, even Hohfeld's sophisticated (and arguably subversive) version of conceptualism.[271] The note, quoting Sumner, continued:

> [H]istory affords the perspective in which we can observe that "law" changes with the *mores* of the community and that "the *mores* can make anything right." No ingenious arrangement of fundamental legal concepts, no mere

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[266] Arthur L. Corbin, *The Dead Hand of the Common Law*, 27 YALE L.J. 668, 672 (1918).

[267] A. G. Keller, *Law in Evolution*, 28 YALE L.J. 769, 775 (1919). See also John E. Young, The *Law as and Expression of Community Ideals and the Lawmaking Functions of the Courts*, 27 YALE L.J. 1 (1917); Arthur L. Corbin, Conditions in the Law of Contract, 28 YALE L.J. 739 (1919) (examining the effect of mores).

[268] *Social Mores, Legal Analysis, and the Journal*, 29 YALE L.J. 83, 84 (1919).

[269] *Id.* at 83-84. It is unclear why the editors did not acknowledge the recent articles in the *Journal*, discussed above, concerning law and mores.

[270] *Id.* at 85.

[271] For a discussion of Hohfeld's relationship to progressive legal thought, see HORWITZ, *supra* note 6, at 151-56.

> machinery or terminology, however exact, can determine for us what the existing law is or what we shall make it for the future. That will be determined, now as in the past, by the varying feelings and customs and desires and needs of men. Hence those who state or who administer the law must be wise to the *mores* of their own times, must keep perpetually up to date.[272]

The editors closed the note by soliciting submissions "making use of the new analysis and showing an understanding of the connection of the *mores* and the law, the *mores* of marriage and the family, the *mores* of production and business, the *mores* of organized human society."[273]

Although the topic of mores can hardly be said to have dominated the *Yale Law Journal* in the years following this call for papers, its pages (as well as those of other law reviews) were peppered with references to mores, folkways, Sumner, and Keller during the 1920s and 1930s.[274] Throughout this period, Corbin remained the leading voice in the legal academy on the subject of mores. He played an instrumental role in training, hiring, nurturing, and inspiring the second generation of realists, and the concept of mores thus inevitably influenced their jurisprudence.[275] Corbin, by his own admission, did not attempt to support his assertions with empirical data.[276] By contrast, the later realists strove to support their claims about custom and law with varying degrees of investigational rigor. Corbin sounded more like Carter than did any other realist precisely because of the general and nonempirical quality of his statements about the relationship between mores and law.

Nevertheless, discussions of custom evocative of Sumner's and Carter's work can also be found in the writing of the second-generation realists. For example, Max Radin observed: "The court can select the precedents or the interpretation of a statute which will lead to a result in accordance with the manners and customs of the people, and the court very commonly does so. . . . And it must not be forgotten that judges also are people and, to a considerable extent, the court's own feeling of justice is adequately met if its decisions create a situation in accord with the manners and customs of the people."[277]

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[272] *Social Mores*, *supra* note 268, at 85.

[273] *Id.* The editors' note cited Carter's LAW: ITS ORIGIN, GROWTH, AND FUNCTION, but only for a point regarding the supposed *ex post facto* quality of judicial decision making. *Id.* at 85, n. 5.

[274] I confirmed this point by using the database HeinOnline to perform a search of these terms in the YALE LAW JOURNAL and other legal periodicals.

[275] For a discussion of Corbin's role in building Yale into the premier realist law school, *see* KALMAN, *supra* note 238, at 98-107. Kalman repeatedly refers to "first generation realists" and "second generation realists."

[276] Arthur L. Corbin, *Recent Developments in the Law of Contracts*, 50 HARV. L. REV. 449, 472 (1937).

[277] MAX RADIN, THE LAW AND MR. SMITH 34 (1938). *See also* Max Radin, *The Theory of Judicial Decisions: Or How Judges Think*, 11 A.B.A. J. 357, 362 (1925) ("We need not fear arbitrariness. Our Cokes and Mansfields and Eldons derive their physical and spiritual nourishment from the same sources that we do. They will find good what we find good, if we will let them.").

