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“From Savigny through Sir Henry Maine”: Roscoe Pound’s Flawed Portrait of James Coolidge Carter’s Historical Jurisprudence

Lewis A. Grossman

I. Carter’s European Influences

In Roscoe Pound’s scathing 1909 review of *Law: Its Origin, Growth and Function*, American jurist James Coolidge Carter’s posthumously published magnum opus, Pound asserted that Carter’s conception of law “comes from Savigny through Sir Henry Maine.”¹ Frederick Karl von Savigny (1779-1861) and Sir Henry Maine (1822-1888) were the most prominent representatives of the German and English historical schools of jurisprudence, respectively. For his part, Carter (1827-1905) was the leading representative of historical jurisprudence in the United States. Indeed, when Pound himself discussed the historical school’s influence in the United States, Carter was usually the only scholar he referred to by name.

Other scholars, following Pound, have similarly linked Carter to Savigny and Maine, especially to the former. Moreover, various authors have noted the great effect these European jurists had on American legal thought in general in the late nineteenth century.² However, with the notable exception of an article by Matthias Reimann comparing Carter and Savigny,³ few if any studies have closely analyzed the impact Savigny and Maine had on Carter or other

¹Roscoe Pound, review of *Law: Its Origin, Growth, and Function*, by James C. Carter, *Political Science Quarterly* 24 (1909): 317.

²See, e.g., James E. Herget, *American Jurisprudence, 1870-1970* (Houston: Rice University Press, 1990), 22-30.

³Mathias Reimann, “Historical School Against Codification: Savigny, Carter and the Defeat of the New York Civil Code,” *American Journal of Comparative Law* 37 (1989): 95-119.

particular American legal thinkers.⁴ Because Carter's perceived debt to these giants of jurisprudence has significantly influenced how others have viewed him, and the American historical school generally, it is important to examine the precise extent and nature of this debt.

In 1889, Carter wrote a letter that reveals much about the state of his jurisprudential knowledge at the time. In this letter, to E. L. Godkin, he asked Godkin, the editor of *The Nation*, to circulate *The Provinces of the Written and the Unwritten Law* among an audience more learned than the practicing bar. Carter explained that he wanted to gauge the "truth" and "importance" of his jurisprudential theories. He continued, "You may think I ought to find this out very easily from my own professional friends. But very few of them are competent to form an opinion, and a still smaller number will take the necessary interest. I was just as ignorant and inattentive myself until circumstances [the battle against codification] compelled me to give close attention to the subject."⁵

Carter's handwritten note continued:

What I suppose to be new in the essay is its conception of the genesis of law. Upon this subject lawyers, especially the older ones are as ignorant as other people. It is not taught in Coke, or Blackstone, or Kent or Story. In more recent years a great crop of writers upon the subject of general jurisprudence has grown up, of which Austin is the recognized chief. I have not closely studied all of them, and there may possibly be some of whom I am wholly ignorant. I don't think very much of them. They have a way of pointing us to crude states of society, village communities etc. in order to show the origin and nature of law. To my mind the thing is going on right before our eyes every day and we have only to thoroughly scrutinize the process to learn just what it is. I think, as I

⁴David M. Rabban points to this dearth of studies in "The Historiography of Late Nineteenth-Century American Legal History," *Theoretical Inquiries in Law* 4 (2003): 556. Rabban's work-in-progress is helping to fill this gap.

⁵James Coolidge Carter to E. L. Godkin, November 15, 1889, Godkin Papers, Houghton Library, Harvard University.

have endeavored to show, that it consists simply in taking the social standard or ideal of practice, just as we find it in any political [society] and applying it to the transactions of man, and that this is done by simply observing the actual transactions and classifying them, in the same way as facts are observed in any inductive science.⁶

A number of interesting facts can be gleaned from this letter. First, it demonstrates that Carter himself was almost completely unversed in legal theory before he joined the codification battle in the early 1880s. By his own admission, he familiarized himself with the jurisprudential literature and developed his own ideas about the origin and nature of law for the specific purpose of resisting codification. Second, the letter's failure even to mention Savigny suggests that the German jurist was not a primary influence on Carter at this point. Third, the letter indicates that Carter had read at least some of the works of Maine, who (not John Austin) was the "recognized chief" of the English school of comparative historical jurists to which he refers. Carter's allusion to "village communities" is telling, for Maine had published a series of lectures titled *Village Communities in the East and West* and had also extensively discussed the subject in his more widely available *Early History of Institutions*.⁷ In the latter book, Maine explicitly and exhaustively challenged Austin's definition of law as a command proceeding from the state's sovereign power and enforced by a sanction.⁸ Carter's mistaken reference to Austin as the leader of the English historical school most likely resulted from a "slip of the pen." The alternative

⁶Ibid. (emphasis in original).

⁷Henry Maine, *Village Communities in the East and West* (New York: Holt, 1976); Henry Maine, *Lectures on the Early History of Institutions (A Sequel to 'Ancient Law')* (New York: Henry Holt, 1888). For references to village communities in the latter work, see, e.g., 381, 389. The English edition of *Early History of Institutions* was published in 1875.

⁸Maine, *Early History of Institutions*, lect. 12.

explanation is that Carter remained shockingly unfamiliar with the jurisprudential canon, even at this relatively late date.

In short, Carter's missive to Godkin suggests that rather than simply borrowing his jurisprudence from other thinkers, Carter conceived it largely on his own. Nonetheless, in light of Savigny's and Maine's enormous influence over western legal thought in the nineteenth century, it is worthwhile to compare Carter's work to theirs and to consider whether the New Yorker's historical jurisprudence had more of a German or English flavor.

Carter and Savigny

Pound claimed to have identified a specific path of influence from Savigny to Carter. He speculated that the first scholar to teach the doctrines of German historical jurisprudence in the United States was Luther S. Cushing, a lecturer on Roman Law at Harvard Law School from 1849 to 1851.⁹ Pound remarked, "It is interesting to note that the late James C. Carter was a student at Cambridge the last year that [Cushing's] course was given, for unless the effect of early training is borne in mind, it is hard to understand how a jurist of his caliber could dogmatically assert Savigny's views in 1905."¹⁰

But even if Carter studied Savigny and the German historicists in law school, he does not appear to have retained very much knowledge about them. After all, in his letter to Godkin, he acknowledged that he was "ignorant" about and "inattentive" to jurisprudential theory until he

⁹Roscoe Pound, "Political and Economic Interpretations of Jurisprudence," *Proceedings of the American Political Science Association* 9 (1912): 99. The years that Cushing delivered the lectures are mentioned in Michael H. Hoeflich, "Bibliographical Perspectives on Roman and Civil Law," *Law Library Journal* 89 (1997): 51.

¹⁰Pound, "Political and Economic Interpretations of Jurisprudence," 99-100.

entered the codification fight. Moreover, in this letter, Carter excluded Savigny from the list of jurists (Coke, Blackstone, Kent, and Story) with whom “older” lawyers like him were familiar. This omission suggests that Carter did not deem German historical jurisprudence to be a central aspect of his Harvard Law School education. If Carter was a Savigny disciple, he became one late in life.

When Carter turned his attention to Savigny decades after leaving Harvard, it is unclear how thoroughly he did so. There is no evidence that Carter was familiar with the intricacies of Savigny’s thought, or with any his works other than *Of the Vocation of Our Age for Legislation and Jurisprudence*.¹¹ He rarely cited Savigny, and he invoked the German jurist’s customary theory of law only once.¹² On the other hand, on one of the few occasions when Carter mentioned Savigny, he called him “the most accomplished philosophical jurist of his time, at once profound and practical.”¹³

As Carter constructed his jurisprudential argument against codification, Savigny likely had some influence on him, at least in a broad sense. The similarities between the two thinkers are obvious. Like Carter, Savigny is renowned largely for his opposition to codification. He led the battle against Anton Friedrich Justus Thibaut’s 1814 proposal to codify German law. As

¹¹Frederick Charles von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence*, Abraham Hayward trans. (London: Littlewood, [1831]). Carter, in his book, quotes from another work by Savigny, *System des heutigen römischen Rechtsbut*, but he acknowledges that he found the quotation in Holland’s *Elements of Jurisprudence*. Carter, *Law: Origin, Growth and Function* (New York: G. P. Putnam’s Sons, 1907), 4-6.

¹²The direct reference is at James Coolidge Carter, *The Proposed Codification of Our Common Law* (New York: Evening Post Job Printing Office, 1884), 41. See *infra* note 18. On two other occasions, Carter, in footnotes, quoted a Scottish journal article that itself referred to Savigny’s theory of the source of unwritten law. See James Coolidge Carter, *The Provinces of the Written and the Unwritten Law* (New York, Banks and Brothers, Law Publishers, 1889), 51. Carter, *Origin, Growth and Function*, 331 (quoting J. A. Dixon in *Journal of Jurisprudence*). Admittedly, none of Carter’s works used extensive citations, so the lack of citations to Savigny does not in and of itself demonstrate a lack of influence.

¹³Carter, *Law: Its Origin, Growth, and Function*, 5.

Matthias Reimann remarks, “[I]n several important regards, the Field-Carter dispute seems like a replay of the Thibaut-Savigny debate.”¹⁴ In Savigny’s *Of the Vocation of Our Age for Legislation and Jurisprudence*, his famous pamphlet responding to Thibaut, he asserted that law was developed “by internal silently-operating powers, not by the arbitrary will of a law-giver.”¹⁵ Savigny thus prefigured Carter’s own opposition to Austinian positivism. According to Savigny, there was

an organic connection of law with the being and character of the people. . . . For law, as for language, there is no moment of absolute cessation; it is subject to the same movement and development as every other popular tendency; and this very development remains under the same law of inward necessity, as in its earliest stages. Law grows with the growth, and strengthens with the strength of the people, and finally dies away as the nation loses its nationality.¹⁶

Savigny’s cyclical image of the rising and falling of nations and their legal systems contrasted with Carter’s Whiggish depiction of law ineluctably evolving toward a universal ideal. Nonetheless, Carter’s linkage of law to the “social standard of justice” shared much with Savigny’s assertion that “the common consciousness of the people is the peculiar seat of law.”¹⁷ Indeed, when Carter set forth his customary theory of law for the first time, in the following passage from *The Proposed Codification of Our Common Law*, he included a footnote citing

¹⁴Mathias Reimann, “Historical School Against Codification,” 102.

¹⁵Savigny, *Of the Vocation of Our Age*, 30.

¹⁶*Ibid.*, 27.

¹⁷*Ibid.*, 28.

Savigny's *Of the Vocation of Our Age*—although this was apparently the only instance in which he ever mentioned that work in print.

