

# INTERWAR GERMAN THEORIES OF INTERNATIONAL LAW: THE PSYCHOANALYTICAL AND PHENOMENOLOGICAL PERSPECTIVES OF HANS Kelsen AND CARL SCHMITT

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## I. INTRODUCTION

After 1918, the social foundations of legal positivism and formalism in Central Europe—especially where German was spoken—were shattered. The political neutrality of the legal profession had previously allowed it to equate legality and legitimacy in the form of the monarchical constitution. The breakdown of the traditional order led to a crisis of constitutional legitimacy. Power seemed destined to fall directly into the hands of the “masses” and neither traditional, liberal, nor conservative *bourgeois* (professional middle-class) opinion was comfortable about this prospect. There followed a profound debate about the nature of the state and political society.<sup>1</sup>

The discipline of international law, with its positivist, formalist definition of the state, can be traced to a pre-World War I theory of the state. According to this theory, the state is defined as a population on a specific territory with an effective government. This definition continues to enjoy popularity because it reflects the desire shared by many international lawyers as well as politicians to remain value-neutral towards democracy and dictatorship. The ultimate significance of the delineation of the state’s rights and duties under international law is unclear because the practice of states with respect to the recognition of new states does not automatically

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The translations in this Article are those of the author unless otherwise noted.

<sup>1</sup> See JOSÉ A. ESTÉVEZ ARAUJO, *LA CRISIS DEL ESTADO DE DERECHO LIBERAL: SCHMITT EN WEIMAR* 73-122 (1989).

accept the three elements—population, territory, government—as either necessary or sufficient. Nonetheless, the positivist concept of the state remains a pragmatic working definition for most international legal relations.<sup>2</sup> However neutral the positivist definition purports to be, it remains tied to a particular anthropology, or “vision,” of the nature of man—one that denies meaning, political or otherwise, to the fact that a particular constellation of individuals somehow come together in a particular place. One way of demonstrating this is to look at a people’s potential claim to self-determination, of which there is much discussion in international legal doctrine.<sup>3</sup> Their claim to self-determination rests on a different anthropology from that of the traditional definition of the state. According to the traditional definition, population means the totality of people living in a territory,<sup>4</sup> or simply an aggregate of individuals. This suits a postcolonial, international environment where there is a proliferation of states without a national past—indeed, they are colonial, imperial constructions. However, these constructions necessarily exclude the concept of a people, which is essential to the language of self-determination, because it draws distinctions among peoples: those who oppress, usually through the apparatus of a state, and those who are oppressed. A phenomenology of the liberatory struggles of people needs, in this view, to be explored.<sup>5</sup>

This is the context in which the “anthropological” debates of post-World War I German legal theorists were held. Their dialogue, though long past, remains of serious interest for contemporary international law. This Article will investigate how two leading German-speaking jurists, Hans Kelsen and Carl Schmitt, addressed the phenomenon of population/people in their writings on the theory of the state. The implications for international law, particularly in the 1920s and early 1930s, will be explored. I will discuss the extent to which both liberal and conservative, professional legal opinions rested upon a similar fear of or disdain for the “masses.” As a result, they down played the potential emancipatory implications of the Central European Revolutions of 1918 on the framework of international law. In the case of Kelsen, I argue that he “escaped” from the menace of the masses through a

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<sup>2</sup> See, e.g., OTTO KIMMINICH, *EINFÜHRUNG IN DAS VÖLKERRECHT* 134-35 (4th ed. 1990) (referring to the so-called *Dreielementenlehre*, or three elements doctrine).

<sup>3</sup> For a contemporary discussion, see REIN MÜLLERSON, *INTERNATIONAL LAW, RIGHTS AND POLITICS* 58-91 (1994).

<sup>4</sup> KIMMINICH, *supra* note 2, at 134-35.

<sup>5</sup> CHARALAMBOS APOSTOLIDIS, *DOCTRINES JURIDIQUES ET DROIT INTERNATIONAL: CRITIQUE DE LA CONNAISSANCE JURIDIQUE* 435-36 (1991).

fetishism<sup>6</sup> of the rule of law in “maintaining” order. He closely followed Sigmund Freud’s metapsychanalytical work of the 1920s in rejecting any theory of law directly derived from the notion that the population of modern European states constituted, in any sense, communities. Schmitt follows Freud even more closely in viewing the importance of mass identification with leadership as a basis for legal authority.

The implication of Kelsen’s theory of international law was that legal order was consistently located at a hypothetical point beyond any concrete community, whether national or international. Any concept of law based upon a dynamic of relations among peoples, crucial for an emancipatory dialectic of international legal relations, was excluded. For Schmitt’s theory of international law during this period, the crucial dimension was what might be called a “battle of representations.” His theory of “the people” was based on a radical opposition of peoples—an identity based not merely on difference, but also on negation. This contested the universality and neutrality of international law.

It is my intention, perhaps tentatively, to use psychoanalytical concepts to critique Kelsen’s and Schmitt’s anthropologies. In their works, the concepts of purity and paranoia run into one another. Kelsen’s purity is an escape from the mass hysteria of the German people, while for Schmitt paranoia is all that stands between that people and the specter of extinction. Kelsen is one of the most outstanding examples of emancipated Jewish lawyers who had a dramatic impact on all branches of law in Wilhelmitic and Weimar Germany.<sup>7</sup> Schmitt is one of the most virulently anti-Semitic of the lawyers who supported the Nazi Regime and German hegemony in Europe. They were arch opponents in Weimar disputations on public law.

However, antagonisms are always mutual. To understand Kelsen’s desire for a pure theory of law, I will explore Freud’s concepts of compulsive neurosis and anal retention. I will also examine Freud’s and Jacques Lacan’s understanding of paranoia to elucidate Schmitt’s theory of identity in law and politics. Still, my intention is not to perform what has been called “psychological

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<sup>6</sup> The psychoanalytic word is used here and later both as a metaphor for a cultural transference of a problem and in the sense of a failure to resolve it nationally and consciously.

<sup>7</sup> See Peter Landau, *Juristen jüdischer Herkunft im Kaiserreich und in der Weimarer Republik*, in *DEUTSCHE JURISTEN JÜDISCHER HERKUNFT* 133 (H.C. Helmut Heinrichs et al. eds., 1993).

reductionism."<sup>8</sup> Rather, a close study of these two jurists must remain open to the fact that their work was enmeshed in a collective psyche or culture which included pathological dimensions.<sup>9</sup> It would be too simplistic, however, to say that the individual case study principle dominates. There is inevitably a dialectic between individual and collective psyches which leads to explanation of the former in terms of the latter. So, my study of the two jurists is not biographical.<sup>10</sup> On the contrary, their works alone are taken as symbolic of the state of the culture to which they belonged—their pathologies are those of their culture. While I intend to offer separate explanations of the individual and collective psyches, I will resort as my primary explanatory vehicle to a phenomenology of collective or national culture, with Kelsen and Schmitt both treated as part of a single German culture. This assumption is justified, despite Kelsen's Austrian heritage, by the context of his writings.

One might also say that the primary explanatory vehicle is a history of mentalities.<sup>11</sup> This supposes a collective unconscious in the sense of the created, lived, *and forgotten* experience of a community. The collective unconscious has an historical beginning, but for those within the community, it can never be brought to full consciousness. In so far as Freud himself is treated as yet another German-speaking author, the following analysis has an element of reductionism of psychoanalysis in favor of a history of mentalities. I intend to draw upon the post-Holocaust, socio-psychoanalytical comments of Helmut Plessner, Norbert Elias, and others to explore German culture as a collective of which both Kelsen and Schmitt were an integral part. In conclusion, I will draw upon the phenomenological critique of psychologism made by Martin Heidegger and Max Scheler. Both authors argue within the German tradition in which Freud plays a central part, but offer alternative visions of the unconscious, as well as personality and individuality in community. As this is a work in progress, the implications for international law can only be briefly stated by way of

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<sup>8</sup> ANDREW SAMUELS, *THE POLITICAL PSYCHE* 9 (1993). Samuels presents an argument for analytical psychology, primarily Jungian, and a concept of interdisciplinarity.

<sup>9</sup> See J.C. SMITH, *THE NEUROTIC FOUNDATIONS OF SOCIAL ORDER: PSYCHOANALYTIC ROOTS OF PATRIARCHY* 133 (1990) ("The collective unconscious is a part of the psyche of each individual rather than the unconscious part of the collective psyche.").

<sup>10</sup> For a biography of Kelsen, see RUDOLF A. MÉTALL, *HANS KELSEN: LEBEN UND WERK* (1969).

<sup>11</sup> See PETER BURKE, *THE FRENCH HISTORICAL REVOLUTION: THE ANNALES SCHOOL, 1929-89*, at 67-74 (1990); FRANÇOIS DOSSE, *L'HISTOIRE EN MIETTES: DES "ANNALES" A LA "NOUVELLE HISTOIRE"* 193-230 (1987).

conclusion in terms of a phenomenology of the nation, *or other cultural community* as (with a collective unconscious) an interpretative or hermeneutic community. This is to demote the concept of state in international law to an administrative apparatus embedded in that community.

## II. KELSEN'S PURE THEORY OF INTERNATIONAL LAW IN THE WEIMAR PERIOD

In his *Der Soziologische und der Juristische Staatsbegriff*,<sup>12</sup> Kelsen outlines his reservations regarding a theory of law grounded in the spirit or customs of the German people and the need to purify the legal order of mass-psychological elements. He rejects any place for the *Volk* (people) as a real psychological fact or social unity in his understanding of law and state. The *Volk* can represent nothing other than mass suggestion and contagion in mass feeling. Hence, there can be no place for common human and societal goals in a definition of law. Kelsen appears to express a deep anxiety about any alternative to his formal theory of legal validity:

Only the objective validity of a legal order or of a legal goal can be the unifying bond, and not the concrete willing, striving, and goal-setting of individual men, who in themselves are a chaos, a meaningless grouping which can only be brought to unity through a legal order.<sup>13</sup>

To what degree is Kelsen creating a fetishism of law in order to achieve a repression or sublimation of social reality? He insists that social psychology can have nothing to do with teleology, but he does this by claiming that there is difficulty in establishing any continuity of consciousness in the group because only individuals exist in a crowd.<sup>14</sup> This brings Kelsen to his primary concern with order. Order is tied to compulsion, not as a fact, but conceptually as the content of a *Sollordnung* (ought-order). In my view, the link is due to a fear of the masses and the need to find some neutral point of control transcending them. For Kelsen, this means that a concept of law has to reach back to something beyond psychological processes.

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<sup>12</sup> HANS KELSEN, *DER SOZIOLOGISCHE UND DER JURISTISCHE STAATSBEGRIFF* (1928).

<sup>13</sup> "Nur die objektive Gültigkeit der Rechtsordnung oder des Rechtszwecks ist das einigende Band, nicht aber die konkreten Wollungen, Strebungen, Zwecksetzungen der Einzelmenschen, die ja an sich ein Chaos, ein sinnloses Neben- und Nacheinander bilden, zur Einheit erst in der Rechtsordnung erhoben werden." *Id.* at 123.

<sup>14</sup> *Id.*

The rule which is to be directed to human conduct—and it can only be to individual human conduct since from a naturalist-empirical perspective there are only individual, human actions—cannot be directed to physical conduct itself but only to a “thought-incorporeal being” standing behind it, as an ideal point of unity, and such a rule can only be a norm.<sup>15</sup>

There is a constant process of displacement here. “Authority” is removing itself more and more from society. That human conduct should make up part of a norm can only mean that “the human being is bound and obliged to this conduct.”<sup>16</sup> The displacement is marked in his denial of any place for a social identity of a people: “The unity of the people is only to be found in the unity of an ought-order which is assumed as valid, and not in psychological, ethnological, religious or economic respects.”<sup>17</sup> This so-called *Sollordnung* is the foundation of *Zwangsordnung* (coercive order). Kelsen does not mean to refer to the fact that coercion is exercised, but rather that the idea of coercion finally grounds the idea of the state as a legal order. It describes the complex of conditions under which certain men are authorized to exercise coercion against others.<sup>18</sup> Kelsen imagines a self-reproducing authority, or *Ursprungsnorm* (original norm), which sets the conditions for the exercise of coercion and completes itself in a descending hierarchy of authority consisting of a chain of genetically linked instances. The final judgment or command comes from a system “through which the genetic system, the founding connecting point of the normative order, continuously executes itself.”<sup>19</sup>

In response to the developments of 1918 and the overthrow of the monarchical state, Kelsen proposed radical change, but not so as to affect the potentially popular ethos of the political and legal order. He objected to the traditional personification of the state in the figure of the monarch who could be perceived as having some

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<sup>15</sup> *Die Regel, nach der man irgendwelche menschliche Handlung—und einer naturalistisch empirischen Betrachtung sind nur einzelne menschliche Handlungen gegeben—nicht dem physisch Handelnden selbst, sondern einem “hinter” ihm gedachten unkörperlichen Wesen, einem ideellen Einheitspunkt zurechnet, kann nur eine Norm sein.*

*Id.* at 82.

<sup>16</sup> “daß der Mensch zu dieser Handlung verbunden, verpflichtet sei” *Id.* at 85.

<sup>17</sup> “[I]st die Einheit des in psychologischer, ethnographischer, religiöser, wirtschaftlicher Hinsicht ebensowenig einheitlichen ‘Staatsvolkes’ nur in der Einheit einer als gültig vorausgesetzten Sollordnung begründet.” *Id.* at 86.

<sup>18</sup> *Id.* at 82.

<sup>19</sup> “durch die sich das genetische System, der Ursprungszusammenhang der normativen Ordnung stetig vollzieht.” *Id.* at 94.

autonomous scope for legal action. Kelsen wanted to remove this aspect, but he did not question the function of the state as such. Now transposed into the more impersonal notion of a legal order, the state constituted order through the threat of coercion. Kelsen followed the leading Wilhelmitic jurist Georg Jellinek who said "the state order is itself the legal order"<sup>20</sup> and order was the essential feature of the state. Kelsen concluded that the contradictions in Jellinek's theory stemmed from a failure to appreciate the identity of state and law from the standpoint of order.

For the purposes of the present argument, it must be stressed how central the notion of sanction is to Kelsen's conception of law. It is supposed to parallel, but not be equated with, the causality of the laws of nature. Law is concerned with determining where the competence lies to impose a coercive element in the event that particular conduct occurs. It has, in this sense, an "as if" quality. Quoting Kelsen's language again:

This assumes a coercive order, that is an order directed to coercion; so, indeed, the legal proposition, that is, the scheme, in which the entire legal material must be presented, is expressed as the connecting of a factual situation as the condition which has a coercive act for its consequence. This legal proposition appears then as the law since it has a function in the area of law analogous to a law of nature in the area of nature. It presents itself as a game-type of the basic category of all "law."<sup>21</sup>

At the international level, the same process of displacement continues. The state itself as a *Zwangs-Sollordnung* (coercive ought-order) is absorbed as one more *Inстанz* (instance) in a hierarchy of *Inстанzen*.<sup>22</sup> Purity for Kelsen means striving for an impartial point which is beyond the influence of interested parties. Again, the question is whether purity is achieved at the price of existence. The international legal order is also conceived of as a genetically self-reproducing, descending hierarchy. Therefore, an

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<sup>20</sup> "die Staatsordnung selbst Rechtsordnung ist." *Id.* at 131.

<sup>21</sup> *Dieses wird hier als eine Zwangsordnung im Sinn einer Zwang anordnenden Ordnung vorausgesetzt; so zwar, daß der Rechtssatz, d.i. das Schema, in dem sich der gesamte positive Rechtsstoff darstellen lassen muß, die Verknüpfung eines Tatbestandes als Bedingung mit einem spezifischen Zwangsakt als Folge ausdrückt. Dieser Rechtssatz . . . bewährt sich als Spielart der Grundkategorie aller Gesetzlichkeit überhaupt.*

HANS KELSEN, UNRECHT UND UNRECHTSFOLGE IM VÖLKERRECHT 101 (Scientia Verlag Aalen 1971) (1932). In this passage, as well as in the following text, the word "coercion" is repeated constantly.

<sup>22</sup> HANS KELSEN, DAS PROBLEM DER SOUVERÄNITÄT UND DIE THEORIE DES VÖLKERRECHTS 245 (Scientia Aalen 1960) (1928).

international constitutional order is complete only in the sense that there is a comprehensive framework afforded for the renewal and change of legal norms.<sup>23</sup> The real or imaginary character of this complete order can be seen in Kelsen's disagreement with a "traditional positivist," such as Lassa Oppenheim, as to whether any such complete international legal order exists distinct from a patchwork of norms on discrete topics.<sup>24</sup> Kelsen distinguishes his concept of a "legal order" from that of a "world state." He is concerned only with the genetic quality of law. For him, there is a complete formal framework for law-creation from *Rechtsetzung* (the setting of logical principles) to *Rechtsgeschäft* (the conduct of legal transactions).<sup>25</sup>

The framework of this legal order of law-creation has to guarantee the circumstances in which the exercise of individual states' freedom is mutually compatible. Kelsen considers this conceivable only on the assumption that "over and above states stands an association which is comprehensive enough to draw the limits to their power, i.e. to their spheres of legal validity."<sup>26</sup> Kelsen's overall political goal is progressive, as it forecloses any opportunity for arbitrary state action stemming from undefined state competencies. He reduces the uniqueness of sovereignty and treats states as members of a wider whole, just as federal entities, provinces, communities, etc., are considered components of a larger entity.<sup>27</sup> The notion of a complete legal order, in the sense of a full hierarchy of competencies, was a German-Austrian response to the 1918 Revolutions and the incompleteness of the previous monarchical legal orders. Parliamentary democracy supposed that there was a clear outline of where legislative and administrative power rested.<sup>28</sup>

Nonetheless, Kelsen retains the pre-War concept of state or legal order such that *Herrschafts-verhältnisse* (the expressions of will of one person) have as their motive the will of another. The question for Kelsen is simply which "will relations" have state and

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<sup>23</sup> *Id.* at 258-59.

