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Book Review

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THE AMERICAN CODIFICATION MOVEMENT, A STUDY OF ANTEBELLUM LEGAL REFORM. By Charles M. Cook. Westport, Conn.: Greenwood Press. 1981. Pp. 234. $35.00

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Although an important episode in our legal history, the codification movement of the 1820's and 1830's has received little more than a sidelong glance from legal historians.[1] We live with restatements, uniform acts, and the Uniform Commercial Code, but we rarely acknowledge that the early nineteenth century codification debate influences modern code writing. In *The American Codification Movement*, Charles M. Cook rectifies that mistake. In the first full-scale treatment of the antebellum codification debate, Cook paints a detailed picture of the confrontation between common lawyer and codifier. Drawing extensively from early American law journals and pamphlets, Cook has captured the flavor of that debate. He treats the codification movement as something more than a whipping boy for common law devotees; yet he does not draft a brief for the codifiers' side. Cook's basic position is that the extremists on both sides of the issue were victims of their own rhetoric and irrationality. Only the moderate codificationists — those who would have cleaned up the morass of common law procedure and restated clearly established common law doctrine in code form — appear as the reasonable advocates of law reform. Perhaps not coincidentally, these moderate codificationists resemble today's academic codifiers.

Cook began his research believing it would reveal a post-Revolutionary debate about whether Americans would adopt the substantive rules of the common law or the civil law. He soon learned, however, that although there was a real debate, it essentially concerned how to reform and to Americanize the legal system inherited from the colonial

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1. *See* L. FRIEDMAN, A HISTORY OF AMERICAN LAW 351-53 (1973); P. MILLER, THE LIFE OF THE MIND IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR 239-65 (1965); R. POUND, THE FORMATIVE ERA OF AMERICAN LAW 23-24, 151-54 (1938).

period.[2] He thus uses law reform to explain the codification movement. For Cook, reformism designates the key actors and establishes the context of the debate.

Unfortunately, Cook's reformist thesis rests on the premise that reform or change occurs in the legal system only because of "dissatisfaction" with the system's technical performance.[3] This technical perspective dominates Cook's analysis of law reform. Thus, "reformers" act only when they perceive and define legal problems as technical ones; lawmen — practitioners and judges — undertake reform only when "actual" problems exist. By viewing codification through the lens of technical law reform Cook establishes a double standard of interpretation. He treats the writings of lawmen as though they dealt with a concrete problem in the legal system. On the other hand, he dismisses the writings of non-lawmen as mere rhetoric, and, therefore, inconsequential. Thus Cook's explanation of the codification movement as a "real" professional response to technical legal problems is akin to the arid historical studies of legal doctrine produced earlier in this century. Such "internal history" deflects attention from non-lawyers' antebellum critique of American law[4] — a critique that raised serious political and moral questions concerning the role of law in American society. By forcing the profession to defend both itself and the common law, such criticism stimulated the articulation of an ideological justification for law in American society. Because Cook has unwittingly fallen into the trap of explaining legal change from within the profession, we can discern only occasionally the codification debate's broader political and ideological meaning. Despite this shortcoming, Cook's work helps us to understand the mechanics of antebellum law reform and the reasons why codification failed to make more of an impact.

The American Codification Movement covers the period 1776-1860, which Cook divides into three sub-periods: 1776-1815, the pre-history of codification; 1815-1830, the opening rounds of the debate; and 1830-1860, the culmination of the debate and the success of partial codification. He also examines codification in action in New York (a partial success) and South Carolina (a failure). According to Cook, the legal

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2. C. COOK, THE AMERICAN CODIFICATION MOVEMENT, A STUDY OF ANTEBELLUM LEGAL REFORM at ix-x (1981).

3. *Id.* at 202-03. Cook never explicitly defines law reform. The contexts in which he uses the term, however, indicate that it means simplification and rationalization of legal subjects that have become overly technical or complex. In this usage, law reform means changing legal rules to produce a more efficient legal system. As my later criticism indicates, this definition of law reform fails to account for its political dimension.

4. Gordon, *Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 LAW & SOC'Y REV. 9, 10-25 (1975).

system inherited from the colonial period had three serious defects. First, neither lawyers nor laymen knew the substantive law. The rules were inaccessible — hence, unknown and uncertain. Second, the arcane nature of much English common law, especially legal procedure, mystified the lay community. Third, the newly formed nation was reluctant to use English sources to unravel the common law's mysteries. Of these three defects (which Cook calls abuses), the first was the most important.[5] The law's inaccessibility became apparent as the states tried to deal with the legislation inherited from the colonial period as well as the many statutes enacted by the new state legislatures. Only later in the nineteenth century would Americans discover the same problems in the common law.

During the immediate post-Revolutionary period most states enacted legislation that adopted British statutes in force as of a particular date, and affirmed the common law's authority (the so-called reception statutes). When new state legislatures began enacting large volumes of legislation, lawyers faced a serious problem. There was no established system for organizing and publishing statutes. Great numbers of obsolete, repealed, and out-of-date statutes compounded the problem.[6] Many legislatures responded to this problem by undertaking statutory revision. While Cook points out that these statutory compilations (often only chronological by year of enactment) were not codifications, he correctly identifies them as precedents for later, more comprehensive legislative efforts.

