

## Chapter 8:

### Confrontations Across Borders (1935–1937)

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By early 1935, Kirchheimer and Schmitt had not had any direct personal contact for over two years. As the Nazi regime became established, their perceptions of each other were asymmetrical. While Schmitt was doing well politically, his public statements were often filled with vitriolic words about Marxists, Jews, and émigrés but he did not mention Kirchheimer even once. Kirchheimer's name no longer appeared in Schmitt's diaries from these years nor in his correspondence. There is no indication that Schmitt even took note of Kirchheimer anymore. At most, he may have mentioned Kirchheimer or heard about his fate now and then in private conversations with his Berlin colleague Rudolf Smend. Incidentally, Smend had the courage to discuss and contrast Schmitt's *Legality and Legitimacy* and Kirchheimer's eponymous essay in his seminar at Berlin University in the summer semester of 1933.<sup>1</sup>

Kirchheimer's everyday life in exile in Paris was miserable. It was only with great difficulty and the help of his friends that he managed to survive financially, enabling him to continue his scientific work. He had followed Schmitt's meteoric rise during his last few weeks in Germany and had then kept a close eye on him from his exile in London and Paris. He intensified his confrontation with Schmitt in the summer of 1935, choosing a new and direct tactic that would strike home personally. Using a pseudonym, he wrote a booklet for the resistance in Germany in which he played cat and mouse with Schmitt. The latter was infuriated and assumed that Kirchheimer was the author. He demanded that the German authorities crack down on the printers in Amsterdam and those disseminating the booklet. Nonetheless, German resistance organizations succeeded in circulating several thousand copies. The search for the authors of the booklet, instigated by Schmitt, was unsuccessful and petered out. Paris was still a safe place for Kirchheimer. Nevertheless, expecting that war was imminent, he was determined to try to leave France for the US in late 1936.

That year, Schmitt, in turn, was taken by surprise, experiencing a reality that officially did not exist in his own propagandist publications and speeches: instead of the political

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1 See Reinhard Mehring's editorial comment in Schmitt and Smend (2010, 90).

unity of the entire *Volk*, guaranteed by the *Führer* and his party, he experienced firsthand what it was like to get caught up in the machinery of the competing power groups struggling for political influence within the system. He lost his most important party positions in the Nazi legal system's bureaucratic hierarchy. If we seek to understand these events, which Schmitt felt to be humiliating and at times even threatening, then the analytical approach presented by Kirchheimer helps to explain and frame the temporary demise of Nazi crown jurist Schmitt.

## 1. Kirchheimer camouflaged as Schmitt

Kirchheimer landed his coup against Schmitt in the summer of 1935 when he authored a 32-page pamphlet titled *Staatsgefüge und Recht des dritten Reiches* [State structure and law in the Third Reich] (see Kirchheimer 1935a). This was published under the pseudonym Dr. Hermann Seitz. The booklet was an indictment of the Nazi regime and its legal policies, and Kirchheimer highlighted Schmitt's position as the leading theorist for the legitimization of Nazi legal policy. And, at the same time, he countered the Nazis' invoking of the alleged unity of the German *Volk* by listing their victims and describing the regime's brutal repression measures.

The booklet was distributed illegally in Germany. Kirchheimer did not want his name on the cover for two reasons. For one thing, giving his name might have meant additional danger for his siblings, who were still living in Germany.<sup>2</sup> For another, it would have made it even more difficult to disseminate it in Germany. To boost distribution, the details of the booklet's cover design, color, and typesetting were intended to make it look like part of the series *Der deutsche Staat der Gegenwart* [The German state of today]; even the logo of the publisher, the Hanseatische Verlagsanstalt, seems deceptively genuine. The cover stated that it was number 12 in the series, "edited by Carl Schmitt, Hamburg 1935."<sup>3</sup> The title Kirchheimer chose, *Staatsgefüge und Recht des dritten Reiches*, also alluded to Schmitt, namely to the main title of his epitaph to the Weimar Republic, *Staatsgefüge und Zusammenbruch des zweiten Reiches. Der Sieg des Bürgers über den Soldaten* [The structure of the state and the collapse of the Second Reich. The victory of the citizen over the soldier] (see Schmitt 1934f), which had been published as number 6 in the same series.

Schmitt had begun publishing the series in the summer of 1933. It was one of his favorite political journalistic projects from 1933 to 1936, and he sought to use it to distinguish himself as the leading constitutional scholar of the Nazi regime.<sup>4</sup> Schmitt put considerable effort into the series and was concerned primarily with its political impact. In the militaristic language of the Nazi regime, he saw it as a "shock troop" for a new jurisprudence aimed at legitimizing the regime.<sup>5</sup> The external form of the series was

2 John H. Herz had published his critique of the Nazi regime, which he had written in exile, under a pseudonym for the same reason, see Puglierin (2011, 79).

3 The title of the actual number 12 in the series, which was published in 1935, was *Bericht über die Lage des Studiums des öffentlichen Rechts* [Report about degree programs in public law].

4 On the history of this series and Schmitt's leading role as editor, see Lokatis (1992, 52–59).

5 Letter from Carl Schmitt to Ernst Rudolf Huber dated 28 October 1933, quoted in Mehring (2014a, 308).

also intended to make a political statement: Schmitt prevailed in having the publishing house use the same typeface as in Ernst Jünger's book *Der Arbeiter* [The worker],<sup>6</sup> which it had published in autumn 1932. The series began with a pamphlet by Schmitt with the programmatic title *Staat, Bewegung, Volk – Die Dreigliederung der politischen Einheit* [State, movement, Volk—the tripartite structure of political unity] (Schmitt 1933d). Prominent Nazi legal theorists such as Ernst Rudolf Huber, Reinhard Höhn, and Friedrich Schaffstein also published in the series. The booklets had twenty-four to fifty-eight pages and sold for only 1 to 1.50 reichsmarks. Their print run of several thousand copies was relatively high for academic legal works. They were distributed through bookstores and libraries, and large numbers were sent to various institutions and organizations in the Reich and to private law firms.

The camouflaged booklet was written by Kirchheimer in Paris in June and July 1935, and then printed in Amsterdam. The 11th International Congress for Criminal Law and Corrections, which took place from 18 to 24 August in Berlin, was the special occasion for distributing it in Germany and internationally. The decision to stage the congress in Berlin had already been made prior to 1933, and the Nazi government wanted to use this event to take the wind out of its critics' sails and generate a positive image of itself on the international stage—similarly to the much more important Olympic Games the following year. In advance of the congress, the SPD party leaders had sent all congress attendees a position paper from their exile in Prague focusing on the conditions in the Nazi regime's prisons (see Denkschrift 1935). Erwin Bumke, President of the *Reichsgericht* (see List of German Courts), was the chairman of the congress, which was complemented by an extensive program, including visits to German penal institutions and the concentration camp Esterwegen in the Ems moors near Oldenburg, which had been spruced up for this propaganda event (see Müller 1987, 96). Much of Kirchheimer's booklet was written in a decidedly factual, descriptive tone. The booklet is nothing less than a masterpiece of ingenious anti-Nazi propaganda because unsuspecting readers had to read multiple pages before realizing that it was a subversive act and an indictment of the Nazi regime.

Kirchheimer explicitly referred to Schmitt right in the first paragraph of the booklet,<sup>7</sup> immediately after mentioning other prominent Nazis such as Wilhelm Frick, Hans Frank, and Roland Freisler. Schmitt is described as the theorist for their legal policy: "Theoretical clarity concerning how we are to understand the National Socialist version of the rule of law, the so-called 'German *Rechtsstaat* of Adolf Hitler' can be gained in particular from the writings of a member of the state council, Professor Carl Schmitt" (142). This was an allusion to the argument among Nazi jurists in the regime's early phase about the question whether it was still appropriate to call the regime a *Rechtsstaat* (see Pauer-Studer 2014, 61–67). Schmitt had commented on this argument shortly earlier in a lecture at a conference of the Bund Nationalsozialistischer Deutscher Juristen (BNSDJ, Association of National Socialist German Legal Professionals) and had proposed drawing a distinction between a (liberal) *Rechtsstaat* and a (National Socialist) *Gerechtigkeitsstaat* (state based on a certain idea of what is just) (see Schmitt 1934f). In a later, longer version

6 Letter from Benno Ziegler (Hanseatische Verlagsanstalt) to Carl Schmitt dated 28 October 1933. Carl Schmitt Papers, RW 472.