<sup>24</sup> For references to contemporary literature on this debate, see NGUYEN QUOC DINH ET AL., *DROIT INTERNATIONAL PUBLIC* 83-90 (4th ed. 1992).

<sup>25</sup> KELSEN, *supra* note 22, at 273.

<sup>26</sup> "über diesen Staaten ein ihre Macht, d.h. Geltungssphären gegeneinander abgrenzender, höherer, sie als umfassender Verband angenommen wird." KELSEN, *supra* note 12, at 86.

<sup>27</sup> *Id.*

<sup>28</sup> Bettina Stoitzner, *Die Lehre vom Stufenbau der Rechtsordnung*, in *UNTERSUCHUNGEN ZUR REINEN RECHTSLEHRE* 51, 73, 75 (Stanley L. Paulson & Walter Roberts eds., 1986); see also THEO ÖHLINGER, *DER VÖLKERRECHTLICHE VERTRAG IM STAATLICHEN RECHT* (1973).



legal character.<sup>29</sup> He objects only to Georg Jellinek's attempts to anthropomorphize a unity of legal relations into a command: "What has been until now a unity of command-relations suddenly becomes a command!"<sup>30</sup> So, the definition of the elements of a state for the purpose of international law does not change. It is only a question of explaining what it means to be subject to command. The concept of state cannot explain what is meant by command, which holds that there is a firm order in accordance with which one has to command, and the other, to obey.<sup>31</sup>

The three elements of the definition of the state—territory, people, government—go the same way. Territory is the spacial scope in which commands are exercised. As for people, it is not human beings—as biological, psychological unities—but their human conduct which make up the content of the state-order and binds it together in a juridical unity. Human conduct exists legally in adherence to the rule of law. The unity of the people rests not in any psychological, ethnic, religious, or other matter, but in the unity of an "ought-order" assumed to be valid.<sup>32</sup>

The alternative for Kelsen is the euphoric German nationalism of August 1914. In opposition to social theorist Kistiakowski, Kelsen rejects the idea of a community based upon human beings living together whose social-psychological interaction alone makes up the unity.<sup>33</sup> For Kelsen, one cannot speak both of the state as *eine sehr empirisch reale Seelentätigkeit* (an empirically real activity of human spirit) and of the state as personifying the people as a real psychological fact.<sup>34</sup> The state-nation as a so-called "real-social unity" only exists in certain brilliant or blazing moments such as the War of Liberation of 1813 or 1870, or, above all, August 1914. The psychological exchange is, in fact, a moment of enthusiasm for war, mass suggestion, mass imagination, and mass feeling.<sup>35</sup> Kelsen objects that, in any case, the mass feeling produced, for example, by catastrophes, rushes beyond national boundaries. Indeed, if "sociological" language were employed, it might be said that in Au-

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<sup>29</sup> KELSEN, *supra* note 12, at 121.

<sup>30</sup> "War der Staat bisher die Einheit von Herrschaftsverhältnissen, ist er jetzt plötzlich ein Herrscher!" *Id.* at 127.

<sup>31</sup> "Vielmehr, daß eine feste Ordnung besteht, nach der der eine zu befehlen und der andere zu gehorchen habe." *Id.* at 83.

<sup>32</sup> *Id.* at 85-86.

<sup>33</sup> *Id.* at 107.

<sup>34</sup> *Id.* at 110.

<sup>35</sup> *Id.* at 112.

gust 1914 the feeling that swept through the masses made Germany and Austria-Hungary one "real-state."<sup>36</sup>

At the international level, a certain ambiguity remains in Kelsen's analysis. The objective is always to direct the idea of law away from the (legal) subject by a kind of logical magic that Kelsen seems to enjoy. At one point, Kelsen is anxious to dismiss as futile debates about whether sovereignty *as such* is compatible with international legal order *as such*. In the following passage from *Das Problem der Souveränität und die Theorie der Völkerrechts*, he points out how such a slippery concept can be twisted various ways. The fierce tensions of post-World War I international society can be overcome quite playfully:

The so to speak *a priori* valid principle of sovereignty (on analogy with the inborn freedom of men) means, that the state is a free personality. Therefore no one—also no other state—may use force against it. There follows out of sovereignty the duty of each state to respect the others under certain conditions; therefore, out of freedom, obligation. That each state is not in a position to guarantee its own freedom, the interest of solidarity of all states should be ensured through a League of Nations, through a universal republic. So one draws from apparently logical-juridical conclusions out of the concept of sovereignty, its dissolution.<sup>37</sup>

In this somewhat mocking treatment of an adaptation of Jean Jacques Rousseau's doctrine of the social contract to international legal order, Kelsen is anxious to remove the impurities of political value and judgment. These impurities, Kelsen believes, identify with an anthropomorphized state certain political values and power that render the idea of an international legal order suffocating for the supposed freedom of states as persons, turning them into *Unterthanen* (subjects). Once the confusion of such metaphors

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<sup>36</sup> *Id.* at 113.

<sup>37</sup> *Das sozusagen a priori gültige Prinzip der Souveränität (analog der angeborenen Freiheit der Menschen) bedeutet, daß der Staat eine freie Persönlichkeit sei. Also darf ihm niemand—auch kein anderer Staat—Gewalt antun. Folgt aus der Souveränität: die Verpflichtung jedes Staates, den anderen unter gewissen Bedingungen zu respektieren; also: aus der Freiheit die Gebundenheit! Da der einzelne Staat nicht imstande ist, seine Souveränität allein zu wahren, gilt es, dieses solidarische Interesse aller Staaten durch den Völkerbund, durch die universelle Republik zu garantieren. So leitet man auf dem Wege angeblich logischjuristischer Schlüsse aus der Souveränität—deren Aufhebung ab!*  
KELSEN, *supra* note 22, at 273.

is removed, one can see that there can be no political danger in an international legal order, as it is a "competence-order."<sup>38</sup>

The question remains whether Kelsen's own concept of an international legal order is too thin. He describes an extension of the "competence-order" in the German sense of a *Stufenbauordnung* (descending stages of norms). As a so-called, international, constitutional order, it is complete only in the sense that there is a comprehensive framework afforded for the renewal and change of legal norms, stating how and by whom it is to be undertaken.<sup>39</sup> It makes no sense to ask whether such a world, legal order might "oppress" states because law is not concerned with the political content of legal norms, but only with what is logically necessary to describe legal relations among states. By this, Kelsen means the organs for the creation of international law or simply the states acting together through treaties.<sup>40</sup> It is only in this sense that Kelsen asserts the state is not the "highest instance," but is only a relatively high power.<sup>41</sup> Given his original concept of law as a "coercive-ought-order," the question arises as to whether there is *really* any international legal order. Kelsen recognizes this problem in his discussion of illegality:

Should the so-called international law be a legal order, then this norm-system must be valid as a coercive order. Such a conception is possible in so far as the coercive acts stipulated by positive international law—reprisals and war—can be regarded in the same way as coercive acts within an internal state order.<sup>42</sup>

Whether such a conception is possible, Kelsen investigates in his later works.

### III. SOME NAZI CRITICISM OF THE PURE THEORY OF INTERNATIONAL LAW<sup>43</sup>

There are very specific Nazi criticisms of Jewish perspectives on law, the state, and international law which are not directly con-

<sup>38</sup> *Id.* at 273-74.

<sup>39</sup> *Id.* at 258-59.

<sup>40</sup> *Id.* at 256, 273.

<sup>41</sup> *Id.* at 245.

<sup>42</sup> "Soll das sogenannte Völkerrecht eine Rechtsordnung sein, dann muß auch dieses Normensystem als eine Zwangsordnung gelten. Eine solche Auffassung ist möglich, sofern die durch das positive Völkerrecht statuierten Zwangsakte, insbesondere die Repressalie und der Krieg, in der gleichen Weise gedeutet werden können wie die Zwangsakte der innerstaatlichen Rechtsordnung." Kelsen, *supra* note 21, at 103.

<sup>43</sup> For a recent appraisal, see DAN DINER, *WELTORDNUNGEN: ÜBER GESCHICHTE UND WIRKUNG VON RECHT UND MACHT* 77 (1993); Dan Diner, *Rassistisches Völkerrecht:*

sidered in Schmitt's earlier works of the 1920s and 1930s. Whether Schmitt was "really" anti-Semitic is difficult to resolve definitively. What is certain is that he expressed himself in anti-Semitic terms after 1933; at the same time, his own negative definitions of identity—which are arguably paranoid—are not specifically, or at least explicitly, directed against Jews. They are, so to speak, reflective of the more fundamental features of German political culture. After 1933, Schmitt's anti-Semitism was not regarded as authentic in many National Socialist circles and thus, did not save him from marginalization by academic and party rivals.<sup>44</sup> This is not to deny or downplay a genuine animosity on Schmitt's part towards Jewish colleagues. In particular, Schmitt deceived Kelsen in the autumn of 1932, promising collaboration with him if he would support Schmitt's candidacy for an academic chair at Cologne. Later, Schmitt failed to oppose Kelsen's dismissal as soon as the Nazis came to power.<sup>45</sup> It is important to distinguish Schmitt's development of his concept of the *enemy* from his undoubted personal prejudices.<sup>46</sup> His theoretical work is marked by a much wider sense of embattlement and insecurity. The threat to existence posed by the *foreign* is something which Schmitt traces to the very center of German political culture from at least the time of the Reformation. His view, as will be seen later, is shared by Helmut Plessner, Norbert Elias, and others.

This can be seen more clearly if one considers first the more specifically anti-Semitic contribution of Norbert Gürke to the 1936 Seminar. In his contribution, *Der Einfluss jüdischer Theoretiker auf die deutsche Völkerechtslehre*, Gürke showed an immense anxiety in the face of the challenge posed both by Kelsen-style theories of law and by the social critique of Freud to any viable development

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*Elemente einer nationalsozialistischen Weltordnung*, 37 VIERTELJAHRSCHEFTE FÜR ZEITGESCHICHTE 23 (1989) (same article).

<sup>44</sup> See BERND RÜTHERS, ENTARTETES RECHT: RECHTSLEHREN UND KRONJURISTEN IM DRITTEN REICH 139-41 (1988) (noting that Schmitt's anti-Semitism was regarded in SS circles as opportunistic and concluding that the Seminar, organized by Schmitt, was part of an intrigue in which Schmitt came off the loser). But see CARL SCHMITT, *Die deutsche Rechtswissenschaft im Kampf gegen den jüdischen Geist*, in DAS JUDENTUM IN DER RECHTSWISSENSCHAFT 29-30 (1936) (primarily a call for the purification of German legal science from citations of Jewish legal scholars). See generally NICOLAUS SOMBART, DIE DEUTSCHEN MÄNNER UND IHRE FEINDE: CARL SCHMITT—EIN DEUTSCHES SCHICKSAL ZWISCHEN MÄNNERBUND UND MATRIARCHATSMYTHOS 261-94 (1991).

<sup>45</sup> See Klaus Gunther's entry on Kelsen in STREITBARE JURISTEN 376 (1988) relying on Hans Meyer's *Erinnerungen*. For a recent discussion of Schmitt's anti-Semitism, see Raphael Gross, *Carl Schmitt's "Nomos" und die "Juden"*, 1993 MERKUR 410.

<sup>46</sup> Once again, as with Kelsen, my intention is to present Schmitt as symptomatic of a culture, rather than undertake a strictly biographical study of the man.

of *Völkisches Denken* (national popular thinking). Gürke argued that the influence of Jewish academics, particularly Paul Laband and Jellinek, on the conceptual development of modern German public and international law was decisive. They shaped a discipline marked by formal logic and the transfer of private law method to public law. The crucial point in Gürke's argument is that a group not tied to a particular territory or political organization presents and develops a theory of law and the state which has no place for his *Völkisches Denken*. The determination to free jurisprudence from philosophy and sociology has this aim: "Law and the State have to be removed from the context of the historical-nationalist-racist in order to become a Jewish intellectual construction."<sup>47</sup> Gürke completed this part of his argument with the statement that the standard German textbook of international law by Franz von Liszt used in the Wilhelmitic and Weimar period drew directly on Jellinek's concept of the state. The result is a thoroughly unpolitical concept of international law. "To the concept of the state belongs the three elements: 1. the government; 2. the territory; 3. the population. It is self evident that on such foundations Liszt could only construct the most unpolitical international law."<sup>48</sup>

Gürke notes von Liszt's work was promoted after his death in 1918 by Max Fleischmann, a Jew driven to suicide in Berlin in 1943. Gürke cannot reconcile what he regards as the politically neutral, *pure* character of his discipline with its present contours shaped by Jewish intellectuals.<sup>49</sup> Gürke sees this anti-*Völkische* tendency in the pure theory of law as compounded by the influence of Freud on international law. It is not enough that the concept of the *Volk*

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<sup>47</sup> "Recht und Staat sollen aus geschichtlich-völkisch-rassischer Bedingtheit gelöst und zu einem Ideengebäude jüdischen Intellekts werden." Norbert Gürke, *Der Einfluß jüdischer Theoretiker auf die Deutsche Völkerrechtslehre*, in *DAS JUDENTUM IN DER RECHTSWISSENSCHAFT* 9 (1936). In his investigation of Jung's anti-Semitism, Samuels focuses on the critique of Jews as nomads. See SAMUELS, *supra* note 8, at 292-93.

<sup>48</sup> "Zum Begriff des Staates gehören mithin drei Merkmale: 1. die Staatsgewalt; 2. das Staatsgebiet; 3. das Staatsvolk. Es ist selbstverständlich, daß Liszt auf dieser Grundlage nur ein möglichst unpolitisches Völkerrecht schuf." Gürke, *supra* note 47, at 11 (quoting Franz von Liszt).

<sup>49</sup> This argument appears to contain elements of prejudice in at least two respects. As one of the more successful *survivors* among German international lawyers in the twentieth century, Erich Kaufmann was both Jewish and a fervent German nationalist. Furthermore, it can easily be argued that Jellinek and von Liszt who followed him were merely reiterating the commonplace, *de facto* notion of state personality accepted in international law since the early modern period. See also Anthony Carty, *Social Theory and the "Vanishing" of International Law: A Review Article*, 41 INT'L & COMP. L.Q. 939 (1992). In this case, Gürke has attributed a genuine conceptual difficulty to a class of people who have contributed nothing to it, although some of them may be unenthusiastic about his proposed solution.

should be regarded as metalegal;<sup>50</sup> it is also regrettable that Freud advances farthest the idea that society is nothing more than psychological reactions of (isolated) individuals. Psychoanalysis presupposes individualism. Freud's influence can be seen in the work of Rudolf Blühdorn.<sup>51</sup> Blühdorn's conception of international law is rooted in a thoroughgoing individualism, where everyone is dominated by a *Trieb* (drive) to his own self-preservation. Individuals and animals behave in the same way, completely ruled by instinct. States display the same drives as individuals, which is not surprising, since men created states to satisfy their personal drives. For Gürke, the concluding point of Blühdorn's argument is that international law has to be purified. "Blühdorn makes the attempt to exclude historical and biological facts from his 'applied' international law."<sup>52</sup> For Gürke, Kelsen's pure theory of international law is an expected outcome of Freud's psychoanalytical anthropology.<sup>53</sup>

What will a closer look at Blühdorn's work show? In his discussion of the principle *pacta sunt servanda*, Blühdorn argues that states conclude treaties out of self-interest. This self-interest is enough to ensure that treaties are honored; indeed, no state regards it as in its interests to declare that treaties as such need not be honored. However, the foundation of political power is the sublimation of individual drives in favor of a superior, coercive power that makes survival possible. Even in internal relations, this compromise is unstable. At the international level, it has not occurred at all. Where states regard their own particular interpretation of a treaty as essential to their self-preservation, or where the treaty conflicts with that interest, the state will not observe it, leaving the other state with the option of using force to insist on its wishes. In this sense, international law has not progressed to the final stage of a complete legal order.<sup>54</sup>

Blühdorn makes an important distinction which is particularly relevant to Kelsen's system in his discussion of the legal nature of the principle *pacta sunt servanda*. The principle means, in international law, that "the peoples, in case they wish, as is in their interests, to live in peace with one another, 'ought' to hold themselves

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<sup>50</sup> Gürke, *supra* note 47, at 12.

<sup>51</sup> RUDOLF BLÜHDORN, EINFÜHRUNG IN DAS ANGEWANDTE VÖLKERRECHT (1934).

<sup>52</sup> "Blühdorn macht den folgerichtigen Versuch, mit diesen Deutungen die geschichtlichen und biologischen Tatsachen aus dem 'angewandten' Völkerrecht auszuschalten." Gürke, *supra* note 47, at 14.

<sup>53</sup> *Id.* at 14-17. Gürke treats Kelsen and his followers as the culmination of a tradition which, from the many angles he has outlined, favored the pure theory of law approach.