All well conceived efforts to make, or to declare, law, are, therefore, efforts to apply [the] public, or, as we have styled it, national standard of justice to human conduct. This national standard . . . is the final result of the moral and intellectual life and culture of a nation, the product of all the influences, public and private, which tend to cultivate and develop men's conceptions of what is just, expedient and useful, and which is unconsciously perceived and felt by every individual member of society by reason of the fact that he is such a member, and exposed to the like influences with his fellows.¹⁸

There are other similarities in Savigny's and Carter's jurisprudence. Although opposition to complete codification does not necessarily equal opposition to legislation generally, Savigny and Carter appear to have shared a deep-seated aversion to the latter, as well. Carter, despite an increasing ambivalence about legislation toward the end of his life, still instinctively resisted it. He told E. L. Godkin, "I can render no greater service in my day and generation than by defeating the various schemes of codification and other forms of over-legislation."¹⁹ Savigny seems to have thought similarly. As James Q. Whitman observes:

[T]he Savigny who mounted his influential defense of professorial lawmaking could be called . . . a kind of scholarly anti-statist. It was Savigny's hope that the charismatic Roman-law professors, sheltered within the free universities, could form the basis for a true spontaneous order . . . that . . . represented a kind of intellectual laissez-faire. Thus his *Vom Beruf unserer Zeit* attacked

¹⁸Carter, *Proposed Codification*, 41 (citing Savigny, *Of the Vocation of Our Age*). Interestingly, both Carter and Savigny are best known for terms they did not initially use. Just as Carter did not call his social standard of justice *custom* in his earliest work, Savigny did not label his "common consciousness of the people" as *Volksggeist* until later in his career, when he borrowed the term from Puchta. See Mathias Reimann, "Nineteenth-Century German Legal Science," *Boston College Law Review* 31 (1990): 853.

¹⁹James C. Carter to E. L. Godkin, 15 Nov. 1889, Godkin Papers, Houghton Library, Harvard University.

codificationism on liberal grounds: those who demanded a code, Savigny said, proceeded from the false belief that all law must grow out of ‘statutes—that is, express prescriptions of the highest state power.’²⁰

Another, related similarity between Savigny and Carter was the way in which both men assigned legal elites a prominent role in advancing the development of law, despite the source of law in the spirit of the people.²¹ Savigny, who was a professor of Roman law at the University of Berlin, contended that law had a “twofold life; first, as a part of the aggregate existence of the community, which it does not cease to be; and, secondly, as a distinct branch of knowledge in the hands of the jurists.”²² Savigny did not see any inconsistency in anchoring law in the culture of the people and then assigning exclusive stewardship over it to specialized experts. As Reimann explains, “‘Culture’ [to Savigny] was not the totality of habits of a people, but the characteristics of its intellectual life. When this life grew more sophisticated over time, the ideas of intellectual elites in their respective fields shaped it more and more. In respect to law, therefore, the jurists represented the nation as a culture.”²³ James Q. Whitman evocatively describes the role of law professors in Savigny’s legal order as “vicars of the Volk.”²⁴

Carter, like Savigny, spoke of private jurisprudence as a “science,” although he viewed judges and lawyers, not legal scholars, as “the masters of that science.”²⁵ There are undeniable

²⁰Whitman, *The Legacy of Roman Law* (Princeton: Princeton Univ. Press, 1990): 111.

²¹Reimann, “The Historical School,” 110-13.

²²Savigny, *Of the Vocation of Our Age*, 28.

²³Reimann, “The Historical School,” 854.

²⁴Whitman, *The Legacy of Roman Law*, 109.

²⁵Carter, *Proposed Codification*, 88.

parallels in the way Savigny and Carter sought to preserve the influence of their own professional communities. Carter told the Virginia State Bar Association:

With us public improvement can be brought about only by the voluntary efforts of the people themselves; and in the realm of law the people at large are wholly incompetent to the task. The members of the legal profession alone are able to contrive the methods by which the administration of justice can be best secured. Sciences can be advanced only by the labor of experts, and we are the experts in the science of the law.²⁶

Savigny would have wholly concurred with this statement, apart from its reference to practitioners rather than academic jurists.

Despite these similarities, however, there was a crucial difference between Savigny's and Carter's visions of "legal science." As Reimann has observed, they diverged on the role of conceptual order and logical reasoning in law.²⁷ Savigny combined the historical aspects of his jurisprudence with a commitment to building a coherent, logically-ordered system of law. In Reimann's words, "Once the leading principles had been found, the historical work had been done. . . . The legal scientists could then begin to build a truly scientific system with these principles."²⁸ In other words, Savigny believed that conceptual system-building was a critical aspect of legal science. Indeed, he thought it became the most important task of all once jurists obtained a certain level of historical knowledge. Savigny analogized law in its advanced stage to geometry.

²⁶Carter, *Provinces*, 60.

²⁷Reimann, "The Historical School," 108-110.

²⁸Reimann, "German Legal Science," 854.

In every triangle . . . there are certain data, from the relations of which all the rest are necessarily deducible: thus, given two sides and the included angle, the whole triangle is given. In like manner, every part of our law has points by which the rest may be given: these may be termed the leading axioms. To distinguish these, and deduce from them the internal connection, and precise degree of affinity which subsist between all juridical notions and rules, is amongst the most difficult of the problems of jurisprudence. Indeed, it is peculiarly this which gives our labours the scientific character.²⁹

It is unclear what role, if any, Savigny assigned to the study of contemporary societal developments in advanced legal science. On the one hand, he thought that historically-derived principles could logically generate the rules for modern cases. On the other hand, he was convinced that jurists, in some hard-to-define way, ensured that the law continued to reflect the organic evolution of these principles.³⁰ Consequently, even in highly-developed nations, where the law was solely in the hands of the jurists, the “general consciousness of the people” continued to “shew [sic] itself in particular applications.”³¹

In any event, conceptual order played a vital role in Savigny’s thought, and he saw logical reasoning as the primary vehicle for the growth of law in his own time. For many of Savigny’s followers in the German historical school, the systematic aspect of his jurisprudence was far more influential than the historical component. They almost entirely neglected the facet of Savigny’s project dedicated to identifying legal principles through historical work. Instead, scholars such as Puchta and Jhering (early in his career) concentrated on creating a conceptually-ordered legal system, with logically arranged principles capable of generating new law through

²⁹Savigny, *Of the Vocation of Our Age*, 39.

³⁰Reimann, “German Legal Science,” 854; Whitman, *The Legacy of Roman Law*, 109-10, 117-20.

³¹Savigny, *Of the Vocation of Our Age*, 29.

deductive processes.³² The German Pandectists represented the apotheosis of this approach; they artificially extrapolated one part of Justinian's Digest into a complete, timeless, logically coherent system, utterly disconnected from reality.³³

By contrast, the systematic component of Savigny's jurisprudence had little or no impact on Carter. As I have explored elsewhere,³⁴ he evinced minimal interest in the logical arrangement of law, and he objected to deciding cases by deduction from general rules, because he thought such an approach generated unjust results. Moreover, Carter's legal science was not nearly so autonomous as Savigny's, let alone Puchta's. With increasing frequency as the years passed, Carter maintained that judges should refer directly to societal customs as well as to judicial precedents.³⁵

Interestingly, Savigny's and Carter's contrasting views about the desirability of deductive legal reasoning led them to different conclusions regarding the ultimate possibility of satisfactory codification. Like Carter, Savigny understood that it was impossible to draft enough code provisions to address every situation directly. He explained, "[T]his undertaking must fail, because there are positively no limits to the varieties of actual combinations of circumstances."³⁶ Both men thus recognized that under a code system, judges must resolve particular cases by

³²Reimann, "German Legal Science," 859-71. Jhering later abandoned formalism and conceptualism almost entirely when he advanced a new, sociological type of jurisprudence that anticipated legal realism. *Ibid.*, 840, 861 n. 93.

³³*Ibid.*, 866-67; John P. Dawson, *Oracles of the Law* (Ann Arbor: Univ. of Michigan Law School, 1968), 450-58. Dawson observes that the Pandectist approach was an important and direct precursor to the German Civil Code, which the legislature approved in 1896 and which took effect in 1900. *Ibid.*, 459-61.

³⁴Grossman, "Langdell Upside-Down," *Yale Journal of Law and the Humanities* 19 (2007): 149-219.

³⁵*Ibid.*, 190-93.

³⁶Savigny, *Of the Vocation of Our Age*, 38.

deduction from general rules. However, whereas Carter concluded from these observations that codification was inevitably problematic, Savigny, who heartily embraced geometric order and logical decision making, did not reject codification out of hand. He doubted the feasibility of codification in his own age, because he did not think German legal scientists had yet acquired the requisite logical or linguistic skill to create a decent code.³⁷ Nonetheless, he did not oppose codification in principle.³⁸ As Reimann observes, “Savigny considered legal science mostly as a *logical system* and thus as an indispensable [sic] prerequisite for codification. For Carter legal science was a certain *empirical method* which made codification nonsensical.”³⁹

In sum, although there were striking similarities between Savigny and Carter, their jurisprudence diverged in important ways. As will be discussed later, Roscoe Pound’s failure to recognize these differences helps explain why his critical portrait of Carter was profoundly inaccurate.⁴⁰

Carter and Maine

When Pound, in his 1909 review of *Law: Its Origin, Growth, and Function*, identified Sir Henry Maine as the transmission belt for Savigny’s ideas, he granted the Englishman more influence over Carter than he usually did. Normally, he depicted Carter a direct imitator of Savigny. Pound could not, however, fail to discern echoes of Maine in Carter’s final work.

³⁷Ibid., 36-43.

³⁸Reimann, “The Historical School,” 105.

³⁹Ibid., 110-11.

⁴⁰See pp. [], below.

Carter's anticodification tracts may have borrowed more from Savigny, but his posthumously published magnum opus owed at least as much to Maine.

There are obvious parallels between Carter's book, on the one hand, and Maine's *Ancient Law* and its sequel, *Early History of Institutions*, on the other.⁴¹ In writing *Origin, Growth, and Function* (which cites these works by Maine repeatedly), Carter clearly emulated the Englishman's comparative approach, his attention to customary law in primitive societies, and his sensitivity to the social context of law. Carter's debt to Maine is most apparent in the hundred-page "survey of human life in all ages and in all stages of social progress" that makes up most of the first third of *Origin, Growth, and Function*.⁴²

Maine's jurisprudential conclusions also influenced Carter. Sir Henry contrasted primitive and non-western societies, in which "the great bulk of men derive their rules of life from the customs of their village or city," with modern society, in which "the Sovereign is ever more actively legislating on principles of his own, while local custom and idea are ever hastening to decay."⁴³ According to Maine, a careful examination of ancient law demonstrated the inadequacy John Austin's definition of law as a command emanating from a determinate sovereign and backed by coercive force.⁴⁴ Carter remarked that he and Maine fully agreed that Austin's doctrine was "erroneous in the past to the point of absurdity."⁴⁵

⁴¹Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society, and its Relation to Modern Ideas* (London: John Murray, 1861); Maine, *Early History of Institutions*.

