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THINKING IN WAR TIME

Address of

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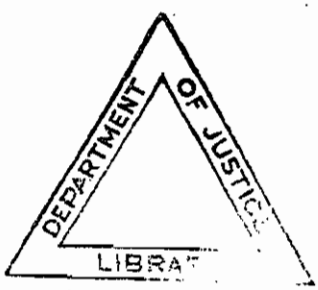

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THINKING IN WAR TIME

Forty-five years ago, Mr. Justice Holmes, then of the Supreme Judicial Court of Massachusetts, delivered an address, which he called "The Path of the Law," at the dedication of the law school building of the Boston University School of law. "The law," he said, "is the witness and external deposit of our moral life. Its history is the history of the moral development of the race." Of course, he added, after discussing the confusion between legal and moral ideas, the law in the broadest sense, like everything else, is a logical development. But the danger is to think of law as a given system to be worked out, like mathematics, from some general axioms of conduct. The logical method may flatter the longing for certainty and repose; but "certainty generally is illusion, and repose is not the destiny of man." Considerations of social advantages should be weighed by the judges. "I cannot but believe," he said, "that if the training of lawyers led them habitually to consider more definitely and explicitly the social advantage on which the rule they lay down must be justified, they sometimes would hesitate where now they are confident, and see that really they were taking sides upon debatable and often burning questions."

History too, he said, must be a part of the study. "It is a part of the rational study, because it is the first step toward an enlightened scepticism, that is, towards a deliberate reconsideration of the worth of those rules. When you get the dragon out of his cave onto the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal." We have, he finally added, too little theory in the law rather than too much.

This empirical approach of the great judge to the study of law suggests the approach that I shall venture to indicate tonight to the subject of our thinking in time of war. I have chosen this topic because it strikes me as an interesting speculation to consider what happens to our thinking in any time of war, and particularly in this war, not from the point of view of civil liberties - an aspect about which all of you have heard a good deal - but from a broader view. To what extent will the ideology of our war effort affect the peace that is to follow? Is there, to use a phrase of William James, a moral equivalent of war, a unity of will and of purpose, which grows out of the war and can be carried over into the peace? Must we lose, when peace comes, the directness and ferment which comes with the breath of war?

I assume, it is hardly necessary to say, the only peace which is possible - a peace which will come as the result of the victory of the united peoples.

The stream of human thinking, like the stream of consciousness, or the flow of history, has no sharp beginnings or endings. And yet in our deliberations it is difficult for us to resist the process of sorting ideas into time compartments. The past is past, we feel, and the future unborn. In reality the future shapes itself each instant before our eyes; and whether or not we turn away and say we cannot discuss the conditions of peace while we go about the business of war, the future peace, every day, out of our own actions, is driving its roots into our present life, and daily we are shaping and moulding the form of what is to come. If we could divest our minds of this tendency to frame our vision in the four static corners of a single picture, and could think and <u>feel</u> life as it really is, a constant shift and movement, timeless, and, to our vision, at least, infinite, we could use the "moral equivalent" of which James spoke for constructive ends.

All of which sounds, perhaps, like idle metaphysics curiously unconnected with the tough problems of here and now. But it is not. Let me show you, more concretely, what I mean.

The last war illsutrated what I mean by compartmentalized thinking. We built a huge war economy. Every day that we were building it - the spreading factories, the unified railroads, the expanded markets, the technological improvements, the emphasis on federal as against state action - we were building the basis of the kind of peace that was to follow. Yet we must have cherished a naive assumption that the peace, being peace, would be like the old peace, would certainly be more like the old peace than the economy we had come to know in the war. But the world of 1919 was in fact a world spread on the carpet of war. We rubbed our eyes, and built the fiction, to tide us over the years - endlessly as we came to think - that speculation could take the place of production, and that we could sell goods, pay for them ourselves by loans, and continue to prosper.