<sup>54</sup> BLÜHDORN, *supra* note 51, at 54-59.

to the principle. One cannot speak of a 'must,' as such an expression supposes that someone is authorized to coerce the recalcitrant."<sup>55</sup> This argument repeats Kelsen's notion of a *Sollenordnung*, but Blühdorn is absolutely explicit about the absence of procedural guarantees at the international level. For Blühdorn, the question of instinctual drives—overcome at the national level largely because of external enemies<sup>56</sup>—is particularly relevant to the radical subjectivity of any human judgment, resulting in the irrational prioritizing of one's own interests or felt needs.<sup>57</sup> Because of this tendency, it is particularly important that states reserve to themselves the power to decide what their international obligations require. This is demonstrated in the declaration of the United States to the Kellogg-Briand Pact of 1928.<sup>58</sup> The United States asserted that it is each state's right to decide for itself when it is justified in using self-defense. Blühdorn points to this assertion as a sharp statement of the claim of a people to use a right of self-preservation to justify breaches of law.<sup>59</sup>

For his part, Gürke stresses the question of territory as *Heimat* (homeland). In his book, *Volk und Völkerrecht*, he examines the "three elements" which define a state—people, territory, government—more closely.<sup>60</sup> In so doing, he raises a crucial element of the fear or paranoia towards Jews, in part because they lack a definite *Heimat*. In his critique of Carl Jung's anti-Semitism, Andrew Samuels quotes Jung as follows: "The Jew, who is something of a nomad, has never yet created a cultural form of his own and as far as we can see never will, since all his instincts and talents require a more or less civilized nation to act as host for their development."<sup>61</sup> In his perfectly scholarly treatment of the nineteenth-century literature, Gürke does not focus on any mark of racial prejudice. Carl Frederick Gerber, Georg Meyer, Jellinek, and von Liszt are all seen as forerunners of Kelsen's theory of law.<sup>62</sup> Kelsen's work is treated as a sound development of a formalist approach to international law by Gürke. After quoting von Liszt's view of territory as

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<sup>55</sup> "die Völker, falls sie, was in ihren eigenen Interesse gelegen ist, friedlich miteinander leben wollen, sie sich an die Vorschrift diese Satzes halten 'sollen.' Von einem 'Müssen' kann nicht gesprochen werden, da dieser Ausdruck sprachlich zur Voraussetzung hat, daß jemand zuständig ist, den Widerstrebenden zu zwingen." *Id.* at 58.

<sup>56</sup> *Id.* at 22-23.

<sup>57</sup> *Id.* at 14.

<sup>58</sup> *Id.* at 51.

<sup>59</sup> *Id.*

<sup>60</sup> NORBERT GÜRKE, *VOLK UND VÖLKERRECHT* (1935).

<sup>61</sup> SAMUELS, *supra* note 8, at 292-93.

<sup>62</sup> GÜRKE, *supra* note 60, at 24.

what is simply encompassed in the power of the government, Gürke observes: "This is the concept which has been developed correctly by Kelsen, whereby a territory is grasped as the sphere of validity of norms, without drawing out its political significance for the state."<sup>63</sup> Gürke's objection, as seen above in his criticism of Freud, is that the traditional definition of population in relation to territory favors a liberal conception of the state; it supposes an aggregate of autonomous, "atomized" individuals who have no fixed attachment to a territory. The only significance of the territory is that it is the spatial framework within which they become subject to a particular collection of official regulations. In response, Gürke offers a nationalist or racist conception of individuals bound together as a matter of history and destiny to a particular land. Gürke writes:

People and territory are not "elements" of the state, but the state is the lifeform of a settled culturally creative people. The government is not something given in itself, it is the leadership of the people formed into state institutions. The territory is not the area of command of a government, but the foundation for the life of the people, which in the form of state institutions orders and defends its being so settled.<sup>64</sup>

This conception of the state elevates the relations of peoples with one another. According to Gürke, international law should not be a framework for coordinated spheres of legal validity, but must recognize the primacy of peoples and accommodate their differing world views. In direct opposition to Kelsen's perspective, Gürke states:

Nevertheless, the unity of the state is a political unity, because the unity of the law does not come from the "totality" of the state, which regulates all legal questions itself, but rather the unity of the state comes only from a united world view, which itself comes from a people which experiences it. The same applies to international law. It is not a formal hierarchy of law which presents the unity of the law, this unity can only come

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<sup>63</sup> "Dies ist der von Kelsen richtig weiterentwickelte Formalbegriff, der ein Gebiet als den Geltungsbereich von Normen erfaßt, ohne dessen politischen Sinn für den Staat herauszustellen." *Id.*

<sup>64</sup> *Volk und Gebiet sind nicht "Elemente" des Staates, sondern der Staat ist die Lebensform eines seßhaften kulturschaffenden Volkes. Die Staatsgewalt ist nicht etwas an sich Gegebenes, sie ist die staatlich geformte Führung eines Volkes. Das Staatsgebiet ist ebenso nicht bloß Herrschaftsgebiet einer Staatsgewalt, sondern Lebensgrundlage des Volkes, das in staatlicher Zusammenfassung seine Seßhaftigkeit ordnet und verteidigt.*  
*Id.* at 28.



from the relations of the law-creating political forces, that means the peoples and the world views which they have created. It is not international law which provides the basis for cooperation among states, but spiritual and racial agreement of peoples and the harmonizing of their interests.<sup>65</sup>

Gürke's view of international law inevitably leads to a new emphasis on and understanding of the concept of frontier. The frontier must have a central place in international law because it presents the most difficult problems. The heart of a people does not lie in its innermost depths, but on its frontier. The ground for its existence has to be defended. The boundary must be firm. Concepts of frontier—buffer zones, demilitarized zones, irredentism—are political and require political solutions. By quoting worthy Nazi potentates, such as Roland Freisler and Robert Ley, Gürke makes it clear that he sees the resolution of issues of frontier in terms of a meeting of *völkische Weltanschauungen* (world views).<sup>66</sup> How these perspectives might diverge and conflict become evident in Schmitt's more detailed critique of the Versailles Settlement.<sup>67</sup> In any case, the point of disagreement with Kelsen remains firm: "The frontier's importance for the state cannot simply be treated as a division of different areas of validity of norms, rather the frontier throws up many political and thereby legal questions."<sup>68</sup>

#### IV. SCHMITT'S CONCEPT OF THE ENEMY AND THE FRAGMENTATION OF INTERNATIONAL LAW

According to Schmitt, within the very concept of law lies the threat of trickery and deception. Law, whether public or private,

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<sup>65</sup> *Dennoch ist das staatliche Recht eine politische Einheit, denn nicht dadurch wird die innere Einheit des Rechtes hergestellt, daß der Staat "total" gemacht wird, d.h. alle Rechtsfragen selbst regelt, sondern die Einheit des Staates wird nur durch eine einheitliche Weltanschauung, die vom Volke miterlebt ist, gewährleistet. Dasselbe gilt aber für das Völkerrecht. Nicht eine formale Rangordnung von Rechtssätzen stellt die Einheit des Rechtes her, diese kann nur aus der Beziehung der rechtserzeugenden politischen Kräfte zueinander, d.h. der Völker und des von ihnen gesuchten Weltbildes erkannt werden. Nicht das Völkerrecht begründet zwischenstaatliche Zusammenarbeit, sondern die geistige und rassistische Übereinstimmung der Völker und der Ausgleich ihrer Interessen sind deren Voraussetzung.*

*Id.* at 30-31.

<sup>66</sup> *Id.* at 77.

<sup>67</sup> CARL SCHMITT, POSITIONEN UND BEGRIFFE IM KAMPF MIT WEIMAR-GENF-VERSAILLES, 1923-1939 (Dunker & Humblot 1988) (1940).

<sup>68</sup> "Die Grenze kann in ihrer Bedeutung für den Staat nicht bloß als Trennung verschiedener Geltungsbereiche von Rechtsnormen gekennzeichnet werden, vielmehr wirft die Grenze viele politische und damit juristische Fragen auf." *Id.* at 27.

can only have a limited existence within an established political order. The reign or sovereignty of law can refer either to positive laws, which guarantee a status quo, or to a *Vernunftrecht* (law of reason), which means the command of those men able to call upon this "higher law" and decide its content. In Schmitt's view, Hobbes shows how the "Command of a Higher Order" is an empty phrase.<sup>69</sup>

Schmitt's *ideological suspicion* extends to the universalist, objectivist claims of the Enlightenment to ground law, including international law, in a common humanity. With Germany's defeat in World War I as a backdrop, Schmitt argues that law can be a weapon for conducting war:

When a state fights its political enemy in the name of humanity, it is not a war for the sake of humanity, but a war wherein a particular state seeks to usurp a universal concept against its military opponent. At the expense of its opponent, it tries to identify itself with humanity in the same way as one can misuse peace, justice, progress, and civilization in order to claim these as one's own and to deny the same to the enemy.<sup>70</sup>

In short, universalizations are battering rams. When he continues by quoting Pierre Joseph Proudhon, Schmitt is basically arguing against the twentieth century conception of the just war:

[W]hoever invokes humanity wants to cheat. To confiscate the word humanity, to invoke and monopolize such a term probably has certain incalculable effects, such as denying the enemy the quality of being human and declaring him to be an outlaw of humanity; and a war can thereby be driven to the most extreme inhumanity.<sup>71</sup>

Schmitt openly presents such hostility to objective, normative order (whether ethical or legal, or whatever) as a defensive reaction. He has in mind a particular view of German history. His analysis is especially interesting because it allows a psychoanalytical entry into the problem of so-called "realist" perspectives on international relations which, from the 1930s onwards, constituted the main academic opposition to international law.<sup>72</sup> Schmitt

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<sup>69</sup> CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 67 (George Schwab trans., Rutgers Univ. Press 1976) (1932).

<sup>70</sup> *Id.* at 54.

<sup>71</sup> *Id.* Sombart notes how the opening expression concerning deception and humanity is taken directly from page 270 of Bismarck's *Die Deutschen Männer*.

<sup>72</sup> German historical scholarship has characterized the *Realpolitik* of pre-1914 Germany as especially marked by a lack of reality and a failure of the governmental system to bring an everyday, aggressive, nationalist public feeling into line with the realities of inter-

harkens back to Machiavelli, who was given a central place in German culture by Johann Fichte and Georg Hegel, because they saw his importance as a weapon against imperialist French humanitarianism. Machiavellian suspicion of morality in politics is especially applicable to Germany, which is marked by its ideological conquest by Republican and Napoleonic France. To the conservative forces in Germany, France was the culmination of the century of the Enlightenment. Ideological conquest is at the fore of Schmitt's consciousness:

At the beginning of the nineteenth century the situation of the ideological defensive was repeated in Germany—during the revolutionary and Napoleonic invasions of the French. When it became important for the German people to defend themselves against an expanding enemy armed with a humanitarian ideology, Machiavelli was rehabilitated by Fichte and Hegel.<sup>73</sup>

Schmitt's approach to law, as well as politics, is dominated by his definition of *enemy*. His concern with enemy is explicitly related to the ever present fear of the foreign; sometimes dormant, that fear is always capable of exploding into mortal conflict. As an integral part of his definition of the enemy, Schmitt rejects two aspects of the liberal paradigm of law—objective norms and independent (or third party) impartiality.

But he is, nevertheless, the other, the stranger; and it is sufficient for his nature that he is, in a specially intense way, existentially something different and alien, so that in the extreme case conflicts with him are possible. These can neither be decided by a previously determined general norm nor by the judgment of a disinterested and therefore neutral third party.<sup>74</sup>

It is only in the course of conflict, in which the parties decide to draw lines to the point of death, that the determination of enemy emerges. Law, commonly understood as a means of preserving order in society, has no place in conflict. The primary state of political being, whether internally or internationally, is one of civil war: "The friend, enemy, and combat concepts receive their real meaning precisely because they refer to the real possibility of physical killing."<sup>75</sup> Law may be supposed to be about the peaceful settlement of disputes, but by what may appear to be a play on words or

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national relations. See WOLFGANG J. MOMMSEN, DER AUTORITÄRE NATIONALSTAAT: VERFASSUNG, GESELLSCHAFT UND KULTUR DES DEUTSCHEN KAISERREICHES 342 (1990).

<sup>73</sup> SCHMITT, *supra* note 69, at 66.

<sup>74</sup> *Id.* at 27.

<sup>75</sup> *Id.* at 33.

a logical trick, Schmitt assumes that if a dispute is serious, then, by definition, it cannot be settled. Otherwise, it is not *really* a dispute.

The perhaps obsessive, and certainly repetitive, character of Schmitt's style is unmistakable. He juxtaposes opposites, such as the *concrete* and the *abstract*, as well as the existential and the normative. For example, though law is a coercive order, capable of sanctioning conduct with the "ultimate" penalty, it is irrelevant to those engaged in conflict. "Each participant is in a position to judge whether the adversary intends to negate his opponent's way of life and therefore must be repulsed or fought in order to preserve one's own form of existence."<sup>76</sup>

Schmitt's own concept of the political as the definition of the enemy is, in a sense, abstract and this irony is picked up by his critics.<sup>77</sup> By definition, Schmitt has no particular enemy in mind and, in this sense at least, his theory of the political is not anti-Semitic. "For only in real combat is revealed the most extreme consequence of the political grouping of friend and enemy."<sup>78</sup> The abstractness of the definition of enemy—it is only concrete in the sense that it is left to each individual party in each instance to determine—raises the central question of whether the sense of threat is constituted within the self. This abstraction is demonstrated on at least two levels. First, on the personal level, Schmitt speaks of levels of intensity leading to ever more earnest and eventually mortal oppositions.<sup>79</sup> Words, such as "one's own strength," "struggle," and "the strength to decide" appear throughout his texts. Second, on the political level, there is the capacity to declare war and pronounce outlaws, especially "enem[ies] of the state."<sup>80</sup> The political strength or weakness of the people can spell its existence or nonexistence. "If a people no longer possesses the energy or the will to maintain itself in the sphere of politics, the latter will not thereby vanish from the world. Only a weak people will disappear."<sup>81</sup> Schmitt's repetitive preoccupation with strength is tied to a fear of annihilation.

Schmitt's world is in fact the absolute state of the seventeenth century, characterized in international law by the Peace of Westphalia (1648) and by its capacity to wage war without questioning

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<sup>76</sup> *Id.* at 27.

<sup>77</sup> See, e.g., CHRISTIAN G. VON KROCKOW, *DIE ENTSCHEIDUNG: EINE UNTERSUCHUNG ÜBER ERNST JÜNGER, CARL SCHMITT, MARTIN HEIDEGGER* (Campus Verlag 1990) (1958).

<sup>78</sup> SCHMITT, *supra* note 69, at 35.

<sup>79</sup> *Id.* at 38-39.

<sup>80</sup> *Id.* at 46-47.

<sup>81</sup> *Id.* at 53.

whether the war is just, and marked in its internal relations by the absolute power necessary to suppress civil war.<sup>82</sup> In the 1920s, Schmitt faced the ideologizing of World War I, German war guilt, and attempts to reintroduce the concept of just war while outlawing war as an instrument of national policy. All of these developments are entangled in Schmitt's mind with the particular standing of Germany. Schmitt rejects ideologizing that, in his view, is a repetition of the justifications for the French Revolution and Napoleonic conquest of Germany. The power to define the enemy rests with the state.<sup>83</sup> Implied in this intense expression of the political is a willingness to die or to be killed. In Schmitt's view, it is nonsense to look to the normative order or to impartial arbitrators for justification. Schmitt's rhetoric has a fiercely repetitive, ever mounting, momentum:

War, the readiness of combatants to die, the physical killing of human beings who belong on the side of the enemy—all this has no normative meaning, but an existential meaning only, particularly in a real combat situation with a real enemy. There exists no rational purpose, no norm no matter how true, no program no matter how exemplary, no social ideal no matter how beautiful, no legitimacy nor legality which could justify men in killing each other for this reason. If such physical destruction of human life is not motivated by an existential threat to one's own way of life, then it cannot be justified.<sup>84</sup>

Schmitt's oppositions are a dichotomy which function through the "other" by polarizing negative concepts of identity. For instance, pacifist opposition to war is only politically significant if it is strong enough to express itself by fighting off nonpacifists.<sup>85</sup> Global peace is merely the goal for which some groups are willing to wage war against others. This is a consistent deconstruction of the objectivity of norms. They are battering rams with which some represent themselves against others. The League of Nations and the Kellogg-Briand Pact<sup>86</sup> are treated as meaning whatever states want them to mean. The League of Nations has no consistent base because it claimed to be both the basis for a peaceful international order and a framework to maintain the results of the Anglo-French victory over Germany. The Versailles peace treaty with Germany

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<sup>82</sup> *Id.* at 45-53.

<sup>83</sup> *Id.* at 45.

<sup>84</sup> *Id.* at 48-49.

<sup>85</sup> *Id.* at 37.

