The War and Political Theory*

I. INDIVIDUALISM.

A CENTURY and a half ago Rousseau complained that man was born free but that everywhere he was in chains.¹ For a long time man in England and in the United States—and in a few other countries has been free, but the question now is, whether he shall be allowed to continue in chains in the other countries and whether in the free countries man shall continue to be free.

"The world must be made safe for democracy. Its peace must be planted upon the tested foundations of political liberty."² . . . . A supreme moment of history has come. The eyes of the people have been opened and they see."³

The war must and will be won. But as soon as it is won, the problem of reconstruction will arise; in fact, the leagues, unions, and other organizations which are already preparing public opinion for after the war problems, are doing work which must take such a long time that one wonders whether peace can come late enough; for what is necessary is a revision of some conceptions which have been instilled into the minds of youths for many years; and the propagation of ideas which as yet have only been put forward most tentatively. I mean ideas concerning the "is" and the "should be" of political organization. The war, on one hand, provides us with opportunities of studying old problems in a new light; it gives us new information on the work of the human mind, it fosters interest in comparative studies, it makes for a rapprochement, not only in knowledge but in feeling, between the different nations. The war, on the other hand, calls for a preparation for the new conditions that will arise. Hence, we must review and, if necessary, revise, some fundamental problems.

*The two articles, of which this is the first, are based on lectures delivered at the University of California on February 1, 8, 15, and 22, 1918. The footnotes have been added later, but the body of the lectures is almost unchanged.

¹ Rousseau, Contrat Social, book I, ch. 1.
² From the President's address on April 2, 1917, President Wilson's Addresses, ed. Harper, 250.
³ From the President's address on December 4, 1917, ibid. 291.
of political organization, thus preparing for a discussion of concrete problems both of American and of international political life.

It is with man that we start; we want to discuss individualism both as the method of the study of political organization, and as the supposed aim of political organization.

To what branch of human knowledge does this investigation belong? Is it what is called political science? Or the theory of public law? Or the theory of the state? We do not mind the name. For, after all, all these are, or ought to be, lines of human work using the same method (the study of certain aspects of human psychology) for the same end (the good of mankind). And this is the first point that must engage our attention.

What do we do on those lines of work? We describe "government," national, state and municipal government, at home and abroad, contemporary and former; we also study "political theories," which try to combine into systems the more or less fundamental conceptions underlying the social or, to restrict the field, the political life of man. But this is not all. At bottom the study of "government," and of "political theories," amounts to observing the conduct of individuals, the rules which are supposed to guide it, and the rules which actually guide it. This is true of learning civil or criminal law as much as of learning constitutional law or the law of procedure, or of studying political theories. Even those scholars who assume a "state" as the basis of their investigations, now admit, in most cases, that they are studying, at bottom, individuals, and, in particular, psychological phenomena in the life of individuals.

Having observed the rules which guide, or are supposed to guide, the conduct of individuals, we trace them to more fundamental ideas or psychological facts, and then we draw conclusions

---

4 E. g., Jellinek, Allgemeine Staatslehre, 2d ed. 10-11: "The theory of the state must investigate the state as to all the aspects of its essence." (Die staatslehre hat den Staat nach allen Seiten seines Wesens zu erforschen). We select this book as not only typical, but as the admittedly leading representative, of German political theory, much admired before the war in many a country now fighting on the Allied side. Cf. Orlando, Principii di diritto costituzionale 23; Ranelletti, Principii di diritto amministrativo I. 3.

5 Jellinek, Allgemeine Staatslehre, 2 ed., 78: "The state happenings are altogether human actions and the results of human actions. But all acting is a psychical activity. Hence psychology is . . . the prerequisite (Voraussetzung) . . . . of the theory of the state . . . . the state . . . . is essentially . . . . a phenomenon of the interior life of man" (innermenschliche Erscheinung). Cf. Rannelleti, Principii, I. 6, 15.
as to how men will act in certain conditions. We notice only tendencies, because the behavior of each individual depends on his own particular position—but the tendencies which we observe may be so general that we may claim for them something very close to universal validity.

This means, then, that we deal with individuals—either men whom we actually observe (every one actually observing political life must pay much attention to the individual make-up of the statesmen with whom he is concerned), or those whose conduct and ideas we observe in legal cases, speeches, statements, and other sources of information; and from the general system of education, the level of honesty, and so on, we try to conclude what action the individuals will take.

Some old theories tell us that political science deals, not with individuals, but with what they call "states," meaning by this word "organisms," 6 "organisms of a peculiar kind," 7 etc. Such theories are dangerous, for at bottom there will always be back of them a man or a group of men who wish to shirk responsibility. Frederick II of Prussia is said to have described himself as "the first servant of the state," 8 but the code prepared mainly in his life-

---

6 E. g., Gierke, Das Wesen der menschlichen Verbände, 9-13. This address is again selected as one of the most recent (1902) pronouncements on the organic theory of the state by a German scholar who is recognized as one of the most prominent exponents of that school of thought. Some characteristic extracts follow: "Again and again there has been a danger of the personality of the state being drowned either in a sovereign ruler or in a sovereign collectivity of the people. . . . Are human associations perhaps real units? I answer with many: Yes! and it seems to me that so must answer everybody who has broken away from the individualistic conception of society and who considers man's social life as a life of a higher order, of which the individual life is a member" (dem sich das Einzelleben eingliedert). Cf. Hegel, Rechtsphilosophie, §§ 256, ff., esp. §259. As to Hegel's theory in general, Duguit, The Law and the State, Harvard Law Review, November, 1917, ch. IV, V.

7 E. g., Bluntschi, The Theory of the State, English trans., 3 ed., 18. A few extracts follow: "It is the especial merit of the German school of historical jurists to have recognized the organic nature of the Nation and the State. . . . In calling the State an organism we are not thinking of the activities by which plants and animals seek, consume and assimilate nourishment, and reproduce their species. We are thinking rather of the following characteristics of natural organisms: (a) Every organism is a union of soul and body, i. e. of material elements and vital forces. . . . In the State spirit and body, will and active organs are necessarily bound together in one life."

