

January 1961

Law in an Age of Revolution

Archibald Cox

Follow this and additional works at: <https://digitalcommons.du.edu/dlr>

Recommended Citation

Archibald Cox, Law in an Age of Revolution, 38 Dicta 277 (1961).

This Article is brought to you for free and open access by the Denver Law Review at Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

LAW IN AN AGE OF REVOLUTION‡

BY THE HONORABLE ARCHIBALD COX*

May I express at the outset my pleasure at joining you in the dedication of this fine new Law Center. It marks a major step not only in the flowering of the University of Denver but also in legal institutions. Not the least significant aspect, I anticipate, will be its usefulness in drawing together in one center both the practicing and academic branches of the legal profession. For reasons I shall try to explain a little later, the community is making increasing demands upon both branches, and each has need of the other.

Upon occasions such as this, it is customary and highly appropriate that we look to the tasks to which we dedicate ourselves in the use of new facilities—in this case as lawyers. This morning I ask you to reflect for a moment upon the role of law and the tasks of the lawyer in an age of revolution.

I

Ours is a period of changes so swift, so profound and on so vast a scale that it is fair to call it an age of revolution. The familiarity of the platitude does not diminish either its truth or the importance of appreciating the fact most keenly.

Abroad the revolution has swept away colonialism and established new nations; it is changing the very structure of society. The stirring peoples of Asia, Africa and Latin America seek overnight to wipe out poverty, disease and ignorance; to establish modern industrial societies, skipping the slow stages through which the western world developed; and so to achieve in a few fast strides the standards of living, both material and intellectual, which have heretofore been confined to North America and parts of Western Europe. But this is not only a revolution of rising economic expectations. Its spiritual side is sometimes described as rising nationalism. Whatever its name it is a natural demand for recognition as our equals, made by our fellow men whom progress had passed by except as the more fortunate condescended.

Even at home we face problems of revolutionary scope and character. Perhaps the closest domestic parallel to the world-wide upheaval is the accelerating movement to eliminate all forms of public racial discrimination, not merely in name but in fact, thus realizing for a large group of citizens the promise of the Declaration of Independence that all men are created equal. Other revolutionary forces are at work. The growth of the population is one. A second is the rapid pace of scientific development. The ensuing technological change is all too plainly promoting an economic revolution at a faster pace and on a larger scale than the industrial revolution of the nineteenth century. And as man stands on the edge of space we can anticipate that his venture into space will bring changes no less profound than the voyages of Columbus and Magellan.

‡Address delivered at the Dedication of the University of Denver Law Center, September 28, 1961.
*Solicitor-General of the United States.

II

It is common repute that the legal profession seldom finds a revolutionary atmosphere congenial, and an opinion so widely held cannot be utterly unfounded. Lawyers devote their lives to the orderly conduct of the affairs of the community in accordance with general rules, while even a peaceful revolution is hardly an orderly process and it invariably compels changes in the rules by which the society was governed. For almost a century many of the leaders of the profession have been attracted to the service of business and financial interests which believe, not always wisely, that preservation of the status quo will best serve their interests. But whatever may have been the prevailing attitude of the legal profession in particular periods, surely resistance to change is not an inherent, inescapable characteristic.

Lawyers played leading parts in the germinal events of Anglo-American history from the days in which the power of the barons was broken by the establishment of royal justice through the King's courts down through our own New Deal Revolution. We honor as lawyers Edward Coke for leading the parliamentary struggle against the encroachment of the Stuart despots, James Otis for resistance to the writs of assistance, Madison, Hamilton and John Marshall for welding quarreling States into one Nation.

It is plain, moreover, that the greatest accomplishments of the legal profession have all involved the germination of new ideas—the creation of new concepts, new legal devices, new rules and new institutions—in response to new human needs and opportunities. To choose an example from an altogether different field, how much of the industrial and commercial revolution would we have enjoyed without the imagination and technical skill displayed by lawyers in organizing corporate enterprises and financing them through new forms of security?

Whatever may have been true in the past, our own era has urgent need for lawyers not to resist change but to channel the vital forces at work in the community. For the question is not whether changes will occur; the question is whether the peoples of the world, in the course of revolution, will maintain and nurture—or abandon—individual freedom. Unhappily we can no longer take the answer for granted. Liberty is not man's only need, and in the world at large Communism promises to satisfy all the rising expectations of the

Homer Reed Ltd.