7 See Kirchheimer (1935a). The following page numbers refer to the English translation of the text.

of this lecture, Schmitt had used the formula “German *Rechtsstaat* of Adolf Hitler” (see Schmitt 1935b, 112), which Kirchheimer quoted without indicating the source.

Only at a few points did Kirchheimer note continuities between the development of the law during the Weimar Republic and the Third Reich—for example, the increasing priority of the concept of deterrence over that of betterment as a maxim in criminal jurisprudence and the business community’s ambitions for labor law. The dominant overall impression was one of a radical break. Kirchheimer showed that in the way in which the Nazis continued to use the term “*Rechtsstaat*,” nothing remained of the liberal pride in the fact that the existing legal order was available to every person irrespective of the individual concerned. The “ethical minimum” (144) of the *Rechtsstaat*, as Kirchheimer wrote, following well-known words carefully chosen by legal theorist Georg Jellinek (see Jellinek 1908, 45), had been dropped in favor of a new law serving exclusively the interests of the groups that had succeeded in seizing power in the state. The new legal theories now put forward by Schmitt and others in Germany were intended to conceal this social fact with the help of an “appropriate timely ideology” (143).

Kirchheimer identified the “transition from competitive to monopoly capitalism” (143) as the underlying cause of this process. In doing so, he foreshadowed an idea that Franz L. Neumann formulated two years later in his famous article “The Change in the Function of Law in Modern Society” (see Neumann 1937, 42). The socioeconomic transformation triggered by the capitalist transition had increasingly caused society’s desire for liberal forms of the law to vanish. Security of contract guaranteed by the rule of law was obsolete under monopoly capitalism; corporate monopolies and major banks had increasingly opposed the liberal state under the rule of law because it limited their interests.

By placing the blame for the economic crisis and unemployment after 1929 on the Weimar system of law, the Nazis had deluded the poorer strata of society into believing that a completely new form of the law would improve their lives. Kirchheimer considered the expansion of general clauses to be the foundation of the legal structure of the Nazi state. General clauses made it possible to construe a new version of the concept of judicial independence. If judicial independence had previously meant judges’ freedom to come to a verdict while being bound to the law, that commitment to the law no longer existed. One characteristic of the new judicial independence was that laws themselves could be changed without any formal procedures and even repealed with retroactive effect by the *Führer*. Moreover, every judicial interpretation of the law was under the caveat of the general clause “compatibility with the National Socialist worldview,” (144) which opened the floodgates to arbitrary decision-making. Kirchheimer quoted verbatim from Schmitt’s “*Neue Leitsätze für die Rechtspraxis*” (see Schmitt 1933h) to illustrate this point.

He described the Nazi system as the order of a new social compromise between multiple social groups that was conducive to the development toward monopoly capitalism at the time. He believed these dominant groups were those with industrial and financial capital, Junkers, the Reichswehr, the state bureaucracy, and the NSDAP. A “system of reciprocal guarantees and obligations” (157) had emerged between them and the Nazi state leadership. Kirchheimer traced the legal structure of the Nazi regime in multiple areas, devoting the most space to an analysis of the developments in criminal law because Nazi lines of reasoning had been established particularly quickly and extensively

there. He drew on Nazi literature to provide a detailed overview of the repeal of the ban on ex post facto criminal laws, the expansion of the field of criminal law through broader interpretations, the introduction of *Willensstrafrecht* and *Täterstrafrecht*,<sup>8</sup> the meaning of the formula “*gesundes Volksempfinden*” (assessment of a matter in accordance with the Nazi *Volksgemeinschaft* governed by the will of the *Führer*”; see Glossary), the limitless expansion of what was defined as political crimes, the changes in the Code of Criminal Procedure at the expense of defendants, the abolition of the independence of the judiciary, the introduction of *Sondergerichte* (special courts for political and especially serious crimes, feared for their swift and severe rulings that could not be appealed), the actions of the *Geheime Staatspolizei* (Gestapo), and the “apparently sadistic” (155) toughening of detention conditions for political opponents.

In multiple places, Kirchheimer explicitly referred back to questions circulating in advance of the 11th International Congress for Criminal Law and Corrections in Berlin, concerning the purpose of punishment, the predictability of legislation, the potential curtailment of show trials, and the ban on ex post facto laws. He highlighted capital punishment, which the Nazi regime had been applying forcefully since March 1933, as the most serious violation of general legal sensibilities. For example, it was only on the basis of ex post facto application of increasingly harsh punishments that it had been possible to convict and execute Marinus van der Lubbe, whom the Nazis had accused of setting the Reichstag fire. Kirchheimer listed the names of several people who had suffered the same fate. It was only by drawing on such “murderous constructs” (153) that the regime was able to have its political opponents executed.

The conversion of criminal law into a party political instrument of combat occurred so fast because this was the only way that the groups dominating the state could fight off their opposition and retain power. Yet criminal legislation and the practice of sentencing were subject to the most serious challenges “not only from a liberal or humanitarian viewpoint” (152). Their usefulness was limited even for the ruling elite. This was because their function was purely repressive and they did not positively sustain the system; thus, they did not create political stability in the long run. Kirchheimer also traced the development

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8 *Willensstrafrecht* (will-based criminal law) included assumptions about the defendant's will (which was considered reprehensible in most cases) in the assessment of the crime as well as the sentencing decision. Of course, this involved wild speculation and made it possible to punish comparatively minor offenses severely since they had been construed as motivated by the offender's evil will; this was assumed as a matter of principle in the case of communists and Jews. The purpose of *Täterstrafrecht* (offender-based criminal law) was to “identify” a particular type of offender and to punish offenders according to their category. A few examples of offender types were “antisocial types,” “notorious criminals,” and “fraudulent fellows.” According to Nazi doctrine, these traits were innate, which meant that resocialization was impossible, leaving punishment “with utmost severity” as the only option. This, too, opened the floodgates for arbitrary decisions by judges and prosecutors. The roots of both theories of criminal law date back to the early nineteenth century, and both cast long shadows on the Federal Republic. For instance, the definitions of “murder” (“out of base motives ...” with no mention of premeditation) still in effect today is based on Nazi legislation, and the wording of the relevant section of the German Criminal Code (“A murderer ... is someone who kills a person ...”) relates to the offender, not the crime, unlike in other sections of the code. (See Translator's Preface.)

of constitutional, administrative, and labor law, as well as that of the law of inheritance inasmuch as it concerned bequeathing farms.

Kirchheimer wrote that although Nazi constitutional law declared the unrestrained sovereignty of the *Führer*, the social reality was that various interests, influences, and tendencies collided in the figure of the *Führer*. This social reality also meant that this *Führer* was first and foremost the leader of a civil war party that had managed to take possession of the state apparatus. The rule of the civil war party depended on compromise between various social groups. The regime attempted to accommodate this compromise in various ways. The state bureaucracy was considered to result from the spoils of the civil war and was filled with tens of thousands of members of the NSDAP. However, Hitler in his role as *Führer* of the party could only maintain his devotees occupying prestigious posts and official positions by associating himself with the social groups in power.

Kirchheimer illustrated these interpretations with examples from property law, labor law, and municipal administrative law. In the area of labor law, he demonstrated in more detail how it could be enforced using criminal law if necessary, using the examples of union busting, the powerful position of corporate executives, the mechanisms of determining wages, and the legislation on occupational safety and dismissal. Kirchheimer detected growing discontent with these conditions in industrial companies. He believed he could discern another potential weakness of the regime in the *Reichserbhofgesetz* (Reich Hereditary Farm Law) which was intended to maintain small farms; in fact, its effect was the opposite, and Kirchheimer anticipated this would result in increasing discontent.