8 In another work, Bluntschi, at one time the leader in political theory in Germany and also much quoted abroad, enumerates as the three great events of the eighteenth century the American and the French Revolutions and "the raising of the Prussian State by Frederick the Great since 1740, he having opposed to the mediaeval theory of the divine right and of the
time, though promulgated by his successor, declared that "all the rights and duties of the state against its citizens and against those under its protection are united in the head of the state," a statement which is still in force, in a general sense, as a part of the Prussian law. All the illegal acts of the Austrian and German rulers are usually traced back to "state necessity," for the actual benefit of a few individual men.

proprietary dominion of the kings the modern legal principle: The king is the first servant of the State." Bluntschli, Deutsche Staatslehre (1880), 9. Yet Frederick II was indeed a well-paid and not dismissible servant. Moreover, his father had swept aside the old feudal rights in favor of his own sovereignty (1716): "I attain my aim and stabilize (establish) the sovereignty and plant the crown firmly like a rock of bronze and I leave to the Messrs. Junkers the wind of the diet." (Acta Borussica, II. 352). William II is still proud of that statement of his ancestor: "The sentiment that finds expression now in Königsberg proves that it is an entirely unique bond which joins the city and the province to our house. . . . Here it was that the Great Elector, by his own right, created himself the sovereign Duke in Prussia; here his son set the King's crown upon his head; and the sovereign house of Brandenburg thus became one of the European powers. Frederick William I established here his authority as 'rocher de bronze'." Gauss, The German Emperor as shown in his public utterances, 280.

On the other hand, this modern royal absolutism should by no means be traced back to the Middle Ages in which the conception that the king was absolutely bound by the laws was stronger than in the Prussia or Austria of the twentieth century. See Carlyle, Political Theories in the Middle Ages 12, 92-93, and elsewhere. Cf. as to French theory in the seventeenth century, Esmein, Traité élémentaire d'histoire du droit français, 11 ed. 391.

9 Allgemeines Landrecht, part II, title 13 s. 1.
10 Part II, title 13 of the Allg. Landrecht is still in force throughout Prussia in so far as later statutes have not abolished individual rules, Bornhak, Preussisches Staatsrecht, I. 108.
11 Por instance: the Bohemian diet had for years been unable to arrive at decisions because of the "obstruction" practiced by the German minority as against the Bohemian (Czech) majority. Instead of taking steps to protect the majority, the Hapsburg government, in violation of the fundamental law of 1861, dissolved the diet and appointed an illegal government commission to take charge of the duties hitherto performed by elective organs. An official communiqué "explaining" this step, which had been taken in the interests of the Germans, stated that "that condition of affairs demands an active interference of the government as a duty toward the country and its inhabitants without distinction of nationality, but also in no less measure as a duty towards the whole state (dem Staatsganzen) . . . . But also general interests of the state and higher considerations of the common good come in view here. . . . The government does not conceal from itself that it has taken a path which hitherto had not been trodden and that the measures taken are moving along a line which lies, not within, but beside (nicht innerhalb, sondern neben) the constitution of the country. . . . With a quiet conscience the government sees the legal title of its action in the undeniable, very marked, state of necessity, out of which there has arisen for it in this case the right of necessity." Neue Freie Presse, July 27, 1913, morning edition, no. 17574, p. 5. The legality of the government measure having been questioned, the Adminis-
Still, if such theories were true, we should have, with whatever sorrow, to accept them. But are they true?

Already before the war opposition to them had been growing. The war has been one great lesson in the importance of individualism as the method of social work. It is to the individual in the allied and neutral countries, to his prejudices, his personal interests, his peculiar make-up, that German propaganda has been, and is, appealing. Not only long before the war, but throughout the war the Germans have been trying to influence the thinking of millions—by which was meant millions of individuals. That there were millions of them, that modern warfare and modern politics both compel us to think in millions, should not blind us to the fact that it is the thinking of millions that counts. And to the same millions of individuals, to one and the second and the third individual and to the rest of them, have been addressed the recruiting posters, the Liberty Loan and Red Cross appeals, the directions of the Food Administration, and the publications of the Committee on Public Information. And the army and the navy and the government are just so many individuals. We see individual civilians come up and don khaki and learn how to march and how to shoot—but however similar the movements of the individual soldiers in a company, each one is distinct from the other in his individual consciousness, and the aim of the enemy

The administrative Court decided that "the right of the prince of the country to take by himself the legislative measures urgently necessary in the interests of the state or of a part thereof to prevent grave damage, must always be recognized as self-evident. This follows if one considers that it could not be reconciled with the vital interests of the state or of the individual countries, nor would it be in harmony with sensible logic and the sense of law, nay, it would amount to denying to a 'state being' (Staatswesen) the right to preserve its existence, were one to condemn the emperor to inactivity only because the imperial parliament or the provincial diet, which otherwise are called upon to co-operate in the passing of a law, are not inclined, or are unable to co-operate." (Decision of October 6, 1913, reported in Neue Freie Presse, October 17, 1913, evening edition, No. 17655, p. 5).

Similarly, in commenting on Art. 4 of the Prussian constitution of 1850, which declares, among other things, that "all the Prussians are equal before the law," a leading German scholar declares that that article was directed against the "state of estates" and not against "the national state," so that it may not be used to hamper the statutes and administrative measures "aiming admittedly and non-admittedly" at the maintenance, strengthening, and expansion of "Germandom" in the Eastern Marches (i. e., the anti-Polish laws, such as the law of 1908 allowing expropriation for purposes of Germanization, and administrative measures which are being constantly taken to discriminate against the Poles). Anschütz, Die Verfassungsurkunde für den preussischen Staat, I. 113.
is to kill individuals—many of them, but each one distinct from the others.  

Hence, what we call political science or whatever term we want to apply to it, is ultimately a kind of applied psychology; we try to discover the fundamental rules governing the conduct of individuals; individualism is the proper method of our study.

But no sooner do we adopt this method than we discover that man is a "social being," that he has what is called the "social instinct," that is, a number of inclinations and tendencies, of which one, for instance, and a most pronounced one, is the tendency to imitate. Man is the most imitative creature, says Aristotle, and this pronouncement, known much less than the other one quoted above, is, nevertheless, one of the most fundamental truths. The instinct of imitation has of late had much light thrown upon it, thanks especially to the Frenchman Tarde.

