

BOOK REVIEW

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

*Reviewed by Robert W. Gordon**

I. INTRODUCTION

Between 1820 and 1850 American legal commentators became obsessed with whether legislatures should codify, either in whole or in part, the common law of the American states. Indeed, "[a]lmost every law writer after 1825 felt compelled to include his views [on codification] in his works of whatever sort."¹ The enormous literature² that emerged from this period survives today to fascinate modern legal historians, who seem to have developed their own obsession for the "codification" issue. As Lawrence Friedman has said, "The codification movement is one of the set pieces of American legal history."³ Charles M. Cook's *The American Codification Movement: A Study of Antebellum Legal Reform* is the first comprehensive study of this period of legal debate.

As Cook's title, *The American Codification Movement*, suggests, modern historians have turned the debates over codification into a "movement"—some sort of groundswell of popular and professional opinion and political action aimed at codifying the law—resisted by a countermovement to preserve the common law. According to that view the conflicting movements ultimately compromised in the passage of New York's "Field Code" of Civil Procedure,⁴ which repre-

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1. C. COOK, *THE AMERICAN CODIFICATION MOVEMENT, A STUDY OF ANTEBELLUM LEGAL REFORM* 109 (1981).

2. Legal writers of this period expressed their views on the codification issue in every imaginable forum: articles, pamphlets, treatise introductions, patriotic and memorial orations, commencement addresses, legislative petitions, and code commissioners' reports.

3. L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 351 (1973).

4. Entitled "An Act to Simplify and Abridge the Practice and Pleadings and Proceedings of the Courts of the State," the "Field Code," as it was popularly called, was enacted by the

sented both a victory for the codification movement and, because the lawmakers restricted the reform to adjective law and did not reach substantive law, its limits. In retrospect, the notion of a "codification movement" seems to have followed from two rather adventurous assumptions: (1) that the substantial legal literature on codification and its accompanying reform proposals must have reinforced the interests of influential clients, politicians, and the general population; and (2) that these interests were the same as or casually could be united with those of the period's multiple agitations for reform of the legal profession, the judiciary, or specific pieces of substantive law.

Indeed, historians have tended to collapse the demands of very different and often conflicting groups into a single movement for law reform, and then to represent "codification" as the centerpiece of this movement's program. Charles Warren, for example, discovered in "The Era Of Codes, 1820-1860"⁵ a "popular trend towards codification," that was inspired by national hostility to the common law, laymen's suspicions of legal privilege, the increasingly unwieldy mass of law reports, the success of the French Civil Code, and above all the influence of Jeremy Bentham.⁶ The Field Code, according to Warren, was a by-product of the "wave of democracy and reform" that had brought about the Chartist movement in England and the European revolutions of 1848.⁷ Similarly, Perry Miller, who characterized the historical conflicts between elite lawyers and their lay opponents as a war of the head against the heart, made codification one of his drama's central themes. In this drama the codifiers promoted democratic aspirations for a national code founded upon the instinctive justice of the natural man's heart, while the common lawyers defended law as the emotionless rationalism of a caste of experts. In the end, Miller wrote, the common lawyers beat down their opponents with an awesome array of treatises.⁸ Mark Tushnet slightly modified Miller's thesis by suggesting that the common lawyers assimilated the codifiers' attack by partially incorporating into the common law the codifiers' desires for a national jurisprudence based on equitable principles. The common lawyers constructed, for example, a general federal common law.⁹ Likewise, Mark deWolfe Howe's legal history

New York Legislature in April 1848. C. COOK, *supra* note 1, at 191.

5. C. WARREN, A HISTORY OF THE AMERICAN BAR 508 (1911).

6. *Id.* at 508-19.

7. *Id.* at 532.

8. P. MILLER, THE LIFE OF THE MIND IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR 239-65 (1965).

9. See Note, *Swift v. Tyson Exhumed*, 79 YALE L.J. 284 (1970).

materials, besides giving the "codification" issue a place of prominence, suggested that Chief Justice Shaw's famous opinion rejecting English law's treatment of union shops as criminal conspiracies¹⁰ was partly a defensive maneuver to forestall codification sentiment in Massachusetts by proving that the common law could purge itself of reactionary content.¹¹ Indeed, Roscoe Pound thought the "codification movement" came dangerously near success in imposing a "premature crude codification" of antebellum American law; treatise writers thwarted this codification barely in time by meeting in their own vastly superior way the demand for clarification and rationalization.¹² Thus, despite its other differences, this uncommonly impressive group of historians fed the consensus that there had once been a mighty codification movement; the response profoundly affected law and lawyers between 1820 and 1850.¹³

Yet even on first inspection the existence of such a "movement" is suspect. Could the common law have ever been in any real danger of being replaced wholesale by codes? A notoriously conservative profession had been trained in the common law, which the new states routinely had perpetuated through the "reception statutes."¹⁴ If 1820 to 1860 was the "Era of Codes," why did it produce so few codes? Why did a much later time, 1890 to the present, produce so many, long after everyone concedes the "codification movement" lost its force?¹⁵ Why does nearly all the evidence cited to support the movement's existence come from the lawyers' literature on codification? Moreover, how could "codification" be the kind of issue that stirs the popular imagination? This Review now explores these questions and others.

II. THE CODIFICATION "MOVEMENT": MYTH AND REALITY

One of Cook's main contributions to the legal literature on codi-

10. *Commonwealth v. Hunt*, 45 Mass. 111 (4 Met.) (1842).

11. M. HOWE, *READINGS IN AMERICAN LEGAL HISTORY* ch. 5 (1949).

12. R. POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 152-53 (1938).

13. Very recent legal historiography continues to assume the existence of a "codification movement." See, e.g., M. BLOOMFIELD, *AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876*, at 59-90 (1976); 5 C. SWISHER, *THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD, 1836-64*, at 339-56 (1974).

14. See 1 J. GOEBEL, *THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801*, at 109-18 (1971).

15. This question is still valid even after one eliminates from the category of "codes," as writers on this subject tend to do, anything but the legislative enactment of rules previously the subject of common law. According to this convention, the Uniform Commercial Code is a true code; the Internal Revenue Code is not.

fication is to cut the codification "movement" down to proper size and deflate some of the common myths about it. The book shows¹⁶ despite its misleading title that a codification movement never really existed. Politically organized law reform movements did exist, and many of these efforts had a substantial impact on the legal system, but "codification" was never important on their agendas.¹⁷ The codification controversy never took the form of organized political action backed by significant interest groups or an intellectual program that recruited thinkers and writers to a set of common goals. In fact, codification was overwhelmingly a preoccupation of lawyers—a small elite of academically minded lawyers at that.¹⁸ The great mass of practitioners, so far as Cook or anyone else knows, were indifferent to the issue except on the few occasions when it resulted in actual proposals that might have affected their livelihoods.¹⁹ The few lawyers who entered the debate over codification were opposed; indeed, the vast literature on the subject consists largely of anthems raised to the common law. Even among proponents of codification, Cook is careful to point out, men of "moderate" views predominated—men like Joseph Story, who was willing to contemplate limited codifications of well-settled common law principles in selected fields.²⁰ The handful of lawyers Cook calls "radical" codifiers for the most part shared with the "moderates" the view that the actual work of codification could be safely entrusted only to commissions of legal experts. The "radicals" likewise shared with the "orthodox" defenders of the common law the belief that the task of law reform was to clarify the law as it was, to prune out obsolete rules, but not otherwise to bring about substantive rule change.²¹ The codifiers' more orthodox colleagues agreed that the archaic technicalities of the common law should disappear, but they favored gradual change through judicial action. Thus, most of the "radicals" among the lawyers were only radical in the extremity of their polemical intolerance for what they perceived

16. The following survey is a blend of conclusions that Cook makes explicit and those that are fair inferences from his text.

17. See *infra* text accompanying notes 63-73.

18. C. Cook, *supra* note 1, at 70.

19. The evidence of the practicing lawyers' indifference to the codification issue is chiefly negative; if nonelite practitioners cared about the issue, they did not leave records of their concern. Cook suggests that "the anti-codifiers benefited from having at least the passive support of a majority of the profession . . ." *Id.* at 136.

20. *Id.* at 80-83.