I do not propose to discuss tonight the form that our post war economy will take. But it does seem to me important to emphasize the fact that our present economy - being a war economy - has completely changed; and that, when we wake up one lovely morning to find that the peace is here, we shall be at that moment in the midst of a war-time economy that we ourselves have built with splendid haste and insistence. When the sun shines, we should recognize this sudden peace for what it is, and not blink it out of our startled consciousness, which has always striven to insist that the present is the past, whatever these professors and economists say about it. There is today substantially no competitive economy. Today the Government employs all of us to the great common end. If this process is not now complete, it will be before many months. Even now those who are on the thin fringes of that

civil life which does not feed into the single purpose pray that they may find opportunities to fuse their energies with the national will. Of course I speak in broad terms; but broadly our economy, our whole economy, has changed. And, to be honest, must we not admit as the desperateness of time presses on our heels, that if there is a war lag, a faltering in the march, the lag, in its deepest sense, lies in the backward glance to the days that are gone, the days when business went on as usual, and when we were impatiently trying to preserve in war the economy which years of peace had built?

There is, too, the economic equivalent of war. To face the new world ahead, the world whose foundations we are building, we must open our minds to see and our wills to use the economic equivalent of war when war has gone. For we cannot go back to using the equivalent of the peace, by merely turning back a leaf of history, as most of us would like to do, and finding on the other side the picture of the irrevocable past.

I suggest, then, that one of our major problems, when the peace comes, is to learn to use, to live in, the immense productive machine which for the war purpose we have built up. We must have minds bold enough to accept this new economy of plenty, and imaginations sufficiently fertile to devise ways of gearing the machine from war to peace, of retooling our capacity from war to peace, just as we are now completing the process of retooling from peace to war.

The extraordinary thing about war is that it brings to the surface many qualities which, in quieter days, lie hidden. Egotism gives place to a common energy; selfishness cannot be tolerated; the scattered human units move together, think together, work together. The nation as a symbol emerges from a half-forgotton dream, to a dear reality in men's minds. The roots of this refreshed patriotism run deep, and the soil about them is discovered again

to be the nourishment from which we draw our common life. The smaller symbols of our unity - school, profession, community and even state - fade, or at least are merged into this larger concept. We feel the sense of relief that comes from losing the loneliness of naked separatism that so often assails the undefended ego. We gain the elation of belonging to something greater and more durable than our individual selves. Unselfishness is a relief, and sacrifices for a common goal are sustained in the sweep of this new experience.

War as such need not be extolled to realize the virtues that accompany its waging. Courage emerges, and the will to fight, when fight we must. To be willing to die is surely an affirmation of faith. And in that affirmation the negations and doubts that had beset a quieter world disappear; and the passion of action fuses our souls into the possibility of splendid effort.

But the tremendous impact of this new vitality brings a compensating reaction in the other direction when the peace comes. And the future peace we build in our dreams, the uncertain peace which arises like a dim mist from the sweat and tears and blood of the war we are in, is filled with the little comforts, and the little leisure, and the faded memories of habit and routine to which our minds so pathetically seem to cling. Do you remember A. A. Milne writing in Punch from the trenches during the last war?

"When the war is over
And the Kaiser's out of print,
I'm going to get a tortoise
and watch the beggar sprint."

Perhaps one reason why war is such a relief to most of us is that in our hearts it lights a passionate way of taking life that our routine of desk or conveyor belt did not afford. I do not say that war alone can make

life glow for us. But I put the question as to whether the inevitable peace must be patterned on the same emotional lines we know. Is there no emotional equivalent which will create, in terms of normal and steady living, the sense of discipline, the tonic of adventure, the feeling that the soldier has in the hardness of his body and of his will?

I have talked of the present of war and the future of peace, and suggested a few of the moral qualities that rise to the surface in war. If we are daily building the peace from every action we take in the war, cannot some of those qualities, that so quickly sink below the surface when the war suddenly is done, be used now to mould our thinking and our living in directions we wish the peace to pursue? There is a new energy in the air; problems which loomed insoluble before Pearl Harbor seem now but trifling; corners are cut; formalism discarded; traditions forgotton; for even in war civilian life though differently tuned, goes on. The courts are open; the professions are not altogether idle; education, though curtailed, somehow proceeds. Art and music, recreation and reading, the normal cultures of our lives are perhaps interrupted, but they do not, they cannot disappear. It becomes pertinent then to see how they are being affected by the war, to search out ways they can be used in the future peace.