IMPORTERS-STOREKEEPERS FOR MEN
SEVEN FIFTEEN SEVENTEENTH STREET
DENVER

Storekeepers
to those
who recognize
the advantages
of being
superbly
well-dressed.

submerged and oppressed if only they will surrender individual freedom. It is folly to suppose that if liberty is suppressed in the world at large, we shall retain our own freedom.

It is through law that men enjoy freedom. Ours is a free society because the law binds all men equally, the governors no less than the governed. Even the people, the ultimate rulers in a democracy, have subjected themselves to the restraint of law; for the Bill of Rights prohibits even the majority from using its power to oppress individuals or unpopular minorities, and the courts stand ready to enforce the prohibition. The essential difference between the western world and the Communist dictatorships is expressed in the ancient words of Bracton—“*Non sub homine sed sub Deo et lege.*”

In the modern world it is not enough for the lawyer to defend the guarantees of individual freedom from government oppression. Men have other needs and, if government under law is to survive, we must prove that a society governed by law can effectively fulfill them. This, too, I submit, is the special responsibility of lawyers. For the lawyer's true work is guiding the organization of men to meet man's needs. The forms of organization, governmental or private, must be constantly revised to meet new problems and in the light of changing social and economic conditions. Thus, there is a dual task: preserving freedom through the rule of law and proving that law can meet the needs of people.

III

In the early days of the Republic, lawyers were especially concerned, in their professional lives, with the government itself and not only with its impact upon business ventures. This was true of the leaders of the bar, men like George Wythe, John Adams, Madison, Hamilton, Marshall and Webster, and also of the hundreds of forgotten names of men who guided the organization of state and local governments. In later years, when lawyers were attracted in increasing numbers to the service of corporate enterprise and the pressure of business changed them from thinkers to doers, the profession largely abandoned the science and philosophy of government. Even the law schools suffered from the trend, barring the work in administrative law and the study of federalism. How many law schools offer creative instruction in Municipal Law or State and Local Government? How many courses in Constitutional Law have the breadth of the Federalist Papers?

In my judgment, the legal profession, in order to discharge its public responsibilities, must now turn back to the study of government—to the machinery of government, the problems of organization and structure—and also to the relation between governmental and private activities. Events are moving at a faster pace than the science of government. And unless my aim is wide of the mark, the key to the lawyer's dual task of preserving liberty while proving that government under law can meet the needs of people lies somewhere in the study of governmental institutions, not omitting their relation to individual citizens and private economic organizations.

Let me try to illustrate the point concretely by three examples of domestic policy.

For one example, consider how far the transformation of America from a rural into an urban civilization has outmoded some aspects of the very structure of government even to the point where the obsolescence of the governmental machinery with which we must work frustrates the effort to meet the community's needs. Representation in state legislatures often dates back twenty-five or fifty years. Since then the population of metropolitan areas has exploded while that of the country districts has declined. Many states are now governed by rural minorities, ignorant or indifferent to the needs of the cities. In Tennessee, for example, two thirds of the state legislators, both Senators and Representatives, are chosen by one third of the people. In Vermont a ballot cast by a voter in the City of Burlington has 1/676 of the legislative weight of a vote in one of the mountain towns, because of malapportionment. Superficially one might say that this is not a lawyer's problem; the solution is to reapportion the state legislatures. But the answer is not quite so easy. In many states the malapportionment results from constitutional provisions guaranteeing each town at least one representative in a legislature whose size is limited, so that there is simply not room for a proportionate number of representatives from each of the cities. Nor is it clear that statistical equality is always a fair answer. Justice includes protection for numerical minorities and a legislature dominated by a single vast city might be only a little less unfair to the rural areas and towns than domination by rural minorities is unfair to the cities. Where then lies the balance? And if one knew the answer, what is the remedy for the present malapportionments and what is to prevent its recurrence? Malapportioned legislatures dominated by a minority seldom rush into this form of political suicide.