21. The book informs the reader that Justice Story suggested that Robert Rantoul, Jr., the Jacksonian fire-eating archenemy of the common law, serve on the Massachusetts Code Commission chaired by Story to give it bipartisan legitimacy. The suggestion was not adopted. *Id.* at 175-76.

to be weaknesses in the common law system. These critics pointed to archaisms, excessive technicalities, and fictions of the common law, and advocated either their preference for a homemade, American body of law or their "democratic" view that legal rules should be stated in a form accessible and intelligible to ordinary citizens.²²

Moreover, discussion of codification was usually vague and abstract, rarely reaching the level of specific proposals, and such proposals when made resulted not from the concerted action of any group of lawyers, but rather from the isolated efforts of individuals, such as Governors John Wilson of South Carolina²³ and Edward Everett of Massachusetts,²⁴ the energetic propagandist William Sampson of New York,²⁵ or that inexhaustible one man codifying machine, David Dudley Field.²⁶ Typically, these individual lawyers would exhort the state legislature to appoint a commission to consider partial or complete codification; the apathetic legislature would do nothing;²⁷ or else it would appoint the commission, wait for its report, and then do nothing.²⁸ The few deviations from this pattern help reveal how little the "codification" rubric actually accomplished, notwithstanding the tremendous literary fuss over the issue. Several states did revise their statute books following New York's lead,²⁹ but these "revisions" were mostly the housekeeping and cosmetic jobs of collating and reorganizing session laws, shedding repealed ones, and stitching repetitive ones together.³⁰ Likewise, some states instituted procedural reforms such as the Field Code of Civil Procedure.³¹ Nothing that contemporaries would have called a real codification—a legislative

22. One must distinguish this view, of course, from the radical lay critics' antiprofessional positions that ordinary citizens should make the rules in the legislature or that the law should not regulate many social relations at all. *See infra* text accompanying notes 102-09.

Bentham's peculiar influence on the codifiers further demonstrates the rather moderate nature of the codifiers' stance. Legal writers borrowed from his work, but used him mainly as a whipping boy: he was every faction's favorite example of an impractical visionary, and to be associated with him was a "serious promotional liability." C. Cook, *supra* note 1, at 74.

Another matter that Cook profitably might have looked into was the influence of the moderate English law reformers such as Lord Brougham and Sir Samuel Romilly, whom the American law reformers greatly admired and imitated.

23. C. Cook, *supra* note 1, at 125-26.

24. *Id.* at 175.

25. *Id.* at 106-10.

26. *Id.* at 187-98.

27. *Id.* at 129 (South Carolina).

28. *Id.* at 180-81 (Massachusetts).

29. *See id.* at 146 (discussing the Revised Statutes of New York passed 1827-1828).

30. On occasion, however, these revisions did alter the substance of statutes. *See infra* text accompanying notes 61-66.

31. *See supra* note 4.

enactment of rules governing an entire field or subfield previously occupied by case law—of any area of substantive law took place in any American jurisdiction during this period.

III. THE ANGLO-AMERICAN TRADITION OF ANTILEGALISM

Even after Cook has dispelled the fantasies of a "codification movement," a substantial body of polemical jurisprudential literature on the codification issue remains. Its presence seems to demand to be explained and its contents interpreted. Unfortunately, Cook lets us down at that point. His account is, briefly stated, as follows: The new American states perpetuated the existing legal system after the Revolution without complaint.³² But around 1800 both lay and legal critics started to criticize the legal system. The critics believed that the legal system was: (1) "inaccessible and uncertain"; (2) "unnecessarily mysterious, complex, and overly technical"; and (3) English and therefore alien.³³ A fringe group of lawyers and lay reformers therefore pushed for home grown codes that everyone could read and understand. By 1840, however, the demand for codification had subsided. The legal profession had successfully mustered its moderate and conservative elements to defeat this fringe group and, more importantly, actually solved in some fashion most of the problems that the reformers had decried. Law reporting, statutory revisions, pleading reforms, treatises, and digests had combined to make the law clearer, less technical, more accessible, and, above all, more certain. In addition, judges and treatise writers had "Americanized" the common law, adapting it to the needs of republican government and economic development in the new nation.³⁴

Cook's theory of how the codification controversy unfolded is all too familiar. Although Cook has cleared away some of the historical myths about codification, he has not departed from the standard perspective on the period. That perspective in turn derives from the people Cook was studying: moderately reform-minded lawyers. As Andrew King already has pointed out in a review of this book,³⁵ Cook almost uncritically reprocesses early nineteenth century professional ideology as historical reality by converting political struggles over law reform into "problems" that demand and for the most part receive technical "solutions."³⁶ Moreover, that ideology in some respects dis-

32. C. Cook, *supra* note 1, at 3-5.

33. *Id.* at 5.

34. *Id.* at 201-10.

35. King, Book Review, 41 *MD. L. REV.* 329 (1982).

36. *Id.* at 330. Cook is not alone, of course, in making this error. This mistake—viewing as

torts and in others ignores necessary elements of an adequate interpretation of itself. In particular, by focusing narrowly on those aspects of law reform that become the profession's special concern, both nineteenth century professional ideology and Cook's book filter out the much larger context of social reform in which issues such as codification were embedded. Furthermore, by dismissing as radical, crazy, impractical, or hopelessly unrealistic nearly all lay complaints about lawyers and the legal system not shared by the profession, the ideology precludes sympathetic inquiry into the substance of those complaints and the worldviews behind them. Finally, Cook's internalizing of antebellum legal ideology makes a detached, critical view of its basic arguments and assumptions difficult.

The correction of these flaws would take another and longer book as well as much more learning than I possess. The remainder of this Review will suggest a few ways in which a wider perspective than that used by Cook might help explain what probably should be called the codification *debates*.

Initially, the time frame simply must be expanded. I do not mean that Cook's subject should have been a longer time span, only that it needs the perspective of a longer period.³⁷ For example, Cook implies that law reform issues did not get onto the American political agenda until around 1800,³⁸ and he later asserts that before 1830 "lay criticism of the legal order was largely nonideological in nature and focused on the practical desire of lay consumers for quick and speedy justice."³⁹ In his view, radical attacks on the legal system and profession began only upon the advent of Jacksonianism. These conclusions are, quite simply, astonishing. There is a long history of Anglo-American criticism of law and lawyers, sufficiently continuous and coherent in its programs and ideological themes to be called a *tradition* of antilegalism and law reform. The roots of this tradition took hold in the early seventeenth century,⁴⁰ and remain strong today in such

sensible only those reform measures that were favored by moderate reformers at the time or were adopted by moderate reformers at some later time—is a familiar occupational hazard of writing legal history.

37. Cook's rigid periodization sometimes makes him miss relevant parts of his story. He ends a chapter called "Developing National Patterns, 1830-1850," with a recital of how codification projects in Massachusetts died for lack of interest by the 1840's. C. Cook, *supra* note 1, at 181. Yet Massachusetts codified much of its civil procedure in 1852. Mass. Acts & Resolves 1852, ch. 312.

38. *Id.* at 3-7.

39. *Id.* at 158.