⁴²Carter, *Origin, Growth and Function*, 118-19.

⁴³Maine, *Early History of Institutions*, 392.

⁴⁴See generally *ibid.*, lects. 12 and 13.

⁴⁵Carter, *Origin, Growth and Function*, 201.

Despite these similarities, however, Carter's book quarreled with Maine more than it agreed with him. Carter's ambivalence about Maine is not surprising in light of the fact that early in *Ancient Law*, Sir Henry seemed to speak sympathetically of codification and to criticize the manner in which "a rule of English law has first to be disentangled from the recorded facts of adjudged printed precedents, then thrown into a form of words varying with the taste, precision, and knowledge of the particular judge, and then applied to the circumstances of the case for adjudication."⁴⁶ As Cocks observes: "Maine was at least as insistent as Bentham in attacking what he saw as the absurd, almost mystical, claims of the judiciary to be the only group of British society which understood the law. He was always ready to attack the idea that there was something special about the common law because it was unwritten."⁴⁷

Although Maine's discussion of primitive law bolstered Carter's argument that custom was the root of all law, the Englishman's treatment of contemporary law did not. Maine wrote that Austin's command theory, though false with regard to homogenous ancient villages, was largely accurate with regard to modern nation states, with their expansive territory and subsumed subgroups. "When . . . the rules which have to be obeyed once emanate from an authority external to the small natural group and forming no part of it, they wear a character wholly unlike that of a customary rule. They lose the assistance of superstition, probably that of opinion,

⁴⁶Maine, *Ancient Law*, 14.

⁴⁷ R. C. J. Cocks, *Sir Henry Maine: A Study in Victorian Jurisprudence* (Cambridge: Cambridge University Press, 1988), 64-65.

certainly that of spontaneous impulse. The force at the back of law comes therefore to be purely coercive force to a degree quite unknown in societies of the more primitive type.”⁴⁸

In other words, Maine acknowledged that Austin’s definition of law had value—not as an insight into the essence of law, but as a description of its present condition. In Maine’s view, the primary feature of the modern state that tended to bolster Austin’s theory was the centrality of legislation. “The capital fact in the mechanism of modern States is the energy of legislatures.”⁴⁹ Maine observed that although “the Analytical Jurists failed to see a great deal which can only be explained by the help of history, they saw a great deal which even in our day is imperfectly seen by those who, so to speak, let themselves drift with history. Sovereignty and Law, regarded as facts, had only gradually assumed a shape in which they answered to the conception of them formed by Hobbes, Bentham, and Austin, but the correspondence really did exist by their time and was tending constantly to become more perfect.”⁵⁰

For many years, scholars focused on the gulf between Maine and Austin and ignored their commonalities. Recently, however, Maine scholars have also begun to emphasize the positions he shared with Austin.⁵¹ From this perspective, Carter was a scholar ahead of his time, for he perceived the similarities between the two English jurists almost a century ago. In *Law: Its Origin, Growth and Function*, he remarked, “The wonder is that Prof. Maine, after dealing as

⁴⁸Maine, *Early History of Institutions*, 392-93. Maine thought Austin’s theory of law was also quite accurate with regard to the Roman Empire. Ibid.

⁴⁹Ibid., at 398.

⁵⁰Ibid., 396-97.

⁵¹For Richard Cosgrove’s historiographic discussion of the reception of Maine’s work, see *Scholars of the Law* (New York: New York University Press, 1996), 119-47. Cosgrove acknowledges that some early commentators, for example James Fitzjames Stephen, emphasized the complementary nature of Maine’s and Austin’s ideas, rather than their conflict. Ibid., 145.

he does with Austin's theory, still continues to regard it as of such high value as a contribution to jurisprudence."⁵² Carter repeatedly lashed out at Maine for accepting Austin's definition of law with regard to modern society.

Prof. Maine draws a remarkable conclusion . . . as erroneous as it is remarkable. It is that in the passage of these local communities into an extended and centralised empire the laws distinctly altered their character; that while before the passage they rested upon custom, and were obeyed almost blindly and instinctively, seeming to be parts of mere order, after the passage they were broken up and replaced by rules directly emanating from the sovereign, and the power behind them assumed the attitude and character of purely coercive Force; that the theory of Bentham and Austin, while wholly inapplicable to Oriental conditions, and to the primitive social conditions of Europe, did represent those in Europe which came into existence after the change; that legislative activity has rapidly increased and is increasing, and that eventually Austin's formula that law is the command of the sovereign will be as true in fact as it is elegant in theory.⁵³

Because Carter embraced the customary theory with regard to modern as well as ancient law, he viewed his own jurisprudence as a rejection of Maine, particularly the Englishman's assertion that legislation superseded unwritten law in modern societies. Indeed, in *Origin, Growth, and Function*, Carter introduced and concluded his lecture on the futility of custom-abrogating legislation with critiques of Maine.⁵⁴ In light of the fact that Carter formulated his jurisprudence as part of the campaign against codification, it is not surprising that he vigorously rejected Maine's assertion that there existed an ineluctable trend toward legislative supremacy.

⁵²Carter, *Origin, Growth and Function*, 195.

⁵³Carter, *Origin, Growth and Function*, 199-200. For similar criticisms of Maine by Carter, see *ibid.*, 193-94, 218-19.

⁵⁴See Carter, *Origin, Growth and Function*, lect. VIII, 202-220.

Nevertheless, by focusing so intensively on the similarities between Maine and Austin, Carter arguably erred as much as those scholars who have stressed only the differences. Maine's articulation of his theory of law was quite ambiguous, and Carter could have found support in Sir Henry's work for his own anti-Austinian position that, even in modern times, the efficacy of legislation did not depend solely on enforcement by the sovereign. Maine argued:

The vast mass of influences, which we may call for shortness moral, perpetually shapes, limits or forbids the actual direction of the forces of society by its Sovereign. This is the point which . . . does most to show what the Austinian view of Sovereignty really is—that it is the result of Abstraction. It is arrived at by throwing aside all the characteristics and attributes of Government and Society except one, and by connecting all forms of political superiority together through their common possession of force. The elements neglected in the process are always important, sometimes of extreme importance, for they consist of all the influences controlling human action except force directly applied or directly apprehended.⁵⁵

In other words, although Maine argued, as an empirical matter, that Austin's command theory was increasingly valid in the modern age, he also maintained, in opposition to Austin's school, that legal scholars must take into account all aspects of social reality, including the customs and opinions of the people. "[I]t is its history, the entire mass of its historical antecedents, which in each community determines how the Sovereign shall exercise or forbear from exercising his irresistible coercive power. All that constitutes this—the whole enormous aggregate of opinions, sentiments, beliefs, superstitions, and prejudices, of ideas of all kinds, hereditary and acquired, some produced by institutions and some by the constitution of human

⁵⁵Maine, *Early History of Institutions*, 359.

nature—is rejected by the Analytical Jurists.”⁵⁶ Although Carter disagreed with Maine’s assessment of the relative importance of sovereign force and societal custom, his vision of modern law had more in common with Maine’s than he realized.

Finally, Carter’s work resembled Maine’s in its utter disregard for the formalistic and conceptual aspects of law. Maine condemned the “abstract” nature of Austin’s analytical jurisprudence.⁵⁷ He disapprovingly observed that the analytical school’s approach was “closely analogous to that followed in mathematics.”⁵⁸ Maine’s resistance to this aspect of Austin’s work was based on his belief that “the deductions from an abstract principle are never from the nature of the case completely exemplified in facts.”⁵⁹ He damned with faint praise the analytical jurists’ endeavor “to construct a system of jurisprudence [founded] . . . on the observation, comparison, and analysis of the various legal conceptions.” According to Maine, these efforts were “indispensable, if for no other object, for the purpose of clearing the head.”⁶⁰

When modern legal scholars highlight Maine’s “lack of concern with rigorous juristic argument,” his “lack of interest in method,” the absence of “coherence of approach” in his work, and his rejection of the pursuit of “mere logical symmetry,” they could just as well be describing

⁵⁶Ibid., 360.

⁵⁷Ibid., 359.

⁵⁸Ibid., 360-61.

⁵⁹Ibid., 362.

⁶⁰Ibid., 343.

Carter.⁶¹ It is these qualities, above all, that place Carter in the tradition of English historical jurisprudence.

In sum, however, there are too many significant differences between Carter's thought and that of Savigny and Maine for him to be considered a mere imitator, or even a close follower, of either. A careful comparison of Carter with these giants of European historical jurisprudence leads to the conclusion he was, at his core, an American original.

II. Through a (German) Glass Darkly: Roscoe Pound's Vision of Carter

Carter largely disappeared from American legal scholarship after about 1930. During the remainder of the century, his work was occasionally cited, but rarely closely analyzed. When scholars deigned to mention Carter, they often caricatured him as a rigidly logical jurist in the service of big business. Roscoe Pound (1870-1964) bears much of the responsibility for this neglect and misrepresentation.

Pound, who became Dean of the Harvard Law School in 1916, was probably the most influential American legal scholar of the first quarter of the twentieth century. Like John Chipman Gray, he acknowledged Carter's influential role in late nineteenth-century legal thought.⁶² But whereas Gray discussed Carter's theories critically but respectfully, Pound treated the lawyer with barely concealed contempt. As will be explained below, his disdain rested on a shallow understanding of Carter's jurisprudence and politics, and in particular on his unfounded assumption that Carter's jurisprudence was essentially equivalent to Savigny's.

⁶¹R. C. J. Cocks, *Sir Henry Maine: A Study in Victorian Jurisprudence* (Cambridge: Cambridge University Press, 1988), 200, 209; Cosgrove, *Scholars of the Law*, 121 (quoting Feaver).

⁶²John Chipman Gray, *The Nature and Sources of the Law* (1909).