The tendency to imitate operates in many cases subconsciously, but sometimes we imitate, and especially in political institutions, with the fullest consciousness. No one can study the history of the government of modern countries or the mediaeval institutions without remarking immediately the connection between the organization of different groups of men. It is hardly necessary to point out, for instance, the influence which the American constitutional development in the eighteenth century exercised on the developments in France, which were also influenced by Montesquieu's teaching, itself in turn based largely on his study of English conditions. Legal history (and, in general, the history of political institutions), is a history of ideas, as Maitland says, of ideas of individuals, and such ideas are taken over, consciously or subconsciously, by other individuals.

But the chief expression of the social instinct is the feeling of solidarity of man with man. A result of that feeling is the

---

12 These observations, which at present seem almost obvious, were made some time ago by Croce, Philosophy of the Practical, Third Part, The Laws, trans. Ainslie, 465, 499.
13 "Imitation is natural to man from childhood and one of his differences from (or advantages over) the other creatures is that he is the most imitative creature and learns his first lessons by imitation." Poetics, c. 4. Cf. Quintilian, Inst. Orat. lib. x.
15 Borgeaud, Adoption and Amendment of Constitutions, trans. Hazen. 3f.
16 Esmein, Éléments de droit constitutionnel, 6th ed., 65, and elsewhere.
17 It is the glory of Professor Duguit of the University of Bordeaux.
fact that when sympathizing with the "countries" ravaged by the Germans we primarily mean the individuals, and we sympathize with them because of the harm done to their bodies, or their property, or their means of education or of progress. To us Miss Cavell is a type of an individual sacrificing herself for an idea, to help others. The roots of the feeling of sympathy and pity lie in the fact that man, like some animals, is bound to co-operate with others in his fight for existence and for what we call progress. And all human society is ultimately intended to facilitate that co-operation, and to lead to everybody's happiness with everybody's help.

This seems the recognized ideal of democracy. Where a country is governed in an aristocratic or autocratic way (a distinction not necessarily in substance but in form), this aim is evaded by hiding behind an impersonal "state" of which the good is supposed to be served by the rulers that be; only seldom is the good of the governing dynasty admitted to be the only or main object, or even one of the main objects.18 The progress in civilization in the widest sense of the word consists in making conflicts less acute, if possible preventing them, otherwise adjusting them, smoothing away difficulties. This relates to individuals: a cultured individual is one who can bring about the same results in a less offensive way than a rough one; it relates to groups of indi-
individuals, whether we call them societies, or states, or what not; hence, for instance, toleration is taken to be a sign of progress, hence also conflicts between progressive groups are adjusted by arbitration.

Those who believe that the individual exists only in and through the state compel obedience to certain rules and make man less fit to take care of his own improvement. Those who believe that we should take the individual as the basis and then investigate the social instinct, make man responsible for devising, and submitting to, rules which make social life smoother. Having discovered as many facts as possible with regard to the psychological make-up of the individual, in particular with regard to his social instinct, we then want to help the natural tendency to cooperation, the natural instinct of solidarity. In other words, apart from describing the human tendencies, we try to help and further them.

In a democracy everybody is responsible for his own improvement, but at the same time everybody must be given a chance of developing his own will (and acting) in accordance with the requirements of social solidarity. It is for us, whether we designate our study as political science or as theory of public law or as science of politics, to indicate this individual duty and to point out ways in which the aim can best be attained. We discover on reflection, for instance, that while the happiness of the individual is aimed at by himself and its assurance furthered by co-operation with others, there may be need of sacrifice for the sake of the others, and the history of all times, and (what is nearer to us) the history of the present war, teaches us that such sacrifice, whether based on impulse or on a careful consideration of world politics, has been witnessed to a degree that fills one with a thrill of pride at the thought of the noble character of the race. We find that there are at any time principles so dear to everybody that individuals are willing to make sacrifices rather than see those principles wiped out or weakened. And we find it to be our duty to pave the way for a realization of such principles.

And it is in keeping with the same conception of solidarity that where such principles are, or are supposed to be, at stake, and where any individual has the social instinct developed insufficiently to help, or where he even obstructs others in the organiza-
tion of the common effort (as is the case with draft opponents, etc.), other men will get him out of the way. The social instinct in man is manifested by a craving for mutual help, and where an individual breaks away he is likely to be made a sufferer. This is not peculiar to men, it holds good of animals with a social instinct. It is, in the case of man, useful for the purpose of those who penalize the offender, and he can not object because his claim on their solidarity with him has been forfeited.

To conclude: while individualism is our method, we aim at helping solidarity.

Late in 1914 a dear friend of mine, who had been commissioned in the British Army, changed his unit so as to get to France earlier. His father, on notifying me of his son's departure, quoted the words of the poet to show what he expected to be the result of the war:

"Man to man shall be a friend and brother."

Here is the whole substance of what we are doing and why. It is "man" and not the state that we are concerned with. "Man to man shall be a friend and brother,"—that is the postulate of solidarity. My friend was killed in 1915. It is for us, who survive, to help realize as much as possible of the ideal. Success depends on, and is intended for, not "states," but individual men. That entails an individual realization of duty.

II. THE STATE AND SOVEREIGNTY.

Nothing can teach one the theory of the state as it is in force in Europe now, more vividly than life for years in a little Polish city on the border between two of the three "states" among which Poland is divided. There one finds men of the same type, with the same language, the same traditions, the same political aspirations, in a country in which, it would seem, all division is artificial, because there is nothing in its physical geography to warrant such division—yet those men are told that they "owe different allegiance,"¹⁹ "serve different sovereigns,"²⁰ that by

¹⁹ To the Hohenzollerns, the Hapsburgs, and the Holstein-Gottorps (alias Romanovs).
²⁰ In France since the beginning of the war, and in England since February 5, 1918 (London Gazette, February 8, 1918, p. 1826, col. 2) the Polish subjects of the Hapsburgs and the Hohenzollerns have, as a rule, the legal standing of "alien friends." In the United States they, as well as
trying to unite and free their country they are committing high treason; and they are forced every year to yield the flower of their manhood to serve in the armies of the oppressors, the conquerors, foreigners with no sense of the local needs, with no sympathy for the desires of the oppressed, the conquered. And if a complaint goes forth throughout the world, then the oppressed are told that they can not receive help from abroad, because it is the internal affair of each "state" how "it" treats "its" subjects. All is done in the name of the "state." The state is supreme in its territory and independent of all outside powers. It is against these conditions that war is being waged now.