The field of art in paint and letters and music suffers perhaps most from the impact of war. Even to the artist imaginate creative work that does not touch the common effort seems unreal; and he is among the first to offer his services to the government, only too often to feel the frustration that comes from not being absorbed into that common effort. In education, also, the leaders join the vast machinery of planning and research around the edge of the war effort; or try, a little forlornly, to carry on the half emptied shells of their depopulated institutions, echoing to the talk of boys who would be men so that they too can fight. The work of the lawyers dries

up; and those who cannot join the Judge Advocate General's office - the older men - find what they can in service on selective service boards or among the air wardens. Life for the middle-aged and older professional men in a war is hard. Their hearts are young with the longing to fight. They must share the sadness of not being fully used, the lonely sense that but a day ago they were part of the stream of life, and now no longer march with the ranks, but must drop out to do the less important chores scattered along the way.

We realize today, far more than in 1917, modern war engages populations, not merely armies. Today the peoples of the world are at war. Morale is therefore infinitely more important. An army can live on discipline and the fullness of an active job to be done; but a people who are restless, and have still the scattered moments of undisciplined leisure, become uncertain, particularly where they are not absorbed in the actual struggle, so that they think of the peace that may be around the corner, and wonder about the day after tomorrow, and have time to question the direction of the world. Undirected, the quality of their thought becomes negative. They sense that the past is gone for them - the past which seems so dear and excellent, looking back from this uncertainty of the present. Their day dreams, tinged with the nostalgia that comes from sudden change, build into the world about them little that is tough or durable or adventurously imaginative with which to challenge the terrible new peace when finally but suddenly it comes.

I am not certain that this could be altogether different. Yet if we accept that men's thinking cannot be changed even under the morale of war, and the sting of this tremendous life, I do not see how we can make any broad preparation for the future. For the most difficult tasks that confront us are not in my opinion economic, or even political, but are to be found in our own minds and in our wills. The war came and we were not ready for the war. The

peace will come and we shall not be ready for the peace. What war can be, not merely in the headline now grown dim, but suddenly touching us, we can learn in one terrible day. But it will take more than a day, however terrible, to prepare our minds for the problems that will follow the war, problems which, without thought or study, we are shaping from the impact of the present.

Peculiarly this is true of the American mind. Still close to the experience of the frontier, which knew our youth, we think, more than the older democracies, in frontier terms when we come to study social problems. We have not been trained to theorize. There was too great an urgency to dig and build and establish ourselves. We have not developed a philosophy of life, even if we have learned a pleasant way of living. Although the tug of special interests and minority groups shapes, in a sort of hasty arbitration our political life, the machinery of that life still functions under the loose assumptions of an eighteenth century liberalism. If checks and balances were good enough for the fathers, we assume they are good enough for us. The change of the world in terms of time and space in the past hundred years - railroad, telegraph, telephone, automobile, movie, airplane, radio - has hardly found an echo in our political growth, except in the necessary patches and arrangements which have made it so extraordinarily complex without making it much more responsive to our needs. But I am concerned with thinking, rather than institutions. Although institutions reflect thinking, often they are but the depositaries of the exhausted habits of many generations that have given them a sort of obstructive life of their own, like barnacles clinging to a moving vessel.

What of our legal thinking? I am convinced that in the past few years owing to the patient and realistic leadership of a score or so of

scholars and judges and practicing lawyers who have used research and its results as tools to apply to the problems of modern administration of justice - men like Holmes, Wigmore, Brandeis, Pound, Cardozo, Hughes, Stone, and Frankfurter - I am convinced that in the last thirty years, since I have been practicing, there have been telling improvements in the manner in which justice is administered. I go further and note a mental change in lawyers and judges. Our generation - more especially the younger men - are more realistic, less mystic, more pragmatic, humbler, and more determined to improve their profession than the generation at whose feet we older men once sat. We learned from them - and surely they had it from Blackstone - that the law was a body of rounded perfection which we had but to discover and unfold when new facts, horrid facts, rose above the surface. For the law never changed, even if the facts did. . .