40. Like all dates of "origins" this one is bound to be somewhat arbitrary. Criticism of lawyers in England actually did not start in the seventeenth century. See, e.g., Ives, *The Reputation of the Common Lawyer in English Society, 1450-1550*, 7 U. BIRMINGHAM HIST. J. 130

manifestations as movements for "informal justice."⁴¹ Some voices in this tradition of antilegalism advocate moderate law reform, while others offer very radical alternatives. All the voices for reform conflict sharply with one another and make for a discordant chorus. Over a long period of time, however, the reformers have repeated the same arguments and made the same demands—though naturally the particular meanings and tactical uses of those arguments and demands have varied sharply as situations change.⁴²

Just as coherent and continuous as the law reform tradition is a tradition of professional responses to the reformers. These responses almost invariably consist of resistance and small partial accommodations, and they typically either stall reform efforts completely or transmute programs for substantive social change into professionally controlled proposals for technical changes in procedures or forms. Indeed, Lawrence Friedman argued in an important article⁴³ that what lawyers call "law reform"—largely formal change of their internal rules and practices—is a kind of symbolic political action undertaken in response to demands by outside interests for real social change.⁴⁴ Lawyers institute these reforms to convince the outside interests as well as one another that they are basically a public-spirited profession.⁴⁵

If one were to review briefly some of the highlights of this reform-and-response tradition as it developed up to the period of this book's concerns, one might remark that Cook's Jacksonians⁴⁶ appropriated with only minor changes the law reform programs of seventeenth century radicals such as the Levellers, who demanded decentralized justice, publication of legal rules in a form accessible to the ordinary person's understanding, abolition of lawyers, curtailment of judicial discretion, "defeudalization" of the land laws, reform of criminal penalties, and reform of the processes for handling defaulting debtors.⁴⁷ Professional responses in the two periods were also struc-

(1959). Only then, however, did criticism of lawyers reach a level at which it could sustain sufficient pressure to force the adoption of detailed reform projects. See, e.g., D. VEALL, *THE POPULAR MOVEMENT FOR LAW REFORM, 1640-1660* (1970); Prest, *The English Bar, 1550-1700*, in *LAWYERS IN EARLY MODERN EUROPE AND AMERICA* 65, 73-77 (W. Prest ed. 1981); Shapiro, *Law Reform in Seventeenth Century England*, 19 *AM. J. LEGAL HIST.* 280 (1975).

41. See *THE POLITICS OF INFORMAL JUSTICE* (R. Abel ed. 1982).

42. See *infra* text accompanying notes 102-09.

43. Friedman, *Law Reform in Historical Perspective*, 13 *ST. LOUIS U.L.J.* 351 (1969).

44. *Id.* at 357-58, 371-72.

45. *Id.* at 371-72.

46. C. COOK, *supra* note 1, at 160-61.

47. See D. VEALL, *supra* note 41, at 100-06, 200-03, 208-09.

turally similar. For instance, the Hale Commission of the 1650's and 1660's played much the same role as the moderate reformers of the 1830's and 1840's. Both groups proposed limited procedural reforms aimed at reducing the expense and delay of litigation. These proposals included elimination of overlapping jurisdictions, multiple appeals, and unnecessarily formal procedures such as rigid pleading requirements; rationalization of judicial staffs and fees and of the organization of courts; and, finally, a pruning of some of the overgrown thickets of substantive law—getting rid of obsolete or inconsistent precedent, rearranging rules under simpler and more harmonious organizing schemes, and even drafting some limited codifications.⁴⁸

The dance of law reform seems in fact to follow an almost hypnotically regular beat: radical proposals to change the law are followed by minor legal reforms. Radical political movements⁴⁹ generate proposals for reforming law, legal institutions, or the legal profession, and the professional response—when it is not sheer obstruction—is to assume that most of what has merit in these proposals addresses technical malfunctions of the system and to suggest moderate remedies for those malfunctions. By the time the remedies are drafted, the radicals, who in any case are too divided among themselves to push through any single reform, have lost their momentum. In the ensuing apathy, conservative lawyers easily defeat anything genuinely innovative in the ideas of their moderately reformist brethren and agree to only unexceptionable technical reform. By no means, however, is the whole of the radical program forever lost. Much of it may reappear as the orthodox political agenda of some later generation or as the product of seemingly “natural” currents of social and economic change. Yet when common-law rules or legislation registers this kind of change, profound though it often is, no one calls the result “law reform.”⁵⁰

Nothing in history is ever quite this neat, of course, and there have been significant variations from this pattern. But the basic dance has been continuous. The settlers of New England, for example, actually put into practice a large part of the radical program for legal-social reform that had been thwarted in the home country.⁵¹

48. See Cotterell, *Interregnum Law Reform: the Hale Commission of 1652*, 83 *ENG. HIST. REV.* 689 (1968); Shapiro, *supra* note 41, at 293-312.

49. These movements, of course, are sometimes only radical at the fringes or in their most extreme rhetoric.

50. See Friedman, *supra* note 43, at 351.

51. Warden, *Law Reform in England and New England, 1620 to 1660*, 35 *WM. & MARY Q.*

Much of their accomplishment, however—abolition of lawyers, simplification of land law, and partial codification—was undone in the next century by a new generation of lawyers. These lawyers “Anglicized” the legal system by reintroducing the more complex forms and procedures along with the social pretensions of practitioners at Westminster.⁵² Accompanying the rise of this new profession—whose upper orders tended to be recruited either to the Imperial administration or to the suddenly lucrative representation of landowning or mercantile interests and whose lower orders swarmed over the backcountry conveyancing or collecting small debts—episodic riots broke out against lawyers and the courts. The rioters denounced lawyers as parasitic leeches who exploited their monopoly and the superfluous mysteries of their craft to the confusion and ruin of the common man.⁵³ One of the great stories of this period, which is just beginning to be told, is how lawyers helped convert the “republican” ideology of these popular uprisings into the sparks that ignited the American Revolution, a struggle in which the lawyers themselves assumed a leadership role.⁵⁴ In Virginia, as A.G. Roeber recently has shown, critics of local legal process used the classical Whig republican rhetoric to denounce lawyers along with merchants and bankers as forces of “corruption”; they called for reform of the county courts in order to restore simple natural justice and equity.⁵⁵ In response to these criticisms the elite lawyers placed themselves on the side of republican “virtue” by denouncing *English* laws as corrupt, feudal, and hypertechnical. They then took over—in the classic pattern of response—reform of the local courts. What this elite meant by reform, however, was not “deprofessionalization” of law enforcement, but greater “professionalization” and rationalization: trained judges, procedural efficiency, and responsiveness to hierarchical central

668 (3d ser. 1978).

52. Botein, *The Legal Profession in Colonial North America*, in *LAWYERS IN EARLY MODERN EUROPE AND AMERICA* 129, 134-39 (W. Priest ed. 1981); Murrin, *The Legal Transformation: The Bench and Bar of Early Massachusetts*, in *COLONIAL AMERICA: ESSAYS IN POLITICS AND SOCIAL DEVELOPMENT* 415 (S. Katz ed. 1971).

53. Botein, *supra* note 52, at 142; Presser, *An Introduction to the Legal History of Colonial New Jersey*, 7 *RUT.-CAM. L. REV.* 262, 320-27 (1976); Whittenburg, *Planters, Merchants, and Lawyers: Social Change and the Origins of the North Carolina Regulation*, 34 *WM. & MARY Q.* 215 (3d ser. 1977).

54. A. ROEBER, *FAITHFUL MAGISTRATES AND REPUBLICAN LAWYERS: CREATORS OF VIRGINIA LEGAL CULTURE, 1680-1810*, at 145-59 (1981); Klein, *New York Lawyers and the Coming of the American Revolution*, 55 *N.Y. HISTORY* 383 (1974); Morris, *Legalism Versus Revolutionary Doctrine in New England*, in *ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW* 418 (D. Flaherty ed. 1969).

55. A. ROEBER, *supra* note 54, at 112-202.

direction.⁵⁶

After the Revolution the old antagonism to the profession along with most of the old radical elements returned. These became the basis of the Jeffersonian radicals' protests against legal fees, debt collection practices, inaccessible courts, judicial discretion, and some specific Federalist judges and law enforcement policies. This time President Jefferson helped lead the cause of moderate law reform that dammed up radical criticism and channeled it into milder, profession-sponsored proposals to streamline and make more efficient the administration of justice.⁵⁷

IV. THE CODIFICATION CONTROVERSY AND THE TRADITION OF ANTILEGALISM

How does the "codification" controversy of 1820 to 1850 fit into this history? Cook gives us a piece of the answer by describing the criticisms of some of the radical law reformers,⁵⁸ the codification proposals with which moderate lawyers responded to these criticisms, and the actual victories achieved over the objections of the conservatives. This account, however, remains seriously incomplete and in some ways fundamentally misleading without some picture of: (1) the *immediate political controversies*, and (2) the *long-run ideological controversies* out of which the codification debate arose.

A. *The Political Controversies*

Traditionally, moderate law reform proposals have arisen in response to political demands for sweeping change in the profession, in the administration of justice, or in substantive law rules. In this regard Cook does tell us something about Jacksonian agitation to reduce judicial discretion through legislative appropriation of common-law rulemaking power, election of judges, and restoration of the jury's

56. *Id.* at 133, 192-202.