"We are glad . . . . to fight . . . . for the privilege of men everywhere to choose their way of life and of obedience."22

That will necessitate the extermination of some old conceptions. In any case, we must reconsider the most important of them.

The first important conception is that of the state. There are some who see an absolute analogy between the state and an organism, whatever be meant by organism. To them, human associations, and the "state" is one of them, are real "beings." A community regulated by law is an entity with real unity. It has, like the individual, a "corporal-spiritual unity of life, with a will and a possibility of putting its will into practice;"23 "This can not be proved directly except from the effects; it depends also on the way in which one looks on the world—and, after all, most scientific theories are just hypotheses."24 This theory is losing its supporters, but has some prominent ones even now.25 In any case, the individualist theory is simpler, explains things in a way which

the Czechoslovaks and the Jugoslavs, are still legally alien enemies, although the United States is sending an expedition to Siberia to assist the Czechoslovak forces there, whose "legal allegiance" is to the Hapsburgs.

21 See e. g., concerning the efforts of Prince Eulenburg, German Ambassador in Vienna, to prevent the Poles of Galicia from protesting against the oppression of their brethren in Prussia. Poland, Prussia, and Culture (Oxford Pamphlets 1914, no. 37) p. 21, The Times (London) December 6, 1901, p. 5, col. c.
22 From the President's speech on April 2, 1917.
23 Gierke, Das Wesen der menschlichen Verbände, 12.
25 It has owed its importance mainly to the German historical school of jurisprudence, see above note 7.
dispenses with such artificial hypotheses and is therefore, from the point of view of the theory of knowledge, preferable.

Still another theory, which owes its development to German scholars but has been very much favored elsewhere, sees in the state a teleological unit;\textsuperscript{26} from the point of view of the end of the association all its members are united, because they are all there for the same purpose; similarly, between the different citizens or subjects of the state there is that teleological unity, that community of bonds in the form of laws, etc., which makes them, for certain purposes, unite in "the state." Yet once this teleological unity is asserted, the authors proceed to endow "it" with original ruling power\textsuperscript{27} and with legal personality,\textsuperscript{28} to compare "it" with organisms, because organisms are also teleological units.\textsuperscript{29} The main exponent of this theory, Jellinek, has called attention to the difference between what we might call the psychological (he called it social) and the legal point of view in studying the "state." But he and others agree that the state is not (as an American would think) the same as the people of the state, but that the state is composed of three elements: the population, the territory, and the original ruling power.\textsuperscript{30}

And then, the question arises as to the relation between this state and the law. Sociologically or psychologically speaking the state is to Jellinek an "abstraction," the teleological unity of its subjects. Legally speaking, it is a corporation,\textsuperscript{31} and a corporation being such only if endowed with that quality by the law, it would follow that, legally speaking, the state is the creation of the law. Yet no. The law is the will of the state. At the same time the law recognizes the state, whatever this may mean: whether it means that it recognizes an existing organism or that it recognizes a teleological unity with original ruling power; but since the law is the will of the state it would follow that the state may change its law. Ordinarily we speak of persons as having a will, hence once we apply this conception to the state it would follow by analogy that a state is not bound by its law any more than a person by his own will. True, there may, in the case of a person, be an exter-

\textsuperscript{26} Jellinek, Allgemeine Staatslehre, 2nd ed., 170 ff.
\textsuperscript{27} Ibid. 173.
\textsuperscript{28} Ibid. 175-176.
\textsuperscript{29} Jellinek, Allgemeine Staatslehre, 171.
\textsuperscript{30} Ibid. 137-139.
\textsuperscript{31} Ibid. 176.
nal law compelling one to abide by one's promises or other obligations; but in the case of the state there is not supposed to be any law superior to the law of the state. In addition, the theory of the personality of the state is extended almost to an anthropomorphic extent; just as the law recognizes the right of self-defence on the part of individuals, so it is claimed that the state has a right to preserve its existence at all costs. In the case of individuals, to be sure, there is a court or a jury to establish whether the right of self-defence warranted the act complained of; in the case of the state the state itself, or rather its "supreme organ," will, I suppose, be the judge as well as the accuser. For the state is, at least as a rule, sovereign.

The word sovereignty may mean different things. A "sovereign" means, sometimes, the ruler of a country; that is so especially in international relations. Secondly, sovereignty is described as the right of exclusive legal self-determination and self-limitation. This power is, however, sometimes ascribed to the state itself. But what about the countries where the legal conception of the state does not exist, i.e., where what elsewhere is supposed to be the property of the state is vested in the king, or in officials? And where all the "government" powers are the powers of the different individuals? Thirdly, sovereignty may mean the power of unlimited legislation—in this sense the British King in Parliament is sovereign, and so is the French National Assembly, and so, again, is the German Bundesrat plus Reich-

---

52 Ibid. 366 in international relations; ibid. 349-350 generally.
53 See Murray, New English Dictionary, IX., 487-489, s. v. sovereign, sovereignty, etc. The different non-legal and non-political meanings are instructive, but of course there is no room for their discussion here.
54 Jellinek, Allgemeine Staatslehre, 481.
55 E. g., England, and the United Kingdom. Apart from "Crown property," there is property vested, e.g., in the Postmaster-General, in the Solicitor to the Treasury, etc.
56 E. g., Belgian Constitution of 1831, art. 78: "The king has no powers other than those that are attributed to him formally by the Constitution and by the individual laws enacted by virtue of the Constitution."
57 Dicey, Law of the Constitution, 8th ed., 37, 38, 70.
58 Duguit, Manuel de droit constitutionnel 3 ed., 557. This is, however, contested, both as to whether the National Assembly can revise the constitutional laws beyond the scope of the revision originally agreed upon by the two chambers, and as to whether the National Assembly can change the republican form of government (art. 2, law of August 14, 1884) Duguit's argument for the affirmative (Manuel 3 ed., 558, 559) seems convincing, but see Esmein, Éléments de droit constitutionnel, 6 ed., 1073 ff. As to the ordinary statutes passed by the two chambers and violating the constitutional laws, the predominant opinion so far has been that the courts are
Finally, sovereignty may mean the ultimate source of all political organization, in which sense, in France and in the United States and in Belgium, it is declared to reside in the people. The distinction is usually made between legal and political sovereignty. The sovereignty of the British King in Parliament, for instance, is legal, whereas the political or practical sovereignty is supposed to reside in the electorate.