Karl Llewellyn asserted that "law observance is a question not of legal rules, but of the formation of folkways that can be and will be learned chiefly without direct reference to particular rules."[278] He described how the realists studied the "set-up of men's ways and practices and ideas on the subject matter of the controversy . . . , in the hope that this might yield a further or even final basis for prediction."[279] Llewellyn included, in this type of scholarship, not only the painstaking empirical studies of societal practices by his contemporaries, but also the "more or less indefinite reference to custom [by] the historical school."[280]

The realists' approach to custom was less simplistic than Carter's. Llewellyn, for example, criticized "the vast vagueness of Carter's picture," pointing to his failure adequately to address the "multiformity and conflict of subgroup 'customs,'" and situations in which officials created law in the absence of custom, or even in contradiction to it.[281] Nonetheless, the realists' parallel turn to custom reflected a similar impulse to identify objective, "scientific" bases for judicial decisions apart from formalistic legal reasoning. Both Carter and the realists portrayed the study of law as an empirical, value-free enterprise. Llewellyn famously declared that a common characteristic of realist scholarship was "the *temporary* divorce of Is and Ought for purposes of study. . . . This involves during the study of what courts are doing the effort to disregard the question what they ought to do."[282] Carter had used almost exactly the same language a quarter century earlier: "I have sought to discover those rules only which *actually* regulate conduct, not those which *ought* to regulate it. Science asks primarily only what *is*, not what *ought* to be."[283]

C. Codification and Restatement

The parallels between Carter and the legal realists are perhaps most evident when one examines realist discussions of codification. With respect to this subject, it is interesting to start with Oliver Wendell Holmes. The very first

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[278] Karl N. Llewellyn, *Law Observance Versus Law Enforcement*, *in* JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 399 (1962). Llewellyn originally delivered this address in 1928.

[279] Llewellyn, *supra* note 243, at 1244.

[280] *Id*.

[281] Llewellyn, *Carter*, supra note 112.

[282] Llewellyn, *supra* note 243, at 1236. For the leading account of the battle between the realists and their critics over the question of ethics and values, see EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY 159-78 (1973). Morton Horwitz argues that historians, by narrowly defining the Legal Realist movement to include primarily social-science-oriented scholars of the 1920s and 1930s, have understated Realism's ethical concerns and political commitments. HORWITZ, *supra* note 6, at 169-92. Horwitz's argument depends mostly on expanding the list of "realists," however; he does not really demonstrate (or even try to demonstrate) that the scholars traditionally identified as realists prioritized questions of ethics and values.

[283] CARTER, ORIGIN, GROWTH & FUNCTION, *supra* note 40, at 145.

scholarly article Holmes ever published was titled *Codes, and the Arrangement of the Law*. It appeared in 1870 in the *American Law Review* and was reprinted by the *Harvard Law Review* in 1931, during the heyday of the Legal Realist movement.[284] Despite the article's early date, it is worthwhile to consider it in this context, because Holmes was such a powerful influence on the realists of the 1920s and 1930s.[285]

Holmes, a transitional figure, did not altogether deny the value of conceptual ordering. Although he denied that general principles decided concrete cases, he acknowledged that such principles (in Thomas Grey's words) "focused attention on the competing considerations relevant to the decision, providing guidance by confining the range of argument."[286] Thus, in *Codes, and the Arrangement of Law*, Holmes remarked that a "well-arranged" and "connected" statement of "the whole body of the law" would be a valuable thing.

> The importance of it, if it could be obtained, cannot be overrated. In the first place it points out at once the leading analogy between groups. . . . The perfect lawyer is he who commands all ties between a given case and all others. But few lawyers are perfect, and all have to learn their business. A well-arranged body of the law would not only train the mind of the student to a sound legal habit of thought, but would remove obstacles from his path which he now only overcomes after years of experience and reflection.[287]

Because a single author might not have the capacity to prepare an entire "philosophically arranged *corpus juris*," Holmes suggested that the task be assigned to a group of scholars working for the government.[288] He opposed giving the work of these public employees the status of legislation, however; he favored some sort of unenacted treatise rather than a true code. Holmes justified this position as follows:

> New cases will arise which will elude the most carefully constructed formula. The common law, proceeding, as we have pointed out, by a series of successive approximations—by a continual reconciliation of cases—is prepared for this, and simply modifies the form of its rule. But what will the court do with a code? If the code is truly law, the court is confined to a verbal construction of the rule as expressed, and must decide the case wrong. If the court, on the other hand, is at liberty to . . . take into account that the code is only intended to

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[284] Oliver Wendell Holmes, *Codes, and the Arrangement of the Law*, 44 HARV. L. REV. 725 (1931) (previously published in 5 AM. L. REV. 1 (1870)). The Harvard Law Review reprinted this article as part of a collection of four *Early Writings of O. W. Holmes, Jr.*, with an introduction by Felix Frankfurter. Frankfurter noted that the essays "pose juristic issues still, or, more accurately, again in controversy." *Id.* at 720.