Malapportionment is only one example of our failure to keep governmental institutions abreast of urban development. There is an utter lack of correspondence between the cology of the metropolises and the existing units of government. The affairs of the 168 Standard Metropolitan Areas listed by the Bureau of Census in 1950 were administered by 16,000 governmental units—an average of 100 local governments for each metropolis. As metropolises grew (business and commerce), residential development and social institutions spilled over political boundary lines, whether state or municipal, yet little was done to revise the governmental organization. The

YOUR OFFICE SAFE

may be safe enough for ordinary purposes but your important documents should be in a **SAFE DEPOSIT BOX** in our new modern vault, designed for both safety and convenience.

A whole year for as little as \$5 plus tax.

COLORADO STATE BANK

Member Federal Deposit Insurance Corporation
OF DENVER — SIXTEENTH AT BROADWAY

mushrooming of suburbs about a decaying central city, we are told, is the core of the substantive problems. Those who work and play in the city live and pay taxes in the suburbs; in the suburbs there is desperate need for community services while the center city suffers from an exodus of people and industry, accompanied by the deterioration of vast residential areas and a declining tax base; between the two there lie chaotic traffic jams and inadequate mass transportation. Obviously none of the 100 governmental subdivisions which rule the one metropolis can solve its problems alone, nor is the situation likely to be ameliorated by the disjointed efforts of each unit seeking to serve its own selfish interests. Improvement would require some measure of integrated planning, but how can an integrated plan be developed by 100 independent governmental units? Surely reorganizing the units of local governments or devising the machinery through which existing units can deal with problems pervading a broader area is a challenge to the lawyer's imagination and technical skill which surpasses in both difficulty and importance the reorganization of business ventures.

For a second example I must ask you to leap suddenly into the area of industrial relations and to focus your attention upon what I conceive to be the need for new institutional and organizational arrangements involving the coordination of government and private economic activity.

The extraordinary scientific achievements of recent years have started a new technological revolution. The technological revolution promises untold wealth but the inescapable economic dislocations, coupled with the sharp rise in the labor force as a result of our growing population, have made insecurity of employment and actual unemployment our chief domestic dangers. Even under the most favorable conditions, the dislocations give rise to temporary unemployment and loss of pertinent skills. Even the immediate transfer to a new job with another employer may involve loss of seniority and pension rights. With anything less than extraordinary luck, the dislocations create serious unemployment and depressed areas like the iron and steel towns of Pennsylvania and the coal fields of West Virginia. Nor is the solution likely to be found in familiar remedies. To eliminate unemployment and create the 25,000 or 30,000 jobs a week needed for new workers entering the labor market, we shall have to have a much quicker rate of economic growth; but even this indispensable condition is not likely by itself to cure the kind of unemployment from which we suffer. During the 1950's the pace of economic activity alternately quickened and declined; the percentage of unemployment fell and rose; but the hard truth is that on the average the percentage of unemployment rose constantly; and, despite the improvement in business, the percentage has not declined appreciably during the past spring and summer.

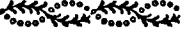
The problem will not take care of itself. Nor can collective bargaining alone meet the industrial workers' need for continued or renewed employment at their former levels of skill. Collective bargaining may be carried on by one company and one union, or it may be industry-wide. But not even a whole industry, both manage-

ment and labor, can adequately cope with the dislocations created by a technological and industrial revolution. Coordination and cooperation upon a much broader scale are necessary. The fear of automation can be dispelled and its promise can be realized only by a multi-pronged attack both by government and in collective bargaining. The most searching study made in collective bargaining, the work of the Automation Committee established by Armour and Company jointly with the Amalgamated Meat Cutters and the United Packinghouse Workers, reached this same conclusion.

The experience of working together in looking at the problems of automation during the past year-and-one-half has convinced all the members of the Committee of one thing. Only

**MAKE LEISURE LIVING
BETTER LIVING
★ ★ ★
ELECTRICALLY
★ ★ ★**

**PUBLIC SERVICE
COMPANY**



through a coordinated approach in which public policy and private action mutually reinforce one another can the employment problems of technological change be met. Collective bargaining by itself cannot fully solve these problems.