<sup>86</sup> This 1928 treaty outlawing war as an instrument of national state policy was used to try Nazi leaders for the crime of waging a war of aggression.

is described as the antithesis of the expectations embodied in the principle *pacta sunt servanda*. Its purpose is "to enable the stronger treaty party to intervene repeatedly by setting deliberately vague concepts in the treaty."<sup>87</sup> Germany also signed the Kellogg-Briand Treaty. Commenting on it long before World War II was on the horizon, Schmitt argues that the treaty did not change traditional international law in which the concept of just war had been banned. He argued that the treaty contained reservations entitling a state to use force in self-defense and to ensure its continued existence. What these reservations meant depended upon who decided. The concepts, as such, have no concrete meaning.<sup>88</sup> With respect to the treaty, Schmitt asks "who decides . . . what are peace, order and security."<sup>89</sup> War, undertaken as an instrument of national policy, is necessarily arbitrary and unjust. As examples, Schmitt cites the French and Belgian entry into the German Ruhr area after 1918. Was that entry a war and, if so, was it justified? In our time, how are the landing of United States Marines in Panama or Nicaragua to be judged? The basic difficulty with the treaty is that hegemonial powers do not conduct wars as instruments of national policy but as instruments of international politics. What can the treaty say about such fine points, asks Schmitt.<sup>90</sup> A clear post-Nietzschean metaphysic is presented in concrete groups of people who, in the name of order, freedom, etc., struggle against other human groups.<sup>91</sup>

There is one particular enemy which Schmitt appeared to single out, one towards whom he felt a measure of resentment and rivalry—the Anglo-American victors of World War I and the exponents of economic liberalism. Liberalism, Schmitt argues, is concerned with the reduction of the political to the economic or mere competition. Its political counterpart, discussion, is offered within a framework in which public life is reduced to production and consumption.<sup>92</sup> Schmitt ties together the labels "humanitarian-moral" and "intellectual" with the economic, industrial, and technical.<sup>93</sup>

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<sup>87</sup> "durch absichtlich unbestimmte Begriffe dem politisch und militärisch überlegenen Vertragsgegner ständige Interventionen zu ermöglichen" Carl Schmitt, *Der Status quo und der Friede* (1925), in SCHMITT, *supra* note 67, at 33, 38. See generally Carl Schmitt, *Das Doppelgesicht des Genfer Völkerbundes* (1926), in SCHMITT, *supra* note 67, at 43.

<sup>88</sup> SCHMITT, *supra* note 69, at 50-51.

<sup>89</sup> "wer entscheidet darüber . . . was Ordnung und Sicherheit ist" SCHMITT, *supra* note 67, at 176.

<sup>90</sup> *Id.*

<sup>91</sup> SCHMITT, *supra* note 69, at 67.

<sup>92</sup> *Id.* at 69-72.

<sup>93</sup> *Id.* at 74-75.

The rhetoric of economic individualism—of reciprocity and equality—conceals a practice of force and conquest.<sup>94</sup> This is the ideological background of doctrines such as *pacta sunt servanda*:

A domination of men based upon pure economics must appear a terrible deception if, by remaining nonpolitical, it thereby evades political responsibility and visibility. Exchange by no means precludes the possibility that one of the contractors experiences a disadvantage and that a system of mutual contracts finally deteriorates into a system of the worst exploitation and repression. When the exploited and the repressed attempt to defend themselves in such a situation, they cannot do so by economic means. Evidently, the possessor of economic power would consider every attempt to change its power position by extra-economic means as violence and crime, and will seek methods to hinder this. That ideal construction of a society based on exchange and mutual contracts and, *eo ipso*, peaceful and just is thereby eliminated. Unfortunately, also, usurers and extortioners appeal to the inviolability of contracts and to the sentence *pacta sunt servanda*. The domain of exchange has its narrow limits and its specific categories, and not all things possess an exchange value. No matter how large the financial bribe may be, there is no money equivalent for political freedom and political independence.<sup>95</sup>

This text is followed by a scornful critique of the League of Nation's use of the language of economic sanctions in the terms of its covenant. The liberal international order appeared unwarlike. However, an economically based imperialism led to a global situation in which power was maintained through, for instance, blocks on credit and raw material. Ironically, it would have been regarded as noneconomic force or violence if a people tried to break out of this system. Such peaceful devices as Article 16 of the League of Nations statute would have been used to maintain economic imperialism.<sup>96</sup> The League of Nations, which disposed of modern means of killing, now uses a new language, not of war, but of execution, sanction, pacification, defense of treaties, and international police. The opponent is no longer the enemy, but a disturber of the peace, an outlaw, set beyond humanity.<sup>97</sup>

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<sup>94</sup> *Id.* at 75.

<sup>95</sup> *Id.* at 77-78.

<sup>96</sup> *Id.* at 79 (citing paragraph 14 of the decision of the second League Assembly of 1921 introducing a hunger blockade).

<sup>97</sup> *Id.*

V. A SOCIO-CULTURAL AND PSYCHOANALYTICAL PERSPECTIVE  
ON Kelsen's THEORY OF INTERNATIONAL LAW IN  
THE 1920s

I do not intend to offer directly a pseudo-psychoanalytical reading of Kelsen's texts. Rather, I will argue that there are many features of his legal theory which accurately reflect the position of the essentially apolitical, bourgeois class, including academics and other professionals, during the pre-1914 period in Austria-Hungary and Germany. Freud's critique of members of this class with respect to certain specific psychic disorders *could* help to explain why international law continues to block the development of a democratic and multicultural international order.

Kelsen's theory of law has very clear elementary features. Law is a framework in which competencies are outlined. The competencies attributed to legal subjects or organs authorize them to impose sanctions against other subjects in the event that certain factual conditions are met. The system or structure of law so outlined is hypothetical and, in this sense, theoretical. It does not have to exist in fact. Kelsen's theory of public and international law reflects the pre-1914 dominance of an administrative law model for the state. That model ensured the effective functioning of the state as a machine, but did not commit the administrative law class to the achievement of material political goals. The academic class was imbued with the philosophical values of liberalism, above all the importance of individual freedoms over potentially arbitrary behavior by the state. However, executive government retained a decisive measure of independent legal power and was not responsible to an elected Parliament. Legal education, with administrative law at its center, was concerned with the training of civil servants.<sup>98</sup>

An essential stage in a socio-cultural critique of the liberal academic and professional class is to outline the distinctive features which marked it as apolitical in the sense of not having to engage in political conflict or accept responsibility for political decisions. In *Die Verspätete Nation*,<sup>99</sup> Helmut Plessner treats the whole German critical intellectual tradition from Kant to Freud as a fetishism of

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<sup>98</sup> PIERANGELO SCHIERA, LABORATORIUM DER BÜRGERLICHEN WELT: DEUTSCHE WISSENSCHAFT IM 19. JAHRHUNDERT 102-35 (1992). The concern was to train civil servants to administer an interventionist state which could effectively develop social and economic policy, but within the framework of an unreformed monarchical state. Questions beyond legal competence and the attending capacity to implement a decision were mere policy or, even worse, simply not pertaining to the subject matter of administration.

<sup>99</sup> HELMUT PLESSNER, DIE VERSPÄTETE NATION (Suhrkamp 1988) (1959).



doubt—a perfect environment for a politically neutralized class. This classical German statement, written by a person who happens to be Jewish, treats neo-Kantianism and neo-Hegelianism (from which Kelsen and Schmitt come) as equally politically immature, unable and unwilling to accept the complexities of political life. More fundamentally, they are each torn by the divisions of the self, forced or brought to light by Kant's epistemology. Freud's "contribution" to this panorama is, then, to offer an intricate phenomenology of the most intimate pathologies of this tradition. Common to a socio-cultural critique and a psychoanalytical critique is a problematic self-distancing from reality—a self-distancing which extends into the very being of the critical thinker.

Plessner characterizes neo-Kantianism as a reduction of Kant's ethical categorical imperative to a hypothetical logical imperative (the reputed division of the is-ought). This, in Plessner's view, was an attraction for late nineteenth century German *Burgerthum* (upper middle class). They were economically comfortable, but held no firm political convictions and were required to make no decisions. Neo-Kantianism offered the appeal of an uncommitted existence "in yet a more sublime form the thrill of a life without ties."<sup>100</sup>

There is an attitude of indifference to a state which is on the one hand nothing but an administrative apparatus—conforming to Kelsen's picture of a genetically self-reproducing, descending order of authoritative instances—and on the other hand, a *Machtstaat* (material power constellation), without direction and subordinate to no normative regulation.<sup>101</sup>

A similar stress upon the apolitical or politically immature quality of Kelsen's theory comes from Christian von Krockow. He writes of the illusory and escapist quality of its *purity*. For Kelsen, as a neo-Kantian, the state *in itself* or man *in himself* are *Undinge* (non-things).<sup>102</sup> Kelsen's *Grundnorm* (basic norm) *pacta sunt servanda* is supposed to serve as an objectively necessary presupposition of legal order.<sup>103</sup> Yet this functions as an hypothesis which threatens to treat social forces and interests as invisible. "[I]n that the total lack of content of his normative logic allows any content,

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<sup>100</sup> "in noch sublimier Form den Reiz des unverbindlichen Lebens" *Id.* at 132-33.

<sup>101</sup> *Id.* at 132-33, 142.

<sup>102</sup> VON KROCKOW, *supra* note 77, at 26.

<sup>103</sup> Here, von Krockow is following an argument very close to that of Plessner.

as long as the starting hypothesis allows a unified total system."<sup>104</sup> Von Krockow insists upon the helpless passivity, the resignation in the face of brute force which, in his view, Kelsen's search for *purity* represents. "The pure theory of law, in that it cleans the theory of the state from all prejudices and treats all starting hypotheses (basic norms) as formally equal, shows precisely its complete helplessness in the face of the despised naked facts."<sup>105</sup>

It is a much more hazardous task, but nonetheless essential, to explain generally how Kantianism and neo-Kantianism, as such, worked themselves out in the wider German political culture in the Wilhelmitic and Weimar periods. I will assume here that a theory such as Kelsen's pure theory of law, criticized by Gürke as merely the final and extreme expression of a long tradition, must have worked well. As a variant of Kantianism, Kelsen's pure theory of law internalizes within the self an abstracted, authoritarian, coercive social order to the point where the *purified rule* "took possession" of the self and left it helpless and directionless in the face of "outside political forces." Such an assessment of the actual impact of Kantianism and neo-Kantianism on German political culture is provided in Norbert Elias' response to the Adolf Eichmann Trial. His analysis of the breakdown of civilization anticipates the Lacanian-style psychoanalytical critique of Kant which has been developed much more recently.<sup>106</sup>

Somehow the sheer *purity*—read *formality*—of this tradition of thought seems to favor the "filling up" of the self with a spirit of normative compulsion and displacing personal responsibility.<sup>107</sup> The starting point for Elias is the nostalgia or yearning for a point of unity which will overcome differences.<sup>108</sup> At the same time, the German tradition of absolute rule is the background for the insistence upon unconditional, uncompromising regulative discipline. Hence, it is no accident that the imperative is *categorical*.<sup>109</sup> The

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<sup>104</sup> "[I]ndem die totale Inhaltslosigkeit seiner Normlogik jeden Inhalt zulässt, sofern nur aus der Ursprungshypothese ein einheitliches Gesamtsystem erzeugt wird." VON KROCKOW, *supra* note 77, at 27.

<sup>105</sup> "Die 'reine Rechtslehre,' indem sie so gründlich die Staatstheorie von 'Vorurteilen' reinigt, zeigt eben in ihrer formalistischen Gleichsetzung aller 'Ursprungshypothesen' ihre völlige Hilfslosigkeit angesichts der verpönten 'nackten Tatsachen.'" *Id.* at 28.

<sup>106</sup> See SLAVOJ ŽIŽEK, *DER ERHABENSTE ALLER HYSTERIKER: PSYCHOANALYSE UND DIE PHILOSOPHIE DES DEUTSCHEN IDEALISMUS* 117-49 (1992).

<sup>107</sup> I will shortly show that the same type of criticism is made by von Krockow and Richard Wolin against Schmitt's supposedly concrete decisionism.

<sup>108</sup> NORBERT ELIAS, *Der Zusammenbruch der Zivilisation, in STUDIEN ÜBER DIE DEUTSCHEN* 391, 415 (1990).

<sup>109</sup> *Id.* at 422.

yearning is for a common *Wir-Gefühl* (we feeling), an absolute ideal which would compensate for the emptiness and dullness of the everyday.<sup>110</sup>

Idealism has a special sense in the German tradition. It entails admiration for definite convictions, beliefs, or principles. Not always could there be an explanation as to the why or the wherefore. Elias attributes to this tendency the readiness for a rigidity and exclusiveness which favored sharp distinctions between human groups, friends, and enemies. To understand National Socialism, you must appreciate the part played by an unbending conviction which is unable to perceive realistically the complexity of the world and limitations of one's own perspective.<sup>111</sup> The bottom-line is an absolute duty of obedience of the individual.

At this crucial last stage, Elias stresses how the authority of the state functioned internally as a *Selbstzwang* (self-compulsion). He describes the legal order as follows: "The rules and norms of a national state, which were supported through the external coercion of the state, had their pendant in the self-compulsion (coercion), which the individuals in the form of their conscience and their 'we-ideal' exercised on themselves."<sup>112</sup> Elias criticizes Freud for simply interpreting this process as a projection of the social norm into the personality of the individual. This simplification treats the social panorama as static and misses how the political culture has actually developed. It is a false dichotomy to treat external compulsion as belonging to "society" and to suppose that what is developed internally may then be expressed externally as "culture."<sup>113</sup> In the idealist tradition the two were not so separable as demonstrated by the role given fantasy in compensating for the incomplete reality of German political ideals for most of the country's history.

This is what proved distinctive about German political/legal culture: its purity as rigidity, making up a framework of normative control and expectation which was particularly immune to external correction. The collective pressure was, at the same time, individually interactive. This process served to strengthen an already thoroughly internalized, self-compulsive acceptance of normative regulation.<sup>114</sup>

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<sup>110</sup> *Id.* at 424-25.

<sup>111</sup> *Id.* at 427-29.

<sup>112</sup> "Die Regeln und Normen eines Nationalstaats . . . das durch den Fremdzwang des Staates gestützt wurde, hatten ihr Pendant in dem Selbstzwang, den die Einzelnen in der Form ihres Gewissens und ihrer Wir-Ideale auf sich ausübten." *Id.* at 434.

<sup>113</sup> *Id.* at 434-35.

<sup>114</sup> *Id.* at 442-43.

Freud's static view of the manner in which social compulsions operate upon the individual misses the immense attraction which the categorical imperative, whether ethical or hypothetical and logical, could exercise within German political culture. The very formality of the imperative allowed it to be filled with whatever content. Its generalizability was no guarantee of restraint since the material content was widely shared; removal of the imperative from the impurity of reality ensured all the more intransigent adherence to it. So, as Elias explains: "Above all in times of crisis men will be, through reciprocal strengthening, driven to intensify the demands of moral principles, ideals and whatever and to follow them ever more uncompromisingly. In such situations groups, social movements and whole nations can fall into an escalation dynamic . . . ." <sup>115</sup>

When a nation, such as Germany, with a strong tendency to an autocratic conscience and an idealistic collective identity (in the sense of an orientation towards a dream of a greater past) runs into the escalation dynamic of a crisis, then the purity of its conscience and ideals will take on an especially devastating character.

[I]n the first instance the ruling power elite and thereafter wider social circles drove one another, through mutual reinforcement, to a radicalization of conduct and belief and to an increasing blocking of their perception of reality; then there was an acute danger that a traditionally autocratic orientation would increase to a tyrannical hardness, at the same time as a moderate fantasy of domination became ever larger. <sup>116</sup>

This is not to say that the state did not control or dictate the conscience of the individual. Instead, Elias stresses a point which Freud, in his view, misses. The individual begins from a position in which he does not have trust in his own capacity to control his own drives, instincts, or whatever. There is already a willingness to in-

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<sup>115</sup> "Vor allem in Krisenzeiten werden Menschen durch reziproke Verstärkung dazu getrieben, die Forderungen . . . moralischen Grundsätze, Ideale oder was sonst, immer mehr zu übersteigern und ihnen immer kompromißloser zu folgen. In solchen Situationen können Gruppen, soziale Bewegungen oder ganze Nationen in eine Eskalationsdynamik geraten . . . ." *Id.* at 444.

<sup>116</sup> [I]n der zuerst die herrschende Machtelite und danach auch breitere Gesellschaftskreise einander durch wechselseitige Verstärkung zu einer Radikalisierung des Verhaltens und Glaubens und zu einer fortschreitenden Blockierung der Realitätswahrnehmung trieben, dann war die Gefahr akut, daß sich die traditionell autokratische Neigung von ihrer bisherigen Strenge zu tyrannischer Härte und von ihrer bisher mäßigen zu einer immer stärkeren Phantasiedominanz steigern würde.  
*Id.* at 445.

ternalize external controls which are necessary to the completion of one's conscience. Whether it is called the state or the legal order<sup>117</sup> this external authority removes any dimension of individual, personal intelligence or reflection. Elias draws attention to the role of the categorical imperative in Hans Frank's work, *Die Technik des Staates*.<sup>118</sup> "Behave so that the leader, if he had knowledge of your conduct, would give it his approval."<sup>119</sup> This identification of the self with the "collective-we," incorporated in the leader, is precisely how the formal categorical imperative was filled out materially and could function as a widely accepted legal order.<sup>120</sup>

Returning to Plessner's critique of the German idealist tradition, one finds many useful markers to bridge socio-cultural critique and Freud's psychoanalytical phenomenology. Plessner sees in the Kantian deconstruction of the self the makings of the tormented figures of Thomas Mann's earlier novels.<sup>121</sup> To be free, man distrusts the reality of the self and searches for a principle beyond the self which will guarantee freedom. This exercise in displacement is common to both Kelsen and Schmitt. Plessner summarizes Kant's program as follows: "To be a free man means therefore firstly, to acquire a suspicion of oneself and to lay no value on the internal power of conviction of one's own consciousness and conscience . . . to relativize a world and a self till then valid and thereby to expose it as ideology."<sup>122</sup> This is a full presentation of a psychoanalytical agenda which is also accepted, as will be seen, by Heidegger. There is an inevitable opaqueness in consciousness itself—"the lack of transparence of consciousness to itself,"<sup>123</sup> or what Plessner calls "a doctrine of the hiddenness of this world."<sup>124</sup> Man discovers a hidden world not beyond, but within, himself.