57. R. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* *passim* (1971). See G. GAWALT, *THE PROMISE OF POWER: THE EMERGENCE OF THE LEGAL PROFESSION IN MASSACHUSETTS, 1760-1840* (1979) for an exceptionally good illustration of how the legal profession channelled radical demands into moderate law reform. *But see* Nolan, *The Effects of the Revolution on the Bar: The Maryland Experience*, 62 VA. L. REV. 969, 987 (1976) (at least in one jurisdiction there was no antilegalist sentiment for the profession to combat). Professor Nolan's article also challenges the traditional notion, promoted by C. WARREN, *supra* note 5, and R. POUND, *supra* note 12, that antilegalist sentiment intensified after the Revolution because the migration of lawyers lowered the quality of practice.

58. Cook, however, mostly discusses the criticisms of radical lawyers rather than those of lay critics.

role in trials to include judging law as well as fact.⁵⁹ He also discusses attempts to demolish entry barriers into the legal profession and to subvert the authority of lawyers by simplifying rules and procedures so that anyone could understand and employ them.⁶⁰ Strangely, even though some of these proposals—elective judiciaries and demolition of entry barriers—achieved unusual success, Cook treats them cursorily and as almost too absurd to mention at all.⁶¹ On lay proposals for substantive legal change he says even less, though he rightly identifies the lawyers' reform as the most significant. He notes, for example, that the New York Revised Statutes of 1828⁶² significantly modernized the substantive real property law of the state, abolishing "feudal" tenures, simplifying the law of future interests, and circumscribing restraints on alienation.⁶³ Although Cook describes this reform at some length, he makes its political significance exceedingly difficult to assess, because he never shows what changes in property law, if any, lay interests were pressing for or what effects the revision had on entitlements in actual use. He shifts back and forth between assertions that the reform was purely formal⁶⁴—proscribing only practices long defunct and ratifying changes long established—and contrary claims that it was substantively fundamental.⁶⁵ What plainly is needed on this matter is a study that determines which old common law gimmicks lawyers actually used for their propertied clients before the revision and what consequences these had for the distribution of land and wealth.⁶⁶

59. C. Cook, *supra* note 1, at 158-68.

60. *Id.*

61. *Id.* at 161-62.

62. *See supra* note 29.

63. C. Cook, *supra* note 1, at 146-53.

64. Consider the following remarks: "The change was largely technical, with little meaning in substance, but it had great impact." *Id.* at 148. "In short, the common law was left largely undisturbed." *Id.* at 152.

65. "When the revisors tackled the problem of expectant estates [future interests], they went beyond changes of mere form to undertake substantive reforms. These reforms, carefully designed not to upset existing property rights, struck at the very roots of the common law." *Id.* at 149.

These pages, the most technical in the book, are neither as concrete nor as clear as they should be. Readers knowledgeable in the law will find them a bit vague about how the Revised Statutes changed existing property law. Lay readers will find a number of unexplained legal terms, such as the Rule in Shelley's Case. *Id.* at 149-50.

66. Apparently, no such study exists. Some materials are available for assessment of an earlier phase of land law reform, the post-Revolutionary legislatures' abolition of primogeniture and entail. *See, e.g.,* Katz, *Republicanism and the Law of Inheritance in the American Revolutionary Era*, 76 MICH. L. REV. 1 (1977); Keim, *Primogeniture and Entail in Colonial Virginia*, 25 WM. & MARY Q. 545 (3d ser. 1968).

Studying the land law in action would impose an enormous and possibly prohibitive burden on an historian of codification. Investigating the connection between codification and the labor movement, on the other hand, might prove profitable and certainly would be less burdensome since satisfactory histories of the labor movement already exist. The connection between codification and the labor movement rests mainly on the fact that William Sampson and Robert Rantoul, Jr., leading "radical" procode lawyers, denounced the common law as antilabor and called for wholesale codification in various contexts, including speeches to the jury in famous labor conspiracy trials.⁶⁷ As earlier mentioned, Professor Howe thought that Chief Justice Shaw might have rejected the common law of labor conspiracy in the hope that doing so would stave off the threat of codification in Massachusetts.⁶⁸ This theory, however, exaggerates the importance of codification—as distinct from comprehensive law reform—as a popular movement during this period; codification really posed no threat.⁶⁹ Also, although Rantoul's speeches portrayed codification as a democratic program that would make the people's legislative representatives the source of all laws, most codifiers were elitists who wanted experts to do the drafting.⁷⁰ Codification is not, of course, inherently democratic. It has been a genuinely radical slogan, calling for the enactment of fixed written rules to restrain arbitrary authority, but it also has been the instrument of despotic authority striving to enforce its will through plain, succinct rules; and it has been the program of academic lawyers with the largely aesthetic aim of achieving *elegantia juris*.⁷¹

A discussion of the politics of law reform would be incomplete without mention of the internal politics of the legal profession. In the context of codification the central question becomes: Which lawyers were likely to support a given reform, and which were inclined to oppose it and why? Cook addresses these questions by breaking down the legal profession into radicals, moderates, and conservatives. This approach, however, is not much help. Elite lawyers who are utterly reactionary in every other respect may favor codification because it is

67. *Commonwealth v. Hunt*, 45 Mass. (4 Met.) 111, 115-19 (1842) (argument of counsel); *Case of the Journeymen Cordwainers of New York*, 1 Yates (N.Y. 1809) Sel. Cas. 81, at 115-78 (argument of counsel), reprinted in 7 N.Y. Common Law (Yates Sel. Cas.) 153 (1884).

68. M. HOWE, *supra* note 11.

69. L. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* 201 (1957).

70. C. COOK, *supra* note 1, at 79-80.

71. 2 M. WEBER, *ECONOMY AND SOCIETY* 839-59 (G. Roth & C. Wittich eds. 1968).

the cheapest means of giving the illusion of reform⁷² or because its costs fall upon lower and less powerful orders of practitioners.⁷³ Lawyers who can always be sure of a supply of corporate clients with complex problems may propose reforms that will wipe out whole fields of routine practice. Similarly, lawyers who usually would automatically oppose any change, however slight, may switch to passionate advocacy of some reform strategy in order to ward off some worse threat. In fact, Avner Offer has demonstrated brilliantly the operation of such a motive in the reaction of nineteenth century English solicitors to land law reform.⁷⁴ Some American lawyers also may have opposed moderate codification merely because they feared that even a code drafted by impeccably respectable commissioners might suffer an undesirable fate in the process of legislation.⁷⁵ Still others may have liked or disliked a particular code because one or two of its provisions would work for or against a favored client.

To reproach Cook for not descending to so concrete an analysis of internal guild politics, however, is unfair because law reform histories ignore these matters almost completely. One would need to unravel the motives and interests of both lay reformers and lawyers to explain what factors influenced them to favor or oppose specific codifying measures. Moreover, these reasons are so miscellaneous that the perspective of law reform or guild politics is unlikely to explain satis-

72. See Crystal, *Codification and the Rise of the Restatement Movement*, 54 WASH. L. REV. 239, 271 (1979); Friedman, *supra* note 43, at 358-59.

73. Cf. J. CARLIN, *LAWYERS' ETHICS* (1966).

74. A. OFFER, *PROPERTY AND POLITICS, 1870-1914*, at 31-32 (1981) (citations omitted):

No vital interest of the solicitors was served by division of labour with the barristers or indeed, by the whole cumbersome system of real property law. It merely alienated clients and was difficult to defend. A reform would suit solicitors well, provided it could be kept within limits.

Simplification of the land laws would leave the solicitor's function, in a system of private conveyancing, very much as before. Procedures would be easier to carry out, costs and delays reduced, demand would increase, turnover accelerate and clients be more content. Less work would be farmed out to the senior branch, whose expertise would be rendered obsolete. This approach may be called "the simplification strategy" after the title of a paper read in 1862 by E. P. Wolstenholme, a leading conveyancing barrister. In contrast with previous schemes, the codification and simplification of the property laws was not put forward as a supplement to registration, but as *an alternative*. Codification would make private conveyancing so simple as to make registration unnecessary. His scheme went unremarked at first, but it was to have the greatest significance and influence in the long run. It embodied two unspoken qualifications. First, that fees in the aggregate should not fall and second, that simplification should not go so far as to make solicitors themselves redundant, or permit the substitution of a public office for the guild monopoly. Reform had to be a plausible alternative to registration.