Of course it is possible for government and industry each to go its separate way. The government could concentrate upon achieving the high rate of growth necessary to full-employment, upon strengthening the Employment Service, upon aid to distressed areas and revision of the unemployment compensation laws. In collective bargaining, management and labor might deal with such matters as job preferences and transfers to new plants, retraining programs, seniority, and devices like severance pay for cushioning the shock of unemployment. If rationality prevails, however, there will be much closer cooperation. And cooperation requires new organizational, new structural and procedural arrangements, in short, new hybrid institutions, partly private and partly governmental.

Study of our second major problem in the area of industrial relations leads to a similar conclusion. For a quarter century, except during the war and the Korean episode, the government's avowed policy with respect to labor disputes has been marked by great concern for the negotiation of a settlement upon some terms—any terms—and by considerable indifference to the substance of the bargain. Over the same period collective bargaining produced—or, if it did not produce, operated in the environment of—a rising level of wages and prices. When the government's influence was felt in a real crisis, under both Democratic and Republican administrations, it too was in favor of a settlement upon terms that would buy peace. And certainly this was the dominant philosophy, until recently, in the thinking of most "public members."

The wage and price inflation carries some costs, but the wider distribution of wealth was to the general advantage, and our widespread prosperity, not to say affluence, certainly gives some support to the Keynesian view that under the economic conditions then existing increased consumer purchasing power would help to produce a higher rate of economic activity or, as we should put it today, faster economic growth.

Changes in our condition raise a question, however, as to whether the indefinite continuation of this trend is either possible or desirable. Our competitive position *vis-a-vis* other industrial nations has shifted. Superior engineering and industrial plant, the skill of our workers, the sharp devaluation of the dollar in 1933, the European War, and later the wartime devastation of the industrial capacity of other countries made it possible for us to pursue our own wage-price policy (or lack of policy) without immediate injury. Today the new plants in Europe, the United Kingdom and Japan are often more modern than our own. Competition is beginning to hurt. Because of foreign aid, which surely must continue, we have a balance of payments problem. Under these conditions our current need, as President Kennedy pointed out last October, is for "... wage and price policies that are consistent with stability. We can no longer afford the large erratic movements in prices which jeopardize domestic price stability and our balance of payments abroad."

Private enterprise, management and labor, working through collective bargaining, might do much to evolve wage and price policies suited to current conditions. One might even hazard the guess that collective bargaining will evolve new methods of compensation yielding higher real earnings geared to productivity. If the fear of unemployment were dissipated, a great deal of work could be done by cheaper methods and with increased individual and group production. The recent contract between American Motors Company and the United Automobile Workers, taking up the thread of the UAW's 1959 proposal, may represent the kind of imaginative thinking which breaks new ground.

But while collective bargaining can do much alone, a sense of direction must be supplied which can only come from the whole community. Wage and prices, moreover, are only components in a larger equation that includes taxes, monetary policy and public spending. Since collective bargaining indubitably affects both the public welfare and also the formulation and feasibility of government policies in other areas, there is increasing pressure to find ways of exerting public influence upon the terms of collective bargaining agreements. Here again there is need for new machinery and a new philosophy for coordinating governmental and private activities.

For a third example let us take one more sudden leap into still a different realm of activity and consider very briefly the problems involving the organization of government and private industry which we face as we poise for the thrust into space—problems which we face not outside in the universe, but here at our home base. Communications satellites are a good example. Private industry currently owns and manages most of our domestic and foreign systems of communications. Few people, I take it, would use the development of communications satellites as an occasion for turning the whole responsibility over to the government. Still, government funds were needed to finance most of the research and development. Sending and receiving stations must be built in foreign lands. The system will surely be an instrument of national policy not only in the construction and operation of stations but as a means of mass communication. Who then is to own the satellites? Who is to control their use, and control and direct the construction of ground stations? And how shall we prevent the primacy which a single firm might acquire in this new universal field from adversely affecting domestic competition? It is obvious that government and the communications industry must combine their efforts, but through what machinery and on what basis?

Perhaps we should hesitate to draw conclusions from so few examples but I venture to suggest that these illustrations and others which will occur to you may support general conclusions going beyond the bare assertion that the structure and organization of our governmental machinery have failed to keep pace with other forms of human development.