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<sup>117</sup> Von Krockow and others have pointed out the mark of helpless passivity in Kelsen's theory of the legal order.

<sup>118</sup> HANS FRANK, *DIE TECHNIK DES STAATES* (1942).

<sup>119</sup> "Handle so, daß der Führer, wenn er von deinern Handeln Kenntnis hätte, dieses Handeln billigen würde." *Id.* at 15.

<sup>120</sup> ELIAS, *supra* note 108, at 493.

<sup>121</sup> For similar critiques in the fields of the sociology and historiography of literature, see HARVEY GOLDMAN, *MAX WEBER AND THOMAS MANN: CALLING AND THE SHAPING OF THE SELF* (1988).

<sup>122</sup> "Ein freier Mensch werden heisst also zunächst, gegen sich selbst Verdacht bekommen und auf die innere Überzeugungskraft des eigenen Bewusstseins und Gewissens keinen Wert mehr legen . . . den bisher gültigen Welt und Selbstaspekt . . . relativieren d.h. als Ideologie entlarven." PLESSNER, *supra* note 99, at 120.

<sup>123</sup> "die Undurchsichtigkeit des Bewusstseins für sich selbst" *Id.* at 121.

<sup>124</sup> "eine Lehre des verborgenen Diesseits" *Id.*

This critical attack applies as much to Kelsen as to Schmitt<sup>125</sup> because Plessner is anxious to dispute the *purest* methodology as a form of manic scrupulosity serving, but not able to satisfy, individual psychological needs. It is the fear of what is hidden in our way of perceiving reality which leads to an endless chasing behind appearances. The preoccupation with the allegedly ideological function of reason runs parallel to a suspicion of personal motivation and sets the agenda for so-called methodological inquiry—i.e., “the concealment of a practical instrumental intention in what is supposed to be a theoretical function of the human spirit.”<sup>126</sup> Purity of method marks a scrupulosity with respect to the dividing line between what a man is aware of within himself and what he dimly perceives he is not aware of.

This is the *root* of the pure theory of law, rules, and regulation. “Then man can never let off his guard, he must always control his use of reason; otherwise it will bring him into contradiction.”<sup>127</sup> For Plessner, it is the belief, as well as the fear, that reality is entirely a subjective construction that leads to the search for a sound hypothetical starting point for an intellectual enterprise. Psychoanalysis functions within this intellectual tradition. It expresses the belief that “everything falls under suspicion to be a mere fantasy of the consciousness which lay behind it.”<sup>128</sup> An awareness of reality is only possible as, or can only mean, “what is hidden or unconsciously embedded in the categories of thinking.”<sup>129</sup> The Freudian concept of political culture, which appears so congenial to Kelsen, is, in Plessner’s view, every bit as much destructive of the possibility of civilized, human, political community as the neo-Darwinism with which he equates it. Freud continued the unmasking of consciousness at the level of “seine triebhafte Existenzbasis.”<sup>130</sup> This is a form of *konkretes Denken* (concrete thinking). Whether one uses such words as sublimation, conversion or neurosis the out-

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<sup>125</sup> Again, I mean to treat the two as cultural types, not as biographical studies.

<sup>126</sup> “*die Verstecktheit einer praktischen Gebrauchsbestimmung in einer theoretischen Funktion des menschlichen Geistes*” PLESSNER, *supra* note 99, at 121.

<sup>127</sup> “*Denn kann der Mensch sich nie überlassen, er muss seinen Gebrauch ständig regeln; sonst gerät er mit ihm in Widersprüche.*” *Id.*

<sup>128</sup> “*alles geriet in den Verdacht, eine Hypostase des dahinter stehenden Bewusstseins zu sein*” *Id.* at 126.

<sup>129</sup> “*verdeckter oder unbewusster, d.h. in der Funktion selbst sich erschöpfender Kategorien*” *Id.* at 131.

<sup>130</sup> *Id.* at 142.

come is the same. "Consciousness speaks an indirect, ideological language."<sup>131</sup>

The two broad elements of Freud's theories that I will consider here are his purely psychoanalytical theories of anal retention and compulsive neurosis and his metapsychological theory of mass society and the ego. My intention is to throw light on what might be irrational blockages which support such theories as those of Kelsen. I do not intend to claim that his position is discredited, but rather assume that there is a rigidity in Freud's theories and an inflexibility surrounding Kelsen's discussions. I hope to open their work up to different interpretations.

The very repetition of the word *pure* in Kelsen's theory of law, a repetition common to German racist obsessions with purity, points easily to Freud's theory of anal-erotic character. For Freud, it is an established fact that there is a repeated coincidence of the qualities of orderliness, a concern for bodily cleanliness, a scrupulous attention to the execution of the smallest duties, an excessive attendance to monetary economies, and a spirit of obstinacy which can readily break out into rage and a lust for revenge.<sup>132</sup> Concern for *purity* will be matched by a concern for order, minute attention to the detail of duty and a tendency to react explosively to imagined violations of duty. The reaction will, in all probability, be vengeful—concerned with exacting an appropriate remedy for a real or imagined violation of order or duty. Order and duty are concerned with preserving one's space against contaminating intrusions. Freud stresses the preoccupation of the anal-erotic character with the possibility of disturbance, of "dirt in the wrong place." For Freud, this is all causally explicable in terms of struggles between small child and parent in toilet training. Whether this remains the latest psychoanalytical view, it suggests not taking at face value a definition of legal order which automatically imposes ferocious sanctions upon alleged disturbers of *order*. An interest in law could very well have quite a different focus.<sup>133</sup>

The concept of the compulsive neurotic is intended to heighten the importance of law as a framework for attributing competence to exercise coercion. In German, the word Kelsen

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<sup>131</sup> "Das Bewusstsein redet eine indirekte, eine ideologische Sprache." *Id.* at 143. Plessner treats both Darwin and Freud as *biological* thinkers, the one believing in progress, the other, not. See *id.* at 142.

<sup>132</sup> 7 SIGMUND FREUD, *Charakter und Analerotik* (1907), in ZWANG, PARANOIA UND PERVERSION 23 (S. Fischer Verlag 1973).

<sup>133</sup> *Id.* at 28.

uses for sanction, *Zwang*, is the same as that which Freud uses for the description of this neurosis, *Zwangsneurose*. Freud speaks of a past intention, or simply awareness of an intention, to do something reprehensible—usually connected with sex—which leads to an obsessive determination to defend oneself from executing the intention, or to hide *defensively* from oneself the fact that one has an intention to behave reprehensibly.<sup>134</sup> Such internal disorder affects judgment and powers of perception in their reactive, *defensive* response to the perceived threat that one's intentions might become exposed. The defensive reaction functions as a sanction against the person concerned.<sup>135</sup> The explosive reactions of the individual appear disproportionate compared to their failure to observe "other" duties. Yet, a psychoanalytical explanation shows that the explosive response is in fact reasonable given the connection between a specific incident and a repressed earlier intention or action.<sup>136</sup> This type of analysis is "explosive" for a pure theory of international law because the lack of international institutions makes inevitable a wide subjectivity in appreciation of disturbances of order and the need to sanction them. In personal relations, Freud highlights how compulsive conflicts are attended by real and imagined misunderstandings of the intentions of others. These misunderstandings are a function of the contradictory unconscious emotions associated with the relationships—quite simply a not understood confusion of love and hatred.<sup>137</sup>

Freud himself makes a political connection in his discussion of a person's obsessive attempts to fulfill real or imagined duties which his or her father (read "father figure") failed to execute. When discussing the significance of a father's failure to pay a gambling debt to a military superior, Freud makes a clear reference to a general political climate. The son hears the captain's command that he must return the money. A cramped obedience involves repression of awareness that the warning rests upon a mistaken assumption by the representative of the father. The father, it is assumed, cannot be mistaken. Freud concludes: "Also majesty cannot be mistaken, and if it attributed to a subject a title which

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<sup>134</sup> 7 SIGMUND FREUD, *Bemerkungen über einen Fall von Zwangsneurose* (1909), in ZWANG, PARANOIA UND PERVERSION, *supra* note 132, at 42.

<sup>135</sup> *Id.* at 44.

<sup>136</sup> *Id.* at 50.

<sup>137</sup> *Id.* at 60-62. Freud formulates a compulsion to understand in the form of a duty: if you are to avoid pain for yourself, you must never misunderstand anyone.



does not belong to it, it thenceforth carries that title.”<sup>138</sup> Indeed, Freud goes on to highlight compulsive uncertainty, not only about “other’s” intentions and the reality of duties and commands, but also doubts about one’s own recollections, which lead to hesitancy and indecisiveness in action.<sup>139</sup> These are characteristics of the “unpolitical” liberal which is the subject of both Freud’s metapsychological works and the self-hate and the search for strong leaders as decisive men of action which, it will be seen, are attributed to Schmitt’s definition of the enemy.

The repressed contradictory emotions which threaten understanding are seen by Freud as phenomena attached to both hysteria and paranoia.<sup>140</sup> They induce paralysis of the will by encouraging both a self-doubting, inhibiting action and resort to defense mechanisms to ward off imaginary dangers.<sup>141</sup> In particular, the *Zwang* (compulsion) is a compensation for the doubt. It balances out the erratic attachment to intolerable strains of imagined duties. This picture suits the world of the unpolitical man, because, as Freud stresses, it characterizes and intensifies a life of regressive thinking rather than effective action. The compulsiveness then attaches not to unwilled action, but to a process of thinking itself.<sup>142</sup> This bears comparison with a hypothetical, *pure* theory of law as a system of thoughts about when to punish. Freud stresses the role of compulsive thinking in postponing effective action. At the same time, however, he connects the anal-erotic, obstinate retention of the bowels and strictness in cleanliness with a narcissist failure to come out of the self so as to reach a natural object of intention (e.g., a child in the case of a woman’s sexuality).<sup>143</sup>

It is not my intention to use Freud’s metapsychological work in exactly the same way as the psychoanalytical studies to deconstruct Kelsen’s work. Instead, my general thesis is that Kelsen and Freud are in political agreement about the quality of post-1918 mass democracy, in so far as Kelsen’s opinions have been represented in his work on the distinction between the sociological and

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<sup>138</sup> “Auch die Majestät kann nicht irren, und wenn sie einen Untertan mit einem ihm nicht gebührenden Titel angesprochen hat, so trägt er fortan diesen Titel.” *Id.* at 81.

<sup>139</sup> *Id.* at 90-94.

<sup>140</sup> *Id.* at 96.

<sup>141</sup> *Id.* at 97-99.

<sup>142</sup> *Id.* at 99-100.

<sup>143</sup> See 7 SIGMUND FREUD, *Die Disposition zur Zwangsneurose* (1913), in ZWANG, PARANOIA UND PERVERSION, *supra* note 132, at 110; 7 SIGMUND FREUD, *Über Triebumsetzung, insbesondere der Analerotik* (1917), in ZWANG, PARANOIA UND PERVERSION, *supra* note 132, at 127.

juridical concept of the state.<sup>144</sup> Freud and Kelsen are both, therefore, liberal conservatives. They hold to a dichotomy between a cordoned off, autonomous *ego*—the ideal fiction of the bourgeois world—and the masses of modern society. Kelsen, like Freud, believes that society can only be effectively constituted through a *grounding act*—or substitute of father figure—which somehow restrains the irrationality of group relations.<sup>145</sup> This is not presented as Kelsen's view of psychoanalysis, but rather as an argument that his view of mass society corresponds with Freud's metapsychological views. This means Kelsen, as much as Freud, follows the opinions of the authoritarian, culturally pessimistic, conservative, French intellectual, Gustave Le Bons.<sup>146</sup>

Indeed, the connection with what has gone before is more specific. Crucial features of Freud's political anthropology are contained in his understanding of the anal-erotic, compulsive-neurotic, narcissist individual. This person is capable of group relations only upon the basis of the most abject submission to authority. The submission is an expression of his already outlined powerlessness and indecisiveness; it takes the form of narcissist, self-identification with the object of authority. The individual loses all sense of self by submerging himself in a mass and egalitarian society, with dramatic implications for independent identity as a sexual relationship.<sup>147</sup> The brilliance and originality of Freud is that he takes the language of mass suggestion used by Le Bons and Kelsen and gives it a precise, scientific meaning.<sup>148</sup> This meaning has evolved in his analysis of love and sexual relationships and can be transposed with the use of the key concept of identification, onto the wider political plain. I have focussed on this particular notion of affective identification here with the hope that, in the conclusion, I can give some indication as to how an alternative political anthropology, based upon Max Scheler,<sup>149</sup> could lead to an alternative legal and international law theory.

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<sup>144</sup> KELSEN, *supra* note 12, at 108.

<sup>145</sup> Reimut Reiche, *Introduction to SIGMUND FREUD, MASSENPSYCHOLOGIE UND ICH-ANALYSE: DIE ZUKUNFT EINER ILLUSION* 7, 12-13 (Fischer Taschenbuch Verlag 1993) (1921).

<sup>146</sup> *Id.* at 9. Freud considers Le Bons' work extensively in *Massenpsychologie*.

<sup>147</sup> *Id.* at 68-71, 74-79, 82, 87-89, 91, 104.

<sup>148</sup> See Reiche, *supra* note 145, at 10.

<sup>149</sup> Freud's anthropology also excludes any real struggle in the Hegelian paradigm of the master-slave struggle for recognition. This avenue of inquiry will have to be taken up in another place.

VI. SCHMITT'S THEORY OF THE POLITICAL AND  
INTERNATIONAL LAW FROM A PSYCHOANALYTICAL-  
PHENOMENOLOGICAL PERSPECTIVE

While Kelsen reflects a radical suspicion of reality in the Kantian tradition, Schmitt recovers contact with reality even at the price of radical activism and decisionism. Schmitt is not committed to the belief that decisions taken are rationally grounded. Quite the contrary, his ultimately racist concept of enemy, and the decision to define and confront it, is based upon an open insistence about the opaque quality of social relations. His phenomenology is a reaction against neo-Kantianism, but it takes an existentialist form by simply accepting the unintelligible and acting/deciding *with and through it*. Subjectivity is recognized as having lost all contact with an alienated reality of objects and its radical sovereignty sweeps around in an empty space.

This "existentialism" means, concretely, two related forms of unintelligibility. First, the subject, a collective or political community, cannot grasp intelligibly more than partially the roots of its own historicity, or of its embeddedness in a system or network of practices. Second, the subject is only dimly aware of the nature or explanation of its estrangement from its neighbors. Blocking "mechanisms" render its surroundings opaque and hence, inevitably, threatening. Readiness to embrace racism means, above all, a categorical denial of the possibility of mutual comprehension. The emphasis upon difference is, therefore, incompatible with any international harmony or order. A hermeneutic of interpretative communities is out of the question.

The following is a theoretical "justification" of racist intolerance as an inevitability, again within the concept of enemy as Schmitt developed it during the Third Reich:

Far into the deepest, most unconscious movements of the soul, and also right into the finest threads of the brain, the human being stands in the reality of a national and racial affinity. . . . Someone foreign in kind may behave ever so critically and take great trouble to be alert, he may read and write books, (nonetheless) he thinks and understands in another way, because he is simply constituted differently and remains in every step of his thinking within his own kind. That is the objective reality of "objectivity."<sup>150</sup>

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<sup>150</sup> *Bis in die tiefsten, unbewußtesten Regungen des Gemütes, aber auch bis in die kleinste Gehirnfäser hinein, steht der Mensch in der Wirklichkeit dieser Volks- und Rassenzugehörigkeit. . . . Ein Artfremder mag sich noch so kritisch gebärden*

This racist context gives a different perspective on Schmitt's much earlier developed choice for decision over norm. There can be no "true" decision which appeals to norms because the appeal to the norm, as a rational dimension, takes away the element of *pure* (i.e., out of nowhere) decision. The primacy of decision over norm is a function of the definition of the political in terms of the enemy. Nihilism, or the cult of "nothing," is a further reflection of, and a cult of, the unintelligible. Drawing on Schmitt's *Politische Theologie*, von Krockow quotes him: "Seen from the perspective of the norm, the decision is born out of nothing."<sup>151</sup> The power to decide the *exception* is based again on the phenomenological impatience with neo-Kantian skepticism in the face of reality. "In the exception the strength of real life breaks through the crust of a mechanical existence grown stiff through routine . . . ."<sup>152</sup> There is no mistaking how hostile this language is to hermeneutics. A crucial step is taken by Schmitt, above all in the *Politische Romantik*, to oppose the very idea of discussion, since so long as dialogue exists, there is the danger that the distinction between friend and enemy becomes blurred.<sup>153</sup> This equation of romantic and liberal is part of a more general "antibourgeoise" sentiment which has been characterized at the psychological level as a form of self-hatred. The contempt for the imagined spirit of indecision, itself a preference for allowing the so-called life-flow to escape rigorous definition, produces an elitist reaction on the part of those few capable of decision and action.<sup>154</sup>

Von Krockow detects in this language a passivity coming from the same background attributed to the Romantics—in particular Schmitt's own critique of the same—leading to the playing of a desperate and essentially pathetic, voyeuristic role over and against "real men of action."<sup>155</sup> In other words, one should expect to find

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*und noch so scharfsinnig bemühen, mag Bücher lesen und Bücher schreiben, er denkt und versteht anders, weil er anders geartet ist und bleibt in jedem entscheidenden Gedankengang in den existenziellen Bedingungen seiner eigenen Art. Das ist die objektive Wirklichkeit der "Objektivität."*

CARL SCHMITT, STAAT, BEWEGUNG, VOLK: DIE DREI GLIEDERUNG DER POLITISCHEN EINHEIT 45 (1933). This is a representative expression of Nazi racism.