We can not criticize the conceptions of state and sovereignty without tracing in a very general way, at least, their growth. The theory of the state owes its origin to many elements. In a very direct way it can be traced to the different ethnic groups of Europe which can be observed rising out of the chaos of the early middle ages. In the case of the Slavs it was loose tribes with a communistic local organization united by conquest, either from outside (Russia) or by a man who had first acquired power over one of the tribes (Bohemia, Poland). In the case of France it was a remnant of the old Roman Empire slowly recovering from the horrors of the Teutonic invasion; or (Britain, Spain) it was a local population subdued by outside invaders. Finally each one of the groups thus formed would find itself under a ruler who would share with it, or with the majority of the inhabitants, tongue and traditions. In addition to this ethnic element there would be the newly recovered Greek conception of a polis, or the Roman conception of a republic; and then, the organic theory

39 German Const. of 1871, art. 2, 4, 5, 78. Those two bodies can change the constitution itself under art. 78, so as to indefinitely enlarge the scope of their own competence; moreover, even without such a change of the constitution laws have time and again been passed on subjects which were admittedly outside the actual legislative competence of the two bodies (Laband in Jahrbuch des öffentlichen Rechts, I. 27, and ibid. note 1: If, according to the decisions of the Bundesrat, there are presented to the Reichstag bills on subjects which do not belong to the competence of the Empire, the question of the competence is hardly raised in the Reichstag). The courts, it may be added, can not question the validity of imperial (that is federal) statutes, Laband, Das Staatsrecht des deutschen Reiches, 2nd ed., I. 555, 608.

40 Preamble to the Constitution of the United States: "We, the people of the United States"; Preamble to the Constitution of California, and see ibid., art. I, sec. 2; Declaration of rights of man and the citizen, art. 3; Belgian Constitution, art. 25. Of course, "people" or "nation" does not necessarily coincide with "the body of voters."

was introduced with the recovery of Aristotle's Politics under the influence of St. Thomas Aquinas and was to remain there, even if at first it supplied but figures of speech, and even if the mediaeval individualism which had taken the place of primitive communism continue to be the main conception until the eighteenth century. The natural tendency of keeping together where people had a tongue in common and where their traditions and organization favored coherence, would suggest anthropomorphistic comparisons; that is a general human tendency. Primitive peoples personify their gods just as Roman and modern lawyers vest property and other rights in "fictitious" persons. But just as with a primitive people the god, though personified, must be superhuman to warrant things that would not be permissible to mere men, so the conception of the "state" is devised to supply a personified, but impersonal or superhuman excuse. Hence Frederick II considered or advertised himself as the first servant of the state; and German scholars distinguish the state from the people (to make the ruler independent of the people), endow it with personality, and with sovereignty. 

Sovereignty was at first an attribute of persons. "Sovereign"

---

42 Carlyle, History of Mediaeval Political Theory in the West III. 3.
43 Thus the English Chancellor, the bishop of St. Davids, addressing parliament in 1377, uses the following comparison: "If the head of a man be healthy and full of virtues, yet if the arm or leg of the same man because of illness be dry, so that there be no moisture in it, that dry leg or arm is not habile and by nature cannot receive the virtue and the grace of health from the head of the body. And by that head of which I have spoken I mean our lord the king who is our head (chief) and our sovereign, and we all (are) his limbs and subjects, and are burned by sins and vices, and principally (is burned) the principal virtue, which is charity, it has dried out and is altogether failing among us." (Rolls of Parliament, II. 362, col. 1). Characteristically enough, he proceeded at once to draw the conclusion that parliament ought to grant the king more money—an early example of the application of the organic theory for the benefit of the ruler. But even today we continue to speak of the "head" of the state, of the "members" of an organization, of the "growth" of an empire. Many other expressions of this type are still to be found and can be traced back to the middle ages.

44 Carlyle, History of Mediaeval Political Theory in the West, III. 7, cf. 6, 8.
45 E. g., Rehm, Das rechtliche Wesen der deutschen Monarchie, Archiv des Öffentlichen Rechts, XXV, 397: "The people and the state are legally not one. In the modern state the state power belongs to a compound of land, men and those who have the power into one unitary compound conception (die Zusammenfassung von Land, Leuten, und Gewalthabern zu einem einheitlichen Gesamtbegriffe). The state is the personification of a conception comprising land, people and those who have the power." Cf. Jellinek, Allgemeine Staatslehre, 2nd ed., 137.
meant supreme. Every ruler wished to be as independent as possible from all the other rulers, and also from the Pope. While the official theory of the “Holy Roman” Empire distributed the two swords between the pope and the emperor, in other countries, for instance in England, it was thought preferable to give the secular sword to any secular ruler, whether emperor or king. In Poland, in France, in Russia, in England, the ruler’s power was, by the end of the middle ages, practically centralized and consolidated, while in the Empire it was growing weaker. The Reformation was not so much the cause as the result of the weakening of the power of the popes. Already in the fifteenth century in Poland, the king had asserted his right of overruling papal decrees. The middle ages delighted in picturesque, instead of abstract, expressions. Such a picturesque expression was “corruption of blood;” it was taken from every-day physical experience. Another such expression was “supreme;” the more independent the ruler was, the more did he deserve the predicate “supreme;” hence in France, when feudalism was still almost at its height, every baron was considered “sovereign” in his barony, while the king was sovereign in the whole country. Later on the king, and the king alone, became sovereign in the sense of being above everybody within his country and independent from everybody outside. At first “sovereignty” was a quality; it meant “being sovereign;” later on, sovereignty came to mean, among other things, a power. Finally, for the sovereign ruler, there was substituted, in some cases, the nation; elsewhere, the king plus parliament (England); or, the “state” (Germany).