SACHS-LAWLOR CORPORATION SEALS-ALPINE 5-3422

For one thing many of man's undertakings are becoming too vast for individuals or even large business corporations to carry them on alone without the use of the other, wider form of organization known as government. The exploration and use of space furnished our example.

Second, our lives are now too interrelated to leave the making of all decisions to private judgment. The solution of many social and economic problems is beyond the power not only of private enterprise but even of existing governmental machinery. Here I have used the problems of industrial relations and metropolitan planning as examples.

Third, one wonders whether, even if we are spared a nuclear holocaust, the western world can win the cold war without a stronger sense of common purpose and central direction. We face an opponent which marshals every resource through a central strategic authority for the single purpose of world domination. Is the philosophy and governmental organization of the individualistic eighteenth and nineteenth centuries entirely adequate even when supplemented by sprawling regulatory agencies and a vast Department of Defense?

IV

What I have just said suggests a prescription for more and bigger government, but I am not unmindful of the danger that in the central effort to preserve our national security and also prove that a democratic system can meet the need of the community we may end by destroying the very liberty that makes it worth preserving. There is danger that enforced conformity may sweep across the land through loyalty oaths and similar pressures designed to root out all suspicion of dissenters. The power of legislative investigation, which is designed and usually exercised for the achievement of high ends, can be used all too easily as a means of effecting the disgrace and degradation of honest non-conformists. There is danger also that too much central planning would destroy initiative, and big government impair the sense of local and individual responsibility which springs from self-determination. We should never forget the Jeffersonian principle that at the heart of liberty lies the restraint of government.

But they also err who see law in its highest form as only a check upon government. History, here, has distorted our perspective. So long as the government was a monarch ruling by claim of divine right or a tyrant ruling by force, it was proper to look upon government as an alien power imposed upon humanity. But under a democratic system, the government is simply people working together to fill their common wants; and there are areas in which affirmative governmental action is required to make men free. Restraints upon a man's freedom may be imposed by other men, by economic conditions, or by oppressive circumstances. Action by the government, through law, for the relief of those restraints is an enlargement of liberty.

The clearest illustration, perhaps, is the prevention of discrimination on grounds of race, creed, or color. The Department of Justice

has been prosecuting suits to break up alleged conspiracies to take economic reprisals against Negroes who dared to exercise the right to vote. Obviously such a conspiracy is an interference with freedom, and the intervention of the law will increase liberty and human dignity. This is also true of laws to protect voting rights and to secure equality of educational opportunity by ending school segregation.

The Social Security Act immeasurably enlarged human freedom. Once attacked as "Socialism," all of us now realize that the lives of millions have been enriched by the simple measure of providing an assured income during the latter years of life. A fair minimum wage law extends freedom. The industrial workers of today are immeasurably freer under the eight-hour day and five-day week than their fathers and grandfathers who labored twelve hours a day six and seven days a week for smaller real earnings. And would not the first step in bringing greater freedom to migrant farm laborers be to lift from their back the oppressive burden of poverty?

Thus, those who protest that government interference is the negation of liberty only pose the dilemma. They are partly right, but there are aspects of freedom, as well as other human needs, for the securing of which under modern conditions governmental action is usually required.

Some men find a resolution of the dilemma in the Biblical injunction, "Render unto Caesar the things which are Caesar's, and unto God the things which are God's." The physical safety of society, economic activity, and jobs—the bricks and mortar of the community—may be subject to regulation, but the private life of the individual, thought and conscience, belong to the realm of the spirit and on these Caesar has no claim. Accordingly, they distinguish between human and civil rights, which are immune from government and economic regulation.

The distinction is valid in many contexts, but if erected into an absolute it may set too low a value upon economic freedom and voluntary methods. The business community, the labor movement and the general public are all committed to an open economy in which there is wide freedom of contract and private citizens make their own decisions. There are better reasons for our attachment to private enterprise than mere habit or accepted doctrine. An open economy has a flexibility which permits taking account of the

Expert

Brief Printers

THE *Golden*

Bell

PRESS

- Commercial Printing
- Catalogues and Brochures
- Year Books — Magazines
- Books — Book Binding
- House Organs

AM 6-3777

2400 CURTIS STREET

Denver, Colorado

individual case in ways not open to a distant official. It adapts itself to changing conditions. It encourages growth and experimentation. Economic voluntarism has also a philosophical basis—by permitting man to exercise the power to choose between good and evil it evokes man's noblest quality and calls upon him to reach for the stars.