Cook next discusses the common law and there comes face to face with the crux of the codification issue. The American lawyers of the post-Revolutionary period believed that the common law was a body of fixed universal principles rooted in mankind's history and customs.[7] Yet the convoluted texts of reported English cases and treatises hid

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5. C. COOK, *supra* note 2, at 5. A technical interpretation would treat inaccessibility as primary. The other two — lay concerns and nationalism — do not fit the simple stimulus-response model that Cook employs. Cook asserts that the absence of the loyalist elite and the inexperience of the remaining lawyers explains post-Revolutionary lawyers' dissatisfaction with the common law. Yet, the Maryland bar, for example, did not lose its most experienced practitioners. Nolan, *The Effect of the Revolution on the Bar: The Maryland Experience*, 62 VA. L. REV. 969, 969-90 (1976). Cook also does not consider that lawyers' attitudes toward statutory and common law flowed from the contrasting perception that statutory law was created by legislatures and was applied prospectively, while common law was discovered by courts and was applied retrospectively. *See* M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 4-9 (1977).

6. New Hampshire, for example, frequently enacted legislation with a fixed expiration date, expecting to re-enact only those statutes that proved to be valuable.

7. One mark of Cook's presentism is that he does not seem to understand that lawyers really believed in a common law of fixed principles. *See* C. COOK, *supra* note 2, at 112-13. From a twentieth century perspective this antebellum idea is naive; but this failure to con-

these principles. The creation of an American federal republic exacerbated the lawyers' problem. As each state wrestled with the problem of defining its own version of the common law, that supposedly unified body of principles became fragmented. Furthermore, the separation of powers doctrine and political events produced a distrust of judges that added to the uncertainty about the authority of the common law. The desire for judicial accountability promoted the publication of judges' opinions, thus beginning the American tradition of fully reported cases. Americans believed that published opinions would restrain judges from rummaging through the mysterious common law.

During the second period, 1815-1830, an increasing number of reported cases and an eruption of new case law doctrine produced an information overload for the legal profession. The focus of the complaints about uncertain and unpredictable law turned from statutes to the common law. After 1820 codification became "a general American law reform movement."[8] Yet, as Cook points out, the movement had no spokesman and no umbrella organization. At various times different men emerged as its advocates, but lawyers predominated in both the first and second periods of reform.

Although there was no archetypal codifier, Cook categorizes the codifiers as moderates and radicals.[9] The moderate codifiers proposed to rationalize and to systematize the common law. They believed that although its substance was sound, the common law needed to be reformulated so that it would be accessible to the profession. The moderates sought to discard obsolete or overruled cases, and to condense the remaining case law into a set of concise principles. A state legislature would then have combined these axioms with a reorganized body of statutes, publishing the package as a comprehensive code. The moderates wanted to create a new American common law, thus inadvertently gratifying the demands of American nationalism. Evidently the moderates also clung to the ideal of a unitary common law of fixed principles. Once those principles had been suitably reorganized, the normal common law process of analogy would operate, enabling the law to adapt to new circumstances.

This latter aspect of the moderates' theory separated them from

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sider seriously the historical actors' perception of their world precludes a more sensitive explanation for their actions.

8. *Id.* at 69. According to Cook, Jeremy Bentham coined the word, *id.* at 76; it was not commonly used until the 1830's.

9. *Id.* at 79-88. In any analysis, classifying groups as "radical" places them at a disadvantage. Although Cook also indicates that the radicals were "conservative," that is, seeking to stabilize the law via codification, this acknowledgement does not dispel the stigma.

the radicals. The latter sought not only to redesign the common law, but also to reform the rules along civil law lines and to prevent judges from changing the newly fashioned rules. The radicals thus made a frontal assault on the citadel of the common law method — reasoning by analogy. Under the radical plan the legislature would replace the courts as the key agency for legal change. Cases would no longer serve as precedents; instead each decision would stand sui generis. The legislature would change the codes following a report from a judge that the code did not cover a particular dispute.

Against these two loosely connected groups of reformers Cook places the solid phalanx of common law orthodoxy. These theorists, who supported common law methods and rules, rejected any legislative intervention in the common law process.[10] They clearly perceived the historic interconnection between common law procedure and substance.[11] In political outlook, however, little distinguished the orthodox from the moderates; both were "conservative."

In addition to analyzing the ideas of these three groups of lawyers, Cook discusses the lay codificationists' position, although in less detail. Before 1830 this group, according to Cook, was essentially a collection of consumer advocates who used the codificationists' language to attack egregious common law procedures. But in describing the 1830-1850 period, Cook must contend with interesting changes. First, the lay codificationists launched an ideological attack on the common law.[12] Second, the anti-codificationists' criticism of codification and their defense of the common law became more strident. Third, the moderate codificationists began to advocate codification of only those common

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10. Modern analogues of the orthodox position may be found in R. BRIDWELL & R. WHITTEN, THE CONSTITUTION AND THE COMMON LAW 11-33 (1977); Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977); Rubin, *Why is the Common Law Efficient?*, 6 J. LEGAL STUD. 51 (1977).