Pound began referring to Carter regularly in 1908, the year after the posthumous publication of *Law: Its Origin, Growth and Function*. In 1909, Pound wrote his negative review of Carter's book in *Political Science Quarterly*.⁶³ He opened the review by stating: "This work, bearing the date of the twentieth century, is in reality to be placed a quarter of a century earlier. It cites the authorities, considers the problems and breathes the spirit of twenty-five years ago."⁶⁴ After several pages of critical analysis dismissing Carter's theories as misguided and amateurishly derivative, Pound concluded the review with a half-hearted tribute to the late author and a final, stinging dismissal:

One need not say that any book from Mr. Carter's pen deserves and repays careful and thoughtful reading. The case of the common-law lawyer against legislation is put clearly, forcibly and skilfully [sic] by a master of advocacy. As an argument of an advocate retained to make a case against the imperative theory and the activity of American legislatures, it is admirable. As a contribution to jurisprudence, it has appeared too late, and it is to be doubted if the author's memory is well served thereby.⁶⁵

Interestingly, despite the review's characterization of Carter as an irrelevant dinosaur, Pound continued to refer to him frequently in later pieces. (His deliciously ironic 1913 appointment as the Carter Professor of General Jurisprudence at Harvard may have contributed to his continuing interest.) Indeed, Pound published his most extensive consideration of Carter, an article in the *George Washington Law Review*, almost a quarter of a century after brushing

⁶³Roscoe Pound, review of *Law: Its Origin, Growth and Function* by James Coolidge Carter, *Political Science Quarterly* 24 (1909): 317-320.

⁶⁴*Ibid.*, 317.

⁶⁵*Ibid.*, 320.

him aside in the book review.⁶⁶ Throughout his career, Pound grudgingly acknowledged Carter's important role in the history of American legal thought, even as he attacked the lawyer's jurisprudence. He viewed Carter as the leading American representative of the historical school of jurisprudence, a school that, in Pound's eyes, dominated the end of the nineteenth century.

Carter's Place in Pound's Legal History

One of Pound's most significant contributions to legal scholarship was his insightful, if overly schematic, division of western jurists into three groups—the Analytical School, the Philosophical School, and the Historical School.⁶⁷ The Analytical School, which rose to importance in the nineteenth century, was typified in England by Austin and in Germany by Jhering. In Pound's words, the analytical jurists “regard the law as something made consciously by lawgivers, legislative or judicial. . . . They see chiefly the force and constraint behind legal rules. To them, the sanction of law is enforcement by the judicial organs of the state, and nothing that lacks an enforcing agency is law.”⁶⁸

The Philosophical School, as Pound defined it, had roots in ancient Roman law and was “the longest-continued method of legal science.” Dominant in the seventeenth and eighteenth centuries, but with ongoing influence afterward in both Europe and America, the school encompassed a variety of approaches, ranging from Rousseauist natural law theory to Neo-

⁶⁶Roscoe Pound, “The Ideal and the Actual in Law—Forty Years After,” *George Washington Law Review* 1 (1933): 431-447. This article is discussed below at pp. [].

⁶⁷Pound first set forth these schools in a systematic way in “The Scope and Purpose of Sociological Jurisprudence I,” *Harvard Law Review* 24 (1911): 591-611.

⁶⁸*Ibid.*, 595.

Hegelianism.⁶⁹ Philosophical jurists, in contrast to analytical jurists, believed that law is found, not made, and they tended to “look at the ethical and moral bases of rules rather than at their sanction.”⁷⁰

Historical jurisprudence, according to Pound, was the last of the three methods to develop. He characterized this school as follows:

1. They consider the past rather than the present of law.
2. They regard the law as something that is not and in the long run cannot be made consciously.
3. They see chiefly the social pressure behind legal rules. To them, sanction is to be found in the habits of obedience, displeasure of one’s fellowmen [sic], public sentiment and opinion, or the social standard of justice.
4. Their type of law is custom, or those customary modes of decision that make up a body of juristic tradition or case law.
5. As a rule, their philosophical views have been Hegelian. . . .⁷¹

Pound identified two subgroups of the Historical School: “the German Historical School, whose method is philosophical (indeed often metaphysical) and historical, and an English Historical School, whose method is comparative and historical.”⁷² Savigny was the intellectual father of the former group, and Sir Henry Maine was the most esteemed member of the latter.

Pound dated the genesis of historical jurisprudence in Europe to the work of Savigny in the early 1800s. As noted above, Pound conjectured that the historical approach made its first

⁶⁹Ibid., 591-92.

⁷⁰Ibid., 606.

⁷¹Ibid., 599-600.

⁷²Ibid., 592.

appearance in American legal academia in the Roman Law class that Luther Cushing taught at Harvard from 1849 to 1851.⁷³ Nevertheless, Pound thought the Historical School had limited influence in the United States until about 1870, when increasing numbers of American students starting reading Maine's work and studying in Germany.⁷⁴ By the end of the century, according to Pound, the Historical School dominated American legal thought. In 1911, he declared that historical jurisprudence "in recent times has been, perhaps is still, the method most in vogue." Later in the same article, he asserted, with more confidence, that the Historical School continued to have "almost uncontested supremacy . . . in our institutions of higher learning."⁷⁵

Pound dubbed Carter the "American apostle of the nineteenth-century historical jurisprudence."⁷⁶ Indeed, as noted above, when Pound discussed the Historical School's influence in the United States, Carter was usually the only scholar he referred to by name. By identifying Carter as the leader of this dominant school of thought, Pound assigned him a critical role in the nation's legal history. According to Pound, "Certainly no one could speak with more assurance [than Carter] for the best of American science of law as it stood . . . in 1890."⁷⁷

⁷³Roscoe Pound, "Political and Economic Interpretations of Jurisprudence," *Proceedings of the American Political Science Association* 9 (1912): 99.

⁷⁴Pound, "Political and Economic Interpretations of Jurisprudence," 100.

⁷⁵Pound, "Sociological Jurisprudence I," 598, 603. These assertions were in tension with Pound's 1909 declaration, in his review of *Law: Its Origin, Growth, and Function*, that Carter's book was a quarter of a century out of date. Pound, review of *Origin, Growth and Function*, 317.

⁷⁶Roscoe Pound, "David Dudley Field: An Appraisal," in *David Dudley Field: Centenary Essays*, ed. Alison Reppy, 3-16 (New York: New York University School of Law, 1949), 7.

⁷⁷Pound, "The Ideal and the Actual in Law—Forty Years After," 432. Nevertheless, Pound's ambivalence about Carter led him also to make the following inconsistent assertion: "At most, the historian of juristic thought in America would note [Carter] in passing as a belated exponent of a body of doctrine already moribund when the book, by which he is best known, was published." Pound, "David Dudley Field," 7.

Carter's Exclusion from Pound's Sociological Jurisprudence

Why, then, was Pound so dismissive of Carter's work? His dislike of the lawyer may have been, in part, personal. Although it is unclear whether the two men ever met, the Nebraska-born Pound seems to have been predisposed to resent eastern elite reformers of Carter's variety. This attitude was reflected in a letter Pound wrote to his parents from Harvard Law School in 1889, after hearing an address by Theodore Roosevelt, then the United States Civil Service Commissioner. "He talked very virtuously and gave us considerable rot. . . . Everything is to be 'reformed.' . . . Whatever mugwumpy ideas I may have had before I came have been thoroughly dispelled and I shall be content to be an offensive partisan the rest of my days."⁷⁸ Although Pound later embraced Roosevelt's progressive wing of the Republican party, he may never have overcome his instinctive bias against northeastern gentry reformers—a type epitomized by James Coolidge Carter.

Regardless of whether Pound bore such personal animus toward Carter, however, there were more substantive explanations for his critical reaction to the New Yorker. Pound was a scholar with a modernist agenda, even when he wrote legal history. He viewed Carter primarily as the representative a dangerously obsolete mode of thought that continued to vie for predominance with his own "sociological jurisprudence," which suited the conditions of twentieth-century America.

⁷⁸Letter quoted in N. E. H. Hull, *Roscoe Pound and Karl Llewellyn: Searching for an American Jurisprudence* (Chicago: University of Chicago Press, 1997), 61, and David Wigdor, *Roscoe Pound: Philosopher of Law* (Westport, Connecticut: Greenwood Press, 1974), 33. Interestingly, by this time, Roosevelt himself had broken from the Mugwumps by supporting James Blaine over Grover Cleveland in 1884. Pound was nonetheless disgusted by Roosevelt's moralistic patrician mien.

Pound's main scholarly project, early in his career, was to identify and advance a new school of law to replace the philosophical, historical, and analytical approaches. The primary goal of his sociological jurisprudence was "to enable and to compel law-making, and also interpretation and application of legal rules, to take more account, and more intelligent account, of the social facts upon which law must proceed and to which it is to be applied."⁷⁹ To advance this mission, Pound urged a social-scientific approach to law and a concomitant rejection of lawmaking based on deduction from abstract conceptions. He contended that the urban industrial conditions of the twentieth century demanded an attention to social facts and an abandonment of the radically individualistic jurisprudence of the nineteenth century. Moreover, according to Pound, these modern social and economic developments required that legislation replace the common law as the primary mode of lawmaking in the United States.⁸⁰

In Pound's view, all three of the major jurisprudential schools of the nineteenth-century violated important tenets of sociological jurisprudence and thus were unsuited to the modern age. The Philosophical School used pure conceptions to uphold individual rights and, through its influence on constitutional interpretation, to strike down needed legislation.⁸¹ The Analytical School, with its affection for formal perfection and logical deduction, neglected the practical ends of law.⁸² Finally, the Historical School, with its focus on customary standards, doubted the efficacy of legislation or any other kind of conscious lawmaking. Furthermore, although

⁷⁹Roscoe Pound, "The Scope and Purpose of Sociological Jurisprudence III," *Harvard Law Review* 25 (1912): 512-13.

⁸⁰See, e.g., Roscoe Pound, "Common Law and Legislation," *Harvard Law Review* 21 (1908): 403-07.

⁸¹Pound, "Sociological Jurisprudence I," 593, 604-11.

⁸²*Ibid.*, 594-98.

historical jurisprudence was not inevitably a jurisprudence of conceptions, it was, Pound thought, dominated by Savigny's metaphysical heirs. In Pound's eyes, Carter was one of these conceptualistic disciples of Savigny and thus was an impediment to the Sociological School's ascension in America.

Pound's criticisms of Carter clustered around several themes, reviewed below. In some instances, Pound's observations were cogent, but in others, his lack of attention to the details of Carter's writings led him astray. His rigid division of jurists into different schools allowed little nuance in treating individual scholars. Although Carter's jurisprudence undeniably mirrored Savigny's in certain respects, there were also important differences, discussed above, that Pound failed to discern. By pigeonholing Carter as a Savigny-inspired "metaphysical historical jurist," Pound blinded himself to various ways in which Carter's thought was actually compatible with his own "sociological" approach.