As mentioned in Chapter 7, Schmitt had had decisive responsibility for the new Prussian municipal law in 1933. In particular, Kirchheimer emphasized the changes that had taken place regarding home rule after 1933, ascribing Prussian municipal law a pioneering role for the entire Reich. All the top municipal positions had come under the power of the Nazi apparatus as a result of the reorganization following the new law. Moreover, the Nazi state prohibited municipalities from engaging in any activities that could be seen as competing with the private sector. At a time when political debates about taking over the major utilities had erupted, Nazism had handed these companies over to private capital at the expense of the general public.

Kirchheimer concluded his brochure by referring to the otherwise unexposed social instability of the German Reich, not least attempting to show where resistance against the regime was forming. The Reich could retain its current political stability only at the price of a previously unimaginable reign of judicial terror. This analysis of Kirchheimer's was supported by his conviction, which had already become apparent in his writings during the Weimar period, that the social function of Nazism ultimately consisted in preventing the latent class conflict between capital and labor from erupting. For this reason, Kirchheimer saw Nazism as being, among other things, a precarious system of government and, consequently, temporary. He believed the task of forging the law after the end of the Nazi regime would be to put an end to its campaign of annihilation in all areas of the law and to prepare the "groundwork for the legal system of a socialist Germany" (166). At one point in his booklet, Kirchheimer changed his tone and took direct aim at Schmitt and other Nazi jurists: "the jurists of the Third Reich—theoreticians and prac-

tioners alike—will have to take responsibility someday”<sup>9</sup> for their support of the murderous practices in the German Reich.

Leftist émigrés produced and distributed Kirchheimer’s booklet as a targeted act of resistance against the Nazis. They had already used false titles to camouflage other publications. For example, the booklet titled *Die Kunst des Selbstrasierens. Neue Wege männlicher Kosmetik* [The art of shaving oneself. New horizons in male cosmetics] was actually the text of the *Prague Manifesto* of the SPD party leaders, who were active from exile, and the *Braunbuch über Reichstagsbrand und Hitlerterror* [Brown book on the Reichstag fire and Hitler’s terror] was camouflaged as a booklet published by Reclam publishing house with the title *Goethe: Hermann und Dorothea*. Kirchheimer’s forceful critique was distributed mainly through the illegal channels of communist media entrepreneur Willi Münzenberg, who had also fled to Paris.<sup>10</sup> From his exile, Münzenberg worked for the KPD and organized action groups, propaganda materials, conferences, and press services for the anti-Nazi resistance abroad. Kirchheimer’s first wife Hilde had already served as a courier transporting anti-fascist propaganda materials to and within Germany (see Ladwig-Winters 2009, 404), which was extremely dangerous, and she was also involved in illegally disseminating Otto Kirchheimer’s booklet. Eugene Anschel wrote the following in his memoir about visiting Otto Kirchheimer in his Paris exile: “He also worked on his own, which included the writing of the brochure in which he attacked his old teacher, Carl Schmitt. When I was in Paris, Hilde had already shipped it illegally to Germany” (Anschel 1990, 127).

Carl Schmitt was furious. His distancing *Mitteilung* (note) in the next issue of the *Deutsche Juristen-Zeitung* (DJZ) in the section *Juristische Rundschau* [Legal review] on 15 September 1935 attests to the fact that he felt personally attacked as the addressee of Kirchheimer’s piece. Although the *Mitteilung* did not bear Schmitt’s name, he had editorial responsibility for these notes to the readership since he had been managing editor of the DJZ since June 1934. The *Mitteilung* stated<sup>11</sup> that the author of the booklet belonged to an “international clique which, according to the *Führer*, is keen on discord in the world.”

The complete text of the *Mitteilung* reads as follows:

Actualizing and securing a true order of peace founded upon the honor of the peoples and the reciprocal recognition of their right to exist is one of the unalterable and inalienable goals of the new Germany. Many attempts are made to reach this goal, and it would be an error based on an outdated view to consider only state actions to be usual or effective means. Above all, what is needed is true intellectual collaboration of

9 My translation (HB). The English version by William Scheuerman and Anke Großkopf does not mention theoreticians and practitioners (such as Schmitt) (page 147). The original German text reads: “Die Juristen des dritten Reiches – Theoretiker wie Praktiker – werden sich einmal verantworten müssen” (page 158).

10 It cannot be clarified to what extent Gurland’s presumption was accurate that a few passages of Kirchheimer’s text had been changed by Münzenberg or his staff; Jürgen Seifert told Volker Neumann about this presumption of Gurland’s (see Neumann 2015, 392 and e-mail from Volker Neumann to the author dated 23 February 2017).

11 *Mitteilung*, in: *Deutsche Juristen-Zeitung* of 15 September 1935, vol. 40 (1935), issue 18, columns 1104–1105.



the peoples based on unlimited reciprocal recognition and not only on an externally organized *coopération intellectuelle*. For this reason, academic work based on responsibility as well as meetings and the exchange of views with scholars from abroad are of particularly high value in order to achieve understanding of National Socialist Germany abroad. Whereas there is no lack of such serious efforts on the German side and encouraging successes can already be ascertained, an international clique which, according to the *Führer*, is keen on discord in the world is attempting time and again to thwart the real understanding between the peoples which is increasingly in the making. They apparently stop at nothing, not even shying away from criminal acts. A particularly drastic example of these attempts to interfere is, in recent days, an inflammatory piece apparently printed in France and Holland which attempts to apply seemingly 'scholarly' objectivity to expose the National Socialist legal structure as the expression and the means of brutal domination on the basis of force and class. It is not worth going into the substance of this piece in more detail; it soon bores the reader as it helplessly turns about in the quandary of presenting both communist/Marxist and liberal/bourgeois/rule-of-law arguments against the National Socialist legal structure. The moral level of this enterprise is just as low as its intellectual level, as this 'exposé' itself resorts to camouflage, which is an outright forgery and a criminal abuse of the generally recognized rights of editors, printers, and publishing houses. In its external design, it presents itself as 'issue 12' of the series *Der deutsche Staat der Gegenwart* (Hanseatische Verlagsanstalt, Hamburg), which is published by the editor of the DJZ, and it bears the promising title *Staatsgefüge und Recht des dritten Reiches*. The author is a completely unknown Hermann Seitz. Even concerning oneself with this instrument of incitement of the people would surely grant it too much honor. But it does seem necessary to guide international attention once again to the criminal methods with which the international front of criminals is trying to thwart the intellectual collaboration of the peoples and thus the actualization of a true peace.<sup>12</sup>

In his *Mitteilung* in the DJZ, Schmitt had been unable to resist taking a swipe at the author of the booklet, namely that it "soon bores the reader." He was certain that the author was Kirchheimer. In a 1958 letter to Arvid Brødersen,<sup>13</sup> then his colleague at the New School for Social Research in New York, Kirchheimer confirmed in retrospect that Schmitt had recognized at once that he was the author behind the pseudonym: "I enclose a perhaps instructive little piece I wrote under a pseudonym in 1935 and that was smuggled into Germany. C.S., who, as he later told me, knew that I was probably the author, responded as can be seen from the blurb."<sup>14</sup> George Schwab, who became a late mouthpiece of Schmitt's, so to speak, claimed Kirchheimer's coup was part of "endeavors to endanger Schmitt's life in Nazi Germany" (Schwab 1990, 81).

12 *Mitteilung*, in: *Deutsche Juristen-Zeitung* of 15 September 1935, vol. 40 (1935), issue 18, columns 1104–1105.

13 Brødersen had studied sociology in Berlin in the early 1930s and knew Kirchheimer from this time. He later belonged to the Norwegian resistance against Germany until he succeeded in fleeing to the US, where he was given a chair of sociology at the New School for Social Research.

14 Letter from Otto Kirchheimer to Arvid Brødersen dated 2 March 1958. Otto Kirchheimer Papers, Series 2, Box 1, Folder 25. —The "blurb" is the *Mitteilung* in the DJZ quoted above and "as he later told me" refers to Kirchheimer's visit to Schmitt's home in 1949 (see Chapter 15).



