COMMENT ON SCHLEGEL

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I recall vividly taking part in a session just over a decade ago at a meeting of the American Society for Legal History titled "New Directions in Legal Research." Two young legal historians presented a paper in which they took to task some of the luminaries in the field for not writing "truly social histories" of the law. (I will not mention the names of the young historians who presented the critical paper; but those readers interested in knowing names can employ the traditional research skills for which we historians are noted). The two iconoclasts attacked Lawrence Friedman's *A History of American Law* (1973), William Nelson's *The Americanization of the Common Law* (1975), a series of Morton Horwitz's articles that became the basis for *The Transformation of American Law, 1780–1860* (1971, 1972–73, 1974, 1977) and even Willard Hurst's impressive body of work (1950, 1956, 1960). Although the session was held late on a Saturday afternoon, the discussion following the paper was spirited. It struck me, however, that all of the examples of influential but ersatz legal history presented were on eighteenth and nineteenth century subjects. So I was moved to ask: "What about twentieth century American legal history?" The quick and clever answer from one of the paper readers was: "We don't care about twentieth century legal history, that's just the history of ideas with a little constitutional law thrown in." This drew laughter from the audience, and the discussion quickly went back to Horwitz, the fellow servant rule, nineteenth century instrumentalism, and other pre-1900 matters. I should add that the glib young historian soon after this meeting left the writing of legal history behind, attended law school and, I am told, is now a comfortable partner in a major West Coast law firm. Perhaps there is a lesson in this, but it was lost on me.

Professor Schlegel, to his credit, treats queries about the status of twentieth century American legal history more seriously. Yes, Schlegel acknowledges, it involves ideas as embodied in texts, but it also involves social actions. What distinguishes legal history *qua* legal history from a mere casenote is the ability of the former to blend discourses on doctrine with analysis of the relationship of doctrine to the actions of people: lawyers, litigants, judges, legislators, police, criminals, businessmen, and citizens. Properly written, legal history is more history than law. I have no argument

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with that. Hurst made this point a generation ago (1960), but it needs to be reiterated regularly as Schlegel has done here.

Part of the difficulty that Schlegel and others have had in packaging twentieth century American legal history is that there is no single great work that has distinguished the field and, thus, sparked the interest of scholars to elaborate, attack, or revise. We have no *Transformation of American Law, 1780–1860* (Horwitz, 1977), and we have no *Law and Authority in Early Massachusetts* (Haskins, 1960). How many sessions at scholarly meetings have been devoted to seminal works of twentieth century legal history? If there have been some, I have missed them. On the other hand, probably a majority of the readers of this essay have attended a session on Horwitz's *Transformation*. We have no paradigm to work within or against.

A related problem is that our legal history text writers have not done justice to the twentieth century. Lawrence Friedman's first edition of *A History of American Law* (1973) devotes merely a thirty page Epilogue to the post-1900 period. The second edition (Friedman, 1986) is only a little better. Perhaps the more detailed treatment of the twentieth century provided in Hall's forthcoming text (1989) will provide more of the grist needed to mill a twentieth century legal history.

Another problem of identity for those of us who make research claims to the twentieth century is that we must share the field with political scientists, constitutional scholars, philosophers, academic lawyers and even docu-dramareans (as I compose this, a television mini-series on the 1913–15 Leo Frank case is being aired). Do we recognize the work of our fellow and sister legal scholars as that of legal history? An easy answer is of course we do if it is good and useful to us, and we disown it if it is not. But that does not dissolve our diaspora.

One possible way out these traps, Schlegel believes, is to sample the "old chestnut" of periodization. If we can agree on a meaningful body of time to claim for our domain, he argues, we are part way toward getting a grip on the twentieth century. Schlegel's ruminations on possible dominant themes in twentieth century legal history and, thus, where we as scholars and teachers should mark the beginning of the century, offer a good place to start. But, as someone who once suggested a synthetic structure and novel periodization for twentieth century American law (Johnson, 1981), I urge caution.

Do we need to jam everything into a single frame? And why can we not tolerate a number of different emphases? As the legal realists that Schlegel and I so much admire frequently have advised: Don't be afraid of a little bit of chaos. Let us take Schlegel's four issues as a beginning: (1) race, (2) the economy, (3) international adventure, and (4) the nation state. I would append three more. One is a topic that Schlegel modestly ignores because

it is his own specialty, viz., legal thought and legal education. Another is the miscellany of substantive private law matters that cannot be subsumed under any of the previous categories. Finally, I would add the rise of civil and individual rights under the United States and state constitutions.

I believe that *the* great story of twentieth century American legal history has been the willingness of courts since World War I to grapple with civil and individual rights. Notwithstanding the fact that there is some overlap with the dimensions of race and the nation state singled out by Schlegel, the subject of civil liberties deserves a discrete category. As Murphy has ably argued (1979), civil liberties as a concept was virtually nonexistent in this country until World War I. But since the *Schenck* and *Abrams* cases, it has seldom been absent from the national consciousness. Anyone who has had anything to do with the Bicentennial of the United States Constitution over the last few years knows that there has been as much interest by scholars and the public in the current century's tensions over civil liberties as in the grand eighteenth century document itself.

The literature on American civil liberties is legion and growing. For those who wish to sample the literature, two good charts to peruse are Murphy's seventeen-year-old text (1971) and Urofsky's brand new one (1988). Both offer excellent bibliographical guides to a rich body of research to which Schlegel should devote more attention.

Admittedly, the scholarly ventures onto the land mass of civil liberties have been selective. But the example of past explorations (particularly in the last fifteen years) should inspire many future undertakings.

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