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RUDOLF B. SCHLESINGER— WORLD LAWYER

Bertram F. Willcox†

He came to us already laden with promise, those many years ago. It was 1948. He was just under forty, and had come from his native Germany to the United States not quite ten years earlier. For the last four of those years he practiced with the outstanding firm of Milbank, Tweed, Hope and Hadley in New York City. Before that he clerked for one year for Chief Judge Irving Lehman of the New York Court of Appeals and the following year served as the confidential law clerk to all the judges of that court. These two years yielded an exhilarating experience to which he often refers. In 1941-1942, his final year at the Columbia Law School, he had won the coveted post of Editor-in-Chief of that School's law review, a remarkable achievement for anyone, but an exceptional honor for a newcomer to this country. He had entered the United States late in 1938, already a citizen by reason of his father's citizenship. His first brief teaching in this country was of girls at the Dalton School. They had, he says, the highest average pulchritude of any class he ever taught.

He was born in Munich in 1909. His law studies took him to the Universities of Geneva and Berlin; then in 1933 at the University of Munich he was granted his Doctor Juris *summa cum laude*, after which he served as general counsel to a German banking house. Thus, he brought to our faculty unique experiences as a cosmopolitan jurist.

Through the years, professional brilliance was matched by affectionate friendships. Professor Schlesinger and his charming

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and gifted wife, with their delightful children, became a well-loved part of the Cornell community. Now that the time has come when he must retire from Cornell, we feel deeply saddened by the loss which their going will create. For Professor Schlesinger is a warm friend, an outstanding teacher, a loyal and beloved colleague.

One of the many enthusiasms that my wife and I share with the Schlesingers is for Switzerland and the glories of its mountains. Mountains and mountain-climbing have always been a real part of Rudi's life and inspiration. I recall with particular delight one visit, during sabbaticals, that we made to the Schlesinger family when they were at Wengen in the Swiss Alps. Before we had to leave, we called a rump meeting of the Cornell Law Faculty and passed, without dissent, a resolution that the formula for sabbaticals—one year of sabbatical after six years of duty—should be reversed. I remember that Dean Thoron raised his eyebrows when I reported this action to him; fortunately, it was never put into effect.

Professor Schlesinger is an international lawyer of eminence; his exhaustive scholarship is combined with an innovativeness that is even more rare. He has broken new trails into the study of the world's legal systems. From the first, his teaching has been outstanding, stimulating and tinged with his engaging humor; it has always commanded students' enthusiasm. But his excellent teaching is only a part of a brilliant career. His more than forty books, articles and reviews, in many languages, have been published in the United States, in five European countries, and in Latin America. To read his elegant, lucid English is a pleasure in itself. He has lectured widely, and has chaired or taken part in conferences, symposia, and round tables in various countries. In the United States, he was a visiting professor at Columbia in 1952, at Utah for one summer, and, most recently, in Spring Term 1974, at Hastings Law School (California), whose faculty he will join permanently in the fall of 1975.

The Carnegie Corporation gave him one of its rarely-granted Reflective Fellowships which he enjoyed in 1962-1963, but he worked far harder, I am told and I believe, than the name of that grant would imply. He is also, of course, a member of many professional and academic associations and societies.

Throughout the years, he has continued—no ivory tower academic—some practice of transnational law. I recall his remarking once that he had found that the first rule for such a practice should have been never, but *never*, to write a book (which a clever opponent might quote).

He once gave me the best lesson in jurisprudence I have ever received. I had quoted to him Judge Oliver Wendell Holmes's iconoclastic remark that general principles do not settle concrete cases. He answered, "No, but they help." Those four words delighted me, for they seemed to put everything in its place.

As a colleague he has always been deeply involved in this School's activities, as well as in those of the University, which he served from 1961 to 1966 as Faculty Trustee. He has been a wise and shrewd counselor in meetings of the School's faculty and its committees.

At one time, I served for a few months as acting dean of our School. Much of that time had to be spent, I recall, in trying to make it seem reasonable to Professor Schlesinger to resist the siren calls of other institutions. Our success in that was no doubt the greatest service I have ever rendered to Cornell.