I do not believe it an exaggeration to suggest that there lurks in the legal thinking of many of our lawyers, even today in this year of tough realism, a mystical imperative that tends to confuse the lay mind, to make the layman wonder what it is all about. Lawyers still assume the comfortable dogma that the law is substantially settled, and that their task is but to expound the ancient learning, to construe and arrange it. But the life of the law, as Holmes said, is experience and not logic. Law is but one of the expressions of a manifold and changing life. Symbols that fit the thinking of one generation cannot fill the needs of a world that is changed. Legal fictions may be useful in bridging the steps of that change, may afford the sense of consistency and logical perfection that we cannot forego; but when the new values have emptied the over-used generalities of their relation to life, it is a point of wisdom as well as of courage to discard them. The imperative insistence of war plays havoc with our comfortable patterns of

peace. It is infinitely harder to think when the institutions which buttress our thinking, and relate it to what we love or are used to, give way to the necessity of new and swift decisions. And yet the door is suddenly opened to the creation of what is often so urgently needed, disentangled from the impediments of the past.

If we are to solve the problems with which the sudden peace will immediately confront us, we must learn to think more precisely, more simply, and above all with greater freedom from the legal jargon which encumbers so much of our lawyers' talk. Let me give you an example of that kind of jargon. It is taken from the opinion of a chief justice of the Supreme Court of the United States, written some thirty years ago. "Coming to consider the validity of the tax from this point of view," he wrote, "while not questioning at all that in common understanding it was direct merely on income and only indirect on property, it was held that, considering the substance of things it was direct on property in a constitutional sense since to burden an income by a tax was, from the point of substance, to burden the property from which the income was derived and thus accomplish the very thing which the provision as to apportionment of direct taxes was adopted to prevent. . . Moreover in addition the conclusion reached in the Pollock case did not in any degree involve holding that income taxes generically and necessarily came within the class of direct taxes on property, but on the contrary, recognized the fact that taxation on income was in its nature an excise entitled to be enforced as such unless and until it was concluded that to enforce it would amount to accomplishing the result which the requirements as to apportionment of direct taxation was adopted to prevent, in which case the duty would arise to disregard form and consider substance alone and hence subject the tax to the regulation as to apportionment which otherwise as an excise would not apply to it."

Doubtless there were many reasons for the failure of the League of Nations, after the last war, as an instrument for implementing the ways of peace. I do not here seek to evaluate them, or to uncover their intricate origins - the unworkability of the peace itself, the exclusion or absence of certain great powers, the artificial redistributions of territory and power, such as the Polish Corridor, the lack of more vigorous sanctions. Nor do I pin my faith to systems alone, nor confuse the fundamental moral causes with the mechanics of life. But the machinery of peace is enormously important because through its readjustments will flow the great economic and spiritual forces which we must master if we are to live. If we are honest, and look objectively at the systems under which we have been used to living, have taken for granted, we may find in them the same seeds of failure which we must not bring to the peace table.

Life must be organized on a simpler basis. We have failed in war, as well as in peace, to build ourselves houses. The failure is a beautiful example of the unsolved confusion of making complex a matter that could be simple. The complicated building codes, many of them unrevised for generations, the countless overlapping jurisdictions of federal, state, county, and city authority, the wasteful jurisdictional labor divisions, the confusion between private and public housing purposes, the planlessness of the communities where the houses are to be built - this is a field which cries for simplification.

A similar confusion is found in the multiplicity and overlap of the units of government. Surely to govern ourselves in a civilized manner it is hardly necessary to have quite so many counties, cities, towns, townships, school boards, and metropolitan units all making laws and passing regulations, and competitively scrambling for taxes. This dispersion saps our energies.

It is hard to be a good citizen on so many fronts.

I wonder if too we have not diluted our creative energies similarly in the field of education. The ideal of universal education seems sometimes to have found expression in the universal choice, affording our youth the opportunity to nibble from a dozen dishes, during the intervals they can snatch from the radio and the movie.

If in the peace to come there is a chance to build a new order, let us look closely at the kind of order we now have.

I am no physician, but I know that doctors sometimes, in their rare moments of leisurely thinking, doubt the diffusion which specialization has brought about. Intuition thrives on broad and varied human experience; and eyes fixed on a narrowing field tend to become myopic. In the complexity of modern life, in its mechanistic resources, in its over-specialization do we not lose the subtler values, the simpler values, and the sharper senses that give fun and gayety to life?

It is not enough to say that we must preserve our institutions. We must of course preserve them; but we must strengthen them to be powerful enough to absorb or withstand the immense pressures of a world that has largely outgrown our capacity to think; and make them flexible enough to respond to that world, which now in the war is being so swiftly rebuilt.