Pound's Criticism of Carter's Antilegislativ Stance

Some of the links that Pound drew between Carter and Savigny were valid. For example, as explained above, the two jurists shared a visceral resistance to lawmaking by legislation. Pound, by contrast, was the American legal academy's leading champion of legislation during the first two decades of the twentieth century.⁸³ In his view, legislation was the most important

⁸³Pound's views on codification in particular were less clear. He was no enthusiast for Field's New York Civil Code. He did not oppose codification in principle, but he observed that the "failure of the New York Draft Codes to meet the requirements of good code-making has set back codification so thoroughly, that none of us are likely to see a codified common law." Roscoe Pound, "Do We Need a Philosophy of Law," *Columbia Law Review* 5 (1905): 343.

mode of “conscious lawmaking.”⁸⁴ In his early writings, he frequently discussed the advantages of legislation and condemned judges’ and jurists’ efforts to restrict the scope and efficacy of statutes. He argued that courts, with their limited resources and expertise, could not be the primary vehicles for a modern law based on sociological principles. “Judicial law-making cannot serve us. . . . We must soon have a new-starting point that only legislation can afford. That we may put the sociological, the pragmatic theory behind legislation, is demonstrating [sic] every day.”⁸⁵

Pound must have viewed with ambivalence (or perhaps devilish delight) his occupation of a chair that Carter had endowed at Harvard Law School with instructions that the holder “expose the pernicious effects of legislation.”⁸⁶ In Pound’s eyes, Carter’s resistance to legislation was the most objectionable and outmoded facet of his thought. Pound condemned his benefactor for asserting with “all the fervor of a preacher, that legislation, except when declaratory, was a futile attempt to make what could not be made.”⁸⁷

In his review of *Law: Its Origin, Growth and Function*, Pound seemed most irked by the book’s treatment of legislation. He acidly observed, “Not only is Mr. Carter persuaded that the true field of legislation is a very narrow one, but he is clear that courts should be jealous of encroachment, and conceives that strict construction of statutes in derogation of the common law

⁸⁴The phrase “conscious lawmaking” is from Pound, “The Ideal and the Actual in Law—Forty Years After,” 432.

⁸⁵Roscoe Pound, “Mechanical Jurisprudence,” *Columbia Law Review* 8 (1908): 621. Pound similarly championed legislative lawmaking in “Common Law and Legislation,” 405-406, and “Popular Dissatisfaction,” 338.

⁸⁶Wigdor, *Roscoe Pound*, 207. The Carter Chair of General Jurisprudence is currently occupied by Duncan Kennedy.

⁸⁷Pound, “David Dudley Field,” 7.

and assumption that such legislation is declaratory only constitute a ‘wise doctrine’ to apply to modern legislation.” Pound hypothesized (correctly) that Carter’s hostility to legislative lawmaking was rooted in “the deep-seated aversion to legislation as a form of law which the hasty and ill-considered Draft Codes have brought about in the bar of New York.” Only this background could explain Carter’s “deliberate assertion in 1905 that statutes are of necessity crude, ill-adapted to the case to which they are to be applied, unenforced and incapable of enforcement.” Pound’s review condemned Carter’s failure to recognize that “[n]ot merely the growing point but also the center of gravity of our law is shifting to legislation.”⁸⁸

Pound seems not to have noticed the concessions Carter made in *Law: Its Origin, Growth, and Function* (particularly toward the end of the book) to the growing need for legislation in an urban industrial society. Moreover, Pound apparently was unaware that Carter had acknowledged the beneficence of many types of legislation in his other writings, in his speeches, and even his brief for the railroads in *Smyth v. Ames*, the Supreme Court case that imposed substantive due process limitations on legislative ratemaking.⁸⁹ As I will explain below, Carter’s thoroughgoing hostility toward codification did not extend automatically to other varieties of statutes. Nonetheless, Carter undeniably was predisposed to resist legislative solutions. In this respect, Pound did not misperceive Carter by comparing him to Savigny.

⁸⁸All quotations in this paragraph are from Pound, review of *Origin Growth and Function*, 319.

⁸⁹169 U.S. 466 (1898); Grossman Ph.D. dissertation, 264-66.

Pound's Criticism of Carter's Customary-Declaratory Theory of Law

Pound also accurately discerned a parallel between, on the one hand, Savigny's linkage of law to the "common consciousness of the people" or *Volkgeist*, and, on the other hand, Carter's equation of law with the "social standard of justice" or "custom." Pound correctly perceived that for both of these nineteenth-century jurists, the customary source of the law had normative as well as descriptive implications. Just as Savigny believed that the link between law and *Volkgeist* demanded that law's development be controlled by academic jurists rather than legislators, Carter maintained that the customary roots of the court-centered common law made it superior to codes and statutes. Therefore, when Pound challenged the truth and wisdom of Carter's customary-declaratory theory of law, the fact that he viewed Carter as a Savigny imitator did not lead him astray.

Pound contended that Carter's equation of law and social custom was simply inaccurate. He mocked "Mr. Carter's theory . . . that custom is not merely a source of law, but *is* law, and *vice versa* that law is custom."⁹⁰ According to Pound, simple observation disproved Carter's thesis that "the customs of popular action are law—*i.e.*, are administered in judicial proceedings as rules of decision."⁹¹ Pound argued that law represented *judicial* custom, or "juristic development of the analogy that chanced to be at hand when the institution or doctrine was

⁹⁰Pound, review of *Origin, Growth and Function*, 319.

⁹¹*Ibid.*, 320. Carter suggested that the world of sports illustrated "in miniature the whole scheme of human justice," because a baseball umpire or boxing referee found the rules he administered in "the habits and usages of the game." Carter, "Ideal and Actual in the Law," in *Report of the Thirteenth Annual Meeting of the American Bar Association*, (1890) 225. Pound scoffed at this argument. He correctly pointed out that modern sports actually supported Austin's conception, since "[n]ational commissions, rules, committees and congresses make the rules of games for us today." Pound, review of *Origin, Growth and Function*, 320.

formative,” at least as often as it represented *social* custom.⁹² Indeed, judges frequently clung to such lines of development “in the face of convenience and of the experience of the community.”⁹³

Pound did not deny that the social standard of justice affected the evolution of law. He explained, “The law seeks to . . . adjust the relations of every man with his fellow so as to accord with the moral sense of the community.”⁹⁴ Nevertheless, Pound rejected Carter’s view that custom’s role made judging nondiscretionary. He contended that Carter’s declaratory theory was particularly untenable in light of modern conditions.

Very likely in a relatively simple, homogeneous society there may be a substantial unity of individual social ideals, as there was largely in pioneer, rural, agricultural America. Probably in Mr. Carter’s formative youth in rural New England there was very largely a social standard of justice for that section. . . . But . . . there is no such settled and detailed social standard of justice in a heterogeneous, complex social order in the urban industrial society of today. As things are now, we find many divergent standards of justice in competition . . . If . . . we look at the course of decision as it takes place, we must see that it is not a discovery of a given social standard of justice but a valuing of claims and choice of starting points with reference to ideals traditionally received and held authoritative by bench and bar which is decisive.⁹⁵

In Pound’s words, one of the main features of sociological jurisprudence was that “we [have] come to think of the task of the legal order as one of reconciling or harmonizing

⁹²Pound, “Sociological Jurisprudence I,” 603.

⁹³Ibid., 603. See also Pound, review of *Origin, Growth and Function*, 320, where he observed that “that habits of judicial and professional thought and action are exceedingly stubborn and hard to change.”

⁹⁴Roscoe Pound, “The Causes of Popular Dissatisfaction with the Administration of Justice,” in *The Pound Conference: Perspectives on Justice in the Future*, eds. A. Leo Levin and Russell R. Wheeler, 337-353 (St. Paul, Minn.: West, 1906), 340.

⁹⁵Pound, “The Ideal and the Actual in Law—Forty Years After,” 441-42.

conflicting and overlapping interests.”⁹⁶ Carter, by contrast, acknowledged the growing diversity and complexity of American civilization only reluctantly, and late in his career. This complexity never worked its way to the core of Carter’s jurisprudence. Instead, it remained a problematic development that Carter strove to accommodate.

Pound was genuinely troubled by the normative and practical implications of Carter’s customary jurisprudence. Although Carter embraced various progressive efforts toward the end of his life, he stuck to his core belief that attempts to impose an ideal vision on a society not prepared to receive it were futile and often harmful.⁹⁷ Pound, by contrast, wanted law to transcend society and thus to improve it. He described this difference between Carter and himself in his 1933 analysis of “The Ideal and the Actual in the Law”:

The historical jurist of forty years ago agreed with the analytical jurist in excluding all ideal element from the law. When Mr. Carter speaks of the ideal in law he does not mean an ideal element as part of the authoritative materials of judicial and administrative action. . . . Today, on the other hand there is renewed recognition of an ideal element as part of the law in the sense that it is part, and for many purposes a controlling part, of the

⁹⁶Ibid., 437. Nonetheless, it is possible to overdraw the disorder and indeterminacy of Pound’s vision Wigdor writes:

Pound acknowledged the contradictory impulses of social forces, but his theory of social development emphasized accommodation and consensus. His competing social interests represented a different orientation from earlier organic theories, whose laws of society made no provision for conflict, but Pound’s conflicts were neither enduring nor irreconcilable. His social interests challenged each other as parts of a larger whole rather than as self-contained entities struggling within a vacuum, and their interaction, although occasionally violent, was fundamentally meliorative. There was conflict between interests, but the results were balanced ones rather than victories and defeats.

Wigdor, *Roscoe Pound*, 214.

⁹⁷Lewis A. Grossman, “James Coolidge Carter and Mugwump Jurisprudence,” *Law and History Review* 20: 577-629 (2002).

authoritative materials in which courts are bound to find the grounds of decision and by which they are bound to be guided in their determinations.⁹⁸

Pound abhorred the passivity that Carter's customary-declaratory theory of law instilled in judges and legislators. The sociological jurisprudence Pound favored "regard[ed] law as a social institution which may be improved by intelligent human effort, and h[e]ld it their duty to discover the best means of furthering and directing such effort."⁹⁹ He rejected the Historical School's assumption that "the human experience by which legal principles were discovered was determined in some inevitable way[,] . . . not a matter of conscious human endeavor."¹⁰⁰ Pound did not want lawmakers to view their role as one of passively reflecting ineluctable social developments; he wanted them to strive to solve problems and shape a good society.

Pound's (Exaggerated) Criticism of Carter's Neglect of Social Science

Despite the undeniable parallels between Savigny's and Carter's jurisprudence, there were also some important differences that might have made Pound more sympathetic to Carter, if he had recognized them. For example, in Pound's eyes, another deficient aspect of Carter's jurisprudence was his neglect of social science.

Forty years ago law was thought of a self-sufficient and the science of law as quite independent of any other of what we now call the social sciences. . . . Now, on the other hand, we seek a certain unification of the social sciences. Jurisprudence is no longer held

⁹⁸Pound, "The Ideal and the Actual in Law—Forty Years After," 437-38.

⁹⁹Pound, "Scope and Purpose of Sociological Jurisprudence III," 516.