Although he taught extensively in procedure, restitution, and conflict of laws, his major interest, as already noted, has been in world law—worldwide conflict of laws in a sense—and its multifarious sources. This is reflected by the chair that he holds as the William Nelson Cromwell Professor of International and Comparative Law. He has worked devotedly for the improvement of the law in many fields, having served long as a consultant to the New York State Law Revision Commission and as a member of the Board of Editors of the *American Journal of Comparative Law*. He was also a member, from 1959 to 1966, of the United States Advisory Committee on International Rules of Judicial Procedure.

His casebook, *Comparative Law: Cases—Text—Materials*, has been through three editions so far, the first in 1950, the second in 1959, and the third in 1970. It is a masterpiece in the organization and coverage of the infinite complexities of this subject.¹ It is by far the most popular casebook in its field.² It stresses practical usefulness, though at no sacrifice of wide-ranging scholarship, and is so useful that one reviewer said that he had used it as a practice manual before beginning to use it for teaching.³

Perhaps his crowning achievement was a project sometimes called "common core research": his direction, administration, and editing of a ten-year study by nine comparatists from various

¹ Jones, Book Review, 45 CORNELL L.Q. 604 (1960) (review of second edition).

² Juenger, Book Review, 19 AM. J. COMP. L. 369, 369-70 (1971) (review of third edition).

³ *Id.* at 369. Both reviewers cited in the two preceding footnotes were active in comparative-law practice.

countries dealing with ten legal systems.⁴ The subject of their study was the law of offer and acceptance as they combine to make contracts in ten of the world's legal systems. The goal was more than mere juxtaposition of statements of law; it was true comparison in detail and in depth.⁵ In this collaboration Professor Schlesinger was engaged with experts who had grown up in diverse legal systems. The work analyzes in depth both the similarities and the differences in the law of offer and acceptance as they exist in the systems studied. In two respects it was a momentous "breakthrough"—to borrow the word popular in the natural sciences.

First, it brought together not only laws, as comparatists had always done, but men; and the men educated one another, through extensive correspondence and long working sessions in Ithaca. The premise was that no scholar, however scholarly, can understand *au fond* a system of law in which he has not been reared. He often thinks he can; but in truth he can not. As Professor Otto Kahn-Freund, of Oxford, put it in reviewing this book:

A legal scholar of great eminence and well-deserved international reputation many years ago confessed to the present reviewer that whenever he dealt with a system of law other than the one in which he had been trained, he felt like a burglar in a strange house. Here, in the case of the Schlesinger team, no one had to move in a strange house, except as a guest shown around by the owner of the house who took him by the hand and acted as his host. The value of this type of international cooperation is that it involves a large measure of mutual education. This education is bound to have, and had, in fact, three aspects: it helped the members of the group to understand the legal systems that were represented by the other members; it helped them to sharpen the tools of their own comparative techniques, but, as always with comparative research, it also gave them a much better understanding of their own law. In the reviewer's opinion, this last point is of special importance. Not only did, as Professor Schlesinger says, "every participant come away from the Ithaca sessions with new ideas regarding his own legal system"—this was to be expected—but the questions asked in the National Reports [which set forth the law of the particular systems] were, in some cases, "new" to the legal system under discussion, or at any rate

⁴ R. SCHLESINGER, *FORMATION OF CONTRACTS—A STUDY OF THE COMMON CORE OF LEGAL SYSTEMS*, by P. Bonassies, G. Gorla, J. Leyser, W. Lorenz, I. Macneil (of the Cornell Law School Faculty), K. Neumayer, I. Saxena, R. Schlesinger and W. Wagner; General Editor, R. Schlesinger (1968) [hereinafter cited as *FORMATION OF CONTRACTS*].

⁵ *Id.* at 2-3 & nn.1-3.

“new” to it in the particular context, and were suggested by one of the other legal systems, compared by the team. One can easily see how this happened; one can almost reconstruct the dialogues which led to its happening. We all know the “unexpected” question a foreign observer is apt to ask about a legal system with which we claim to be familiar, and how that question may illumine our thinking. This intellectual process—the result of team work—is traceable throughout the book.⁶

The second major innovation was the method used for consulting the experts about their own laws: putting the questions to them, in the first instance, not in the language of law but in the language of facts—a method so usual in examining students but so novel in examining eminent colleagues from other countries. The chosen facts rested on actual cases. The language of law entered the study at a later stage.