Now, when we consider all these theories of state and sovereignty, it is interesting to note that even among those who accept these theories as necessary elements of our thought, there is no

47 Carlyle, History of Mediaeval Political Theory, III. 174, note 1.
48 Bracton, De legibus et consuetudinibus Anglie, f. 107 a, and elsewhere.
49 Beaumanoir, Les Coutumes du Beauvaisis, No. 1043 (written in the second half of the thirteenth century).
50 Duguit, Les transformations du droit public, 10.
51 See above, notes 40 and 36.
52 See above, note 37.
53 Jellinek, Allgemeine Staatslehre 421. To Jellinek, sovereignty remains an attribute of the power of the state, and is not the power itself, ibid, 470. A state need not be sovereign, ibid. 472.
agreement as to what the state, and what sovereignty, is. And that is not all. The organic theory of the state is admittedly not borne out by what is given in our experience;\(^5\) on the contrary, individual psychology can explain the phenomena of social life. Moreover the organic theory assumes that the state is one great organism composed of smaller organisms, which in their turn are composed of individual men; it could be graphically represented by a number of circles, of which one, the largest, includes all the others, and represents the state. Yet our experience points to a possibility of many circles which need by no means be contained in any one smaller than the one that would represent humanity. The actions of the individual are the result of different motives which can be traced back to rules originating in different ways. To the "state," the church, the different clubs, the political party, the social group, the family, to all these groups of men can be traced the rules which determine the behavior of each individual.\(^6\) It is the tendency of modern social life to make the individual more and more independent of the organization into which he was born, by letting him join many different organizations, on each of which he can fall back if the others fail him.\(^6\)

Such organizations or unorganized groups (the church; the international community of scholars or business men; a group of influential friends, etc.) may be within or without the same state; an individual may consider the rules of one of them more important than

\(^5\) Gierke, Das Wesen der menschlichen Verbände, 19-20 (Cf. above, note 24): "A direct proof of the existence of social living units (von sozialen Lebenseinheiten) can not be given. But the individual living unit can also not be proven directly. We can, however, infer the existence of such units indirectly from their effects. The convincing power of such evidence will of course not be equal in the case of everybody. The outlook upon the world (Weltanschauung) also plays its part here. But, after all, even the seemingly most solid foundations of scientific understanding are only well founded hypotheses." First of all, they are well founded. Secondly, to argue that "we can infer the existence" of something from "its" effects is to use as evidence what we set out to prove: for when we speak of "their" effects we already assume the "they"—and we wanted to prove the existence of the very same "they." Furthermore, on this basis one might prove anything one wanted, merely by saying that after all nothing else can be proved. In other words, we have here a religion with a dogma as its starting point. Finally, in the case of the individual, there is the individual consciousness of our existence as a unit.

\(^6\) On the psychological work of different rules, one type of which is what we call the laws, see Croce, Philosophy of the Practical, trans. Ainslie, Third Part, The Laws, 463-585.

\(^6\) This point is discussed by Makarewicz, Soziale Entwicklung der Neuzeit, Archiv für Rechts—und Wirtschaftsphilosophie, (1913).
those of the state. A young man hurrying to meet his sweetheart will probably risk breaking the state rule against speeding rather than incur the girl's displeasure. Similarly, the more the world advances, the easier is it for the individual to break off his connection with the group to which he belongs by birth, and to join another. We are moving "from status to contract."57 And if we speak of "joining an organization," we mean the undertaking to submit to the rules of behavior established in a group of men. It all comes down to the influence of rules on the mind of the individual.

If we could regard the state as one of the many groups into which individuals unite, there might be some excuse at least for the "teleological school." Unfortunately, this school proceeds to compare the state with an organism, thus basing its teaching on an assumption like that of the organic school.58 Moreover, the theory can be applied only in certain countries; its success or failure depends entirely on its scope.59 If we assume a certain group of rules, claiming for none of them absolute "supremacy" from the psychological point of view, then the state will remain one of the many groups. But no; once the teleological unity is asserted, we hear that "the international law is there for the sake of the states and not the states for the sake of international law,"60 a statement which implies that the states are there, even if not for the sake of international law. Yet we thought that the state was only an abstraction, from the psychological or the sociological point of view.

We face more difficulties on confronting the legal aspect of the state. Is the state a creation of the law?61 Then how can it,
in turn, create the law? If it has "original ruling power," that is power not given it by anybody, who can impose limits on that power? But then, if "legally" the state is a corporation, it is fair to ask, what is meant by "legally?" From the point of view of one given state? Then that is not true of England, where the law does not recognize the state. From the point of view of some juristic doctrine which is international? Then that would be something above any one state.

The difficulty is due to the fact that the conception of sovereignty has, since the sixteenth century been exaggerated. The middle ages, which had no conception of an abstract state had, however, very sound political ideas. True, they were unable to devise a sufficiently good executive organization, but the law was above everybody and everything. Some rules of the law were supposed to be of divine, others of human origin. Some could, others could not, be changed by man. But there were principles which no one might violate, and even the king, though in certain respects able to change the law, was under the law and, as Bracton says, could do nothing else than what he could do by law; for it was the law that made him king. It took centuries of centralization of the royal power in France before the king could assert that his power was not to be subject to human check; even when royal absolutism was at its height, the parlements could refuse, or at least delay and remonstrate against, the registration of royal decrees which they considered illegal. It
was not until the theory of the state as a juristic person was worked out, that the state was declared to be bound by any law only as long as it, the state itself, did not care to change it\textsuperscript{68} (a reminiscence of the theory of Hobbes and of Austin with the introduction of the conception of the state as owner of the ruling power, a conception which again was an adaptation of Rousseau's conception of the sovereign general will). In other words, the old conception of the sovereignty of the impersonal law, as Krabbe calls it\textsuperscript{69} (a conception still preserved in English and in American practice) gave way of late, in Germany and in a few other countries, to the conception of the sovereignty of the personified state; according to the German doctrine,\textsuperscript{70} the "bearer" of the power of this sovereign, personified state is the ruler or, in the German Empire, the Federal Council, a meeting of the diplomatic representatives of the rulers of the individual states.