¹⁰⁰Roscoe Pound, *An Introduction to the Philosophy of Law* (New Haven: Yale University Press, 1922), 51.

self-sufficient. Economics, sociology, ethics, psychology, as well as politics and philosophy, are to be drawn upon; law is to be studied as part of the whole process of social control.¹⁰¹

Here, Pound veered off course by linking Carter with the German Historical School. Savigny's thought truly bore no connection to modern social science. He viewed law as rooted in his nation's culture, but, as Matthias Reimann explains: "Savigny's concept of 'culture' was not anthropological but intellectual. 'Culture' was not the totality of the habits of a people, but the characteristics of its intellectual life. . . . In respect to law, therefore, the jurists represented the nation as a culture."¹⁰²

Carter's jurisprudence, by contrast, represented a fledgling merger of law and social science. He cannot be considered a true sociological jurist in this respect; his social science was so rudimentary as to hardly deserve the name. Nonetheless, Carter shared Pound's commitment to the "study of the actual social effects of legal institutions and legal doctrines."¹⁰³ He anticipated Pound's famous interest in "law in action" in addition to "law in books."¹⁰⁴ For Carter, case reports were "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."¹⁰⁵

¹⁰¹Pound, "The Ideal and the Actual in the Law—Forty Years After," 436.

¹⁰²Mathias Reimann, "Nineteenth-Century German Legal Science," *Boston College Law Review* 31 (1990): 854-55.

¹⁰³Pound, "Sociological Jurisprudence III," 513.

¹⁰⁴Roscoe Pound, "Law in Books and Law in Action," *American Law Review* 44 (1910): 12-36.

¹⁰⁵Carter, *Origin, Growth and Function*, 339.

Although Pound himself completely overlooked this facet of Carter's thought, others were more insightful. For example, in 1910, a professor of sociology wrote:

It is certainly an encouraging sign that the late Hon. James C. Carter, in his valuable lectures on 'Law: Its Origin, Growth and Function,' recognized at the outset that the subject he was dealing with was a part of the field of sociology. When an eminent lawyer and legal thinker takes such a position, it is perhaps time to emphasize that the foundations of the science of law, or jurisprudence, must be laid in a general knowledge of human society, and especially in a knowledge of the principles of its organization, development, and functioning. Of course, those who are content with the mere knowledge of the law . . . as a system of rules, will have little interest in any inquiry into its foundations in other sciences. But . . . a proper understanding of law and legal theory can only be obtained through the study of the social sciences, especially sociology.¹⁰⁶

Pound had greater faith than Carter in the efficacy of legislation and hence a greater devotion to "[s]erious scientific study of how to make our huge annual output of legislation and judicial interpretation effective."¹⁰⁷ Nevertheless, Carter anticipated sociological jurisprudence in his 1895 American Bar Association presidential address, when he called for "an increased study by our profession of the science of legislation . . . in its broadest extent." In that speech, he declared that legislation's appropriate role could be determined only with a grasp of "the fundamental elements of economic science, and the principles upon which sociological inquirers are generally agreed."¹⁰⁸

Pound and Carter shared a particular interest in the question of enforcement, and they similarly argued that law often was not enforceable in the face of popular disrespect for it.

¹⁰⁶Charles A. Ellwood, "Sociological Foundations of the Law," *The Green Bag* 22 (1910): 576.

¹⁰⁷Pound, "Sociological Jurisprudence III," 514.

¹⁰⁸James Coolidge Carter, "Address of the President," in *Reports of the American Bar Association*, vol. 28 (Philadelphia: Dando Printing and Publishing Co, 1895), 233-34.

Indeed, Pound's explanation for this phenomenon closely echoed Carter's customary theory.¹⁰⁹ He observed, in Carter-like language, that much legislation and judicial law "has been nugatory in practice" because it "has not expressed social standards accurately."¹¹⁰ Unlike Carter, Pound was confident that with "preliminary study of the conditions to which it [is] to apply," legislation could be made to conform with the social standard of justice and thus be enforceable.¹¹¹ Nonetheless, the two jurists shared a similar awareness of the limited effectiveness of law that conflicted with societal norms.

Pound might have recognized Carter's budding social-scientific ethos if, instead of dwelling on the lawyer's links with the Germans historicists, he had paid more attention to Carter's commonalities with Maine. Pound acknowledged that the historical school's second, non-metaphysical phase, of which Maine was the leading representative, was in some ways a precursor to sociological jurisprudence. He observed:

It laid the foundations of a sound comparative legal history in place of the brilliant superficiality of the eighteenth-century universal legal history in terms of rational conjecture. . . . In its unification of jurisprudence and politics, if it was not the actual forerunner of the unification of the social sciences which is going on today, at least it kept alive one connection of jurisprudence when nearly all had been dissolved. Finally through its attempt to generalize the phenomena of primitive law and of developed systems by a theory of custom it led to the idea of the legal order as part of a wider social control from which it cannot be dissociated. . . . This way of thinking did much to help break down the conception of law as something existing of itself and for itself and to be measured by itself; it prepared the way for the functional attitude of the legal science of today.¹¹²

¹⁰⁹Pound, "Enforcement of Law," 401-410.

¹¹⁰Pound, "Mechanical Jurisprudence," 613-14.

¹¹¹*Ibid.*, 613.

¹¹²Pound, *Interpretations of Legal History*, 68.

Pound could have applied every one of these observations to Carter, as well as Maine. But he did not do so.¹¹³ The Savigny parallel better served his effort to caricature Carter as a detached formalist.

Pound's Criticism of Carter's (Imagined) Deductive Formalism

Pound also falsely posited that Carter and Savigny shared a commitment to formalistic legal reasoning. Famously, he was a critic of such “mechanical jurisprudence.” He used this term to describe the rigid application of rules in a way that neglected equity and policy. In his famous article titled “Mechanical Jurisprudence,” the future Harvard dean argued:

Law is not scientific for the sake of science. Being scientific as a means toward an end, it must be judged by the results it achieves, not by the niceties of its internal structure; it must be valued by the extent to which it meets its end, not by the beauty of its logical processes or the strictness with which its rules proceed from the dogmas it takes for its foundation.¹¹⁴

Pound identified the quest for “reasonable and just solutions of individual causes” as one of the core characteristics of sociological jurisprudence.¹¹⁵

[T]he very fact that laws are general rules, based on abstraction and the disregard of the variable and less material elements in affairs, makes them mechanical in their operation.

¹¹³One time only, in a footnote in *Interpretations of Legal History* (1923), Pound suggested that Carter’s jurisprudential career had two phases; an earlier metaphysical one influenced by Savigny (exemplified by “The Ideal and the Actual in the Law”) and a later positivist one influenced by the second generation of historical jurists (exemplified by *Law: Its Origin, Growth and Function*). Pound, *Interpretations of Legal History*, 34 n. 1.

¹¹⁴Pound, “Mechanical Jurisprudence,” 605.

¹¹⁵Pound, “Sociological Jurisprudence III,” 515.

A mechanism is bound in nature to act mechanically, and not according to the requirements of a particular case. Common experience teaches us that, while laws tend to preserve and produce what is just and right in common estimation, “cases occur in which, owing to its necessary mechanical operation, the moral law is violated and broken by the positive law.”¹¹⁶

Pound thus resisted “any confining of the judicial function by too many hard and fast rules. . . .

Justice demands that instead of fitting the cause to the rule, we fit the rule to the cause.”¹¹⁷

As I have explained elsewhere, Carter rejected overly formalistic legal decision in a strikingly similar way. He routinely condemned the inequities that resulted when judges applied general rules mechanically to particular situations.¹¹⁸ Carter would have wholly agreed with the following criticism, by Pound, of jurists who advocated the adoption of a complete code: “[T]he application of law is not and ought not to be a purely mechanical process. Laws are not ends in themselves; they are a means toward the administration of justice. Hence within somewhat wide limits courts must be free to deal with the individual case so as to meet the demands of justice between the parties.”¹¹⁹

Nonetheless, despite their shared commitment to case-specific fairness, Pound falsely depicted Carter as an exponent and practitioner of mechanical jurisprudence. In his 1933 consideration of “The Ideal and the Actual,” Pound drew the following contrast between Carter’s metaphysical Historical School and his own Sociological School:

¹¹⁶Roscoe Pound, “Decadence of Equity,” *Columbia Law Review* 5 (1905): 20-21, quoting Friedrich Paulsen, *A System of Ethics*, trans. and ed. Frank Thilly (New York: C. Scribner’s Sons, 1899), 629.

¹¹⁷Roscoe Pound, “Courts and Legislation,” *American Political Science Review* 7 (1913): 366.

¹¹⁸Lewis A. Grossman, “Langdell Upside-Down: James Coolidge Carter and the Anticlassical Jurisprudence of Anticodification,” *Yale Journal of Law & the Humanities* 19: 149-219 (2007).

¹¹⁹Pound, “Courts and Legislation,” 365-66.

The metaphysical historical jurists took legal rights to be declaratory of natural rights which were deduced from and necessary implications of the idea of freedom. . . . In 1930, by contrast, we had come to think of the task of the legal order as one of reconciling or harmonizing conflicting and overlapping interests which were to be discovered, not by deduction from some fundamental ideas, but by an actual inventory of the claims actually asserted by concrete human beings and so pressing upon the law for recognition.¹²⁰

Pound thus condemned not only Carter's jurisprudential views, but also his legal methodology.

To fully understand Pound's formalistic portrait of Carter, it is necessary to revisit his understanding of Carter's place in legal history. As discussed above, Pound viewed the jurisprudence of the pre-sociological age as divisible into three schools: the analytical, the philosophical, and the historical. Pound did not see these schools as entirely autonomous; he observed "a marked tendency to abandon the exclusive use of any one method, and to bring these formerly divergent schools into something like accord."¹²¹ The most important commonality among the three schools was "a jurisprudence of conceptions, in which new situations are to be met always by deduction from old principles, and criticism of premises with reference to the ends to be subserved is neglected."¹²² In other words, Pound thought all three schools tended to be too mechanical.

The conceptualistic and formalistic qualities of philosophical jurisprudence were obvious, for jurists from this tradition were "attempting to construct abstract systems by

¹²⁰Pound, "The Ideal and the Actual in the Law – Forty Years After," 437.

¹²¹Pound, "Sociological Jurisprudence I," 592.