This procedure was time-consuming, involving almost ten years of study; face-to-face conferences, exchanges of writings, editing, and final writing. It was also expensive, and would not have been possible but for a generous grant from the Ford Foundation.

The ten main systems of law included in the project, in alphabetical order, are: American, Australian-Canadian-New Zealand, Communist Legal Systems, English, French, German-Swiss-Austrian, Indian, Italian, Polish, and South African. The omission of the Spanish and Portuguese systems is due to an unfortunate accident, a last-minute withdrawal, for medical and family reasons, by the expert. The failure to include detailed analyses of Egyptian and Islamic law was due, again, to an appointment of the Egyptian expert to high government office, compelling him to drop out.⁷

The volumes are organized in an ingenious and useful manner. The *General Reports*⁸ distill the findings on the twenty-six issues treated (as parts of offer and acceptance) into a single compendious statement. The *Individual Reports* (or *National Reports*)⁹ on the particular systems give the details of each system's treatment of these twenty-six issues, arranged by subject. Thus the reader interested, for example, in the law on acceptance by silence in

⁶ Kahn-Freund, Book Review, 18 AM. J. COMP. L. 429, 434 (1970). Other reviews and articles are also broadly illuminating. I do not intend to slight them, but I draw heavily on this one because it is so succinct and so perceptive. (It contains some adverse criticisms too.)

⁷ FORMATION OF CONTRACTS 20-30.

⁸ *Id.* at 69-182.

⁹ *Id.* at 191-1693.

various parts of the world can find it, by use of the index and key-numberings, in a single section for each legal system.

The project succeeded. The "common cores" of agreement were greater than had been anticipated. Not only were they identified, but their boundaries and extents were mapped. This was a new achievement in comparative law, in which one or two men usually juxtapose two or three legal systems, with far less detailed comparison than became possible here. The usual semantic difficulties, along with the problems spawned by the Tower of Babel, were avoided or at least lessened. And, *mirabile dictu*, the *General Reports*, setting forth the group's conclusions on the twenty-six issues, were substantially unanimous.

Professor Kahn-Freund comments:

All comparative lawyers assume the existence of the "common core"—or else they would have to give up their work—but as far as the present reviewer can see no one has, up till now, segregated for investigation a limited area of law, put it, as it were, under the microscope, and tabulated the data from which the extent of the "common core" can be inferred.¹⁰

If Nobel prizes were awarded to jurists, I am confident that Professor Schlesinger would be a Nobel laureate.

The subject—specifically the mechanics, or external manifestations of consent, needed to form a contract—was chosen partly because of its inescapable legal importance in international sales and other contracts, and partly because of current efforts to unify its pertinent legal rules.¹¹ After the authors' ten years of labor, "the participants . . . asked themselves," as Professor Schlesinger puts it, "the agonizing question often prompted by social science research: did we merely demonstrate the obvious?"¹²

The generally favorable reviews¹³ by comparatists and transnational lawyers answer this "agonizing question" strongly in the negative. I have sampled this literature. Although I am not myself qualified to give an independent expert judgment, the literature convinces me that the study is indeed of first importance. There are, to be sure, differences in the degrees of the reviewers' enthusiasm. But I believe that Professor Kahn-Freund must be cor-

¹⁰ Kahn-Freund, *supra* note 6, at 429.

¹¹ FORMATION OF CONTRACTS 17-20.

¹² *Id.* at 41.