No wonder, then, that even before the present war the theory of the omnipotent state, a theory of which the chief result has been the justification of the autocracy of the Hohenzollerns and of the Hapsburgs, was meeting with opposition. In Italy, Croce was discussing the sociological conception of the law, and was pointing out the consequences of the fact that the law works mainly in our mind just as do all the other rules; of the fact that, from the point of view of the theory of knowledge, we must take the individual as the starting point of our observations.\textsuperscript{71} In Poland, Makarewicz was applying the individualistic method of investigating social problems, such as the problems of crime and of punishment; he was emphasizing the growing freedom of the individual to change, and to increase the number of, the associations to which the individual belongs.\textsuperscript{72} In Holland, Krabbe was

\textsuperscript{68} Jellinek, Allgemeine Staatslehre, 359, 360.
\textsuperscript{69} Krabbe, Die Lehre der Rechtssouveränität, 47, 254.
\textsuperscript{70} E. g., Stier-Somlo, Preussisches Staatsrecht, I, 24. Jellinek, Allgemeine Staatslehre 2nd ed. 538-539, and ibid. note 2, where Jellinek, who formerly had adhered to the same theory, now having deserted it, has to fight men like Laband, G. Meyer, and Ansächt. Of course, the roots of such doctrines go back to the teaching of Hobbes, and perhaps to that of his follower Austin. But then, Hobbes' theory would seem to be a poor one for the twentieth or even for the nineteenth century. As to Austin, see the criticism of Dicey, Law of the Constitution, 8th ed. 68 ff.
\textsuperscript{71} See above notes 12 and 56.
\textsuperscript{72} Apart from his writings in Polish and from his teaching at the University of Lwów (formerly at that of Cracow) there might be mentioned L'Évolution de la peine, Einführung in die Philosophie des Straf-
pleading for a return to the old conception (still observable in England and, we may add, in the United States) of the sovereignty of the law, for giving up the idea of the sovereignty of the state. And in France, Michel was tracing the recent history of the conception of the state; Duguit was pointing out how the legal conception of the state and that of sovereignty had grown up only of late and how they were unsuited to meet the facts of modern life; and H. Berthélémy in a terse statement attacked the traditional legal conception of the state:

“What do we see? The majority of the French electors have, according to a constitution designated a few hundred from among themselves to make laws. These, according to the same constitution, have chosen the chief of the state. The president selects the ministers; and president and ministers, directly or through their subordinates, select some seven hundred thousand officials. Among the latter, some have the duty of rendering to us the services specified in those same laws that create their functions. Others are invested by the laws with the right of giving us orders. To explain the authority of the latter, what is the use of saying: they exercise the rights of the state? I really do not see what additional explanation this fiction gives us. We say more simply: the state is the nation provided with organs of government; the government is the whole body of citizens who hold from the law, not the right, but the duty of giving orders to others. Let us beware of saying: the State can do all save what it forbids itself to do; rather let us say: The state is but a figure of speech. Those who govern are alone the living realities. And those who govern can do nothing save what they are charged with doing.”

rechts, and a series of articles on the social evolution of modern days. See above, note 55.

73 His book, Die Lehre der Rechtssouveränität, though written in German, displeased, for obvious reasons, the German scholars, and hence, apart from an enthusiastic review by Preuss in Archiv für öffentliches Recht, XXIII, 307, has received little publicity.

74 Another book by Krabbe, De Staatsidee, published in Dutch during the war, has been unobtainable.

75 Henry Michel, L’Idée de l’État, see Preface vii-viii: “When I was beginning my work I was, like so many others, strongly impressed by that method called “scientific” and that metaphysical realism which so singularly prevail in many works. Individualism appeared to me an outgrown idea. . . . to discover the origin of this illusion was to free myself from it.”

76 See above, note 17.

77 H. Berthélémy, Méthode applicable a l’étude du droit administratif, in Les méthodes juridiques, 73-76.
The last few words sound exactly like Bracton's statement in the thirteenth century: the king can do nothing else than what he can do by law. The king meant "the king by himself or through his officials." We now substitute "all the officials" for "the king." And once we assume this attitude, we can think of a world law binding on world officials.

For the conceptions of state and sovereignty, in the traditional sense, are hampering us in progressing on that road. They are not up to date. Do we assume that a state, whether "sovereign" or not, is a living being? Was Mecklenburg-Strelitz a living being as long as it had a line of the common ruling dynasty for itself, and will it cease to be a living being because the grand duke is dead and the grand duke of Mecklenburg-Schwerin will unite both countries? Is the German principality called Reuss elder line different from that called Reuss younger line, the only difference being the fact that under the old law of inheritance at one time the country was divided between those two lines?

And if a state is not a real, living organism, then its conception only serves the selfish purposes of dynasties and their cliques. "Self-preservation" and development are phrases which transplanted into the field of the "theory of the state," are intended to cover oppression and other crimes on the part of dynasties and junkers. No better example could be given than the cry for "no disintegration of Austria-Hungary," though Austria-Hungary is a mere conglomeration of territories conquered or otherwise appropriated by a dynasty, and kept together against the wishes of a majority of the peoples.

So far as concerns the subjects of the state, there is in modern days a growing tendency of freer communication with the out-

---

78 Bracton, De legibus et consuetudinibus Anglie, f. 107 a: "For the king can do nothing else on earth, being God's servant and vicar, but only what he can by law . . . . for the law effects it that he is king."
79 Encyclopedia Britannica, XVII, 11th ed. 1019, s. v. Mecklenburg, and ibid. XXIII, 210, s. v. Reuss.
80 This is admitted openly by leaders of the German theory: "a change in the foundations of the life of the state can indeed destroy the law, but the law never has the power of determining the course of state life in critical times. To beautify striking (eklatante) violations of the order of the state people have applied the conception of the right of state necessity which is in reality only another expression of the statement that might goes before right." Jellinek, Allgemeine Staatslehre, 2nd ed. (1905), 349-350.
81 Austria-Hungary: Its Peoples and Government, University of California Chronicle, April, 1918, 181, 189.
side world, and Professor McMurray's suggestion of intercitizenship is the juristic formulation of a principle which has been desired and needed in the life of nations for a long time.\textsuperscript{82} The quickness of international communication, the frequency of emigration, the large numbers of aliens in every modern country, the international community of financial, religious, scientific, industrial organizations, all militate against dividing the world into air-tight compartments in some of which the existing organization is but a means of perpetuating oppression and of keeping the outside world from interference on behalf of the oppressed.\textsuperscript{83}