¹²²*Ibid.*, 596.

reasoning from first principles.”¹²³ Although the analytical jurists viewed law as the conscious product of lawmakers rather than as a system derived from preexisting natural or divine principles, theirs was no less a jurisprudence of conceptions, in Pound’s view. He explained, “The desire for formal perfection seizes upon [analytical] jurists. Justice in concrete cases ceases to be their aim. Instead, they aim at thorough development of the logical content of established principles through rigid deduction, seeking thereby a certainty which shall permit judicial decision to be predicted in detail with absolute assurance.”¹²⁴

At first glance, historical jurisprudence, based as it was on evolving societal customs, would not seem to share the other schools’ conceptualistic and logical character. Pound, however, saw the historical method, too, as one of “deduction from predetermined conceptions.”¹²⁵ Although historical jurists found their legal principles in a different place—namely, in the history and social life of a people—the process they used to apply these principles was “a purely logical one.”¹²⁶ Pound explained:

From the sociological point of view, the chief objection to confining juristic study to the historical method is similar to that first urged above against the analytical method. For the Historical School also works *a priori*. It has deduced from and tested existing doctrines by a fixed, arbitrary, external standard. Having no true philosophical method of their own . . . when the German historical jurists overthrew the premises of the Eighteenth-Century Law-of-Nature School, they preserved the method of their predecessors, merely substituting new premises. . . . They sought the nature of right and

¹²³Ibid., 606. Pound stated that the metaphysical method in its pure form fell into disrepute in the nineteenth century, but he asserted that the philosophical approach had returned at the end of the century as an important supplement to the analytical and historical methods. Ibid., 605-08.

¹²⁴Ibid., at 596.

¹²⁵Pound, “Mechanical Jurisprudence,” 610.

¹²⁶Pound, *An Introduction to the Philosophy of Law*, 113.

of law in historical deduction from the Roman sources, from Germanic legal institutions, and from the juristic development based thereon.¹²⁷

Pound summed up the approach of the “metaphysical” historical jurists as follows: “An idea was realizing in legal history. It could be discovered by historical research and when discovered its implications could be developed logically.”¹²⁸

Importantly, most (though not all) of Pound’s observations about the mechanical character of historical jurisprudence referred to Savigny and the Germans, not to their less metaphysical English counterparts, led by Maine. Pound was correct to see conceptualistic and logical tendencies in the work of Savigny and his followers. As explained previously, the systematic element of the German historical jurists’ intellectual project was at least as important as the historical element, and at times the former completely overwhelmed the latter.

Against this background, it becomes clearer why Pound concluded that Carter was a conceptualist. His mistaken assumption resulted from the fact that he associated Carter with the German Historical School. Pound remarked that it was “curious to see something of the same sort [of deductive methodology] in Mr. Carter” as in the Germans.¹²⁹ Pound offered only one excerpt from Carter’s work to illustrate the lawyer’s supposed embrace of Savigny’s dedication to formal order. It was the following passage from “The Ideal and the Actual in the Law”:

¹²⁷Pound, “Sociological Jurisprudence I,” 600.

¹²⁸Pound, *Interpretations of Legal History*, 18.

¹²⁹Pound, review of *Origin, Growth and Function*, 318.

It is agreed that the true rule must somehow be *found*. Judge 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 customs 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.¹³⁰

In fact, Carter diverged significantly from Savigny in this passage by declaring that judges and lawyers should turn not only to formal legal sources, but also directly to the customs and habits of the people. Nevertheless, Carter's words do seem to demonstrate some commitment to formal legal reasoning, if not to systematic order. In Carter's total corpus of writings, however, such statements are far outnumbered and ultimately overwhelmed by statements reflecting the author's antiformalistic resolve to deliver justice in particular cases by a direct appeal to the social standard of justice. Indeed, the utter absence of formal methodology or system in *Law: Its Origin, Growth and Function* led even Pound himself, on one occasion, to question the extent of Savigny's influence over the book.¹³¹

If Pound had carefully read Carter's entire body of work, including *The Proposed Codification of the Common Law*, he might, instead of concluding that Carter was too mechanical, have deemed him to be not mechanical *enough*.¹³² Pound always emphasized the need to reach a "proper balance between certainty and flexibility of application to particular

¹³⁰Carter, "The Ideal and the Actual in the Law," 224, cited in Pound, *Interpretations of Legal History*, 34 n. 1.

¹³¹Pound, *Interpretations of Legal History*, 34 n. 1. Pound hypothesized that Carter had an earlier phase influenced by Savigny and a later phase influenced by the second generation of the historical school, including scholars such as Maine.

¹³²There is no evidence Pound ever read *The Proposed Codification of Our Common Law*, Carter's most antiformalistic work.

cases.”¹³³ He never viewed the “mechanical” aspect of law in a purely negative light; rather, he thought that “mechanical action belongs to law; it is a proper quality of law.”¹³⁴ Indeed, as early as 1908, he concluded that “a proper proportion between the technical and the discretionary elements in the administration of justice will give chief weight to the former.”¹³⁵

Whereas Carter argued that a common law based on customary morality offered both fairness and certainty, Pound thought these two goals were inevitably in tension with each other.¹³⁶ The diverse and complex modern civilization in which Pound lived offered a less stable and less determinate foundation for law than did Carter’s quaint vision of an agrarian society with homogenous customs. Pound explained: “[T]he jurisprudence of forty years ago assumed that there was an absolute answer to every juristic question . . . Today, by contrast, jurisprudence has become relativist. . . . Different conflicts or competings of interests must be treated in different ways.”¹³⁷ Consequently, he concluded, “no human being can tell how the

¹³³Roscoe Pound, “Enforcement of Law,” *Green Bag* 20 (1908): 408.

¹³⁴*Ibid.*, 409. See also Pound, “The Causes of Popular Dissatisfaction” 339, in which Pound, in 1906, discussed the “necessarily mechanical operation of legal rules” and the inevitable oscillation in legal history between the priority of rule and the priority of discretion.

¹³⁵Pound, “Enforcement of Law,” 408. It is often falsely assumed that Pound embraced elements of formalism only at a later stage of his career, when he was crankily resisting the Realists’ more daring modernism. As Pound’s statements quoted here demonstrate, however, he started emphasizing the need for rule and form in his earliest writings. The common assumption that there was a fairly abrupt shift in Pound’s thought in the early 1930s derives from the fact that a public schism developed between him and his Realist proteges at this time, based in part on Pound’s contention that the Realists paid insufficient attention to rule and form. In “The Call for a Realist Jurisprudence,” his famous 1931 response to Karl Llewellyn’s “A Realistic Jurisprudence—The Next Step,” Pound chided the Realists for ignoring “the logical and rational element [of law] and the traditional technique of application.” Roscoe Pound, “The Call for a Realist Jurisprudence,” *Harvard Law Review* 44 (1931): 706 (responding to Karl Llewellyn, “A Realistic Jurisprudence—The Next Step,” *Columbia Law Review* 30 (1930): 431-65).

¹³⁶Pound, “Enforcement of Law,” 407.

¹³⁷Pound, “The Ideal and the Actual in the Law – Forty Years After,” 438.

social standard of justice will work on the judge's mind before the judgment is rendered.”¹³⁸

Unlike Carter, Pound viewed judges' equitable resolution of cases as “discretionary.”¹³⁹ And he was more than a little ambivalent about such discretion. Too much judicial discretion undermined “certainty and uniformity . . . the essential attributes of law.”¹⁴⁰ Pound remarked: “The commercial world demands rules. No man makes large investments trusting to uniform exercise of discretion.”¹⁴¹

In light of Pound's concern for legal certainty, he might well have excoriated Carter for neglecting the importance of coherent legal rules. Pound completely overlooked the antiformalistic aspects of Carter's thought, however, and instead caricatured him as a deductive logician. It is perhaps due to Pound's flawed portrait of Carter that at least one prominent scholar continues today to describe Carter as a “classical jurist” similar to Langdell.¹⁴²

Pound's Criticism of Carter's (Exaggerated) Laissez-Faire Individualism

Pound also criticized Carter for anachronistically advancing a purely individualistic vision of law—for maintaining that law's purpose was (in Pound's words) “to bring about and maintain a regime of the maximum of abstract free individual self-assertion.”¹⁴³ He disapprovingly observed, “While [Carter] claims to be an historical jurist, his philosophical

¹³⁸Pound, “Decadence of Equity,” 24-25.

¹³⁹On discretion, see Pound, “Courts and Legislation”; Pound, “Decadence of Equity.”

¹⁴⁰Pound, “Enforcement of Law,” 408.

¹⁴¹Pound, “Decadence of Equity,” 24.

¹⁴²William M. Wiecek, *The Lost World of Classical Legal Thought* (New York: Oxford University Press, 1998), 99. Wiecek implicitly equates Carter with Langdell at *ibid.*, 91-93.

¹⁴³Pound, “The Ideal and the Actual in Law—Forty Years After,” 439.

position is that of natural law, with individualism and the principles of Anglo-American common law standing for nature.”¹⁴⁴ Pound contended that Carter’s promotion of abstract individual freedom took too little account of complex modern social conditions.¹⁴⁵

Pound thought that the “conflict between the individualistic spirit of the common law and the collectivist spirit of the present age” was one of the primary causes of popular dissatisfaction with law in the early twentieth century.¹⁴⁶ He observed: “Men have changed their views as to the relative importance of the individual and of society; but the common law has not.”¹⁴⁷ Pound was particularly incensed by the way Gilded Age courts had injected an individualistic ethos into the United States Constitution to strike down social welfare legislation.¹⁴⁸

Although Carter’s scholarship had little to say about constitutional law, Pound linked him directly to the distressing developments in this area, and not just because of his participation as a lawyer in cases like *Smyth v. Ames*. Pound noted that Carter’s jurisprudential theories “were no small factor in fashioning American judicial decisions of the last quarter of the nineteenth century.”¹⁴⁹ To Pound, Carter’s discussions of the limits of legislation had “the ring of the decisions upon ‘right to pursue a lawful calling’ and ‘liberty of contract.’”¹⁵⁰ With regard to Carter’s statement (in *Law: Its Origin, Growth, and Function*) that the “sole function both of law

¹⁴⁴Pound, review of *Origin Growth and Function*, 318.

¹⁴⁵See, e.g., Pound, “The Ideal and the Actual in Law—Forty Years After,” 437.

¹⁴⁶Pound, “Popular Dissatisfaction,” 343.

¹⁴⁷Pound, “Do We Need a Philosophy of Law,” 346.

¹⁴⁸See, e.g., Roscoe Pound, “Liberty of Contract,” *Yale Law Journal* 18 (1909): 454-487.

¹⁴⁹Roscoe Pound, *Interpretations of Legal History* (New York: Macmillan, 1923), 34. Pound here appears to be referring to Carter’s scholarly arguments, not his arguments in court.