Id. (emphasis in original).

75. C. COOK, *supra* note 1, at 116.

factorily the long-term obsession with codification as an issue, one that usually was discussed very abstractly, with nothing immediately at stake.

B. *The Ideological Controversies*

Placing the codification debate in the history of the ideological struggles of radical law reformers seems more helpful. In this perspective participants in the debate want to establish the primacy of a certain view of the world, which if successful would help people like themselves control the way society perceives and reacts to reality.⁷⁶ Viewed from this perspective, Cook would delight the antebellum legal elite because like most other legal historians he trustingly accepts their view as the only reasonable way to explain what was happening to American law. Cook's account of their ideas is conscientious and accurate, probably more so than most prior histories. He properly characterizes the legal elite's main disputes over codification as disputes over means, not ends. The legal elite disagreed mainly on what techniques were appropriate to accomplish the goals almost all of them said they wanted: the formulation of private law, safely entrusted to the exposition of learned professionals, that would provide both certainty and adaptability. They sought certainty in the law to guarantee security in possession of property and predictability in its exchange, and they sought adaptability to the "needs" of America: preservation of republican institutions and rapid commercial development. The reformers agreed that the English common law of 1800 had bad points. The English law was full of anomalies and archaisms that interfered with consistency. Moreover, bizarre fictions and arbitrary "technicalities" obstructed the clarity of the law, and the remnants of "feudal" tenures and social hierarchies were inconsistent with both republicanism and expanding commerce. The legal elite believed that the remedy for these defects, as well as the only way to achieve both certainty and adaptability, was the development of the science of law, which if applied to legal problems in a "liberal" manner would reveal that the vast majority of positive law rules could be assembled inductively into and then derived deductively from a set

76. Perry Miller, perhaps the greatest of all American historians, approached the issue essentially from this perspective. See P. MILLER, *supra* note 8. Yet his treatment is strangely unsatisfying, despite its many insightful observations. Miller did not know the nineteenth century's law from the inside, as he did its theology, philosophy, and literature. His knowledge of nineteenth century law, though exhaustive within its limits, came from general works *about* law—books, articles, addresses, pamphlets, and introductions to lawbooks—rather than from lawbooks themselves.

of general *principles*. The elite lawyers either rejected the remaining rules—those unrelated to this set of general principles—as obsolete or inappropriate or else acknowledged them as “expedient” rules adopted to meet some transient or local requirements of “policy.” Thus, a highly skilled legal scientist would have to be steeped not only in the English common law and equity reports, and treatise literature, but also in historical and comparative materials such as the history of free republics, Roman law, civilian writers on the law of nature and of nations, and commercial and maritime law. In its own words the legal elite wanted American law to become a “liberal” science of certain yet adaptable principles.

As Cook says, the points of divergence within this consensus were relatively slight, rhetorically exaggerated only because the orthodox lawyers tended to portray their opponents as crazy Benthamites instead of the moderates they usually were.⁷⁷ Some codifiers, including Story himself, thought that certain common-law principles already were clear and settled enough to be enacted as general code provisions. Other codifiers suggested that additional principles could be extruded without great difficulty from the artificiality and technicality of common-law precedent. Another group argued that on some matters the civilians had a better principle entirely, and others advocated that in a few areas, notably pleading rules, an entirely fresh start was needed. For the opposition, only real mossbacks took the position that the common law was already as scientific as it could be. As one reform opponent stated: “The rules of real property under the system of the common law were founded upon principles of mathematical truth, and a departure from those rules necessarily implied a subversion of true principles.”⁷⁸ More often, common lawyers mildly preferred gradual case-by-case extrusion of principles to sudden codifications, on the ground that the case method was a more reliable refining process. Probably the most common objection to codes was that they would be too rigid to meet rapid social changes. Only the common law, in the hands of scientific judges and treatise writers,⁷⁹ could guide the stable core of enduring principle through all the shifting circumstances to which it must adapt.⁸⁰

77. C. Cook, *supra* note 1, at 112-18.

78. *The Law of Real Property as Affected by the Revised Statutes of the State of New York*, 4 AM. L. MAG. 310, 310 (1845).

79. Bacon, Hale, Blackstone, Mansfield, and Sir William Jones, and ultimately of course Kent and Story, were those most frequently mentioned as model legal scientists.

80. C. Cook, *supra* note 1, at 113.

Accepting the legal elite's ideas at face value, Cook concludes that the more progressive common lawyers, with the help of digest and treatise writers, finessed codification by actually implementing the goals of its advocates.⁸¹ In some very limited senses, of course, they obviously did implement them. By midcentury the common lawyers had produced a large body of reported cases and a body of treatises interpreting them, some of which were internationally known and cited. With or without legislative help, the profession had managed to simplify the most irritatingly technical feature of common-law practice, the pleading rules.⁸² The most eminent of the common lawyers also had lived up to the ideal of "liberality" in judicial opinions written in what Karl Llewellyn called the "Grand Style"⁸³ of justification by reference to broad considerations of "principle" or "policy."

One must ask, however, whether these changes really add up to a certain-yet-adaptable body of law? Law reformers whose project is to make existing law more rational always claim that their reforms will make the application of legal rules more predictable and will make the rules adaptable to changing circumstances. Yet these claims in fact have only modest meaningful content, because the key concepts—certainty and adaptability—are loaded with problems.⁸⁴

1. Certainty

The essence of the "certainty" claim is that clarity in the conceptualization, organization, and presentation of legal doctrine, particularly the grouping of rules under their dominating principles, will make easier the lawyers' tasks of finding rules that suit their cases and predict the legal consequences of their clients' actions. But increased clarity of legal statement, though obviously sometimes helpful, is neither a sufficient nor even a necessary condition of improving a client's ability to predict how the legal system will treat her. First, rules devised to be logically consistent with one another and with "principles" may conflict with established expectations.⁸⁵ For exam-

81. *Id.* at 201-09.

82. See Nelson, *The Reform of Common Law Pleading in Massachusetts 1760-1830: Adjudication as a Prelude to Legislation*, 122 U. PA. L. REV. 97 (1973).

83. K. LLEWELLYN, *THE COMMON LAW TRADITION* 36-41, 62-72 *passim* (1960).

84. For a different criticism of the notion that doctrinal clarity brings about legal certainty, see Gordley, *European Codes and American Restatements: Some Difficulties*, 81 COLUM. L. REV. 140 (1981); see also Gordon, *Critical Legal Histories*, STAN. L. REV. (forthcoming); Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017, 1028-36 (1981).

85. See 2 M. WEBER, *supra* note 71, at 885.

ple, jurists once concluded that long-term, open-ended contracts were unenforceable for lack of consideration despite the prevalence of such contracts in the business world.⁸⁶ Second, if a rule uses legal terms-of-art (such as "consideration") that have no ordinary language counterpart or a general legal standard (such as "negligence" or "reasonableness") whose operational meaning varies widely with circumstances, then the clear statement of the rule makes neither lawyer nor client much wiser about the consequences of the rule's application. Both lawyer and client still must reason analogically from similar situations in which courts have applied that rule. Third, a rule that promises a "certain" result for one party may do so only at the expense of another party's desire for certainty.⁸⁷ For instance, while rationalization of virtually all tort liability under the fault principle⁸⁸ may have made the law more predictable for defendants, who could then avoid liability by avoiding faulty conduct, the same improvement made the law less certain for some plaintiffs whose injuries became uncompensable for reasons that might be wholly fortuitous from their point of view. Thus, one must scrutinize carefully assertions that legal change contributed to making economic decisionmaking more predictable: whose predictions exactly is the writer talking about?⁸⁹ Last, a rule that is clear on its face may have widely variable effects in the patterns of its enforcement. The authorities may not apply it at all; they may apply it only for the benefit of litigants who can pay for it; or they may apply it differentially according to context. For rich and resourceful (or desperate and determined) clients, the horrible messiness and obscurity of a body of law may be what gives security to their expectations. They can barricade themselves behind it, confident that they can wear any challenger down with law. For other clients, the source of predictable legal results is not clear rules, but the collusively maintained customs of insider or "repeat-player" clients and their lawyers⁹⁰ who over time work out a set of

86. G. GILMORE, *THE DEATH OF CONTRACT* 34 (1974).

87. See Kennedy & Michelman, *Are Property and Contract Efficient?*, 8 *HOFSTRA L. REV.* 711, 722-26, 744 (1980); Mensch, Book Review, *Freedom of Contract as Ideology*, 33 *STAN. L. REV.* 753 (1981).