There is wanted a recognition that certain rules arising from our civilization must be obeyed, being, not rules imposed by one man, but rules which are the result of the convictions of mankind, and of the growing sense of solidarity of men.\textsuperscript{84} There must come a recognition that those rules give to everybody, under whosesoever power he may live, a right to "life, liberty, and the pursuit of happiness." There must come a recognition that the principle of solidarity of mankind, the principle which is the result of the fundamental trait of the human mind and which we are trying to aid, makes it impossible for any one group of men, even if acting in the name of a state, to continue oppression under the pretext of the sovereignty of the state (just as the fact that one group of people are continually arming may affect the conditions in other countries and hence may lead to interference).

Now, a recognition that it is everybody's business whether a man ill treats others in his house, leads to a lack of complete independence on his part.\textsuperscript{85} Similarly, a world organization must be entitled to judge certain disputes arising even within what has

\textsuperscript{82} "It would not be very revolutionary to extend the analogy of interstate citizenship which now exists among the states of our Union to an international citizenship among the states of the world." McMurray, Inter-Citizenship, Yale Law Journal, Jan. 1918, 314.

\textsuperscript{83} "Even in international law the state remains legally subject only to its own will." Jellinek, Allgemeine Staatslehre, 2nd ed. 465.

\textsuperscript{84} At any time there exists a large mass of such convictions and beliefs, and not only in individual countries (Dicey, Law and Public Opinion, 2nd ed. 19-21), but all over the world. We merely want to enforce those of them that seem important for the progress of mankind.

\textsuperscript{85} In earlier Roman organization the internal affairs of each family were so completely out of the reach of outside interference that the father had the right of life and death over his children. Amos, History and Principles of the Civil Law of Rome, 268. We now consider the ill-treatment of children by their parents, even of animals by their owners, as something that entitles outsiders to interfere. The abolition of slavery was based on similar ideas.
been considered a sovereign state, and even against the will of the "organs of the state," it must be entitled to make laws, and to enforce the decisions of a world court.

This demand is not unprecedented. Just as now the individual state is a unit in international relations, so was in former ages the individual. Just as at present states are supposed to have the right of making war and peace, so did there exist a right of private warfare of which a late trace is found in the duel. Just as now the individual state need not submit to a rule of international law unless it has ratified it, so in former days, in the days of the dawn of representative government, no one was bound by a law imposing a new charge unless he had personally or through his attorney agreed to it—"a principle of which the latest survival is the rule "no taxation without representation." The principle of unanimity existed in many countries for a time, until it was superseded by the slowly developing rule of majority. The United States, Italy, Germany were at one time composed of separate political units which united for certain purposes. The modern "states" are groups of individuals, and we shall have to take, not the states, but the individuals, as the starting point in world relations.

In other words, I am pleading for an international organization, with not the state, but the individual, as its basis. But this does not imply a defeat of patriotism, or doing away with nationality. I shall try to show that national groups will have to remain the foundation of the new world. Yet the conceptions of state and sovereignty in the traditional sense will no more be very useful.

It may be well to close by quoting some passages from the speeches of the President, speeches which are likely to be studied as the gospel of the new world. And first from the speech on April 2, 1917, the Liberty Day Address:

"We are now about to accept the gauge of battle with this natural foe of liberty .... We are .... glad .... to fight thus for the ultimate peace of the world and for the

---

86 As to the different phases of the development see Stubbs, Constitutional History of England, 4th ed, II, 251, 253; Esmein, Traité élémentaire d'histoire du droit français, 11th ed., 559-561.  
87 E. g., Konopczynski, Une antithèse du principe majoritaire en droit polonais, Essays in Legal History (ed. Vinogradoff), 336.  
88 See article in next issue of this Review.
liberation of its people . . . for the rights of nations great
and small and the privilege of men everywhere to choose their
way of life and of obedience. The world must be made safe
for democracy."

It is the "world," and the individuals in the world, that are to
be freed. It is the gospel of "contract," not of "status," for
"men" are to be left to choose "their way of life and of obedience."
The President reverts to the principle of solidarity on February
11, 1918:

"We believe that our own desire for a new international
order under which reason and justice and the common inter-
est of mankind shall prevail is the desire of enlightened men
everywhere." 

And for the necessity of a change in our whole attitude to
political problems (we shall need it now in international relations)
the President had been pleading long before the United States
found herself at war.89

"One of the most striking facts about the history of the
United States is that at the outset it was a lawyers' history.
. . . The whole conception of government when the United
States became a nation was a mechanical conception of gov-
ernment. . . . And as our life has unfolded and accumu-
lated . . . the whole nature of our political questions has
been altered. They have ceased to be legal questions. They
have more and more become social questions, questions with
regard to the relations of human beings to one another—not
merely their legal relations, but their moral and spiritual
relations to one another."

The conceptions of state and sovereignty are such "legal ques-
tions," obscuring the problems of the relations of men all over
the world to one another. Law should serve to promote the
social relations, and when a legal form becomes obsolete, it must
be cast away like an old piece of clothing. The people in the
world are drawing nearer as the people in the United States have
drawn nearer; and we are interested in adjusting the legal rela-
tions of men all over the world to one another so as not to hamper

89 Address before the National Suffrage Association on September 8,
1916, President Wilson's Addresses, ed. Harper, 210-212. The italics are
those of the writer of this article. Cf. McMurray, Inter-Citizenship, Yale
their close moral and spiritual relations. Individuals must be allowed to retain their national characteristics, and national groups will retain as much freedom in the organization of their affairs as will be consistent with the interests of mankind. And that will mean that the more in conformity with the interests of mankind the government of a country has been, the less will be the amount of interference with the organization of that country. A good example is the United States. For questions of world importance will be regulated, not by abstract standards, but with regard to human beings.

Ludwik Ehrlich.

University of California, Berkeley, California.

(To Be Continued)