<sup>151</sup> "Die Entscheidung ist, normativ gesehen, aus dem Nichts geboren." See VON KROCKOW, *supra* 77, at 56.

<sup>152</sup> "In der Ausnahme durchbricht die Kraft des wirklichen Lebens die Kruste einer in Wiederholung erstarrten Mechanik . . ." VON KROCKOW, *supra* note 77, at 57 (relying on Kierkegaard).

<sup>153</sup> *Id.* at 89.

<sup>154</sup> *Id.* at 84-91.

<sup>155</sup> *Id.* at 91-92.

pathologies common to Kelsen and Schmitt as representative cultural types since they are both exceptionally sophisticated members of the same social class which, throughout their formative years, was politically powerless. Von Krockow interprets Schmitt's theory of decision as obsessive or as a form of repression. For instance, Schmitt claims for the concept of decision the same role as Kelsen claims for his *Grundnorm* in relation to a complete constitutional order. There is, in both cases, a flight from the complexity of political compromise into a nihilistic one-dimensionality which leaves completely open who is deciding what for whom.<sup>156</sup> In at least one sense, legal formalism and decisionism are the same. Schmitt does not have to make use of a fiction or hypothesis. Formal positivism is a hidden decisionism. One might say: "Decisionism is a positivism which has arrived at a consciousness of itself and thereby turns into its opposite."<sup>157</sup> At the same time, Schmitt has no substantive notion of evil in his anthropology, nor a substantive definition of friend/enemy. Hence, his decisionism is only an abstract formalism *which also hides behind* the facade of a "concrete" *Sein* (being).<sup>158</sup>

Schmitt is associated with Heidegger's phenomenology by von Krockow and also by Richard Wolin. Heidegger's equivalent of Schmitt's decisionism is *Entschlossenheit* (the concept of decisiveness). It is rooted in a supposedly irrationalist "glorification" of the fact that decisions are grounded upon what cannot be overcome intellectually because certain dimensions are hidden and ungraspable. Wolin quotes Heidegger as saying, "Every decision bases itself on something not mastered, something concealed, confusing; else it would never be a decision."<sup>159</sup> Wolin leaves no place for the psychoanalytical dimension and, indeed, the argument could follow that Freud was himself a contributor to National Socialism. Wolin outlines Heidegger's rejection of the basis for traditional German hermeneutics. Existence has lost its substance and remains as a bare fact or "thereness" without semantic potential. In medieval philosophy, all existence depends upon a creative primary being. Heidegger, following this tradition, abandons the cre-

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<sup>156</sup> *Id.* at 60-61.

<sup>157</sup> "Der Dezisionismus ist ein Positivismus, der zum Bewußtsein seiner selbst gekommen ist—und damit in sein Gegenteil umschlägt." *Id.* at 66.

<sup>158</sup> *Id.* at 67.

<sup>159</sup> RICHARD WOLIN, *THE POLITICS OF BEING: THE POLITICAL THOUGHT OF MARTIN HEIDEGGER* 53 (1990); see also *id.* at 35 (quoting Schmitt's *Political Theology* to the same effect concerning the state of exception freeing the decision from the norm).

ative being, leaving "existence as such."<sup>160</sup> Anxiety is rooted in the consequent realization of complete contingency and groundlessness. To escape this fact or mere "thereness," the individual loses himself in the average and the public. Heidegger appears to connect the courage to take a decision "out of nothing" with authoritarian and fascist political orientation.<sup>161</sup>

Indeed, a primary mark of Heidegger's "fascist proclivities" is his now noted "aversion" to discourse and dialogue.<sup>162</sup> He is supposed to make a virtue out of the incommunicability of the *Ruf des Gewissens* (call of conscience), which Wolin treats as an infatuation with unreason.<sup>163</sup> As compared with authentic "decisiveness," Heidegger is only contemptuous of law as convention, an expression of the opinion of the mass, of the ordinary.<sup>164</sup> Heidegger argues that decisions have inevitably rested on a dimension which cannot be fathomed.<sup>165</sup> In effect, Wolin treats decisionism as unprincipled, assuming that an absence of content lays the way open for opportunism and nihilistic activity.<sup>166</sup>

Wolin argues that Heidegger's own remedy or response—a call for a "openness to being," the prioritizing of ontology over ethics—is nothing but a masochistic self-abnegation. In the face of the *Volk* and equally dark notions of destiny, it represents an amoral irresponsibility. For Heidegger, being is accorded the status of an all-powerful "metasubject." So-called openness or receptivity to being is a declaration of helplessness in the face of divine, mysterious powers.<sup>167</sup> Wolin counters that liberal, democratic politics are strictly non-metaphysical and human interaction is defined in terms of intentions expressed in laws and institutions in a search for *justice*, not *truth*.<sup>168</sup>

In contrast, I argue that Heidegger should be understood as offering a phenomenology of the unconscious, particularly apposite for social and political contexts. Such a phenomenology offers a framework within which one can be sensitive to the opaqueness of existence in the two meanings already noted,<sup>169</sup> thereby avoiding

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<sup>160</sup> *Id.* at 32.

<sup>161</sup> *Id.* at 35-40.

<sup>162</sup> *Id.* at 44-45.

<sup>163</sup> *Id.* at 43.

<sup>164</sup> *Id.* at 49.

<sup>165</sup> *Id.* at 53.

<sup>166</sup> *Id.* at 53-54, 65-66.

<sup>167</sup> *Id.* at 147-49.

<sup>168</sup> *Id.* at 167-68.

<sup>169</sup> *See supra* introduction to part VI.

the pitfalls of paranoia—anxiety about one’s own uncertain roots and uncertainty about those of one’s neighbors. The “way into” this world will be an explanation of the precisely ethical justification which Heidegger offers for the place he accords metaphysics. This ethical critique directly meets Schmitt’s already noted “battle of representations.” It is Heidegger’s own critique of national socialism. However, Heidegger merely explains conflict and destructiveness very generally, within a pathology of subjectivism or subjective idealism. One has to look to his direct collaboration with psychoanalysis to learn how that pathology might be broken down into the specifics of paranoia, a course which involves a return to Freud and to one of his interpreters, Lacan. After this long journey, I suggest that Scheler offers a “way out of” identificatory politics.

The material which Heidegger himself offers to indicate the “development” of his own opposition to National Socialism is his lectures on Nietzsche. The self is divided because it would be separated, total, and omnipotent. It is the unconcealment of reality which opens up the self and liberates it. In his fourth series of Nietzsche lectures on *nihilism* in 1940, Heidegger places German idealism—within which he includes Nietzsche—in a wider European context beginning with Descartes. In my view, it is immediately apparent from these lectures what Kelsen and Schmitt have in common within subject-based, Western metaphysics. Kelsen follows Descartes’ obsession with a methodology granting certainty to the self, while Schmitt is caught in the subjectivist, intellectual trap of a battle of representations. With Descartes’ methodology, man is defined by referring the world back to man’s representing. Heidegger interprets this to mean a *securing representation*, which is intended to achieve a *self-securing certainty*.<sup>170</sup> The lectures are a gloss on Nietzsche’s views, particularly of Descartes and Kant. They are helpful in the present context because they argue for the existence of a development from a will to certitude, through the rigor of logic (Kelsen), to a will to power through dominant representation (Schmitt). The outcome, in Heidegger’s view, is an implosion of the self (Freud) to be resolved through an openness of the self to the unconcealedness of being.<sup>171</sup> Heidegger’s general

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<sup>170</sup> 4 MARTIN HEIDEGGER, *NIETZSCHE: NIHLISM* 122 (David F. Krell ed. & Frank A. Capuzzi trans., Harper & Row 1991) (1961).

<sup>171</sup> It is the latter step, Heidegger’s own, which is understood by Wolin to be a death of the self for the sake of the *Volk*. It might be said that *being* is the *Volk* in sheep’s clothing, to which the self abandons its capacity for independent judgment. *Id.* at 181-90. This

theme is to treat Nietzsche's will to power, seeping through the whole tradition, as a degeneration of it. He makes the same possible connections to Freud as Plessner would later make.<sup>172</sup>

Heidegger accepts that it is correct that the *cogito ergo sum* is only a "hypothesis" assumed by Descartes because it gave him the greatest feeling of power and security.<sup>173</sup> The closeness, even at this early stage, to Kelsen is clear. The "I" as a subject is an invention of "logic" and logic is an imperative not to knowledge of the "true" but to the positing and tidying up of a world which we shall then call true. So, for Heidegger, logic is command. Truth is what is firm and fixed while logic then emerges as a will to fix and make permanent.<sup>174</sup>

In Heidegger's view, Nietzsche does not change anything fundamental, but merely replaces the "I" with the "body," thus coarsening Descartes. "[E]verything is transferred from the realm of representation and consciousness (*perception*) to the realm of *appetitus* or drives, and thought absolutely in terms of the physiology of will to power."<sup>175</sup> Clearly pointing the finger at Nietzsche—remember that these lectures are supposed to be Heidegger's mature statement about National Socialism—Heidegger claims that Nietzsche's preference for *animalitas* over *rationalitas* means the "absolute essence of subjectivity necessarily develops as the *brutalitas* of *bestialitas*. At the end of metaphysics stands the statement *Homo est brutum bestiale*."<sup>176</sup>

The order in which Heidegger develops his argument places what is more clearly applicable to Schmitt before what more directly concerns Kelsen. Universalistic argument as ideology or propaganda is part of the struggle of representations. Heidegger defines nihilism as the voidness of the transcendent, so that value comes from within people themselves. Value is, therefore, power. "Every power is a power only as long as it is more power . . . only if it overtakes [itself]."<sup>177</sup> Incessant self-overpowering must be a continual "becoming" which cannot move "towards and outside"

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major issue is the subject of a vast literature. Consider, for instance, DAVID F. KRELL, *DAIMON LIFE, HEIDEGGER AND LIFE-PHILOSOPHY* (1992).

<sup>172</sup> Plessner composed his work while in exile in Holland in the 1930s, but it was not published until the end of the 1950s. Of course, Heidegger's own lectures were only published at the beginning of the 1960s.

<sup>173</sup> HEIDEGGER, *supra* note 170, at 131.

<sup>174</sup> *Id.* at 132.

<sup>175</sup> *Id.* at 134.

<sup>176</sup> *Id.* at 148.

<sup>177</sup> *Id.* at 7; *see also id.* at 3-4.



its own “farther and farther,” but is ceaselessly caught up in the cyclical increase of power.<sup>178</sup> This abstract argument is related by Heidegger to an international law issue of the time, the British sinking of the French fleet at Oran. He presents the *combat of representations*. When the British destroyed the French fleet, it was from their point of view justified. “[J]ustified’ merely means what serves the enhancement of power.”<sup>179</sup> Nonetheless, there is no impartial standpoint.

At the same time, what that suggests is that *we* dare not and cannot ever justify that action; in a metaphysical sense, every power has *its own* right and can only come to be in the wrong place through impotence. But it belongs to the metaphysical tactics of every power that it cannot regard any act of an opposing power from the *latter’s* power perspective, but rather subjects the opposing activity to the standard of a universal human morality—which has value only as propaganda.<sup>180</sup>

It is precisely this political context which makes it imperative, in Heidegger’s view, that one escape from a “value-puffing” self into an openness to being. In this sense, it is a return to objective truth. Heidegger opposes *idea* as a representation that we, as *I-subjects*, have to *idea* as visibleness, not the aspect which we form for ourselves but the *Vorherige* (beforehand) and “from out of itself towards us.” Being is the presence of what endures in the unconcealed,<sup>181</sup> not a system of conditions of possibility of an object over which the subject has disposal.<sup>182</sup> Kant’s metaphysics of being has been mistaken subjectivism:

[T]he conditions of the possibility of representing what is represented are also—that is to say, are nothing else but—conditions of the possibility of what is represented. . . . Being is representedness. But representedness is presentedness-to, in such a way that the one presenting can be sure of what is thus brought into place and brought to stand. Security is sought in *certitude*. . . . Truth as representedness of the object, objectivity, has its ground in subjectivity, in self-representing representation . . . .<sup>183</sup>

The will to certitude is not, as such, a will to power. It is only a preliminary stage which “first permits certitude to be explained as

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<sup>178</sup> *Id.* at 7.

<sup>179</sup> *Id.* at 144.

<sup>180</sup> *Id.* at 145.

<sup>181</sup> *Id.* at 162-63.

<sup>182</sup> *Id.* at 174.

<sup>183</sup> *Id.* at 175.

a will to fixation."<sup>184</sup> The only "way out" for Heidegger is to experience the default of being as the advent of being,<sup>185</sup> although we are now at the stage that we neglect to experience even the default of being. "Such blindness comes from unconfessed anxiety in the face of the anxiety that experiences with trepidation the default of Being itself."<sup>186</sup>

Within the context of Heidegger's assertion of the spiritual bankruptcy of subjectivist metaphysics, I will attempt to note some developments in psychoanalytical theory which are being made on the strength of Heidegger's ontology. David Michael Levin gives a Freudian gloss to what I regard as Heidegger's reflections on the implosion of the western subject in the 1920s and 1930s. Objectification is a reflection of the *ego-logical need for security*. The *ego* is necessarily attached to the issue of certainty. Freud demonstrates in both *The Ego and the Id* and *Inhibition, Symptom and Anxiety* that the *ego* is nothing but a product of anxiety—"a structure, or system, of defense which, once it is established, at once becomes the *source* of continued anxiety, since the very rigidity of the system intensifies the need for defense."<sup>187</sup> There is an inherently aversive and aggressive character to representation. "As the prefix itself informs us, representation is repetition: a process of delaying, or deferring . . ." <sup>188</sup> Hence, it is not surprising that the age of representation has been one of terrible strife and destruction.

Levin connects this age with narcissistic disorders, epidemic at present, which manifest "the suffering of an ego caught up in the ontology of its own images and stuck in the dependency of its need for them."<sup>189</sup> However, according to Richard Wolin, Freud offers no way out. Freud would interpret the type of solution offered by Heidegger as an infantile regression. This is the dichotomy which Freud sets up in *Civilization and its Discontents*. Apart from the social ego, there is only the infantile narcissism of the pre-ego.<sup>190</sup> If Freud's theory of ego formation is true, then the ego never comes into being except in a process of adaptation to social power.

So Kant's correlation of the "inner" and the "free" does not work: the differentiation of "inner" and "outer" is itself an effect

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<sup>184</sup> *Id.* at 179.

<sup>185</sup> *Id.* at 225.

<sup>186</sup> *Id.* at 246.

<sup>187</sup> DAVID M. LEVIN, *THE OPENING OF VISION: NIHILISM AND THE POSTMODERN SITUATION* 66 (1988).

<sup>188</sup> *Id.* at 67.

<sup>189</sup> *Id.* at 127.

<sup>190</sup> *Id.* at 215, 218.

of power, and does not in the least ensure that the self has escaped social domination: our inner life may still be controlled by "heteronomous voices that tell us our identity."<sup>191</sup>

Freud himself, in *Civilization and its Discontents*, leaves no way out because he suggests that human beings shape their identity by learning to repress their chaotic inner nature, thereby creating a split between the "inner" and the "outer" which makes us feel that the "inner" is empty or chaotic.<sup>192</sup>

Apart from identification with social authority, there is another way of commenting on how the Freudian individual has no identity. The criticism of Freud is that he is unclear about the mechanisms of identification which are supposed to operate positively to ensure stable political authority. As previously mentioned, Freud sees the power of the masses as laden with processes of identification in which the individual is hypnotized, fusing his identity with the narcissist object of his admiration and devotion, losing himself in this supposedly self-reflecting object.<sup>193</sup> This could be offered as a psychoanalytical explanation of Schmitt's foundation for the distinction between *Gleichartiges* (of the same kind) and *Andersartiges* (of another kind). What such Freudian analysis ignores at the domestic, but not necessarily at the international, level is the murderous rivalry (read paranoia) which underlies narcissist identifications.<sup>194</sup> This particular mechanism needs to be explored further with respect to Schmitt. Quite simply, his enemies—early nineteenth century France, and especially Anglo-Americanism—are mortal rivals. Yet, how does he construct the identity of his friends? And what is the nature of their relationship with one another?<sup>195</sup> These questions are necessary to understand Schmitt's racist nationalism characterized by authoritarian *and homogenous* political communities which are a menace to their neighbors.

An extensive analysis of Schmitt as a paranoid cultural form has been undertaken by Nicholas Sombart and it follows Freud and

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<sup>191</sup> *Id.* at 302.