There is no evidence at all to support Schwab's claim. However, the fact that Schmitt called on the Hanseatische Verlagsanstalt to take legal action in the Netherlands for a criminal copyright violation<sup>15</sup> shows how angry he was that his politically ambitious series had been used as cover for criticism of the Nazi regime. But the publishing house decided to respond in a different way, trusting that the affair made for good advertising. In September 1935, it took out an advertisement in the *Börsenblatt des deutschen Buchhandels* [Gazette of the German book trade] with the following heading in large lettering: "Forgery of our series from abroad!"<sup>16</sup> The ad read:

In agreement with the editor, Staatsrat Prof. Dr. Carl Schmitt, we announce the following to the German book trade: A booklet (communist agitation against the renewal of German law) with the title *Staatsgefüge und Recht im dritten Reich* by Hermann Seitz has been disseminated to a large number of German jurists since mid-August; its appearance completely matches the series we publish [...].

The publishing house also pointed out that a criminal investigation had already been started: "The *Geheime Staatspolizei* (Gestapo) is pursuing the state-police side of the matter." The ad ended with a call for denunciation in which the publishing house made itself a stooge of the Gestapo: "We ask the German book trade to transmit any observations and information which could serve to shed light on the matter and request that any potentially surfacing copies of the piece be handed over to the nearest state police station immediately."

The Amsterdam printing shop evidently produced further editions of the booklet in late 1935 because a typewritten page is pasted into some extant copies explicitly indicating Carl Schmitt as the author of the *Mitteilung* in the DJZ. This added text is quasi a riposte to Schmitt's *Mitteilung* in the DJZ:

This analysis of the development of fascist law, thousands of copies of which have been sent to Germany, seeks to help German jurists recognize the brutal, cynical reality of the new legal system behind the fog of Nazi phrases. Thus, this piece is a sign of foreign jurists' solidarity with their colleagues in the Third Reich, who have been condemned to silence. It is at the same time a weapon against the barbarous Hitler regime.<sup>17</sup>

The language and style of this additional text make it appear unlikely that it was written by Kirchheimer; it was presumably authored by someone working for Münzenberg's organization. It is no longer possible to ascertain whether the large number of copies of the booklet distributed in Germany were part of Münzenberg's propaganda or whether the

15 Letter from Carl Schmitt to Hanseatische Verlagsanstalt dated 6 September 1935. Carl Schmitt Papers, RW 472.

16 This and the following quotes are from the advertisement of the Hanseatische Verlagsanstalt in the *Börsenblatt für den deutschen Buchhandel* No. 207 of 6 September 1935. The full-page advertisement is reprinted in Lokatis (1992, 58).

17 Quoted in Luthardt (1976, 36), who had received one of these copies from Anne Kirchheimer, Otto Kirchheimer's second wife.

number reaching the German Reich and distributed illegally there was that high.<sup>18</sup> It may have been a few thousand. After all, the activists from the resistance had the bar associations' address lists (so they were presumably lawyers themselves), which they used in order to send the booklets to their members, without indicating the sender's real name. The fact that Benno Ziegler of the Hanseatische Verlagsanstalt, which was based in Hamburg, informed Schmitt in a letter that "the forgery was sent to almost all the lawyers in Hamburg"<sup>19</sup> also supports the theory that a large number, perhaps a few thousand, were distributed across the Reich. A year after the smuggled booklet had circulated, Schmitt complained bitterly in the inaugural lecture he gave at the conference he headed on "Jewry in the Legal Sciences" about activities directed against him from people in exile: "I know from my own experience how strongly hatred drives Jewish émigrés and their allies when they seek to destroy the scientific honor and good name of anyone [who]" (Schmitt 1936c, 484), like himself, supported the cause of the *Führer* and the *Volk*.

## 2. Sidelining Schmitt

Only about eighteen months after Carl Schmitt wanted the Gestapo to go after the author of the booklet and the Amsterdam printing shop, he himself was confronted with the situation of being the object of harassment by the Nazi regime's apparatus. Schmitt had angered many NSDAP jurists because of how brazenly he had engaged in his pioneering role as theorist of the Reich. The fact that he lectured others about the proper interpretation of Nazi doctrine only shortly after joining the party was perceived as presumptuous by the "old guard." They believed this "late starter" was simply being opportunistic. At the same time, as Hermann Göring and Hans Frank's new favorite jurist, Schmitt was also met with considerable envy since he was able to rise so easily to outstanding positions in the Nazi bureaucracy's hierarchy.

His competitors' envy and the party veterans' political mistrust became factors inflicting a major blow on Schmitt's career in late 1936. The three major protagonists of his takedown were Otto Koellreutter, Nazi legal historian Karl August Eckhardt, and *Reichsführer* of the SS and director of the *Reichssicherheitshauptamt* (Reich Security Main Office) Reinhard Höhn. The latter had been a colleague of Schmitt's at Berlin University from the winter semester 1935/36 on; Smend had been forced to give up his Berlin chair and switch to Göttingen to make the position available to Höhn. Incidentally, Koellreutter, Höhn, and Eckhardt were all imperiled themselves at some point during the Nazi period. All three felt threatened as a result of their political and professional ambitions, and they all lost their political positions at various points in time.<sup>20</sup> The machinations of Schmitt's colleagues to sideline him have been analyzed in detail multiple times in the

18 In the mid-1970s, Wolfgang Luthardt had asked several of Kirchheimer's contemporaries who knew him well about this matter but was unable to obtain any reliable information; see Luthardt (1976, 35–37).

19 Letter from Hanseatische Verlagsanstalt to Carl Schmitt dated 22 August 1935. Reprinted in Schmitt (2013, 77).

20 See Rütters (1990, 89–92) and Neumann (2015, 398–406).

biographical literature on Schmitt,<sup>21</sup> so I will simply mention the most important events here. A key role was played by the SS and its security apparatus, which in the early years of the regime considered themselves to be custodians of the pure doctrine of the Nazi worldview, so to speak.

Schmitt's career setback was triggered from a completely different direction, namely from exile. The source was Waldemar Gurian, a publicist who had converted from Judaism to Catholicism and had had a close and friendly relationship with Schmitt and his wife in Bonn back in the 1920s. Gurian had had to flee with his family to avoid arrest in July 1934. He was an outspoken opponent of Nazism and after 1933 a sharp critic of the German Catholic Church as well as of Carl Schmitt.<sup>22</sup> He was the editor of the Catholic émigré journal *Deutsche Briefe* [German letters] in Switzerland from 1934 to 1938. Although it only had around 200 subscribers and its print run was not much larger, it was used as source material by several Swiss newspapers, and it was also monitored closely by the German security agencies (see Hürten 1972, 96–127). Gurian sharply attacked Schmitt, whose work he followed at every turn from 1934 to 1936, in multiple anonymous contributions to the *Deutsche Briefe*. In his articles, Gurian proved to be extremely well informed about Schmitt's various changes of course in legal theory. And it was Gurian who in one of his first articles in the *Deutsche Briefe* in 1934 had coined the term “crown jurist of the Third Reich,”<sup>23</sup> soon to be used polemically by Schmitt's opponents and competitors in the Reich. In particular, the passages of Gurian's articles showing where Schmitt had touched up parts of his books for new editions and describing his connections to Jewish friends and political Catholicism were potentially explosive for Schmitt. Gurian asserted that the latter was not a staunch Nazi but an opportunist worthy of contempt who was merely seeking to exploit the regime for his own purposes. He ridiculed the NSDAP for not seeing through Schmitt's opportunism.

Gurian's writings were grist for the mill of Schmitt's opponents in the Nazi system. In the late summer of 1936, Höhn, who had published a booklet in Schmitt's series the previous year, had begun keeping a file on Schmitt in the *Zentralabteilung* (Central Division) II/2 Department 22 of the *SS-Sicherheitsdienst* (SD, the intelligence service of the Third Reich), of which he was director. Schmitt's file ran to almost 300 pages. It included reports summarizing Schmitt's biography as well as lists of his works, which were presumably prepared by Höhn's staff at Berlin University. It also contained reports by informers, some of whom were Schmitt's assistants at the university. As is always the case with such intelligence files, some of the information collected is vague or even incorrect. This is also true with respect to Otto Kirchheimer, who was mentioned twice in the file as an incriminating factor from Schmitt's Weimar days. In one place he was incorrectly referred to as a socialist Jew who had praised Schmitt's *Legality and Legitimacy* in a review.<sup>24</sup> And in another document Kirchheimer was even mentioned as a “most fa-

21 See Bendersky (1983, 219–242), Koenen (1995, 651–764), Blasius (2001, 170–180), Mehring (2014a, 336–348), and Mehring (2022, 384–386).