[285] *See* Fisher, *supra* note 257, at 3 (discussing the realists' celebration of Holmes and frequent citations to his works).

[286] Grey, *supra* note 4, at 44.

[287] Holmes, *supra* note 284, at 727.

[288] *Id.* at 726-27.

> declare the judicial rule, and has done so defectively, and may then go on and supply the defect, . . . the code is not law, but a mere text-book recommended by the government as containing all at present known on the subject.[289]

Holmes recognized that logic sometimes clashed with good sense when it came to the resolution of specific matters, and he thought courts should favor the latter on such occasions. "Law is not a science, but is essentially empirical. Hence, although the general arrangement should be philosophical . . . compromises with practical convenience are highly proper."[290]

Holmes's position on codification was thus very like Carter's. Both men, for the same reasons, opposed the enactment of a code with the force of a statute, but they both also recognized the merit of a well-arranged statement of the common law. Carter similarly remarked that 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 of 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."[291] In the final analysis, however, Carter probably assigned less value to logically arranged principles than did Holmes—particularly the young Holmes.

When the realists addressed the issue of codification decades later, there was little, if any, call for the adoption of a complete code and the abandonment of the common law method. The energy of the codification movement had splintered into an occasionally successful push for uniform state laws in discrete areas, on the one hand, and the American Law Institute's scheme to produce an unenacted but authoritative Restatement of the common law, on the other. Consequently, the realists had little to say about the wisdom of true codification. Nevertheless, at least one major realist directly critiqued the notion of a European-style code. In his influential book, *Law and the Modern Mind*, Jerome Frank attacked the premises of complete codification in a manner that highlights the similarities between legal realism and Carter's jurisprudence.

In Frank's eyes, codification in its pure form was simply another variety of the "legal fundamentalism" championed by the Langdellians.[292] He mocked those jurists, throughout history, who had contended, in his words: "Let us end all this confusion by adopting a code. Let us once and for all by statute enact a carefully prepared body of rules sufficiently complete to settle all future controversies."[293] Frank observed that in each such instance, from Frederick

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[289] *Id.* at 726.
[290] *Id.* at 728.
[291] CARTER, PROPOSED CODIFICATION, *supra* note 39, at 96-97.
[292] JEROME FRANK, LAW AND THE MODERN MIND 53 (1970) (originally published 1930) (Chapter VI titled "Beale, and Legal Fundamentalism").
[293] *Id*. at 200.

the Great's Prussia to Napoleon's France to modern Germany, "the hope of attaining a large measure of legal certainty by codification proved vain. It produced not certainty, but sterile logic-chopping."[294] Frank continued:

> Where code-worship has prevailed in code-governed countries, the real judicial process of adaptation has been concealed under the guise of formal exactness. . . . In attempts to achieve a perfect code covering all imaginable cases, we encounter again the old dream of legal finality and exactitude. Once this dream took the form of a belief in a list of rules directly God-derived. Belief in a man-made code, which shall be exhaustive and final, is essentially the same dream in another form, but a form which hides from superficial study the nature of the dream. But a dream it is, nevertheless. For only a dream-code can anticipate all possible legal disputes and regulate them in advance.[295]

Frank's psychoanalytical terminology and scornful attitude toward religion (qualities that pervaded his book) would have been foreign to Carter. But Carter would have wholly agreed with Frank's assertion that codes are invariably flawed because "no one can foresee all future combinations of events. . . . Situations are bound to occur which the legislature never contemplated when enacting the statutes."[296]

Carter also would have concurred with Frank's contention that "the attempt to have the courts apply statutes as if indeed they were all-sufficient . . . leads to no small measure of uncertainty."[297] Carter maintained that judges, in their efforts to make statutes produce fair outcomes, used "subtle arts of interpretation" that heightened uncertainty.[298] Frank similarly explained:

> Except in those cases which happen to be explicitly covered by the code, the judicial interpreter takes out of the code provisions exactly what he puts in. In spite of, or perhaps more accurately, because of, this false appearance of purely logical interpretation, the decisions become unpredictable. For where the code is silent, the conventional theory of so-called "interpretation" requires the judge to decide cases by analogy to some code rule, and the selection of the rule thus to be applied by analogy involves, of course, the exercise of a flexible discretion to a far larger extent than is acknowledged by the exponents of the theory or by the judges who believe that they are adhering to the theory.[299]

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[294] *Id.* at 203.
[295] *Id.* at 203-04.
[296] *Id.* at 204.
[297] *Id.* at 205.
[298] CARTER, PROPOSED CODIFICATION, *supra* note 39, at 37-38.
[299] FRANK, *supra* note 292, at 205-06. Interestingly, Frank did not categorically reject all codification. In an appendix to his book, he remarked that "a code deliberately devised with reference to the desirability of growth and stated in terms of general guiding and flexible principles may some day prove to be the way out of some of the difficulties of legal administration in America." *Id.* at 337.

In stark contrast to Carter, Frank adamantly insisted that judges "made" law. He did not mention Carter in *Law and the Modern Mind*, but he surely would have dismissed Carter's customary theory as simply another example of a "childish" belief in predetermined law.[300] Nevertheless, there is surprising overlap in the work of the two scholars; Carter anticipated by almost fifty years Frank's analysis of the consequences of applying general code provisions to particular cases.

As noted above, by the legal realists' time, there was no serious effort to adopt a system of complete codification in the United States. During the last years of the nineteenth century, as it became clear that Field's campaign to codify the entire common law would fail, scholars and practitioners interested in codification had turned their attention to establishing uniform codes in particular substantive areas for adoption by the states. This effort remained very much alive in the 1920s and 1930s. Indeed, the legal realist Karl Llewellyn became one of the leading figures in this second-wave codification movement.

The American Bar Association (ABA) hatched the uniform code movement in the early 1890s, as Field's campaign for his Civil Code, and Field himself, were breathing their last.[301] The National Conference of the Commissioners on Uniform State Laws (NCCUSL), which the ABA helped establish, met for the first time in 1892. By the 1930s, the commissioners had produced uniform acts in a variety of discrete commercial subjects, some of which had been adopted by a majority of the states.[302]

In the late 1930s, Llewellyn started planning what would become the uniform code movement's greatest triumph: the Uniform Commercial Code (UCC). The NCCUSL and the American Law Institute jointly drafted and revised the UCC during the 1940s and 1950s, and every state but Louisiana eventually adopted it. Although many scholars and lawyers worked on the UCC, Llewellyn, the chief reporter for the code, was indisputably the individual with the greatest influence over it.[303] It reflected his realist ideals in various ways.[304]

The fact that Llewellyn dedicated much of his career to preparing and promoting a code does not, as one might suppose, reflect an important distinction between the realists and Carter. Llewellyn, like Jerome Frank,

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[300] *Id.* at 204, 207. Frank praised John Dickinson's criticism of the "early 19th Century theory that the 'law behind the law' was located in popular custom." *Id.* at 283-84.

[301] Field died in 1894.

[302] For the history of the NCCUSL, see WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 272-73 (1973); James J. White, *Ex Proprio Vigore*, 89 MICH. L. REV. 2096, 2097-2105 (1991).

[303] *See* TWINING, *supra* note 302, at 270-340 (assessing the extent of Llewellyn's influence over the UCC).

[304] *See id*. at 302-340; Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621 (1975); Zipporah B. Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465 (1987).

unambiguously rejected the idea of a continental-style code providing for every case within its scope.[305] Indeed, in his 1931 encyclopedia article on Carter, Llewellyn wholly sympathized with his subject's condemnation of complete codification. He agreed that Field's Civil Code was "ill considered." Nevertheless, in the article, Llewellyn suggested that codification, properly done, would not necessarily conflict with realist principles. He remarked, "[Carter's] argument attacks not codification as it is—a fresh and fertile start for case law, which at its best already incorporates existing tendencies—but the utopian ideal of the blinder advocates of codification: a closed system, 'certain'—and dead."[306]

