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Foreword: Assisting the Inevitable

HENRY J. FRIENDLY*

"God's mill grinds slow, but sure," wrote George Herbert the year the Long Parliament met. Up to this time the movement for a systematic approach to law revision in the United States has quite notably fulfilled the first half of Herbert's sentence. These drafts are an effort to help the second along; sometimes the inevitable requires assistance.

Three years ago I wrote a piece on this subject, "The Gap in Lawmaking — Judges Who Can't and Legislators Who Won't,"¹ in which I noted the almost complete paralysis of law revision in the federal area, with which I was most familiar. The paralysis has endured. This is in no way to say that Congress has been neglecting its legislative function; on the contrary, we have had most important new federal statutes on civil rights, social security, immigration, and aid to education and the poor. Yet, during this Lyndonian age of legislative efflorescence, little heed has been paid to the hundreds of statutes which, whether through initial inadvertence or because of changed conditions, no longer serve their intended purpose. The contrast is by no means paradoxical. The necessary concentration of Congress on great new measures and its continuing responsibility for appropriations, foreign affairs and the national defense account or at least serve as reasonable excuses for inattention to "the petty tinkering of the legal system which is necessary to keep it in running order"² — a subject of small interest to most Congressmen and of still less to their constituents. Yet the subject presses. A great nation must not be shackled with outmoded and ill worded laws which hardly anyone would defend if only the deficiencies were exposed.

The beginning of a remedy, as has been recognized since the early nineteenth century, is to place someone in charge of the store, as the following drafts suggest for the federal govern-

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1. This was delivered as the Charles Evans Hughes Lecture before the New York County Lawyers Association on March 21, 1963, was published in 63 COLUM. L. REV. 787 (1963), and will be reprinted in a book to be published next winter by the University of Chicago Press. Some excerpts will be found in HONNOLD, *THE LIFE OF THE LAW* 337 (1964).

2. Pound, *Anachronisms in Law*, 3 J. AM. JUD. Soc'y 142, 145 (1919).

ment where nothing of the sort exists, and for the states where notable successes have been scored in a pitifully few. I say the beginning because the creation of a law revision commission is still a long way from the end. Enactment of a fair proportion of the commission's recommendations would depend on the ability and prestige of its members, the competence of its staff and advisers, the wisdom of its choices of subject, the quality of its performance both in substance and in presentation, its relations with legislative committees and their staffs, and perhaps also the revision of legislative procedures to create something like a consent calendar for commission recommendations that have cleared the appropriate committees by a sufficient vote. At least with such a commission *in esse* we would have solid ground for hope of continued and ordered progress; without it we shall remain at the mercy of the waves — or rather of the undertow.

The Harvard Student Legislative Research Bureau has opted for a somewhat restrictive frame of reference for the commission it would have Congress create. This is a debatable choice, and the proposed commission's role may seem to lack lustre when contrasted with the broad conception taken by the recently created Law Commission in England.³ Yet there is something to be said for starting the commission's journey in placid waters; it is better not to risk sinking the ship until the skipper has learned and demonstrated his skills. Moreover, I should think that on balance a fairly modest proposal — not necessarily quite so modest as the attached — would be more likely than a bolder one to gain enactment.

That, after all, is the immediate and vital task. What Senator and what Representative will have the imagination to realize that here is an opportunity both to deserve well of the republic and to earn enduring fame, and to do this without the slightest political risk? A man can hardly go wrong when he links his name with a noble company that includes Bentham, Brougham, Westbury, Stephen and Gardiner in England, and Pound, Cardozo and Traynor in our own land.

3. See Sir Leslie Scarman's paper, *The Role of the Legal Profession in Law Reform*, 21 RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 11 (1966); and Law Commissions Act 1965, First Programme of the Law Commission.