11. *See* T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 381-82 (1956). Cook also fails to give adequate attention to the significance of the shift in American law from procedural to substantive categories. This fundamental change enabled text writers to create paradigmatic conceptions for each category of law. W. NELSON, AMERICANIZATION OF THE COMMON LAW 87-88 (1975).

12. Cook's characterization of both periods as a lawyers' movement contrasts sharply with Mark Tushnet's assertion that the first period was a lawyers' movement, and the second was a popular one. Note, Swift v. Tyson *Exhumed*, 79 YALE L.J. 284, 297-308 (1969). In fact, Cook does not seem to have been aware of Tushnet's treatment of codification. Cook also fails to consider the impact of early nineteenth century labor union conspiracy cases on the codification movement. Although Cook's bibliography lists the 1809 New York trial of the journeymen cordwainers, he seems unaware that in that early case William Sampson, one of the leading radicals, attacked the English common law as class law and called for the creation of "a NATIONAL CODE." M. BLOOMFIELD, AMERICAN LAWYERS IN A CHANGING SOCIETY 75 (1976) (quoting 1 YATES'S SELECT CASES 142 (1811)).

law rules that were generally accepted. Although the moderates had once advocated codification as a means of clarifying confused portions of the common law, between 1830 and 1850 they favored leaving those subjects to further common law development.[13] Cook describes these changes but inadequately analyzes their significance.

At this stage Cook's technical law reform argument no longer suffices. Why were the anti-codificationists driven to defend the common law process as a method of inherent perfectibility? Why did they and the moderates adopt the premises of Savigny's historical jurisprudence and the evolutionist growth metaphor? Why did the lay reformers eventually abandon codification in favor of the popular election of judges? Why all the brouhaha? These questions suggest that the codification debate was more than a squabble among reform and anti-reform elements within the legal profession. Certainly the debate was more than a reaction to the efflorescence of American law in the first thirty years of the nineteenth century — a debate that died away when case law was "magically" organized by treatise writers and case digest compilers.[14] Fortunately, Cook's work suggests a more compelling explanation, one that requires the historian to consider seriously lay rhetoric as a product of an ideological debate raising serious questions regarding the role of law in American society. When such debates surface — as they do periodically — they reveal a fundamental tension in our culture between the values of legalism and justice.[15]

Deep within the American mentality lies a profound distrust of lawyers and the law. Caught in the dilemma of needing, yet despising lawyers, Americans would, if given the choice, do without them. The populace dreams of law without lawyers, of a regime of rules understood and obeyed by all. While lawyers deem such utopianism naive, this lawyer-less ideal has always forced the profession to justify itself. The ongoing need to legitimate its pre-eminent position in American society helps explain both the anti-codificationists' and the moderates' positions. Both groups moved to protect the common law from lay and radical codificationists' criticism that the law was a weapon in the hands of the judges. From William Sampson's defense of the New York cordwainers' union in 1809 to Robert Rantoul and Frederick

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13. The key historical figure in this shift is Joseph Story, who advocated in 1821 an effort at broad common law revision, but in the late 1830's urged a more narrow partial codification of commercial and criminal laws. *See* C. COOK, *supra* note 2, at 48-49, 105-06, 175-79.

14. In stressing the digest writers' role, Cook revises Roscoe Pound's conclusion that only treatise writers, such as Kent and Story, saved us from the evils of codification. *Id.* at 204-08.

15. *See* G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 291-305 (1969); P. MILLER, *supra* note 1, 99-109; J. SHKLAR, LEGALISM 1-18 (1964).

Robinson's attacks on the common law as anti-democratic in the 1830's, the legal profession was placed on the defensive.[16] The profession responded by disengaging the common law process from politics. The lawyers stressed the common law's neutrality and lack of arbitrariness. The orthodox argued that the common law was an inherently perfectible system whose process produced rules validated by custom and experience, an analogue to the self-regulating market of laissez-faire economics. For their part the moderate codificationists relied on the ideology of science as a model. Codification would be the scientific classification of the American experience and a more efficient means of rule production than the inherited common law process. Both the orthodox and the moderates justified the legal system with ostensibly apolitical and value-free methodologies. They believed that the rules generated by the legal process would "apply uniformly to general classes of persons or acts."[17] We would continue to be a nation ruled by laws, not by men. Thus the early codification movement helped to produce the "rule of law" defense of the common law. *The American Codification Movement*, however, only hints at this deeper meaning of the nineteenth century codification episode.

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16. *See generally* 1 YATES'S SELECT CASES 142 (1811) (Sampson); Rantoul, *Oration at Scituate*, in THE LEGAL MIND IN AMERICA FROM INDEPENDENCE TO THE CIVIL WAR 220-28 (P. Miller ed. 1962); Robinson, *A Program For Labor* in SOCIAL THEORIES OF JACKSONIAN DEMOCRACY 320-42 (J. Blau ed. 1954).

17. Trubek, *Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought About Law*, 11 LAW & SOC'Y REV. 529, 541 (1977).