Interestingly, some of the same impulses that drove Carter's battle *against* Field's Civil Code also motivated Llewellyn's work *in support of* the Uniform Commercial Code. As Richard Danzig argues with respect to Article II of the UCC, "[T]he animating principle behind [Llewellyn's] theories and this legislative achievement is, paradoxically, . . . a renunciation of legislative responsibility and power."[307] Like Carter, Llewellyn preferred a flexible, contextual, court-centered decisional process. He thus did not intend the UCC to provide a resolution for every case in advance. Danzig observes: "Whereas a code functioned for such diverse thinkers as Frederick the Great, Austin, or Williston as a means of dictating a result, Llewellyn's UCC Article II more often operated as a means of dictating a method. That method was designed to prompt decision not according to the letter or the logic of a statute or a juristic concept but rather according to the "situation-reason."[308]

If the UCC had appeared during his lifetime, Carter might well have acknowledged that it was a noble effort, so far as any code could be noble. Carter was a champion of the common law, and the UCC was, in the words of one scholar, "drafted in the expectation that it would be interpreted by common law trained lawyers and judges."[309] The UCC explicitly incorporates the principles of common law and equity unless they are "displaced" by particular code provisions.[310] Moreover, it repeatedly directs courts to consider what would be "reasonable" under the circumstances.[311] And Carter would certainly have approved of the fact that the UCC makes "usage of trade" a presumed component of commercial agreements.[312] Ultimately, however, it is impossible to know how Carter would have responded to an open-ended code like the UCC, for although he might have admired certain

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[305] TWINING, *supra* note 302, at 308.
[306] Llewellyn, *Carter*, *supra* note 112.
[307] Danzig, *supra* note 304, at 622.
[308] *Id.* at 632
[309] TWINING, *supra* note 302, at 312.
[310] U.C.C. § 1-103 (2004).
[311] For a list of sections in Article II of the UCC that use "reasonable" or similar open-ended terms, *see* Danzig, *supra* note 304, at 634.
[312] *See* U.C.C. §1-205 (2004).

features of the instrument, he likely would have been hesitant to compromise his anticodification stance.

It is also unclear how Carter would have responded to the American Law Institute's Restatement project. The ALI, founded in 1923, was (and remains) an organization composed of law professors, judges, and practicing lawyers dedicated to the "improvement of law."[313] As noted above, it cooperated with the NCCUSL in the preparation of the Uniform Commercial Code. However, its primary mission, at the time of its formation, was to prepare a comprehensive Restatement of the common law. By 1944, the ALI had produced what it believed to be an authoritative Restatement of the law in each of ten subject areas.[314]

Like David Dudley Field, the proponents of the Restatement project hoped to alleviate the problems of legal uncertainty and complexity by setting forth the fundamental principles of the common law in a logically ordered form. Despite the similar motives behind codification and the Restatements, however, Carter's opposition to the former does not necessarily imply that he would have resisted the latter. Indeed, Carter seemed to declare his support for something like a Restatement, remarking, "A statement of the whole body of the law in scientific language, and in a concise and systematic form . . . would be of priceless value."[315]

In considering how Carter would have responded to the ALI Restatement project, it is important to keep in mind a critical difference between Field's Civil Code and the Restatements: the ALI never intended for the latter to be enacted into law.[316] Indeed, the institute rejected the statutory path for reasons that closely paralleled Carter's anticodification arguments. As Nathan Crystal has observed, the ALI worried that if the Restatements were enacted, "the flexibility of the common law would be lost, . . . courts would be bound simply to follow the statute and 'injustice would result in many cases presenting unforeseen facts.'"[317] Perhaps Carter would have endorsed the Restatements so long as they remained unenacted and thus avoided these problems.

Then again, Carter might have opposed the Restatements in the form they actually assumed. His response might have been similar to that of the legal realists, who initially viewed the ALI's project as a useful effort to ease legal uncertainty, but whose "alienation . . . was complete" by the time the final versions were published.[318] Although the ALI did not pursue legislative

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[313] *About the American Law Institute*, *at* http://www.ali.org/ali/thisali.htm.

[314] *Id*.

[315] CARTER, PROVINCES, *supra* note 39, at 45.

[316] G. Edward White, *The American Law Institute and the Triumph of Modernist Jurisprudence*, 15 L. & HIST. REV. 1, 12 (1997); Nathan M. Crystal, *Codification and the Rise of the Restatement Movement*, 54 WASH. L. REV. 239, 244-45 (1979).