88. Legal historians and commentators generally view this reform as one of the signal achievements of nineteenth century legal science. G. WHITE, *TORT LAW IN AMERICA* 13 (1980). But see Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 *GA. L. REV.* 925 (1981).

89. This point is trenchantly explored in Holt, *Morton Horwitz and the Transformation of American Legal History*, 23 *WM. & MARY L. REV.* 663 (1982).

90. A few modern examples include corporations, tax counsel, and the IRS; the district attorney's office, the criminal defense bar, and prostitution rackets; regulatory agencies and their regulated industries; and insurance companies and personal injury counsel. See Galanter,

informal rules or operating conventions. Of course, these conventions are not immutable since they represent only a few of the many possible interpretations of the governing law. Anyone with a big stake in switching the game to a more formal level can upset the conventions.⁹¹ But for routine cases over the short term the conventions will tend to be stable, and their stability is independent of the clarity or elegance of the governing legal doctrines. A lawyer can predict with some confidence that if a client appears for sentencing wearing a punk hairdo and a defiant sneer he is going to be put away for much longer than if he wears a navy blue suit and an air of shamefaced contrition; yet this confidence has little to do with how well the sentencing statute is drafted.

2. Adaptability

Below this general level of problems lies a specific one: can the nineteenth century legal elite's claim that their changes enhanced the predictability of legal results be reconciled with the broad historical consensus that the same elites spent this period thoroughly transforming the law of private rights? The legislative and judicial managers of the legal system kept reshuffling assignments of legal entitlements to favor "dynamic" users of property—merchants, transportation and industrial entrepreneurs, exploiters of natural resources, promoters of new technologies—over "static" users of property—a class harder to identify but including anyone whose preexisting legal rights might have conflicted with the interests of dynamic users.⁹² The antebellum lawyers themselves had an answer to this problem. They claimed that they had not changed the law but rather had preserved the continuity of basic legal principles by adapting rules to changing circumstances.⁹³ Of course simply by broadening the covering principle, one can make a case that any rule change pre-

Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change, 9 LAW & Soc'y REV. 95 (1974).

91. See, e.g., H. ROSS, SETTLED OUT OF COURT (1970); Handler, *Controlling Official Behavior in Welfare Administration*, 54 CALIF. L. REV. 479 (1966).

92. J. HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES (1956); M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977); S. KUTLER, PRIVILEGE AND CREATIVE DESTRUCTION (1971); Scheiber, *Property Law, Expropriation, and Resource Allocation by Government: the United States, 1789-1910*, 33 J. ECON. HIST. 232 (1973).

93. The flexibility of the common law consists, not in change of principles, but in the application of old principles to new cases, and in the modification of the rules flowing from such cases as they arise, so as to preserve the reason of the rules and the spirit of the law. *Rensselaer Glass Factory v. Reid*, 5 Cow. 586 (N.Y. 1825), cited in C. Cook, *supra* note 1, at 113.

serves continuity. This is the technique lawyers use when they re-write histories of rules every generation to make the past seem to have developed inexorably into the present. But the claim is stronger than that rule change in antebellum America preserved continuity; the claim is that it did so predictably. A familiar way of trying to prove that claim is to say that rule changes tracked changes in customs or expectations; thus, whatever clients predicted law would do for them it eventually would get around to doing.⁹⁴ This approach does not work, for the following two reasons. First, customs and values, especially in a society undergoing rapid change, are not homogeneous. Some sectors of society are "leading" and other sectors tend to be "backward." In the case of antebellum America, one may crudely characterize these sectors as "capitalist" and "precapitalist" mentalities, each of which generated conflicting norms in the legal system. In nearly every area of the law issues arose which these different groups would have resolved in radically different ways.⁹⁵ Second, even within the homogeneous enclaves of the law's favorites, commercially-minded clients, to say that the law just tracked changing expectations is misleading because providing predictability for some brought about new uncertainties for others.⁹⁶ For example, when the courts and legislatures created a predictable rule for holders in due course of commercial instruments, the rule created new uncertainties for

94. See, e.g., R. BRIDWELL & R. WHITTEN, *THE CONSTITUTION AND THE COMMON LAW passim* (1977).

95. See, e.g., H. GUTMAN, *WORK, CULTURE, AND SOCIETY IN INDUSTRIALIZING AMERICA* 3-76 (1976); G. NASH, *THE URBAN CRUCIBLE* (1979); A. WALLACE, *ROCKDALE* 54-56, 293-95, 388-97 (1978); Lockridge, *Social Change and the Meaning of the American Revolution*, in *COLONIAL AMERICA: ESSAYS IN POLITICS AND SOCIAL DEVELOPMENT* (S. Katz ed. 1971). "Capitalist" and "precapitalist" are, of course, nothing but slogans, employed here just to make this very limited point about the heterogeneity of customs. The familiar terminology is used with reluctance, since it falsely implies that: (1) there is a single mentality or uniform culture that inevitably accompanies the economic practices that most of us would call "industrial capitalism," and (2) there is an inevitable historical sequence whereby "capitalist" ways of life succeed "precapitalist" ones.

Nonetheless, the "capitalist" and "precapitalist" sectors would answer quite differently such questions as the following: What defects should an honest trader disclose? Does one follow different standards of fair trading with kinsmen, townsmen, and strangers? How long should a creditor routinely extend time for payment after default? How long should the mortgagor of land have to exercise his equity of redemption? Is bankruptcy immoral? What sort of work discipline may an employer expect or impose? Is slavery permitted? What should an employer do for a disabled workman or hired hand? Is land primarily an expression of family identity, political power, or social position, or just another fungible good? Should one be allowed, through insurance or damage measurement, to put money value on the life of a child? Obviously this is just a tiny sample of such questions, which different groups of early nineteenth century Americans would have answered in radically different ways.

96. See *supra* text accompanying note 87.

drawers or makers of such instruments, because the validity of the drawers' and makers' defenses came to depend on subsequent handlers of the paper—people they could not control. Moreover, as antebellum lawyers themselves kept pointing out, many legal rules deliberately sacrificed conventional morality to considerations of administrative convenience or economic policy.⁹⁷ Even commercial clients must have had trouble guessing in any given case whether a court would conclude that predictability demanded sticking by the old rule or whether adaptability demanded shifting to a new one. Hundreds of routine cases posed this dilemma, and the famous *Charles River Bridge* litigation dramatically spotlighted it.⁹⁸ For a legal system, adapting, like promoting certainty, means taking sides.⁹⁹

Pressed to cope with these difficulties, lawyers both then and now have invoked the notion of social “needs,”—a term that supplies a nicely objective-sounding criterion—to decide when a legal system should favor some clients' interests in security or change over other clients' interests. On close inspection, however, what society “needs” usually turns out to be nothing more than what it has in fact been getting. Thus, the criterion favors whomever the lawyers pick as past or probable future winners. The lawyers who ratified the triumph of capitalist over precapitalist expectations characterized reform as the inevitable tides of progress even though they themselves were doing all they could to promote the changes. Their modern successors have dressed the old Whig histories in new names such as “modernization,” “economic development,” and “industrialization.” In either case the idea is the same: whatever has happened in the past or is

97. For examples, see Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1725-27 (1976).

98. *Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837). In 1785 the Massachusetts Legislature chartered the Charles River Bridge Corporation to build a toll bridge between Boston and Charlestown. In 1828 the legislature chartered another company to build the Warren Bridge near the same place. The legislature intended the new bridge to allow free passage once tolls had paid for its construction. The Charles River Bridge Corporation claimed that the state had impaired its contractual right to a monopoly of local traffic granted by its charter. This claim was the “certainty” argument developed by Justice Story in his dissenting opinion. *Id.* at 583ff-650. (Story, J., dissenting). The Warren Bridge Corporation argued that the Court should construe the old charter in light of the needs of expanding commerce. This was the “adaptability” argument adopted by the Court. *Id.* at 546-53.