22 On Gurian's biography, see Hürten (1972).

23 *Deutsche Briefe*, 26 October 1934.

24 Bundesarchiv Berlin-Lichterfelde, Akten des Sicherheitsdienstes des Reichsführers SS. Aktennummer R. 58/854, 76. The essay, co-authored with Nathan Leites (Leites is not mentioned in the SD

vored student”<sup>25</sup> of Schmitt’s. Some of the articles written by Gurian accusing Schmitt of political opportunism also found their way into the file. However, the SD files and the accusations and assessments assembled there indicate that the purpose was not to persecute Schmitt politically as an alleged opponent of the regime, but only to reduce the large number of functions he had relating to constitutional law, which made him too powerful, and to diminish his public reputation.<sup>26</sup>

Two attacks on Schmitt were published on 3 and 10 December 1936 in *Das schwarze Korps* [The black corps], the SS weekly with a circulation of just under 340,000, on the basis of material collected by the SD (see Koenen 1995, 726–733). He was accused of political hypocrisy: he had not joined the NSDAP until 1933, and then only to further his career. There were references to Schmitt’s connections to political Catholicism prior to 1933. Moreover, the antisemitism he expressed lacked credibility because he had had some Jewish friends before 1933 and some of his students had been Jews. There were quotations in the second article from Schmitt’s earlier writings in which he had rejected ideology based on *Rasse* as thinking of the Romantic period. The material used against Schmitt in the two articles was a combination of accusations made by the professors he worked with and Gurian’s writings from his exile in Switzerland.

Schmitt had become ensnared in the machinery of the Nazi system. His mentor Hermann Göring intervened with the SS, countering the attacks and shielding him. But Göring could not prevent Schmitt’s demotion. Hans Frank, in contrast, dropped Schmitt once he had realized that he could not accomplish anything against the will of the SS. A few days after the accusations, which generated considerable publicity, Schmitt had to cede his leadership position as *Reichsgruppenwart* of the *Reichsgruppe Hochschule* in the NSRB, falsely citing “health reasons.”<sup>27</sup> He also lost editorship of the *Deutsche Juristen-Zeitung* against his will; the journal was simply discontinued and replaced with a new journal. He did not lose his membership in the *Akademie für Deutsches Recht*, which was politically less important, or his position as *Preußischer Staatsrat*. However, his nemesis Reinhard Höhn was unable to realize his intention of stripping him of his prestigious chair at Berlin University. Höhn and his comrade in arms Eckhardt were also to become entangled in the intrigues within the apparatus a year later because of disrespectful statements about the Nazis back in the 1920s and contact with Jews. To Schmitt, demotion after four years of intense activities in the service of the Third Reich was a major rupture in his biography. Once a celebrated and feared figure in the Nazi legal hierarchy, he had become “almost an outcast” (Rüthers 1990, 106) virtually overnight. From then on, he again focused more on working as a university professor and traveling to give lectures. He also avoided writing about any topic in constitutional law related to the internal power struggles within the regime.

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file), was obviously confused with Kirchheimer’s previous article with the same title as Schmitt’s as well as with a positive review.

25 Bundesarchiv Berlin-Lichterfelde, Akten des Sicherheitsdienstes des Reichsführers SS. Aktennummer R. 58/854, 149.

26 See Koenen (1995, 716–723) and Neumann (2015, 408–414).

27 Mitteilung des NS-Rechtswahrerbundes 1936, quoted in Rüthers (1990, 105).

It is impossible to determine now, in retrospect, how relevant it was for these events that Gurian and Kirchheimer knew each other. Gurian and Kirchheimer had met through Schmitt in Bonn in 1927; the three had occasionally spent evenings together over beer and wine.<sup>28</sup> John H. Herz reported that Kirchheimer had met Gurian when he traveled to Switzerland after 1933 to see his family, especially his daughter, at boarding school in northern Italy. According to Herz, they had even planned to publish together about Schmitt.<sup>29</sup> However, there is no evidence in the archives to confirm this or any speculation about the extent to which Kirchheimer provided Gurian with additional information or material about Schmitt. From his Swiss exile, Gurian reported with satisfaction on what was happening in Berlin to his small readership of the *Deutsche Hefte*, using Friedrich Schiller's words: "The Moor has done his work, the Moor may go."<sup>30</sup> He commented on Schmitt's plummet in the hierarchy using the following words: "Carl Schmitt has become a superfluous assistant today, and he has been dropped."<sup>31</sup> On Christmas Eve, his headline referring to Schmitt was: "On the way to emigration or to the concentration camp?"<sup>32</sup> Yet Schmitt was neither threatened with the fate of a member of the opposition in a concentration camp nor was emigration an option he was seriously considering. Gurian was apparently referring to Göring's personal interventions on behalf of his protégé when he wrote six months later that Schmitt "has to thank only certain personal relationships for the fact that he is not completely done for."<sup>33</sup> Essentially, in 1936, Schmitt was confronted with a facet of the brutal reality of Nazi Germany that simply did not exist in his countless lectures and writings in which he exalted the unity of *Führer*, *Volk*, and party.

### 3. Kirchheimer's political activities in Paris and his arrival in New York

In the Paris resistance circles, the booklet written by Kirchheimer and circulated illegally under Carl Schmitt's name had earned Kirchheimer his reputation as an expert in questions of Nazi criminal law. This expertise was the basis for him to be able to leave Paris for the US and take up his first position there, as he had long sought to do.

Despite all his efforts, he was unable to significantly improve his situation in Paris. The everyday life he had to deal with in his French exile frayed his nerves and sapped his strength. A brief improvement in the German refugees' legal situation which many émigrés remembered as "the summer of our hopes" (Sperber 1982, 112) came about in 1936 after the *Front populaire* had won the election. Shortly after Léon Blum's Popular Front government had taken office, France was one of the first countries to ratify the Convention on Status of Refugees. Temporary passports were introduced as a result, and Otto Kirchheimer was issued one. However, this did not include a work permit. Things were

28 See diary entries, 7 April and 12 September 1927 (Schmitt 2018, 133 and 162).

29 John H. Herz at the Symposium on the Work of Otto Kirchheimer at the Freie Universität Berlin in West Berlin in 1985 in response to a question asked by Wilhelm Hennis.

30 *Deutsche Briefe* of 11 December 1936.

31 *Deutsche Briefe* of 18 December 1936.

32 *Deutsche Briefe* of 24 December 1936.

33 *Deutsche Briefe* of 9 July 1937.

made even more difficult for émigrés in academic professions because their degrees were not recognized in France. Taking stock in retrospect, and considering her own personal experience, Ruth Fabian, a lawyer and leftist Social Democrat who had known Kirchheimer well during their time in Berlin and who had also fled to Paris in 1934, said that “until the end of the war, [there had been] no willingness on the French side to integrate people and no opportunity on the side of the refugees to integrate” (Fabian 1981, 202). As a rule, France’s academic establishment did not welcome German émigrés, either, and remained inaccessible.

In his memoirs of these years, sociologist Paul Honigsheim recounted that most German academics had had to reckon with a cold reception. There had been only a few French scholars who had spoken up for their colleagues from German émigré circles (see Honigsheim 1960, 313–314). Among these exceptions were the École Normale Supérieure and the Sorbonne, which provided support to the ISR. German émigrés also reported similar supportive behavior by some scholars in England and Switzerland. In his memoirs, Eugene Anschel sketched the following image of the situation in which Kirchheimer and his wife found themselves in the apartment they shared, despite having separated, in Paris in 1936: “Separated from Hilde [...] and their child [...] he was a lonely figure” (Anschel 1990, 127).