<sup>192</sup> *Id.* at 309-10.

<sup>193</sup> FREUD, *supra* note 145, at 65, 104.

<sup>194</sup> MIKKEL BORCH-JACOBSEN, LACAN: THE ABSOLUTE MASTER 33-35 (Douglas Brick trans., Stanford Univ. Press 1991) (1990).

<sup>195</sup> This Article does not address Schmitt's constitutional theory. A major feature of that theory was that democracy, and indeed any legitimate or stable form of government, depended upon a homogenous, popular base. See CARL SCHMITT, THE CRISIS OF PARLIAMENTARY DEMOCRACY (Ellen Kennedy trans., MIT Press 1985) (1923).

Roland Barthes quite closely.<sup>196</sup> For Freud, paranoia is explicable in terms of a blocked development of the sexual drive. A movement from narcissism and auto-eroticism, through identificatory (read homogenous) homosexuality to the heterosexual (read different) relations is not completed. Remaining at the second stage, the paranoid denies the nature of his sexual impulses towards another man. Instead of saying directly, "I do not like this man," he declares, more categorically, "This man hates me." This is the strongest measure of self-assurance that the repression is successfully completed.<sup>197</sup> For this study of individuals as representatives of cultural forms, it is especially interesting that Lacan has added an essential social dimension to paranoia, while retaining the narcissist-identificatory, *homosocial* function of paranoia. It arises in a close relationship marked by imitative dependence on the part of a slave-like subordinate towards the master-like model with whose qualities and behavior the subordinate wishes to feel at one (i.e., in a state of identification). The identification brings with it a murderous rivalry because the object of an ideal already occupies the desired place and so must be dislodged. The whole process of identification and admiration is self-alienating, and hence, the destruction of the other sets in motion a self-punishing and destructive course of conduct which can lead, at its most extreme, to a murder followed by a suicide.<sup>198</sup> The narcissist foundation of this symbiotic struggle creates murderous struggles for prestige.<sup>199</sup>

Sombart develops his analysis effectively, moving on from Freud in the same direction as Lacan, although without drawing on Lacan directly. At one level, Sombart's work might be dismissed as a mixture of speculation about social history and the role of sexual factors to explain anti-Semitism as central to Schmitt's, in his view, typically German paranoia with respect to Jews.<sup>200</sup> However, Sombart's overall argument is highly plausible and its originality deserves to be stated. The primary focus of the argument is on the problem of decision and not paranoia. *Entscheidung* (decision) contains a clear dimension of "cutting" and thus is easily associated

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<sup>196</sup> SOMBART, *supra* note 44, at 16-19.

<sup>197</sup> 7 SIGMUND FREUD, *Psychoanalytische Bemerkungen Über Einen Autobiographisch Beschriebenen Fall von Paranoia* (1911), in ZWANG, PARANOIA UND PERVERSION, *supra* note 132, at 133, 184-86.

<sup>198</sup> BORCH-JACOBSEN, *supra* note 194, at 40-44.

<sup>199</sup> *Id.* at 53-54; see also JACQUES LACAN, DE LA PSYCHOSE PARANOÏAQUE DANS SES RAPPORTS AVEC LA PERSONNALITÉ 21-148 (Éditions du Seuil 1975) (1932).

<sup>200</sup> *Die Deutsche Männer* was very unfavorably reviewed between April and June 1991 when it first appeared in Germany.

with castration anxiety. The fear of confusion about sexual identity leads to a compulsion to distinguish or differentiate. The decision *ex nihilo* represents a flight from biological necessity. This focus on a supreme power of decision, going back to Jean Bodin, translates quite easily as a preoccupation with potency. Bodin was a great theoretician of witchcraft and a witch-hunter. With respect to the supreme power of decision, the question for Sombart is how long can it be maintained? The answer is not very long. Hence, it is appropriate to speak of *der Ausnahmezustand* (state of exception). After the erection and the ejaculation comes *la petite morte*.<sup>201</sup>

The Jewish advantage is that circumcision overcomes castration anxiety and the compulsion towards negative, self-assertive differentiation. The removal of the foreskin from the penis represents a clear distinction of the male from the female within the male and allows a comfortable association with the female.<sup>202</sup> This has two major consequences for legal hermeneutics and a theory of the state. The Jew, characterized by Kelsen as a cultural type, does not need the patriarchal, authoritarian state represented by pre-1914 Germany and Austria-Hungary. He is able to dispense with personalized (i.e., monarchical) decision so authoritative as to be beyond any measure of discussion. Schmitt takes issue with Kelsen's normativism in his *Political Theology* comparing it with an eighteenth century deism which has removed the miraculous thunder of divine decision.<sup>203</sup> Schmitt's opposition justifies the banning of rational discussion and open debate—"effeminate conversation"—from the center of power, replacing it with heroic decisiveness. The whole liberal, parliamentary tradition, begun by Gerber, Laband, and Jellinek, and continued by Kelsen, dispensed with the personalized decision-making power of the monarch in favor of a legal order of attributed competencies. Legal rigor or purity meant the removal of political potency from the law. Key German liberal nationalists were Jews and Schmitt refers to this as the *Lasalle-Lasker-Syndrome*.<sup>204</sup>

The second disturbing capacity of the Jew is his facility with power, especially when it is exercised by women. This aspect of Sombart's argument, as applied to Schmitt, has a tragic-comic dimension where he plays on the similarity of the words *Vorhaut*

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<sup>201</sup> SOMBART, *supra* note 44, at 161-65, 195-97.

<sup>202</sup> *Id.* at 240-47. Sombart argues throughout his book for a bisexual identity.

<sup>203</sup> CARL SCHMITT, *POLITICAL THEOLOGY* (George Schwab trans., MIT Press 1992) (1922).

<sup>204</sup> SOMBART, *supra* note 44, at 227-30, 277-79.

(foreskin) and *Vorhof* (forecourt). It is an argument which involves a number of leaps because Sombart introduces historical evidence of the importance of the Jew to the German people. However, before coming to that, it is necessary to elaborate on the nature of the frustration which Schmitt felt about the exercise of power. In the homosexual atmosphere of identificatory politics, the humble intellectual only aspires to be the giver of advice. Nonetheless, he has rivals and indeed, in Schmitt's view, politics is not about decision, but about *access* to the decision maker (i.e., from the *Vorhof*). Schmitt himself never attained this access. Indeed, the homosexuality of power is very marked in Wilhelmitic Germany, where the Kaiser seeks to govern with a circle of appropriately attuned male friends. Schmitt's political model always seeks to perfect the Wilhelmitic regime. The "friends" of the monarch are rivals, blustering to come closer to him, only certain in their own minds of the enemies they exclude.<sup>205</sup>

For Hitler, as for Schmitt, England is the admired arch rival. In their view, women have considerable influence in England and Jews are comfortable with them. In his last major speech to the Reichstag in 1942, Hitler spoke of Disraeli. Schmitt gave special attention to Disraeli's relationship to Queen Victoria, portraying England as a land which has attained a world empire with effortless ease. Political society, especially salon and intellectual society, is directed by women, going back at least to the first Elizabeth and up to the place of Mary Shelley in the life of her husband. The ease with which Jews move in this world marks them as managers of witches. Needless to say, they have been exported to Germany and the great anxiety of Bismarck is the influence of the crown princess, the daughter of Victoria.<sup>206</sup> In contrast, the Germans are a constantly struggling power, threatened by a Jewish shadow which comes from their attempt to steal the Jews' God-given place in history. Hegel's notion of the *chosen people* is taken from the Jews. After the French Revolution, emancipated Jews such as Heinrich Heine offered the Germans, also a people without a state, joint world spiritual authority. The very close affinity of Jews in Germany with other Germans increased the sense of rivalry, according to Hitler and Schmitt. Hitler refers to Jews in terms of sibling rivalry and Schmitt was supposedly consumed with envy for the success of Disraeli.<sup>207</sup> The murderous logic of this rivalry is sometimes

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<sup>205</sup> *Id.* at 48-57, 202-10.

<sup>206</sup> *Id.* at 247-49, 280-91.

<sup>207</sup> *Id.* at 281-88.

missed. There cannot be two chosen peoples. If the Germans are the *chosen people*, the Jews cannot be. However, if the Germans are not equal to their destiny, they have no more right to exist than the Jews. It was Hitler's intention to destroy both.<sup>208</sup>

A politics of identification creates a craving for distinction, as well as a blustering for closeness. All of this has its roots in self-alienation or a failure to accept individual finitude and the concealment of being, in Heideggerian language. Hence, narcissism and homosexuality require, *in a repressed form*, a compulsion for differentiation *and hierarchy* as essential to the maintenance of order, which itself means the drawing of clear distinctions. It is this world which draws the false dichotomies between wild, instinctual anarchy and the force behind the state authority and between heroic decision and effeminate conversation.<sup>209</sup> The fundamental dichotomy is in the master-slave paradigm as such, which Sombart summarizes as follows: "In the direction of the will to power (the striving to control reality, to reproduce the unity of the psychic), lies paranoia; in the direction of masochism (the devotion to the unconscious—foreign/external content) there is schizophrenia—to be read out of the President Schreber case."<sup>210</sup>

## VII. TOWARDS A LEGAL CULTURE OF COLLECTIVE SYMPATHY

Key issues in a Heideggerian phenomenology are acceptance of a state of being which is *not-knowing* (concealment) and *Befindlichkeit* (a disposition of affectedness). *Befindlichkeit* accustoms man to his own and others' being and relative powerlessness. The description of Schmitt's concept of the political—in terms of a flight into the illusory omnipotence of homosexual/homogeneous identification—represents a failure of openness to the not-knowing of being and an impatience with the limitedness of affectedness in comparison to the intensity of identification. Schmitt's case typifies a refusal of *angst*, in the face of one's own finitude, in favor of self-dissolution into what are imagined to be "one's own kind."

Levin attempts to elaborate a way out of Freudian identificatory politics with the help of Heidegger's concept of *Gelassenheit* (letting be). The first step is to reevaluate the state of being which

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<sup>208</sup> *Id.* at 288-91.

<sup>209</sup> *Id.* at 95.

<sup>210</sup> "Auf der Linie des 'Willens zur Macht' (des Bemühens, die Realität zu beherrschen, die Einheit des Psychischen intellektuell herzustellen), liegt die Paranoia; auf der Linie des Masochismus (Hingabe an unbewußte—fremde Inhalte) die Schizophrenie—nachzulesen beim Präsidenten Schreber." *Id.* at 117.

is not-knowing and *emotion*, to accustom Western man to his own finitude and resulting relative powerlessness. Once these points are accepted, they will have consequences for the quality of human relations and, eventually, international relations. Before elaborating on these arguments, it might not be out of place to see how Levin describes an alternative to Freudian interpersonal and mass-identification. *Gelassenheit* is not a sensory experience, such as a cold stare, nor is it an interested calculation. It is "an interested looking which cares; it is a being-with which cares; it is a responsibility to the presencing of Being."<sup>211</sup> Levin argues that a caring gaze fulfills its hermeneutic capacity to open into unconcealment. The key concept is *aletheia*, an epistemological attitude which lets unconcealment happen by letting reality speak for itself, instead of being exposed objectively as dead fact. Levin continues:

To see aletheically, i.e., to experience *alētheia* in vision, the seer must first of all learn to relax, to lessen the grip of normal anxieties and tensions. . . . Without the control, the constant, obsessive monitoring of the ego, the seer's gaze is radically decentered, centered in a calm, more restful, more receptive relationship to the openness of the visual field as a whole.<sup>212</sup>

Levin also points to the guidance offered by Medard Boss, a psychiatrist influenced by Heidegger, who offered to rethink the concept of feeling: "Another major emotional mode is composed, joyous serenity. It can give human existence the kind of receptivity that allows it to see in the brightest light the meaningfulness and connections of every phenomenon that reveals itself."<sup>213</sup>

Levin, Boss, and others took part in a symposium entitled *Heidegger and Psychology*. The symposium dealt with the implications of Heidegger for psychoanalysis and covered the same ground as Wolin, but treated Heidegger more as a contemporary of Freud than as a regression from the lucidity of, for instance, an enlightened figure such as John Locke. It is the very living with uncertainty which should, through this reconciliation, remove the compulsions to purity and paranoia which eat at the heart of the rationalist enlightenment.

Another participant in the symposium, William Richardson, insisted that phenomenology has to be understood as a calling for being to reveal itself. From its Greek etymology, the word phenomenology means "that which appears." The question is how

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<sup>211</sup> LEVIN, *supra* note 187, at 244-45.

<sup>212</sup> *Id.* at 463.

<sup>213</sup> *Id.* at 464.



does it appear, or how is it allowed to appear. There has to be a process of revelation, of pulling aside the veil of darkness. Such a process of nonconcealment is the Greek word *aletheia*, the privation of concealment.<sup>214</sup> Both Freud and Heidegger take the coming to awareness of Oedipus as a central motif for the myth of human existence. For Freud, it is reached through the unconscious; for Heidegger, it is obtained through authenticity. Both regard the struggle as problematic and one is always left with an ever-receding opaqueness of being which frightens Wolin, makes Schmitt desperate, and leaves Kelsen disdainful. Richardson is worth quoting at length in his description of the nature of this struggle. Remember the context—everything said applies directly to the foundation of international relations.

In *The Introduction to Psychoanalysis*, Freud first argues to the existence of the unconscious from the small errors that everyone commits: slips of the tongue (*versprechen*), slips of the pen (*verschreiben*), misreading (*verlesen*), mishearing (*verhören*), etc. Heidegger speaks of a similar type of phenomenon: every apprehension (*ergreifen*) is a misapprehension, every discovery (*entdecken*) a covering-over (*verdecken*), every disclosure (*erschliessen*) at once a closing-over (*verschliessen*), etc. The difference is that for Heidegger these phenomena are due to the finitude of truth based on the fact that Being, revealing itself in finite fashion through finite *Dasein* (existence), inevitably conceals itself too. Does the negativity of Being in finite self-revelation through *Dasein* offer a better account of the negativity of all finite comportment than Freud does? If so, this could go very far: for one might be able to find here an ontological ground, i.e. ground in an ontological unconscious, for such classic phenomena as illogicality, distortion, displacement, ambivalence, resistance etc., and all that these imply.<sup>215</sup>

In his standard commentary on Heidegger, Hubert Dreyfus offers impressive evidence that Heidegger's ontology has become widely accepted in the so-called social sciences.<sup>216</sup> In particular, he quotes Pierre Bourdieu as giving a Heideggerian account of the nonmental nature of everyday practices and of their importance: "Principles embodied . . . are placed beyond the grasp of conscious-

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<sup>214</sup> William J. Richardson, *The Place of the Unconscious in Heidegger*, in HEIDEGGER & PSYCHOLOGY 176, 179-80, 190 (Keith Hoeller ed., 1988).

<sup>215</sup> *Id.* at 194-95.

<sup>216</sup> HUBERT L. DREYFUS, BEING-IN-THE-WORLD: A COMMENTARY ON HEIDEGGER'S *BEING AND TIME*, DIVISION I, at 9 (1991).

ness, and hence cannot be touched by voluntary, deliberate transformation, cannot even be made explicit."<sup>217</sup>

This interpretation of *Dasein* is at the same time both a reiteration of the concept of the *hermeneutic circle* and an existential insistence that one cannot consciously or rationally *ground* the nature of one's being, whatever the context. As Bourdieu points out, it is only the anthropologist who could see a legal order as a system of rules, supposedly with a founding *Grundnorm* (Kelsen).<sup>218</sup> One cannot step out of one's beliefs and practices within which one is embedded in relationship with others in space and time. Rather, one can only struggle to grasp at that experience, as "through a glass darkly." Essential to Kelsen's *pure theory of law* enterprise is Habermas' proposal for a critical rationality—that it is possible to jump out of one's own belief system and contemplate it. Heidegger objects that we can never "get clear" about our beliefs because we dwell in them.<sup>219</sup>

I do not intend at this time to offer a fully developed theory or understanding of law from a Heideggerian perspective.<sup>220</sup> Instead, I simply hope to retain the idea of subject, in a collective sense,<sup>221</sup> and to argue that it is largely submerged—in some sense, a collective unconscious—and that one can only come to it through a form of what Heidegger calls *Befindlichkeit* (affectedness). This has direct implications for a specific legal hermeneutic of embedded practices of intentionality—implicit and unspoken *as well as* spoken and completed. It replaces the dichotomy between the illusory lucidity or purity of Kelsen's vision and the paranoid opaqueness of Schmitt's—and their implications for international law—with an acceptance of the elusive, all-embracing, materiality of international relations, and their cultural-ethnic dimension. This stretches Heidegger somewhat. The notion of the ethos of the nation as a person will have to wait on the subsequent treatment of Scheler. However, *Befindlichkeit* has to be retained as the signal of the complexity of self-understanding. A reevaluation of emotion replaces the mood which is best able to grasp the complexity of im-

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<sup>217</sup> *Id.* at 19.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 22.

<sup>220</sup> See BRUNO ROMANO, *RELAZIONE E DIRITTO TRA MODERNO E POSTMODERNO: INTERPRETAZIONE DEL "SISTEMA DI UNIVERSALE DIPENDENZA" CON HEIDEGGER E LACAN* (1987); BRUNO ROMANO, *SOGGETTIVITÀ DIRITTO E POSTMODERNO: UNA INTERPRETAZIONE CON HEIDEGGER E LACAN* (1988).