[317] Crystal, *supra* note 316, at 245 (quoting ALI PROCEEDINGS, 1923, pt. I, 24 (1923)).

[318] *Id*. at 247. The early support of the Restatement project by at least some legal realists is exemplified by realist Arthur Corbin's service as the principal assistant to the

enactment, it inherited the assumption of many code advocates that legal doctrines could be abstracted away from their factual contexts.[319] As G. Edward White has observed, the realists ultimately rejected the Restatement's embrace of taxonomic logic and the "coherence and relevance of the legal rules themselves."[320] Realist Hessel E. Yntema remarked, "[M]ost of the data to which attention should be given in a responsible formulation of law have to be excluded in the preparation of the Restatement—data as to the practical needs to be met and as to the appropriateness of the means of regulation employed to meet them."[321] Criticizing the Restatement's character as a "statement of the general principles of the common law, not dissimilar to the European codes," Yntema observed, "It is something of an irony that Carter's argument [that a good digest of the law would be of 'priceless value'] is employed to support a Restatement of the Law which has a purpose and many of the characters which he opposed."[322]

IX. CONCLUSION: PRACTITIONERS' JURISPRUDENCE?

Carter's jurisprudence, as well as that of his anticodification allies Albert Mathews and R. Floyd Clarke, was probably shaped in part by their experience as practicing lawyers. Because litigators unavoidably tend to focus on the facts of particular cases and on the flexibility of legal rules, there is tension between litigation practice, on the one hand, and the conceptual formalism embodied by complete codification and Langdellian classicism, on the other.

Although Carter took obvious pride in his own erudition, there is an anti-intellectual undercurrent to his writing, directed at those who devoted their lives entirely to affairs of the mind. He described supporters of codification in terms similar to those he used to characterize Langdell.[323] Jeremy Bentham was "a man of pre-eminent intellectual ability, but not an experienced lawyer, or a safe guide upon any subject."[324] The codifiers' calls for more systematic order were "the views of professors of law, whose lives are devoted, not like

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Chief Reporter of the Restatement of Contracts, classicist Samuel Williston. *See* GRANT GILMORE, THE DEATH OF CONTRACT 59 (1974). In addition, in the early 1920s, realists Herman Oliphant and Karl Llewellyn expressed cautious optimism about the Restatements. Crystal, *supra* note 313, at 245-46. Nathan Crystal proposes that the realists' growing disaffection with the Restatements was more a result of their own intellectual evolution than of any change in the nature of the Restatement project itself. *Id.* at 247-48.

[319] *See generally* Crystal, *supra* note 316 (laying out the personal, institutional, and jurisprudential continuities between the codification movement and the Restatement project).

[320] White, *supra* note 316, at 34.

[321] Hessel E. Yntema, *What Should the American Law Institute Do?*, 34 MICH. L. REV. 461, 468 (1936). Dean Charles E. Clark of Yale Law School, also a realist, similarly compared the Restatement to a code. *See* KALMAN, *supra* note 238, at 27.

[322] Yntema, *supra* note 321, at 469.

[323] *See supra* p. [ ].

[324] CARTER, PROPOSED CODIFICATION, *supra* note 39, at 70.

those of lawyers and judges, to the practical administration of law, but to teaching it, and lecturing about it."[325]

Perhaps the daily representation of clients in actual matters led Carter and other practitioners to focus on fine factual distinctions more than on abstract principles. In a speech to graduating law students at Columbian University (now George Washington University), Carter offered advice on "how to direct your attention when you come to engage in the practical work of the lawyer." He told the students:

> Inasmuch as your science consists in the observation of *facts* with which it deals, and those facts are the transactions of men, you cannot study them too closely. You will often find, what every practicing lawyer has found, that much of the difficulty and uncertainty you meet with in the study of any particular case does not come, as one is apt to think, from ignorance of the law, but from a too hasty and insufficient observation of the facts . . . . It has often happened to me that clients would come to me with cases in respect to which they would have an undoubting conviction that the right was on their side, an opinion I was not able at first to confirm, but, upon subsequent reflection, I would become converted to their views. The reason was that I would be thinking upon the abstract rules of law instead of closely studying the facts, while they, living and moving in the facts and in the customs and usages which men observe, really possessed views of the law clearer and juster than my own.[326]

Carter's practice experience may also have instilled in him a belief in the contingency and manipulability of legal reasoning. In the same speech, Carter remarked: "The lawyer is not charged in any case with the duty of finally determining which side is right, but of finding grounds and reasons for defending the side upon which he is retained. . . . Lawsuits are not conflicts in which all arguments upon the one side are right and upon the other wrong; they are conflicts between rival and competing rules and principles, all of which are true within certain limits but some of which must give way to the superior force of others."[327] Although Carter never abandoned his conviction that there was, in fact, a correct answer to every case, he attributed the law's determinacy not to the legal reasoning process, but to the social standard of justice on which the law was based.