In contrast, Kirchheimer’s wife was practically bubbling over with political activism in Paris. Anschel reported that he saw Hilde “quite often. She was deeply involved in communist party affairs [...]. When I saw her in Paris, she had turned her attention to the Spanish Civil War” (Anschel 1990, 128). Hilde was involved in various positions of the communist exile in France and in Willi (Wilhelm) Münzenberg’s extensive communist organizational network. There were 4,000 to 5,000 German émigrés in Paris who were members or sympathizers of the Communist Party, far more than any other opposition groups; most social democratic émigrés were in Prague, while many liberals and conservatives had left Germany for Switzerland.

Hilde Rosenfeld-Kirchheimer carried out research and collected material for the *Braunbuch* [Brown book] published by Münzenberg in July 1933; this reconstructed the progression of events of the Reichstag fire and documented political persecution and terror in Germany over almost 400 pages. It also documented her father’s work as a lawyer for a KPD member of parliament whom Göring had falsely accused of setting the fire (see Braunbuch 1933, 86). She and her father were also involved in preparing the high-profile “countertrial” to the trial against Dimitroff and the others accused of arson before the *Reichsgericht* in Leipzig, which was held before an “International Legal Commission” in London in September 1933 and gained considerable publicity. At this time, Otto Kirchheimer was in London thanks to his stipend, and he presumably also witnessed the public taking of evidence before the commission (see Ladwig-Winters 2007, 248). In Paris, Hilde Rosenfeld-Kirchheimer also coordinated support services for the *Rote Hilfe* and the Workers’ International Relief, organized public demonstrations against the Nazi regime, and was a delegate of the German Women’s Commission, a subgroup of the World Committee Against War and Fascism. In late 1935, she went to Moscow for several months. When she returned in 1936, she joined the KPD (see Ladwig-

Winters 2007, 195)<sup>34</sup> and worked for the *Association Juridique*,<sup>35</sup> an international jurists' association organized by the communists.

Otto Kirchheimer never considered switching to the KPD; he remained affiliated with the SPD. For the SPD, Paris was the most important center in exile besides Prague, the seat of Sopade—as the party executive committee working there called itself. Over 3,000 party activists had found refuge in the French capital. The Paris group of exiled Social Democrats sought to collaborate closely with the SAP<sup>36</sup> and took a stance against the party executive committee's Prague Manifesto of January 1934 (see Matthias and Link 1968, 231–233). But the group kept getting smaller and more divided. Like several other active Social Democrats from the Weimar Republic who had fled to Paris, Kirchheimer and Arkadij Gurland, who had headed the Paris group for a time, withdrew from active party work and focused primarily on personal political contacts from 1934 on.<sup>37</sup> Kirchheimer did, however, participate in efforts beginning in autumn 1935 with the goal of bringing together the various oppositional circles among the exile groups in Paris.

On 26 September 1935, a conference called Freedom Committee Meeting, chaired by writer Heinrich Mann, was held at the Hotel Lutetia in Paris. This was the first time that all the political streams among the German émigrés in Paris, from the liberals to the communists, gathered together. Following the new policy decreed by Moscow, the KPD committed to democracy, free elections, and convening of a national assembly following the overthrow of the Nazi regime. A second conference took place at the Hotel Lutetia on 2 February 1936. The surviving list of attendees indicates that the group of “socialists” was represented by Otto Kirchheimer as well as Kurt Rosenfeld. Another “socialist” guest was Max Horkheimer, the head of the Institute of Social Research (ISR) in New York. The other groups mentioned were the “bourgeois-democratic group,” the “Catholic group,” and “communists” (see Langkau-Alex 2005a, 330). Horkheimer was at the Paris branch of the ISR from December to mid-February and met not only with Walter Benjamin but also with Kirchheimer on this occasion. The assembly at the Lutetia Hotel decided to establish a *Volksfrontausschuss* (People's Front Committee) headed by Heinrich Mann, a program committee, and a joint press publication. Otto Kirchheimer also took part in a follow-up closed-door meeting on 3 February 1936, where a small group of the SPD who were exiled in France discussed how best to press ahead with establishing this *Deutsche Volksfront* (German People's Front), which had been initiated in collaboration with the bourgeois and communist groups (see Langkau-Alex 2005b, 5).<sup>38</sup> After various negotiations, these efforts failed in 1937 to unify those in political exile in France. It is also documented that Kirchheimer took part in the asylum law conference *Conférence internationale pour le droit*

34 Vivid descriptions of the German communists' diverse activities in exile in Paris can be found in the memoirs of Arthur Koestler (Koestler 1954) and Manès Sperber (Sperber 1982).

35 This is evident from a letter from Franz L. Neumann to Otto Kirchheimer dated 27 April 1937. Otto Kirchheimer Papers, Series 2, Box 1, Folder 122.

36 *Sozialistische Arbeiterpartei* (Socialist Workers' Party); a small party that was founded in 1931 in order to unite the Social Democratic Party and the Communist Party.

37 On the rapid demise of the Paris group of the exiled SPD and the role of Gurland, see Langkau-Alex (2005a, 128–134 and 138).

38 No documents have survived, however, that would reveal the extent to which Kirchheimer continued to support these efforts of his party later.



*d'asile* (see Schale 2006, 94),<sup>39</sup> which was held on 20 and 21 June 1936, as well as in the preparations for this in the German émigré circles. The most important decisions made at this international conference of leading representatives of the host countries included the draft of a statute on refugees and the establishment of an International Bureau for Asylum Law and Political Refugees.<sup>40</sup>

Kirchheimer's initial efforts to relocate to the US are documented from early 1936 on. They were actively supported by his father-in-law Kurt Rosenfeld. In January 1936, after a personal conversation with John Whyte, the Assistant Secretary of the Emergency Committee in Aid of Displaced German Scholars (EC) in New York, Rosenfeld wrote a letter to the EC recommending Kirchheimer for a stipend in the future.<sup>41</sup> However, the EC responded immediately that Kirchheimer did "not fall within our group"<sup>42</sup> because he was not a refugee from Germany living in the US. So Kirchheimer had no other option but to remain in Paris.

In May 1936, the Popular Front coalition of socialists and communists under Léon Blum had won the election in France. This brought about considerable economic upheaval because unprecedented capital flight abroad set in within a matter of days. The Blum government shied away from reacting by imposing an export ban on currency and gold and instead devalued the franc by 30 percent. This caused prices to increase considerably, and the ensuing waves of strikes exacerbated the crisis. Blum declared in spring 1937 that his financial and economic policies had failed, and he resigned that summer. These events impacted the émigrés not only in terms of asylum law but also with respect to their living expenses. The *Société Internationale de Recherches Sociales* paid its staff and the stipend holders of the ISR in francs from monies from French foundations, so the economic turbulences beginning in the summer of 1936 meant that their economic situation deteriorated dramatically. For example, Walter Benjamin's income dropped below the subsistence level.<sup>43</sup>

In this situation, Otto Kirchheimer spoke with his friend Eugene Anshel and decided in the late summer of 1936 to make new attempts to relocate to the US. Anshel reported the following about Kirchheimer's motives in his memoirs: "Otto had decided to come to the United States because of the bleak future he faced in Paris. He could not

39 On the impact of this conference see Schiller et al. (1981, 48) and Langkau-Alex (2005b, 261–266).

40 The outcomes of this conference contributed to Sir Neill Malcolm, the League of Nations High Commissioner for Refugees Coming from Germany, joining the call for international regulation of the status of refugees. A League of Nations Convention on this issue was ratified by the French Popular Front government in late 1936. Yet the League of Nations did not take any further measures, and the efforts toward international coordination of the protection of refugees failed at the Évian Conference in July 1938. It was not until 1951 that the United Nations succeeded in adopting an international Convention relating to the Status of Refugees based on the Paris conference, see Vormeier (2002).

41 Letter from Kurt Rosenfeld to John Whyte (EC) dated 27 January 1936. Emergency Committee in Aid of Displaced Foreign Scholars, New York Public Library, New York. I, A Grantees, 1933–46, Box 18, Folder 13 (Kirchheimer, Otto).

42 Letter from John Whyte (EC) to Kurt Rosenfeld dated 30 January 1936. Emergency Committee in Aid of Displaced Foreign Scholars, New York Public Library, New York. I, A Grantees, 1933–46, Box 18, Folder 13 (Kirchheimer, Otto).