99. This statement does not mean that claims that law promotes such neutral virtues as certainty and adaptability are never anything but ideological disguises of class justice, or, in other words, the systematic taking of sides; but that is sometimes exactly what they are. The “sides” whose conflicting expectations the system favors or disappoints, of course, may be members of the same class or abstract sets such as “creditors,” “debtors,” “offerors,” or “offerees” whose members may be scattered widely across classes.

happening now is part of an impersonal process of historical becoming. Surely one of the jobs of historians should be to puncture, rather than to perpetuate, notions of a historical process devoid of human control by accounting for how such notions came to be manufactured in the first place.¹⁰⁰ The story of the codification controversy offers such an opportunity.

V. THE ROLE OF ANTILEGAL RADICALISM IN THE CODIFICATION DEBATE

As suggested in part IV, the antebellum legal elite's goal of increasing the predictability of legal results by clarifying doctrinal principles and adapting them to emerging social needs was confused and contradictory in its premises and methods. The reader who agrees cannot find it plausible that such a project could have been put into practical operation and achieved success on its own terms. This does not mean that all the concern over legal science, a substantial piece of which is the codification debate, is meaningless or unimportant, only that one must seek its meaning or importance elsewhere than in its imaginary accomplishments as a social technology.¹⁰¹ Among all the possible places to look, one of the most promising may be the long tradition of conflict between critics of the legal system and their professional opponents, a tradition that seems to have established the general terms of discourse for arguments about law reform for two centuries.¹⁰² In particular, speculation about the relationship of antebellum codifiers and legal scientists to the most radical of the antilegalist reformers would be most profitable to our understanding of the codification debate and its importance.

The most radical of the seventeenth century critics divined a secret linkage between law and the depravity of the old social order: the intricate techniques and rituals of legal form helped to maintain civil and ecclesiastical hierarchies and the property divisions that allowed the rich to oppress the poor. Legal artifice maintained social artifice, not only by buttressing hierarchy and property with hundreds of legal privileges defended through complex and costly procedures, but also by clouding men's understanding of the natural relations that should exist between them. Legalism was in short a kind of

100. For a fuller discussion, see *supra* authorities cited note 84.

101. This Review does not argue that legal decisions had no effect on the nineteenth century American economy. It argues only that saying that the law promoted economic development by providing a framework for securing expectations through changing circumstances is only as meaningful as saying the law promoted development by disappointing expectations.

102. See *supra* text accompanying notes 37-57.

idolatry. These reformers sought in the words of one of them, John Warr:

[O]nly to free the clear understanding from the bondage of the Form and to raise it up to Equity, which is the substance itself. For though the dark understanding may be restrained or guided, yet the principled man hath his freedom within himself, and walking in the light of Equity and Reason (truly so called) knows no bounds but his own, even Equity.¹⁰³

Somewhere immured in this rubbish-heap of form¹⁰⁴ were the simple equitable principles of justice between man and man. The essential elements in this critique—connecting antilegalism to assaults on property and authority—were carried forward in the evangelical revolts of the Great Awakening in eighteenth century America¹⁰⁵ and were at least partially incorporated in American Revolutionary “republican” ideology.¹⁰⁶ By Jacksonian times, the period about which Cook writes, the basic critique was still around, but in oddly mutant shapes:

Still [other radical lay critics] desired to lessen dependence on all existing institutions as much as possible, suggesting what were essentially anarchistic solutions to the defects they observed in the legal system. Stressing the principle that “[t]he best government is that which governs least,” the *Democratic Review* suggested that “[g]overnment should have as little as possible to do with the general business and interests of the people.” The only proper sphere of intervention by the state into the society was “the administration of justice, for the protection of equal rights of the citizen, and the preservation of social order,” an admittedly small scope of action. “In all other respects, the VOLUNTARY PRINCIPLE, the principle of FREEDOM . . . is alone abundantly competent to work out the best possible general result of order and happiness from that chaos of characters, ideas, notions and interests—human society.” This notion seemed to call for the application of natural law, the golden rule, and mutual trust to interpersonal affairs. The *Review* asserted that the “spontaneous action and self-regulation” that were implied in the function of the voluntary principle would produce order and regulate the society better than any government could.¹⁰⁷

In this tribute to the free market—which Cook with his usual fidelity

103. J. WARR, ADMINISTRATIONS CIVIL AND SPIRITUAL 6-10 (1648), cited in C. HILL, THE WORLD TURNED UPSIDE DOWN 220 (1972). As Professor Hill points out, “Equity” here means “natural justice” and emphatically does *not* mean the justice administered by the English Courts of Chancery, which the reformers strongly opposed.

104. “Form” also means not only strict technical rules and intricate, rigid procedures but also the deferential ceremonies and ritual trappings of documents, seals, costumes, special languages and the like.

105. See A. HEIMERT, RELIGION AND THE AMERICAN MIND FROM THE GREAT AWAKENING TO THE REVOLUTION 304-08 *passim* (1966); Isaac, *Evangelical Revolt: The Nature of the Baptists' Challenge to the Traditional Order in Virginia, 1765 to 1775*, 31 WM. & MARY Q. 345 (3d ser. 1974).

106. See A. ROEBER, *supra* note 54.

107. C. COOK, *supra* note 1, at 162.

to the perspective of the predominantly Whig legal elite amusingly calls "anarchistic"—one can see clearly the Puritan ethic in the final stages of its love affair with the "Spirit of Capitalism."¹⁰⁸ The assault on hierarchy and artificial restraint had become the Jacksonian attack on corporate privilege and status distinctions such as those enjoyed by exclusive professional castes; but the radical programs for breaking up estates or abolishing private property had been reduced to demands for a formal equality of legal rights—most importantly the right to compete on equal terms in the market.¹⁰⁹ Yet the radical identification of artificial law as the mainstay of artificial privileges had survived intact, as had the call for the replacement of that law with a clear, simple, accessible statement of the universal principles of natural justice.

What is more interesting is how much of this same radical perspective had been absorbed by 1830 into the orthodox attitudes of the elite lawyers themselves. Even English orthodoxy, as represented by Blackstone, had adopted much of the seventeenth century radical critique insofar as it applied to the "feudal" survivals in English law;¹¹⁰ and the American bar, by assuming leadership of popular movements during the Revolution and diverting the antilegalist rage of those movements towards bad English practices, had placed itself well to the reformist "left" of the English.¹¹¹ By Jackson's time both Whigs and radical Democrats shared a view of history and teleology¹¹² that progressive societies such as America had been evolving from feudalism into free commercial republics; that the main cause of legal "uncertainty"—excessive technicality and artificiality of law and procedure—was a product of the feudal phase in which the common law protected innumerable special privileges of noble and ecclesiastical orders. As these privileges became obsolete, so did the technical forms protecting them.¹¹³ The gradual liberation of the individual human subject from the toils of superstition and restraints on the free movement of property thus coincided with the gradual

108. M. WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (1976). For an excellent modern reassessment of Weber's famous and controversial thesis, see D. LITTLE, *RELIGION, ORDER, AND LAW* (1969).

109. At that time, people still perceived the market as a theater of moral striving, not yet simply a mechanism of allocation. M. MEYERS, *THE JACKSONIAN PERSUASION* (2d ed. 1960) remains the best summary account of this ideology.

110. See, e.g., 2 W. BLACKSTONE, *COMMENTARIES* *1-15.

111. See *supra* authorities cited note 54.

112. See S. BERCOVICH, *THE AMERICAN JEREMIAH* (1978); R. WELTER, *THE MIND OF AMERICAN, 1820-1860* (1975).

113. See, e.g., J. KENT, *COMMENTARIES*.

peeling off of encrusted layers of technicality obscuring the law's true foundations in principle.

The lawyers and critics diverged only in relatively minor but still important matters involving the crucial relationships of form, authority, and property. The lawyers claimed that all the technicalities in the old books were much more functional for shared purposes than the critics knew. Lawyers had developed some of the most intricate fictions in an effort to evade feudal restraints on alienation.¹¹⁴ Some of the most rigid formal rules were vital to the securing of vested rights or contractual expectations.¹¹⁵ Moreover, the common law taken as a whole was for all its faults a working system; whatever else it had done it had embodied the timeless principles of Anglo-Saxon liberty, and so to throw it all overboard would dispose of the baby as well as the bathwater. The system as administered was in any case self-reforming, since it contained an inner logic of evolution in the direction of liberty and a set of techniques that could be deployed to help it work itself pure.