Clarke, like Carter, suggested that his anticodification stance, and his anticonceptualism generally, derived from insight he acquired as a practicing lawyer.

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[325] *Id.* at 72.

[326] James C. Carter, HINTS TO YOUNG LAWYERS: ADDRESS OF JAMES C. CARTER, LL D., TO THE GRADUATING CLASS OF THE LAW SCHOOL OF THE COLUMBIAN UNIVERSITY AT THE COMMENCEMENT HELD JUNE 12, 1894, 9 (1894).

[327] *Id.* at 12.

> No amount of theory is equivalent to actual practice; and in generalizing on a subject without actual contact with the things themselves, we are apt to lose sight of facts, and be misled by false analogies. In reading the theoretical jurists, a practical lawyer receives the impression that had Bentham, Austin, and some others, ever taken an active part in the actual practice of law . . . they would have preferred as a practical guide the incoherent mass of material preserved in our common law reports to the most scientific code that the human mind could possible produce.
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> The philosopher in his closet, viewing all things by the dry light of generalization, naturally loses sight of the individual cases, and the difficulties inherent in their true solution. His only problem is to generalize these cases into some order and coherence. . . .
>
> The practitioner, on the other hand, looks only at the problem of the special case presented. His difficulty is to find light to guide him to a correct decision of the case in hand. . . .[328]

This is not to say that Gilded Age practitioners unanimously opposed codification. After all, David Dudley Field himself was an active attorney. Moreover, at its 1886 annual meeting, the American Bar Association, by a vote of 58 to 41, adopted the following resolution offered by Field: "The law itself should be reduced, so far as its substantive principles are settled, to the form of a statute."[329]

Nevertheless, in considering the attitudes of practicing lawyers toward codification, it is important to define carefully what is meant by the term *codification*. Clarke, like Carter, railed against a complete code that "professes to, and is intended to, state all the rules that may be applicable to that province of the law of which it is a Code."[330] The lawyers attending the 1886 ABA meeting were not opining on such an instrument. Field, in his comments preceding the vote, emphasized the limited significance of his resolution. He stressed that a vote for the resolution did not represent support for general codification, but merely for the position that principles of law should be stated in statutory form when it was feasible to do so.[331] And although he remarked that he personally supported the adoption of a code, he emphasized that he did "not mean by it a book which shall contain within its covers all the rules of law which are to govern all the transactions of men in all future time."[332] In short, the ABA's approval of Field's resolution cannot be interpreted as anything like an endorsement of European-style complete codification.

Supporters of codification viewed the practicing bar not only as a barrier to enacting a code, but also as a primary cause of the legal uncertainty and disorder they were striving to alleviate in the first place. The *Albany Law*

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[328] CLARKE, *supra* note 220, at 100.
[329] REP. NINTH ANN. MEETING A.B.A., *supra* note 95, at 74.
[330] CLARKE, *supra* note 226, at 97.
[331] REP. NINTH ANN. MEETING A.B.A., *supra* note 95, at 66, 68.
[332] *Id.* at 68.

Journal, in an article supporting codification, thus asserted that lawyers should not be involved in drafting the code. The article maintained that the practicing lawyer

> has been, as it were, counting the bricks in every case he argued before a bench or jury, instead of considering the philosophy and higher analogies of the legal principles involved. . . . Arguments of particular points, even of law and not of fact, are arguments on facts, and not on the expansiveness of laws or of their natural relations to one another, but only on their relation to facts. . . . The facts in each case admit of no deduction. It is only the law involved in these facts that admits of such ratiocinative development. . . . [The practicing lawyer's] functions . . . savor too much of the concrete to foster a philosophic spirit. . . . His eloquence, poetry, imagination, rhetoric and philosophy, all have a point that are [sic] fit only for lodgment in earth, and not for the broad basis of philosophical structures.[333]

Interestingly, the practitioner's mentality is another thing Carter shared with the legal realists. Although the realists' level of practice experience varied greatly,[334] it is probably fair to say that most of them, inspired by Oliver Wendell Holmes's pragmatic and predictive "bad man" theory of the law,[335] manifested a practice-oriented ethos to at least some extent.