43 See the information about Walter Benjamin's financial situation in Fuldt (1979, 265).

find an academic position, and even if he had found one, he would not have obtained a work permit” (Anschel 1990, 157). Kirchheimer counted on his connections to the Institute of Social Research in New York for support, as well as on his relationships with family and friends in the US. His most important contact at the institute in New York was Franz L. Neumann, who had succeeded in obtaining a position there in October 1936. Kirchheimer again renewed his private connections with both Kurt Rosenfeld and Eugene Anschel, who had been living with his relatives in New York since February 1937.

They were all able to benefit from the circumstance that it was still relatively easy for Germans to obtain a visa to resettle in the US prior to 1938 because of the American immigration quota system (see Appelius 2003, 22–28, 69–73).<sup>44</sup> Max Horkheimer agreed to Kirchheimer’s request, and it was arranged that the Institute would make an employment contract with Kirchheimer for a limited period of time and would provide a sworn affidavit, as it had done for Neumann the previous year; these documents were sufficient to receive an immigration visa to the US outside of the quota system. In addition, the institute would cover the costs of passage by ship as ticket prices were exorbitant. It is not clear from the correspondence with the institute whether the idea was for Hilde Rosenfeld-Kirchheimer and their daughter Hanna to move to the US, too; this impression arises at least from the initial letters concerning this matter between Kirchheimer and Neumann, who had taken on the role of in-house lawyer at the institute in New York.

The details of how Kirchheimer immigrated to the US can be reconstructed well on the basis of the surviving brisk correspondence between Paris and New York. The procedures necessary were set in motion in New York in late 1936. Neumann was able to report to Paris in early February 1937 that Friedrich Pollock, the managing director of the institute, had informed him “that all the official documents for your immigration have already been delivered to attorney [Willy] Haas.”<sup>45</sup> One week later, Horkheimer specified the institute’s offer to Kirchheimer in an official letter to the American authorities for the affidavit:

Our Dr. Neumann who has returned from Europe has reported to us that you are prepared to join our staff in New York in the near future. We are glad to hear of your decision, and we hope that we shall soon be able to welcome you here. Dr. Neumann has already told you that we are not in a position to employ you on a full-time basis, but that we shall consider your appointment to full-time work after the university summer vacation. We confirm, therefore, that we shall employ you as Research Assistant for at

44 As of 1921, immigration to the US was subject to a quota system. The numbers of immigrants were curtailed in the 1924 National Origins Act. From then on, 153,879 foreigners per year were permitted to immigrate to the US. The German quota was relatively large, at 51,227 immigrants, but was reduced to only 25,957 after the Great Depression began, see Später (2017, 390–392). Mass emigration from Germany set in only after the anti-Jewish pogroms in November 1938, and the US introduced waiting lists. As a result, the waiting time for refugees from Germany averaged two years as early as 1939.

45 Letter from Franz L. Neumann to Otto Kirchheimer dated 9 February 1937. Otto Kirchheimer Papers, Series 2, Box 1, Folder 122.

least one year on a part-time basis with a monthly salary of \$ 100.-, starting from the moment of your arrival.<sup>46</sup>

In March 1937, however, there was mention of problems with issuing the visa. According to Kurt Rosenfeld, the institute's contract with Kirchheimer indicating a salary of 100 dollars per month was not sufficient for obtaining a visa for the US.<sup>47</sup> On 25 March, Kirchheimer reported that he had spoken personally with Pollock that day; Pollock was in Paris and had promised that he would "intervene with the consul himself in early April so that we can hope that things will be all right. I have the necessary papers from the police, even the German ones."<sup>48</sup> A month later, Neumann wrote to Kirchheimer that he had spoken with Pollock and that Kirchheimer would "presumably not have any difficulties with the consulate."<sup>49</sup> Neumann recommended that Kirchheimer "arrange that you can arrive here around 1 September, at the latest 1 October." Kirchheimer was restless and wanted to leave Paris immediately but Neumann informed him that there was absolutely no purpose in him being in New York from June to August because none of the people he would be interested in would be in town during the hot and humid summer. In June, he put him off again. Kirchheimer was able to make his way to London to the branch of the institute there only in mid-October, and then, on 5 November 1937, embarked by ship from Le Havre to New York on the SS Washington with a ticket paid for by the institute. On 11 November, Kirchheimer's 32nd birthday, the ship arrived at New York harbor.

Anschel and Neumann picked him up at the harbor. Anschel penned a vivid report about Kirchheimer's arrival in New York:

Now on his arrival in America, he came down carrying nonchalantly around his neck a large camera, an incongruous sight for anybody who knew his unfamiliarity with and remoteness from any mechanical device. Both Franz Neumann and I wondered what, in the world, had induced him to walk around with that thing. Naively, Otto explained the reason for it to the customs official who asked him whether it was his own. No, he said, not at all, because he did not know how to use the camera. An acquaintance in Paris had asked him to take it along so that he, the acquaintance, could sell it when he would come to America later on. Of course, that made the camera contraband and the official promptly confiscated it. Otto was most unhappy on the way to the furnished room that we had rented for him. He thought his friend in Paris might believe he, Otto, had sold the camera and pocketed the money. Upset as he was, he left his winter coat in the taxi, the first such coat that he possessed since he had left Germany in a hurry and bought especially for the harsh New York winter. The next morning, Franz Neumann and I were able to convince a soft-hearted official at the Customs House that Otto, in the confusion

46 Letter from Max Horkheimer to Otto Kirchheimer dated 16 February 1937. Max Horkheimer Papers, Letters VI,11, page 119.

47 Letter from Otto Kirchheimer to Franz L. Neumann dated 10 March 1937. Otto Kirchheimer Papers, Series 2, Box 1, Folder 122.

48 Letter from Otto Kirchheimer to Franz L. Neumann dated 25 March 1937. Otto Kirchheimer Papers, Series 2, Box 1, Folder 122.

49 Letter from Franz L. Neumann to Otto Kirchheimer dated 27 April 1937. Otto Kirchheimer Papers, Series 2, Box 1, Folder 122.

of the arrival and due to his difficulty in understanding English had misspoken. We got the camera back, but the coat was gone (Anschel 1990, 156).

Kirchheimer first found accommodation with the Rosenfelds and then with Anschel, who were neighbors in the borough of Queens, where many émigrés lived. Hilde Rosenfeld-Kirchheimer had decided to remain in Paris for the time being with her new partner, pediatrician and KPD politician Rudolf Neumann. Their daughter Hanna stayed at the boarding school in northern Italy, but she was to be brought to the US as soon as possible. In the spring, Hilde Rosenfeld-Kirchheimer was interned for a month as an enemy alien in a camp in Rieucros near the Spanish border. Their daughter Hanna arrived in New York on the SS Washington on 1 November 1939, traveling with friends of the Rosenfeld family. Hilde Rosenfeld-Kirchheimer succeeded in escaping to the US after her release in early April 1940. She lived with her daughter and her parents in Queens for several months. Since the US authorities had banned her partner from residing in the US because of his activities as director of the International Brigades' medical services in the Spanish Civil War, she moved to Mexico with him in early 1941. A larger colony of communist émigrés from Europe had already established itself there.<sup>50</sup>

#### 4. Conclusion: In waiting positions

This and the previous chapter have shown that Andreas Kalyvas's claim that there were "huge differences between Schmitt's political and legal theory and the politics of the NSDAP" (Kalyvas 2009, 443) is correct with respect to the Weimar Republic but does not hold true at all after Hitler came to power. Kirchheimer rightfully characterized Schmitt as the legal theorist *par excellence* of the regime in its early phase. Two more years passed before the first direct confrontation between Kirchheimer and Schmitt in 1935, even though they were not in direct personal contact. Its circumstances, however, were completely different from the previous one in November 1932. Back then, they had been able to have an animated conversation over coffee and pastries about their substantive differences; now, the Nazi regime Schmitt supported had forced Kirchheimer to flee abroad and to communicate indirectly. The result was communicative asymmetry, with Schmitt, on the one hand, as a strident representative of the Nazis in power, finding wide circulation, shouting to the émigrés that they would soon be stripped of their German citizenship, and turning his attention away from Kirchheimer—and Kirchheimer, on the other hand, with many copies of his anonymous booklet parodying Schmitt making the rounds in Germany illegally.