I would add that voluntarism is creative. It is easy to issue compulsory orders. It is much harder to obtain a consensus of opinion resolving sharply opposing interests. Conflict is a powerful stimulant to both the intellect and the imagination. In the field of industrial relations the creativity of collective bargaining shows how successfully new ideas are generated by the process of composing conflicting interests.

Compulsion is not an inescapable ingredient of all government participation. There is a wide range of possibilities between non-intervention and public regulation through orders backed by the force of law. No conference, public or private, no negotiation between opposing interests even without the intervention of government, depends exclusively upon the power of intellectual persuasion. Other pressures are always present, backing or resisting the force of reason. This can also be true when the government participates. The procedures and institutions which we establish will determine the balance between the elements of coercion and submission, on the one hand, and, on the other, of persuasion and consent. Perhaps the government can be allowed ample scope to marshal the powers of leadership without being given the power to issue edicts.

At all events this, I think, is the greatest challenge to the legal profession in this age of conflict in which change rushes upon us like a mountain stream in springtime. The law, through government, must meet the needs of men at a time when lesser forms of organization are often inadequate, yet it must simultaneously check and restrain government enough to preserve individual freedom. The key—I suggest again—may lie somewhere in the nature and structure of government and to this study we lawyers must turn back, following the great lawyers of the early days of the Republic.

V

The opening of the splendid facilities that we dedicate today bears witness to the confidence that the legal profession will meet such public responsibilities. And the facilities will aid it immeasurably.

In 1934, in a dedicatory address at the University of Michigan Law Quadrangle, Harlan Fiske Stone observed that at one of the critical periods in history "candor would compel even those of us who have the most abiding faith in our profession, and the firmest belief in its capacity for future usefulness, to admit that in our own time the Bar has not attained its traditional position of public influence and leadership." The attraction of the best skill and capacity of the profession into the exacting and highly specialized service of business and finance, he said, "has given us a Bar whose leaders, like its rank and file, are on the whole less likely

to be well rounded professional men than their predecessors, whose energy and talent for public service and for bringing law into harmony with changed conditions have been largely absorbed in the advancement of interests of clients." Stone concluded that, "With the ever increasing demands on the time and energy of the practicing lawyer, it was natural that it should fall to the lot of the law school men [the academic branch of the profession] to take the lead in discharging the public duties which rest on the profession as a whole."

It would be unfair to repeat Stone's observations today without considerable qualification but it is still true that the germination and nurture of new ideas is primarily the responsibility of the law-school men. It is they who have the facilities for research, the time for reflection and the detachment for independent judgment. And the outlook of the law schools as they train young men and women today will give character and direction to the profession tomorrow.

But the practicing branch of the profession cannot leave its public responsibilities entirely to the law schools even though it continue, as always in the past, to give them loyal and enthusiastic support. Although the pressures which Stone noted have not abated, I think it fair to say that the Bar's sense of public responsibility has been greatly strengthened and that in its organized capacity it is beginning to turn to public problems. The American Bar Association is an effective force in promoting an international rule of law. The Bar Association of the City of New York has made excellent studies of conflicts of interest in government and the use of wiretrapping and similar devices in the detection and prosecution of crime. Surely, we may expect similar work from the American Bar Foundation. Expanding and enlarging such studies by practicing lawyers, not in the interest of their clients but for the improvement of law and government, is in the best tradition of the legal profession. The availability of adequate facilities such as this Law Center in the heart of a large and growing region should greatly promote such activities on the part of the Bar in this part of the country. Furthermore, the efforts of the practicing and academic branches of the profession will bear richer fruit if they join together in such undertakings. The one would bring time for research and academic detachment, the other greater knowledge and familiarity with practical consequences and the facilities for putting the conclusions into practice.

The last point is important. If the machinery and structure of government are to be improved, ways must be found for enabling legislators and executive and administrative officials to draw upon the research and reflections of those who have time for study. Surely, we all share the confidence of the founders of this Law Center that it will become such a bridge between the academy and the world of affairs.