This analysis of form had implications for authority. Given that some legal technicality was not only good, but indispensable to liberty and property, the beneficial technicalities could be identified and preserved only by people capable of recognizing them—trained lawyers. American lawyers, however, rested their authority only partially on their knowledge of form. They also based their authority on the argument that only the establishment of a “liberal legal science” could bring about the triumph of principle over bad form, unnecessary technicality, and obsolete rules. The understanding of principle, even more than the knowledge of form, they argued, required long study and experience, which was anything but a matter of consulting the natural promptings of the heart. In fact, the courts inductively generalized most principles from the repositories of form—the judgments of law and equity courts. Others could be extracted from the works of civilian writers, general political theorists, or the classics. Thus, only exceedingly smart lawyers could produce the clarity and simplicity of legal statement for which the radicals clamored. Principle was the by-product of more and better legal science, not less.¹¹⁶

114. 3 W. BLACKSTONE, *supra* note 110, at *193-97.

115. *See supra* note 97.

116. Justice Story neatly epitomized this set of attitudes in his rejection of the contention that “equity” represented universal principles of natural justice in contrast to the “rigid, severe, and uncompromising” rules of law. The contention rested on a double misunderstanding, Story said, for equity in fact was as strict a science as the common law, as “regular and exact, in its principles and rules.” Many common law cases, on the other hand, adopt “the most en-

There is every indication that these lawyers took the idea of legal science entirely seriously, and not just because it flattered their pretensions to elegance and learning. Science was the key to their claim to occupy a position of importance in the management of the social order, because it supposedly gave them a method both for preserving the good forms that secured the absolute rights of property and for liberalizing the common law in the direction of its unfolding the foundational principles of a commercial republic. Law in the hands of anyone unfamiliar with the science could never accomplish this balancing act: either property would be made insecure or the benefits of liberalization sacrificed. Ultimately, the notion of a legal science of certain yet adaptable principles was really the legal elite's assertion that they—and only they—could oversee the expansion of corporate capitalism in such a way that it would not violate anyone's liberty or property rights.¹¹⁷

Most of the common lawyers and procode lawyers would have agreed with this analysis so far. Their arguments were really over such matters as the ripeness of the field for the harvesting of principles and the format of their presentation to the world, not over the idea or the general content of legal science. The codifiers thought the time for generalization and systematization of the principles of civil liability had arrived. The common lawyers preferred to allow principles to evolve from slowly multiplying empirical cases. From time to time they singled out corners of a special field—promissory notes, watercourses, bailments, insurance—as ready for generalization into principle, communicated not to the world at large but internally to the profession through treatises or long disquisitions in opinions. They were content to let a comprehensive science of principle remain a hypothetical possibility. Blackstone's categories for organizing the whole legal field were good enough for them. In their view any lawyer who tidied up a subfield, arranging it into fewer and more general pigeonholes, was engaged in legal science.

In a way, the common lawyers' attitude was a shrewd one. Viewed in retrospect they seem to have preserved the ideal of legal science by tactfully refraining from pursuing it too strenuously. The postbellum generation of elite lawyers, spurred by the successes of natural science or by Austin and the Pandectists, was much more

larged and liberal principles of decision." J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 32 n.3, 33-34 (1836). Both systems thus rested on form and principle.

117. For general accounts of the Whig lawyers' vision of their social trusteeship, see D. HOWE, THE POLITICAL CULTURE OF THE AMERICAN WHIGS (1979); J. MATTHEWS, RUFUS CHOATE: THE LAW AND CIVIC VIRTUE (1980).

ambitious and foolhardy. Some of them, like David Dudley Field, were the same people who had pushed for codification. Some, like John F. Dillon, continued to favor using codes as the vehicle of legal science; others, like Thomas M. Cooley, became disgusted with legislatures and shifted the locus of their hopes for legal science to the courts. But regardless of their differences on the codification issue, the leaders of the postwar elite of legal intellectuals really tried to finish what the antebellum lawyers had only begun: construction of a comprehensive science of legal principles. Their science represented a true synthesis of Jacksonian and Whig—radical and orthodox—outlooks on the legal system because it enlisted legal formality to support the “voluntary principle.” In other words, their legal science sought to establish a definite and consistent scheme of legal rules that would maximize the ability of each autonomous individual to act freely so long as he did not infringe the liberty of anyone else.

In contrast with Cook's conclusions about what the antebellum legal elite had done for legal clarity and predictability, the postwar lawyers endlessly lamented the confusion in which their predecessors had left the law. They revived all the antebellum law reformers' complaints about the irrationality of the forms of action, the expense and delay of litigation, the archaisms and anomalies in the substantive law, the confusion and conflict of authority caused by lack of uniformity among jurisdictions, and the mediocre state of theory. Working on the twelfth edition of Kent's *Commentaries*, the young Holmes said, “I . . . have to keep a civil tongue in my head while I am his [Kent's] valet—but his arrangement is chaotic—he has no general ideas, except wrong ones—and his treatment of special topics is often confused to the last degree.”¹¹⁸ A generation later, of course, the authors of the *Restatements* would say the same thing about the vast and indigestible mass of authority left by their predecessors. As Thurman Arnold noted at the time, something about the way doctrinal law reformers approach the pursuit of legal certainty continuously generates more work for future reformers.

No sooner is the Restatement of Contracts off the press than lawyers find a new edition of Williston, increased in size from four volumes to eight. It is obvious what the result will be. No practicing lawyer will dare rely on the earlier work of Williston in the Restatement, when a later work, theoretically improved by all of the ideas which Williston obtained in writing the Restatement, is at hand.¹¹⁹

118. Letter from O.W. Holmes, Jr., to J.N. Pomeroy (May 22, 1872) quoted in M. Howe, *JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS, 1870-1882*, at 16 (1963).

119. Arnold, *Institute Priests and Yale Observers—A Reply to Dean Goodrich*, 84 U. PA. L. REV. 811, 820 (1936). In fairness to Cook, he recognizes that new doctrinal clarifications, being new, must unsettle conventional practices and so cause problems for legal “certainty.” C.

In another sense, however, the generation of 1870 to 1890 did their work all too well: they produced a case law and treatise literature illustrating at least sketchily what fields of legal rules, systematically related to fundamental principle, would look like. By so doing they fatally undermined the general faith that a coherent legal science is possible—that there actually can be any method for extracting from existing law clear principles from which one could derive predictable applications of legal rules.

The major issues of the antebellum codification controversy are still with us in some form. In temperament and general aims the lawyer-economists of the present most resemble their procode counterparts, impatient to get on with a comprehensive restructuring of liability rules on the basis of a positive science. They still encounter resistance as they did in Jackson's time from a much larger number of more traditionally-minded lawyers. These more traditional lawyers were then and are now suspicious of the apparatus and ambitions of formal science, and they are attached to the comfortable, open-ended ways of common law reasoning—some loose analogizing from precedent, some ad hoc policy analysis based on casual empirical assertions that never will be tested, some attempt to generalize principles which will be restricted to particular subfields that no one ever will compare. Perhaps, like their ancestors, they believe that the great mass of legal rules would make sense if one put it all together, even though they might think putting it together a visionary project not worth a practical lawyer's time. Unlike the common lawyers of 1830, however, they are hardly confident enough of this belief to claim the authority to manage the social order on the strength of it. Beyond these two groups of lawyers lies another that did not exist in bulk before the 1920's, but whose numbers seem to have been growing rapidly since then. This group of lawyers has lost the conviction that the existing collection of rules expresses any coherent and defensible underlying principles of normative order. They must now choose between (1) carrying on as if the rules did make sense, either because they do not wish to destroy the faith of the masses in the rule of law, though they have none themselves, or because they cannot think of anything else to do; (2) defending the existing order for no better reason than that it exists; or (3) putting themselves behind the project of working towards an alternative politics whose institutions might stir their instincts for the ideal.

Cook, *supra* note 1, at 193.