<sup>221</sup> Hence, I provide an investigation of Kelsen and Schmitt as cultural types.

plicit—quite simply, hidden relations.<sup>222</sup> “This is the opposite of saying that experience is indeterminate or vague; it is always very demandingly just exactly how it is . . . .”<sup>223</sup> Indeed, clear roots to “acceptable” clarity are always false. The “truth” is not in the “fallen” opinion of those who have forgotten their finality, relying upon the apparent infinity of public unanimity. Rather, it is found in the struggle for authenticity, precisely in the return to finitude.<sup>224</sup>

If Heidegger resists a clearly delineated concept of the subject, he does nonetheless elaborate a distinction between the own and the foreign which is very apposite to international legal relations. Within a general reconstruction of the history of philosophy, he argues for the thesis which is precisely the opposite of that of Schmitt. One can increase *Das Eigene* (an understanding of one’s own) only through a genuine search for the foreign, a going out to it. With respect to philosophical traditions, he contrasts the Germans with the Greeks. The former are somehow absorbed in the grasping of themselves, a clarity and system of the same, while the Greeks have *Das Feuer vom Himmel* (the fire from the heavens)<sup>225</sup> in their spirit. The former can only come to themselves through a return from the other.<sup>226</sup> The argument about the centrality of embracing the opposite—the Greeks are chosen as those most *unlike* the Germans—is, in Heidegger’s way of thinking, tied to a notion of the beginning (of Western philosophy) which is close to the concerns of Freudian psychoanalysis and Scheler’s personalist notion of time. Heidegger rejects a linear notion of time, arguing that the past, the present, and the future are one. More specifically, the recovery of being, the unconcealment of being, comes through the search for the Greek understanding of truth, *alethia*, which is for the Germans, the most foreign. It is such a project of self-ungrounding which a return to the beginning promises—a beginning which is, however, present and which points to the future—i.e., to finitude. It offers freedom from the compulsion of fixated self-repetition.<sup>227</sup> Such a concept of time contrasts very sharply with the linear, mechanical causality of

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<sup>222</sup> Eugene T. Gendlin, *Befindlichkeit: Heidegger and the Philosophy of Psychology*, in HEIDEGGER & PSYCHOLOGY, *supra* note 214, at 43, 67.

<sup>223</sup> *Id.* at 66.

<sup>224</sup> DREYFUS, *supra* note 216, at 274-78.

<sup>225</sup> This raises a controversial debate about the existence of fascist aesthetics around the restoration of the Greek classical world.

<sup>226</sup> JENS HAGESTEDT, FREUD UND HEIDEGGER: ZUM BEGRIFF DER GESCHICHTE IM AUSGANG DES SUBJEKTZENTRISCHEN DENKENS 348-56 (1993).

<sup>227</sup> *Id.* at 314-30.

Freud,<sup>228</sup> although it is not personalized enough to allow Scheler's concept of repentance.

Heidegger's concept of *Befindlichkeit* is intended for understanding human relationships within an ontological framework that does not allow close delineation of human subjects. I do not intend to confine this study only to Heidegger's phenomenology. Instead, I will conclude with a more close analysis of the legal implications of a Schelerian *personalist* phenomenology for a critique of the two doctrines of law and international law in a German tradition—specifically, Kelsen and Schmitt. At the clear risk of eclecticism, I maintain that both Heidegger's ontology and Scheler's ethics of personalism should be exploited to the full in a new hermeneutical approach to international law. This has to be “work in progress” and the subject of another study. Here, consistent with the elaboration of a German tradition, I intend to stress one of Scheler's complex of issues which is central to this study. Scheler points the way to a relativization of the impact of identificatory politics within the confines of the German political philosophical tradition of identity. In other words, Freud's concerns with identification politics, essentially mass-suggestion, and Kelsen's suspicion of the same could find fruitful ground in Hegelian theories of the identity of the individual within the state. Still, it is possible to conceive of collective life, particularly based on feeling, in a sense not dissimilar to that described by Heidegger. In terms of *ethos* and culture, each subject, by its very nature, interacts with the other as a way of expressing itself.

Scheler accepts that what he calls a “love-filled” sexual act dissolves the personalities of the lovers to a single life flow. Further, Freud is correct to say that some political relationships of leader-follower do resemble this union. However, nothing general or absolute is thereby established and Freud offers nothing in the way of a theory of friendship, sexual love, or love generally.<sup>229</sup> To feel oneself into the other person is phenomenologically distinct from feeling sympathy with the other; in the latter case, one retains the mature capacity to distinguish oneself from the other.<sup>230</sup> Freud's

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<sup>228</sup> Joseph J. Kockelmans, *Daseinsanalysis and Freud's Unconscious*, in HEIDEGGER & PSYCHOLOGY, *supra* note 214, at 21, 38-39.

<sup>229</sup> MAX SCHELER, *WESEN UND FORMEN DER SYMPATHIE* 36-37 (Bouvier Verlag 1985) (1926).

<sup>230</sup> *Id.* at 44-45; see also MAX SCHELER, *FORMALISM IN ETHICS AND NON-FORMAL ETHICS OF VALUES* 478 (Manfred S. Frings & Roger L. Funk trans., Northwestern Univ. Press 1973) (1966) (marking the capacity to distinguish one's own acts from those of another); *id.* at 498 (noting that love for the self and the other are phenomenologically equally original).

psychoanalytical method belongs to *Gefühlstradition* (a tradition of feeling) which absorbs individuals within the group that they are not aware of and do not consciously intend what that tradition, at an earlier stage, may have intended.<sup>231</sup> But, a community or collective of mature persons consists of self-distinguishing actor-centers who generate an ethos of interacting intentions.<sup>232</sup> The point remains that a phenomenological method can distinguish between a situation in which self-differentiating centers of intentionality (persons) are able to understand and sympathize with the other, from a more tortuous situation in which a *master-slave* relation develops and there is masochistic self-abandonment in the other or even hysterical, hypnotic or hallucinatory self-dissolution in the other. Mass suggestion has its roots in such phenomena which may well be widespread in particular communities, especially in time of war, but which are by no means exclusive of communities of self-differentiating, distanced actors.<sup>233</sup> Scheler has a much more delineated notion of the subject than Heidegger, but it has to be remembered that his phenomenology limits the role of the social and provides a wide margin of impenetrable, personal intimacy.<sup>234</sup> Crossing the not clear, but ever present, boundary of intimacy leads to the pathologies which Freud so well described. Scheler, like Heidegger, has yet another explanation for the boundaries of the normal and the abnormal. He believes they can be phenomenologically demonstrated and, here he closely resembles Freud, contending that the intimate sphere cannot be *directly* described. While lacking the constant Heideggerian reference to an ontological framework, Scheler's person-centered phenomenology gives an equal priority to human relations based upon emotion and feeling, understood as the most direct but inevitably finite and limited approach to communication among persons. Indeed, human communication is decisively limited by the barrier to full closeness—the fact of an ever-present “absolutely closed.”<sup>235</sup>

The identity-philosophy of Hegel, Arthur Schopenhauer, and others in the German tradition attempts, in various ways, to ignore this fundamental difference and separation. To insist that love

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<sup>231</sup> SCHELER, *supra* note 229, at 48-50.

<sup>232</sup> SCHELER, *supra* note 230, at 521-22. A community is not founded on an “objective” inner world or something psychic. Understanding and coexperiencing (including the inner self-perception of the other) necessarily precludes such objectification. One's own psychic sphere is constituted only in differentiating it from the other.

<sup>233</sup> SCHELER, *supra* note 229, at 53-61.

<sup>234</sup> SCHELER, *supra* note 230, at 511-13, 561-72.

<sup>235</sup> SCHELER, *supra* note 229, at 77-78.

means to become identical with one another or to search for a single essential community in sympathetic pity is not acceptable. Even less acceptable are solipsistic theories of the absolute ego which would supposedly absorb "reality" and all other egos into the self.<sup>236</sup> Indeed, Scheler interprets Hegel's definition of love—treating the other as if he or she were identical with the self—as a mere quantitative extension of individual craving. This is part of a pattern of seeking to treat "reality," the beyond-the-self, as identical with the self and can only mean self-deception.<sup>237</sup> Indeed, the very center of love is that one becomes aware of the boundaries to intimacy with the other.<sup>238</sup>

In contrast, the drive to identify, to treat as alike, can only create a tension in which one feels compelled to decide that the other is in fact alike *or utterly different*. So, it is monistic philosophy of identity which is at the root of friend/enemy distinctions. It is the impossibility of total identity which forces total opposition.<sup>239</sup> The doctrine, taken from the Greeks, that like can only recognize like causes havoc when it overrides the manifoldness of persons.<sup>240</sup> Scheler does not develop a critique of Kantian moral and legal theory which has as obvious implications for psychoanalysis as his critique of identity philosophy. However, Kantianism is also a form of identity philosophy, and thereby works very repressively to devalue all spontaneity, originality, or concrete experience itself. The tradition of moral philosophy which values only a transcendental reason, or an absolute consciousness, leaves no principle of differentiation, no individuality except the body.<sup>241</sup> It is therefore consistent for Kant to devalue everything individual as merely fancied to be good, as subjective.<sup>242</sup> The abstractness of his theory is inevitably depersonalizing. It considers the individual only in a social and rational aspect, putting a repressive pressure on the individual to identify with the general, or at the very least, bringing in only that part of himself which he has in common with others. Kant's basic conceptual error rests "in identifying the merely social person with the person in general, the rational person with the spiritual individual person, and the idea of *equally* 'obtaining' rational per-

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<sup>236</sup> *Id.* at 65-66, 69-76.

<sup>237</sup> *Id.* at 80-81 ("*quantitative Erweiterung der Selbstsucht*").

<sup>238</sup> *Id.* at 82.

<sup>239</sup> *Id.* at 87. Either all are taken up in one Spirit (with a capital S) or there are several and opposing spirits.

<sup>240</sup> *Id.* at 93.

<sup>241</sup> *Id.* at 86.

<sup>242</sup> SCHELER, *supra* note 230, at 510.

sons, presupposed by the idea of all law (private and church law included), with the idea of persons of the *state*."<sup>243</sup>

Scheler's alternative of personalism is directly applicable to international society as well as individual personality and leads at once to his trinity of state, nation, and culture. Personality is a matter of intuiting the unique quality of the individual with each and every intentional act expressing that individuality. The other's relation to this individuality is a mixture of intuition (since the person is not derived from or a function of something else) and understanding, based ultimately on love. It is not an empirical exercise which objectifies the other person as a bundle of psychological processes subject to observation.<sup>244</sup> Morality is therefore a function of two dimensions. Universal value qualities are subjected by the individual to a special moral cultivation. Moral values can only be realized through the interaction of the universal and the individual. This applies not just to individuals but also to "collective individuals" such as families, nations, etc.<sup>245</sup> As already seen, Scheler does not commit himself to the idea of collectivity as an objective essence, but rather as an *ethos* or network of interacting, self-differentiating intentionalities.<sup>246</sup> When he argues that the individual person is always already a part of a wider society, which is in turn part of a world society, he is expressing a concept of the transcendent<sup>247</sup>—the very antithesis of a philosophy of identity. The collective person is always contained in the consciousness of a total finite person as *act-direction*, and not transcendent to it. However, the collective person is *not fully* experienced in *any* of its member-persons, but is something beyond the member-persons in duration, content, and range of effectiveness.<sup>248</sup>

The possibility of transcendence is crucial to explain obligation, especially promissory, at an international level. Individuals who enter into social relations must at some time have united with the community to enter into forms of mutual accord. The nations of Europe form a cultural circle with the nations of Asia, but between themselves they form separate cultural circles. That is to say, obligation supposes not the existence of the unit of the state, but that the individuals and groups entering into contracts "always

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<sup>243</sup> *Id.* at 512.

<sup>244</sup> *Id.* at 488-89, 491.

<sup>245</sup> *Id.* at 492-93.

<sup>246</sup> *Id.* at 521-22.

<sup>247</sup> *Id.* at 521.

<sup>248</sup> *Id.* at 523.

presuppose a further communal whole to which they simultaneously belong."<sup>249</sup> The obligation of one treaty, for instance, is not derived from another treaty, but from the fact that, for example, European nations are not automatically bound as members of their own community-cultural circles. They become so bound precisely because they can transcend themselves in a global (i.e., multicultural, in contrast to Asian nations) perspective.<sup>250</sup> Scheler stresses repeatedly that plurality is the heart of the cultural community/collective person.

Kant's universalist, abstract, uniformizing reason directs him to the idea of a world state, which is antithetical to Scheler's concerns. According to Scheler's concept of transcendence, there must be a plurality of collective cultures in the sense of both simultaneous and successive plurality—in cultural units, nations, and cultural periods. Plurality does not belong to factors of race, milieu, or nationality but, rather, the idea of culture.<sup>251</sup> It is for culture, and not state, that Scheler reserves the word *sovereignty*. Sovereignty means a collective unity or hierarchy which brings together a network of values but remains autonomous. As such, the spiritual act-center of a collective person cannot be primarily a territory or blood. Its sovereignty is always relative because a collective person is at the same time part of another, wider, collective person.<sup>252</sup> A collective person may be a nation but it can also be a cultural unit such as a church. "The state may not be called this. . . . The state, as seen by itself, is simply the highest center of the spiritual collective *will*, i.e., the will of *control* . . . ."<sup>253</sup> As a spiritual subject of will, the state is completely dependent upon an ethos which stems not from it, but rather from the spiritual collective as the persons behind it (i.e., the cultural personality of the nation *or the cultural circle* which stands behind it).<sup>254</sup>

So, the state has no positive task in the realization of cultural values. Its importance is merely that, as an organizational principle, its freedom and independence in relation to other states is the condition required for the cultural person situated behind the state to produce—according to its own proper spirit—a world of cultural goods.<sup>255</sup> What is essential to the state is a defined territory,

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<sup>249</sup> *Id.* at 533.

<sup>250</sup> *Id.* at 531.

<sup>251</sup> *Id.* at 554.

<sup>252</sup> *Id.* at 543.

<sup>253</sup> *Id.* at 545.

<sup>254</sup> *Id.* at 546.

<sup>255</sup> *Id.* at 552.



which is its field of domination. As such, it is exclusive because territories cannot overlap. However, Scheler's cultural collective persons do not require a territory. Their member persons can change their residence and state without unbinding their national ties. This is not to say that the nation as a cultural collective person is ubiquitous. "It essentially possesses a certain *field of effectiveness* that is at every moment spatial, but in such a way that the fields of a plurality of nations can intersect in the same objective segments of space (and their content). They do not exclude each other as territories do; nor do they necessarily change along with migrations of the lived bodies of their members, i.e. *through* the migrations . . . ." <sup>256</sup>

This analysis of the relation of state to the nation or *the cultural circle* which lies behind it and upon whom it depends for its *ethos* is rudimentary. Scheler's insights concern the unrepressive nature of the origin of the collective persons. His views are rooted in the primary principle of the intimacy of the person. Communities are self-differentiating, mutually experiencing, and, based upon intuition and understanding, value both the universal and the individual. Persons exist simultaneously at different levels in accordance with a principle of transcendence which is related fundamentally to the principle of the intimacy of the person. Everything comes back to the person, who is a unity of action-centered intentions, and the implicit or background practices which make up the previous actions of the person. These are what make up the *ethos* or culture of the person. A hermeneutic of state practice, including institutionalized, contractual practice and the embedded, implicit customs will always refer to the interconnecting networks of collective cultural persons and/or nation(s) which lie behind the states.

While Scheler has much to say about the quality of European international relations from 1914 until his death in 1928,<sup>257</sup> I intend to conclude with only a brief mention of his treatment of the notions of guilt and repentance, whether individual or collective. On this subject, Scheler takes issue with philosophical modernity from Benedict Spinoza to Kant and Nietzsche. Writing in 1917 and with the war in mind, he argues for a personalist phenomenology of time. For the person, whether individual or collective, its past is

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<sup>256</sup> *Id.* at 558.

<sup>257</sup> E.g., 4 MAX SCHELER, *Manuskripte zu Politik und Moral und die Idee des Ewigen Friedens Schriften aus dem Nachlass*, in PHILOSOPHIE UND GESCHICHTE: SCHRIFTEN AUS DEM NACHLASS 5 (Manfred S. Frings ed., Bouvier Verlag 1990) (1957).

not dead or gone as a linear past. It is alive and present making up what Scheler understands as personality. To dismiss what has been done as past and pave the future with good intentions is merely debilitating. It is only through a conscious deliberate repudiation of the past as unworthy—as not compatible with the worth of oneself and hence, not part of the self—that one can start afresh, liberated from it. This is not a call to relive the past as a series of associations or causally determinative psychological events. Instead, it is a call for the person to engage in a directed, intentional focus on past, intended actions, now mere embedded practice, and to judge openly the why and wherefore of what is no longer compatible with the sense of one's worth.<sup>258</sup> The distance which the person has to accept in relation to the other, he or she has to maintain as well, and indeed primarily, in relation to himself. Repression, compulsion, and paranoia may not simply "start at home," but they are always an integral part of the self.

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<sup>258</sup> See Max Scheler, *Reue und Wiedergeburt*, in *VOM EWIGEN IM MENSCHEN* 27, 33, 37-39 (Maria Scheler ed., Francke Verlag 1968) (1954).