¹³ A list of 19 reviews and review articles noted through May 15, 1969 appears in 2 CORNELL INT'L L.J. 70-71 (1969). More than 30 additional reviews have been published since then.

rect when he concludes: "All comparative lawyers, indeed all lawyers *sans épithète*, are indebted to Professor Schlesinger and his colleagues for their enormous and fruitful labor, and for the magnificent contribution to comparative law which they have presented."¹⁴

As in basic research in the natural sciences, the innovator can rarely foresee what the eventual uses of his invention will be.¹⁵ The purposes envisaged by the team were: improvement of tools for teaching the future transnational lawyer;¹⁶ refinement of the concept of "general principles of law recognized by civilized nations" for greater usefulness to the International Court of Justice, to international organizations, and to persons involved in international trade, investments, and arbitration proceedings; and, lastly, assistance in the development of national laws.¹⁷

For these purposes to be achieved a vast amount of work will continue to be required. Nine men needed ten years to cover ten systems, on a subject narrowly limited to the mechanics of offer and acceptance, and excluding other requisites for completing contracts such as consideration (or *causa*) and the absence of fraud, duress, illegality or other defects.¹⁸ In Thompson's *Williston on Contracts*,¹⁹ this same subject occupies less than one eightieth of the treatise, and contracts itself is only one subject among hundreds. Much time, effort, and money will thus be needed to complete this kind of contribution to the bulk of the general principles of law recognized by civilized nations. Assuming that the requisite army of researchers will devote themselves to such efforts, and that they will have the skills of the team who worked on the Cornell project, will the funds be available to move such an army about the world for conferences?

Another consideration: although the "common core" was found to be substantial in offer and acceptance, is there reason to suppose that in areas more closely linked to social policy the results will be similar?²⁰ Only the future can tell.

I do not believe that these difficulties detract from the impor-

¹⁴ Kahn-Freund, *supra* note 6, at 441.

¹⁵ Professor Schlesinger makes this point in the Introduction to FORMATION OF CONTRACTS 5.

¹⁶ *Id.* at 5-7.

¹⁷ *Id.* at 7-20.

¹⁸ FORMATION OF CONTRACTS, Part I, Scope Note II, IIA, IIB.2, at 71-72.

¹⁹ WILLISTON ON CONTRACTS (2d ed. G. Thompson 1936) (82 pages out of 6611).

²⁰ See Kahn-Freund, *supra* note 6, at 430-31. Kahn-Freund points out that the "common core" consists of techniques rather than of legal policies or purposes, that every legal problem looks both toward the past of tradition and the future of policy, and that the

tance of the work. A new tool has been invented and new possibilities have been opened. Future scholars must face the task of using the tool and realizing the possibilities.

Professor Schlesinger has no illusions about the intractability of the obstacles to a world rule of law: the twin evils of violence and of maldistribution of wealth. He says in his Introduction:

It is not claimed, of course, that common core research is a panacea which by itself will lead to a full flowering of the rule of law in international relations. The biggest and thorniest of the problems in this area—especially those related to actual or threatened aggression, and to the present maldistribution of wealth and skills—usually cannot be solved by the mere application of existing law. We label these problems as political rather than legal for the very reason that their peaceful resolution will require the creation, through patient negotiations, of *new* agreements, programs and institutions. . . . It does not follow, however, . . . that “an academic research project in comparative law” can make no contribution at all to the solution of the big problems. Without a basic store of shared notions and principles in the law of transactions and of procedure, it will be most difficult to negotiate, to draft and to implement the instruments that will mark future progress in international relations. An endeavor to add to that basic store, and to enhance the reliability of its components, thus appears to be a necessary concomitant of such progress.²¹

If such progress is to come, everything promoting “a basic store of shared notions and principles” will be of crucial value. This is the world’s best hope, no doubt. If rational cooperation can ever bring forth “*new* . . . institutions” with the strength and influence needed for controlling aggressive centers of power and greed, then our present fears may give way to confidence.

Justice Oliver Wendell Holmes put this hope well when he said:

I think it not improbable . . . that man, like the grub that prepares a chamber for the winged thing it never has seen but is to be—that man may have cosmic destinies that he does not understand. And so beyond the vision of battling races and an impoverished earth I catch a dreaming glimpse of peace.²²

Such a peace must come if we are not to perish. If it does, Professor Schlesinger’s labors are more likely to have contributed to it than those of any generals or those of most statesmen.

narrow subject of offer and acceptance was chosen—quite correctly and wisely—because it is “ethically, socially, politically, near the point of absolute indifference.” In other areas of the law the “common core” might well be smaller.

²¹ FORMATION OF CONTRACTS 11-12 (emphasis in original).

²² S. BENT, JUSTICE OLIVER WENDELL HOLMES 354 (1932).