In 1933, Jerome Frank, who had the most practice experience of the leading realists, expressly championed the practitioner's perspective—or at least what he thought *should be* the practitioner's perspective. In his article *Why Not a Clinical Law School?*, Frank asserted that law schools should hire experienced attorneys as professors and should reform legal education to "get in intimate contact with what clients need and with what courts and lawyers actually do."[336] He disparaged Langdell's case method as the invention of a

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[333] *The Civil Code of the State of New York—No. III, Relations of Judge-Made Law to a Code*, 2 ALB. L.J. 450-51 (1870).

[334] On one extreme was Walter Wheeler Cook, who did not practice at all before entering legal academia. Cook was the first person in many years to be appointed to the Columbia Law faculty without any practice experience. SCHLEGEL, *supra* note 238, at 28-35; TWINING, *supra* note 301, at 37. At the other end of the spectrum was Jerome Frank, who was a successful corporate lawyer in Chicago and New York for sixteen years before he published his first book, LAW AND THE MODERN MIND. Despite the long association he had with Yale Law School, Frank continued to practice throughout his life—on Wall Street, in the federal government, and finally as a judge on the U.S. Court of Appeals for the Second Circuit. *See generally* ROBERT JEROME GLENNON, THE ICONOCLAST AS REFORMER: JEROME FRANK'S IMPACT ON AMERICAN LAW 15-37 (1985). In the middle were realists such as Karl Llewellyn, who, before joining academia, practiced for about two years in the legal department of a bank and in a major New York City firm. TWINING, *supra* note 301, at 101-02. Llewellyn's biographer surmises that his practice experience, however brief, affected his jurisprudence. *Id*. at 102.

[335] Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) ("If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict.")

[336] Frank, *supra* note 199, at 913.

pathetic, isolated man with "an obsessive and almost exclusive interest in books."[337] Many years earlier, Carter had similarly, though more gently, criticized the Harvard case method's exclusive reliance on law books, remarking that "[t]hese volumes [of reported cases] . . . are but a part of the great territory of fact which it is the business of the lawyer and jurist to explore."[338]

Just as Carter had scoffed at the "so-called rules found in our digests and treatises and mentioned in the reports of decided cases,"[339] Frank derided the "so-called legal rules and principles" on which law professors focused.[340] In Frank's view, this excessive attention to rules and principles left students ill-prepared for practice.

> Now no sane person will deny that a knowledge of those rules and principles . . . is part of the indispensable equipment of the future lawyer. For such knowledge is of some limited aid in guessing what courts will do. . . . But the tasks of the lawyer do not pivot around those rules and principles. The work of the lawyer revolves about specific decisions in definite pieces of litigation. . . . What the courts will decide in specific cases involving the rights of specific clients under specific acts, documents, or transactions must, therefore, be the center of the lawyer's thinking.[341]

Frank, like Carter, considered conceptual formalism to be an impractical fantasy of detached academicians.

As Frank himself recognized, there is no inevitable correlation between litigation experience and a resistance to formal conceptualism.[342] But in examining the history of American legal thought, it is useful to consider the possibility that the jurisprudence of practicing lawyers (and of law professors with a practice background) has been shaped by that practical experience. Although practicing lawyers do not usually think of themselves as jurisprudential thinkers, they inevitably develop jurisprudential notions. They do not frequently articulate these broad legal theories, even to themselves. At times, however, a controversy arises in the world of legal practice that requires members of the bar systematically to analyze the overall nature of the system within which they work. The codification dispute of the late nineteenth century was such a moment.

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[337] *Id.* at 908.

[338] CARTER, ORIGIN, GROWTH & FUNCTION, *supra* note 40, at 339.

[339] *Id.* at 233.

[340] Frank, *supra* note 199, at 910.

[341] *Id.* at 910-11.

[342] *See* FRANK, *supra* note 291, at 60-61 ("[L]awyers are intensely practical men and their concern is with the lives and property of their clients. Why, then, . . . is *generality* so highly prized by lawyers at the expense of *particularity?*").