Kirchheimer presented Schmitt as the theorist of the Reich without going into Schmitt's personal motivations for his dedicated work for the regime. Schmitt's op-

50 This information is based on conversations with Hanna Kirchheimer-Grossman on 26 April 2017 and on 12 September 2021 as well as Kießling (1980, 194–196), Ladwig-Winters (2009, 404), and Barth (2010, 946). From 1941 to 1946, their daughter Hanna moved back and forth between her parents in Mexico City and New York; she had "the fragmented childhood characteristic of refugees [...] made even more so by the fact of separated and eventually divorced parents" (Kirchheimer-Grossman 2010, 63).

ponents within the Nazi system and several other émigrés chose a different tactic for dealing with Schmitt. They described his Nazi writings as the work of an unscrupulous political opportunist who during the Weimar Republic had made fun of the idea of *Rasse*, ridiculed the Nazi movement, and socialized with Jewish friends in his personal life. The reasons for the attacks against Schmitt, which resulted in him losing his most important leadership roles in late 1936, were not that he had internally distanced himself from Nazism, much less taken a stance of resistance. Nor were there any signs of him retracting Nazi statements in his writings. The truth was closer to the opposite. Schmitt proclaimed his loyal worldview far more than necessary. The party veterans considered Schmitt to be a competitor who threatened to rise even higher—into the ministerial ranks. They feared he would advance further, which is why they attacked him head-on: “It was not Schmitt who distanced himself from Nazism in 1936/37. It was the other way around; an important and powerful segment of the Nazi authorities had turned away from him” (Rüthers 1990, 107). Ultimately, Schmitt fared much the same as the renowned philosopher Giovanni Gentile in Italy, who had held the position of an official interpreter of Mussolini’s state doctrine during the establishment phase of fascism and was useful for the regime’s reputation on the international stage until he was pushed aside by the old guard of the fascist movement. The only indications that would support stylizing Schmitt’s role after his demotion as a voluntary “inner emigration” are those circulated by Schmitt himself after 1945.

How is the setback in Schmitt’s party career in late 1936 to be explained? Waldemar Gurian’s writings about him were not the decisive factor. An illegal publication with a small number of hectographed copies and minuscule circulation, the *Deutsche Hefte* were too insignificant to be influential in the Reich. The files of the *SS-Sicherheitsdienst* (intelligence service of the Third Reich) show that Gurian’s accusations were used at most as additional material against Schmitt. Analyzing the files of the Security Service as to the actual goal of the activities of Reinhard Höhn and the SS brings us closer to an explanation. This goal is quite bluntly characterized as “sidelining”<sup>51</sup> in one of the files. The goal of “ousting”<sup>52</sup> Schmitt from Nazi leadership positions is mentioned in two other documents in the files. In other words, Schmitt’s fall was not a case of a supposed opponent of the regime being persecuted, but a successful attempt to limit his leading role in the institutions of the party and constitutional law.<sup>53</sup>

Yet this explanation is not exhaustive, either. After all, the above-mentioned jealousies alone—of Höhn and other party veterans and of Koellreutter and others who had quickly and opportunistically joined the NSDAP in March 1933—are not sufficient to explain the events. They must be placed within the structure of the system required for the various personal motivations to be able to prevail. The best way to identify a key to such a structural explanation is, of all things, by using Otto Kirchheimer’s descriptions of the

51 Bundesarchiv Berlin-Lichterfelde, Akten des Sicherheitsdienstes des Reichsführers SS. Aktennummer R. 58/854, 257 (Aktenvermerk SS-Sturmabführer J. Lehfeldt). On my interpretation of the files, see also Neumann (2015, 412–414).

52 Bundesarchiv Berlin-Lichterfelde, Akten des Sicherheitsdienstes des Reichsführers SS. Aktennummer R. 58/854, pages 263 and 280). See also Koenen (1995, 660) on his ousting.

53 On the goal of sidelining, see also Blasius (2001, 170–180) and Neumann (2015, 412–414).

social basis of the Nazi system of rule. In contrast to Schmitt, who admired Nazism for overcoming the pluralism of the Weimar Republic and creating a tripartite structure of unity of the German state, Kirchheimer claimed in his analysis of the Nazi regime that no such unity existed.

Starting points for such an analysis are to be found as early as 1935 in his illegally disseminated booklet *State Structure and the Law in the Third Reich*, which was decorated with Schmitt's name. Kirchheimer had called the Nazi regime a "system of reciprocal guarantees and obligations" (Kirchheimer 1935a, 157), thereby describing the relationships of the party, the army, industrial and financial capital, the Junkers, and the state bureaucracy to the *Führer*. In 1941, he further sharpened this analysis in his famous article "Changes in the Structure of Political Compromise." The Nazis had emerged from a civil war as victors and had succeeded in liquidating the democratic parties and the mass organizations of the workers' movement. Yet, contrary to the official ideology, the new state was not a homogeneous entity, but was instead based on a "compromise, as in every other society which has a high degree of social stratification" (Kirchheimer 1941a, 287). Kirchheimer mentioned five major social groups that struggled for influence with and against each other in the Nazi system and had to find new compromises time and again: "monopolies, army, industry, and agriculture as well as the diversified layers of party bureaucracy" (Kirchheimer 1941a, 287). Only in the case of strong conflicts between the competing partners in compromise did the authoritarian *Führer* come into play as the "ultimate arbiter."

Now, Kirchheimer claimed that the relationship of the party bureaucracy to the other four social groups was "subject to sudden shifts" (Kirchheimer 1941a, 287), and the party hierarchy below the level of the *Führer* was also liable to constant regroupings. Under the scrutiny of such an analytical approach, the reasons for the activities of the Security Service of the *Reichsführer* of the SS can be identified not so much in Carl Schmitt's person and more in the complex internal situation of the Nazi system in 1936. As the director of the *NS-Rechtswahrbund* (see Glossary), Schmitt had positioned himself against the Reich Ministry of Justice directed by party member Franz Gürtner in the question of reforming the law of criminal procedure.

At the same time, Höhn was planning to replace Gürtner with Schmitt's mentor Hans Frank. Schmitt's career came to an abrupt end in this tangle of rivalries between various factions of the NSDAP. The concern in the Reich Ministry of the Interior was that, as the new Minister of Justice, Frank would bring along his loyal assistant Schmitt as state secretary and that he, Schmitt, would put the existing structure of compromises between the two ministries at risk with his characteristic activism.<sup>54</sup> To comprehend the explosiveness of this potential personnel decision, we need to understand that the Nazi laws on *Rasse* were not the responsibility of the Ministry of Justice but of the Ministry of the Interior, which did not want to cede control of these to Frank and Schmitt: "The SS leadership construed the 'case of Schmitt' in order to keep Frank in check. The purpose was to harm *Reichsrechtführer* Frank by disparaging and neutralizing his most important assistant" (Blasius 2001, 173). In other words, Schmitt, the preacher of tripartite state unity,

54 On the details of these events, see Blasius (2001, 170–180).

and his ambitions had become caught in the clutches of the polycratic power structure that Kirchheimer had analyzed objectively.<sup>55</sup>

Both Kirchheimer and Schmitt found themselves in situations that had changed yet again at the beginning of 1937. Schmitt remained in a waiting position at first, seeking a new orientation for his career in the Reich. Meanwhile, Kirchheimer hoped nervously that he would be able to relocate to the US since he feared that Germany would soon start a war. By the end of 1937, decisive changes had occurred in both of their lives which also had consequences for the main areas of their theoretical work. Kirchheimer had succeeded in moving to the US, and Schmitt had found his way back into the top ranks of Nazi jurists by throwing himself into a different topic. Yet the subject areas they both began working on in the following years again touched on each other in remarkable ways even though they still had no direct contact at the time.

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55 Incidentally, the hypothesis of polycracy following Kirchheimer is supported by the fact that all of Schmitt's opponents from the ambit of the SD—Höhn, Koellreutter, and Eckhardt—were also disempowered over the course of the following four years, see Gross (2000, 121–122).