¹⁵⁰Pound, review of *Origin, Growth and Function*, 318.

and legislation . . . [is] to secure to each individual the utmost liberty which he can enjoy consistently with the preservation of the like liberty of others,”¹⁵¹ Pound remarked, “It is this kind of doctrine which makes constitutional provisions as to life, liberty and property barriers in the way of social progress.”¹⁵²

Like other aspects of Pound’s portrait of Carter, his depiction of the New Yorker as an extreme proponent of laissez-faire derived in part from the fact that he equated Carter with Savigny and the German historical jurists. According to Pound, continental historical jurisprudence was “from the beginning a negative conception of the function of jurist and legislator; it demanded a holding down of the legal order to the necessary minimum—to the least which was required to realize freedom in men’s relations with each other.”¹⁵³ In this connection, he repeatedly cited Savigny’s definition of law: “The rules whereby the invisible boundaries are determined within which the existence and activity of each individual gains secure and free opportunity.”¹⁵⁴ Pound also routinely emphasized the “Hegelian” character of German historical jurisprudence, in particular its embrace of Hegel’s idea that “law realizes the idea of freedom” and “[i]deal perfection in human relations is liberty.”¹⁵⁵

¹⁵¹Carter, *Origin, Growth and Function*, 337.

¹⁵²Pound, review of *Origin, Growth and Function*, 318.

¹⁵³Pound, *Interpretations of Legal History*, 48.

¹⁵⁴Pound, *Interpretations of Legal History*, 28-29; Pound, “The Scope and Purpose of Sociological Jurisprudence,” 143 (citing Savigny, *System des heutigen romishcen Rechts*, I, § 52).

¹⁵⁵Pound, *Interpretations of Legal History*, 46. In this context, he quoted Puchta’s statement that “[f]reedom is the foundation of right, which is the essential principle of all law.” Pound, *Interpretations of Legal History*, 47 n. 1 (quoting Puchta, *Cursus der Institutionen*, § 2 (1841)). Pound also quoted Puchta’s definition of law in *Cursus der Institutionen*: “The recognition of the just freedom which manifests itself in persons, in their exertions of will and in their influence upon objects.” Pound, “Sociological Jurisprudence,” 143 (quoting Puchta, *Cursus der Institutionen*, I, § 6).

When discussing Carter’s laissez-faire ideology, Pound also linked him to Sir Henry Maine. Like many scholars before and since, Pound simplistically reduced the essence of Maine’s jurisprudence to the Englishman’s famous description of the course of legal evolution “from status to contract.”¹⁵⁶ Pound declared, “At bottom Maine’s theory is Hegelian. The idea which is realizing is liberty—free individual self-assertion. The way in which it is realizing is a progress from status to contract.”¹⁵⁷ Pound asserted that Maine, along with the Germans, helped cause the rise of laissez-faire constitutionalism in the United States. “Much in American judicial decision with respect to master and servant, liberty of contract, and right to pursue a lawful calling . . . is in reality merely the logical development of traditional principles of the common law by men who . . . read every day in their scientific books of the progress from status to contract”¹⁵⁸

Pound may well have been correct that the libertarian aspects of German historical jurisprudence influenced Carter; after all, Carter favorably quoted Savigny’s definition of law—twice—in his book.¹⁵⁹ There is no evidence, however, that Maine had a similar impact on Carter. He never quoted Maine’s “status to contract” formulation in his published writings, and,

¹⁵⁶Richard A. Cosgrove points out that this phrase did not appear in the first 160 pages of *Ancient Law*, that the concept did not represent the heart of the book, and that Maine never sought to elaborate on it in his later works. Richard A. Cosgrove, *Scholars of the Law* (New York University Press (New York, 1996), 124-26.

¹⁵⁷Pound *Interpretations of Legal History*, 54.

¹⁵⁸Roscoe Pound, “Political and Economic Interpretations of Justice,” *Proceedings of the American Political Science Association* 9 (1912): 100.

¹⁵⁹Carter, *Origin, Growth, and Function*, 5-6, 135. On the same pages, he also quoted Kant’s definition of law favorably.

as explained above, he saw the Englishman as an Austinian legislative positivist, not as an exponent of limited government.¹⁶⁰

In any event, regardless of the true extent of Savigny's and Maine's influence over Carter, Pound arguably misunderstood all three when he identified them as uncompromising laissez-faire individualists with natural law conceptions. Although Savigny's writings certainly manifested natural-law thinking,¹⁶¹ his views on the regulation of property were actually quite complex and not clearly "laissez-faire."¹⁶² Maine, for his part, was apparently a fairly committed laissez-faireist, at least by the end of his life,¹⁶³ but Pound's suggestion that the Englishman was

¹⁶⁰See supra p. [].

¹⁶¹Whitman, 185.

¹⁶²Reimann states that Savigny and Carter "[n]uances aside . . . shared a laissez faire philosophy in the sense that they cherished clear separation of the state's public affairs and society's private business. Legislation in private law matters was to them an unwarranted intrusion of the former into the latter." Reimann, 116. But interestingly, Savigny has also often been characterized as a reactionary opponent of "a new forward-looking liberalism of the nineteenth century." Whitman, 94. It is important here not to conflate two different aspects of nineteenth-century liberalism: democratic representative government, on the one hand, and economic laissez-faireism, on the other. Certainly, Savigny was not a champion of the former. The question of his attitude toward the latter is complex. As someone who wanted to centralize legal power in the university-based jurists, he was a firm opponent of legislative schemes of economic regulation and redistribution. In addition, Savigny and his Romantic Romanist allies put great emphasis on a "pure" conception of property. Whitman, 165. Whitman points out that Savigny's jurisprudence "certainly was founded, in some sense, on a classical liberal view of the world: he declared . . . that possession was protected by the state as a measure for the protection of the inviolable individual." Whitman 165. But Whitman also warns that

there is a fundamental error in the widespread belief that the romantic Romanists were in favor of a kind of ruthlessly free property. In fact, they were not advocates of free property as such at all. Rather, they were advocates of *Roman* property law, with which they hoped to replace . . . feudal property law And while Roman property law surely contemplated a freer property regime than did feudal property law, it by no means lacked encumbrances on property. Quite the contrary. The main arena of doctrinal struggle among the Romanist lawyers of Savigny's time was the law of property encumbrances. Only historiographical neglect of the great legal battles of the romantic era could leave intact the reputation of the Romanists as free property absolutists

Whitman, 166.

¹⁶³ For example, in his 1884 political tract, *Popular Government: Four Essays*, Maine, discussing the contracts clause in the American Constitution, opined "there is no more important provision in the whole Constitution. . . . It is this prohibition which has in reality secured full play to the economical forces by which the achievement of cultivating the soil of the North American Continent has been performed; it is the bulwark of

a natural law theorist ignored Sir Henry's persistent efforts to demonstrate the absurdity of such notions.¹⁶⁴ Pound's depiction of Carter with respect to laissez-faire individualism was probably the most inaccurate of all. First of all, Pound's contention that Carter's "philosophical position is that of natural law" disregarded Carter's own emphatic rejection of natural law theories. Carter declared: "In viewing the law as a body of rules proceeding from a supposed Law of Nature—an invisible fountain of right—we are simply indulging in hypothesis. No such thing is open to our observation, and consequently, not to our knowledge."¹⁶⁵

Furthermore, although Pound was certainly correct in describing the New Yorker's jurisprudence as more individualistic than his own, Carter's laissez-faire individualism was not nearly so extreme as Pound suggested. Carter did not, in fact, support the parade of horrible "liberty of contract" cases condemned by Pound. During the 1890s, he began explicitly to endorse exceptions to the laissez-faire principle such as tenement building regulations, restrictions on child labor, factory safety statutes, and other "legislation . . . preventing evils which arise from the competitive struggles of modern life in industrial pursuits." Carter remarked that an Illinois statute requiring that laborers be paid in "bankable money" (instead of company scrip) was a measure "evidencing a bold, but perhaps not impolitic, estimate of the just extent of legislative power in growing, thickening and active populations."¹⁶⁶ Interestingly, Pound himself later specifically condemned the Illinois Supreme Court case that struck down

American individualism against democratic impatience and Socialistic fantasy." Henry Sumner Maine, *Popular Government: Four Essays* (New York: Henry Holt, 1885): 247-48. See also Cocks, *Sir Henry Maine*, 131-32; Cosgrove, *Scholars of the Law*, 137-39.

¹⁶⁴See Cocks, *Sir Henry Maine*, 72-75.

¹⁶⁵Carter, *Origin, Growth, and Function*, 13.

¹⁶⁶Carter, *Origin, Growth, and Function*, 245; Carter, "1895 ABA Presidential Address," 193.

this statute.¹⁶⁷ In other words, as to the constitutionality of this particular legislation, the two men agreed entirely.

If Carter was a laissez-faireist, he was certainly an ambivalent one.¹⁶⁸ In his book, he observed:

When we consider the enormous mass of necessary legislation found in modern societies, we are almost led to doubt the soundness of the maxim that the best government is that which governs least, as well as the soundness of the teaching that the sole function of government and of law is to secure to every man the largest possible freedom of individual action consistent with the preservation of the like liberty for every other man.¹⁶⁹

In Carter's evolving customary vision of law, the line marking the limits of state regulation was not static, but rather moved along with the people's evolving perception of what was appropriate.¹⁷⁰ His deep-seated apprehension that government could be used to advance "selfish purposes and personal enrichment" coexisted with an understanding that "[w]ithin its province [legislation] is capable of a work of great and increasing beneficence."¹⁷¹ Carter acknowledged that legislation was "the source of so many advantages" and that it was frequently

¹⁶⁷Pound, "Liberty of Contract," 463. The case was *Frorer v. People*, 141 Ill. 171 (1892).

¹⁶⁸Carter, "1895 ABA Presidential Address," 229. On acceptable functions for written law, see Carter, *Proposed Codification*, 17-21; Carter, *Provinces*, 52-55; Carter, *Origin, Growth, and Function*, 254-62.

¹⁶⁹Carter, *Origin, Growth, and Function*, 335.

¹⁷⁰See Lewis Grossman, "Extending the Revisionist Project," *Law and History Review* 20 (2002): 640-41.

¹⁷¹Carter, "1895 Municipal League Address," 271; Carter, *Origin, Growth, and Function*, 135.

a desirable, or even necessary, supplement to the common law in the regulation of private affairs.

In 1894, Carter proclaimed, “Do not legislate against the rich, but yet legislate for the poor.”¹⁷²

We have no idea how Savigny might have reassessed his own philosophy if he had survived into the age of urban industrialism. The fact that Carter seemed to adjust his own views to accommodate such developments demonstrates another flaw in Pound’s portrait of historical jurisprudence. Pound’s discussions of this school and the other nineteenth-century schools assumed that they (unlike his own Sociological School) were purely intellectual constructs, detached from and unresponsive to socioeconomic developments. However, a close analysis of Carter’s historical jurisprudence demonstrates that he accommodated his thought to the needs of modern society.

¹⁷²Carter, *Hints to Young Lawyers: Address to the Graduating Class of the Law School of the Columbian University at the Commencement* (Washington, D.C.: Judd & Detweiler, 1894), 21.