

Chapter 7: **The Consolidation of the Third Reich (1933-1934)**

The lives of Otto Kirchheimer and Carl Schmitt took diametrically opposed paths after the collapse of the Weimar Republic. Schmitt started a successful career as the “crown jurist of the Third Reich” in the capital, Berlin, with a salary that allowed him to move into a villa with domestic staff. In contrast, Kirchheimer was detained briefly before he managed to escape to Paris. The French capital soon became the intellectual headquarters of the exiled resistance against the Nazi dictatorship. Kirchheimer survived his exile in miserable circumstances, with virtually no income and constantly keeping an eye out for a room that was even cheaper than his current accommodation.

In intellectual terms, however, the paths of Schmitt and Kirchheimer crossed again a few times during the consolidation phase of the Nazi Reich. Once Schmitt had decided to support the Nazi *Führer* state (see Glossary), he soon emerged as the most prominent Nazi legal theorist. In newspaper articles, he took a strikingly aggressive position as he insulted Germans such as Kirchheimer who had been forced into exile. Kirchheimer, on the other hand, closely observed Schmitt’s activities for the new regime and commented on them. Before he had to leave the country, Kirchheimer had experienced the various ways in which conservative anti-positivists reacted to the new regime. Rudolf Smend, for example, had come to a different conclusion than Schmitt and did not provide his legal expertise to support of the Nazi regime.

The newer research literature on Schmitt provides plenty of material for assessing his role in the Nazi regime, connecting Schmitt’s publications and his recently published diaries with various pieces of archival material. This makes it possible to trace the individual stages of Schmitt’s collaboration with the regime in detail. He quickly grew into his new role and was adept at translating his prominence into power in the media. This period was an enormously productive phase in his life. He published over sixty pieces of writing between 1933 and 1936 in which he supported the establishment of the new regime. He wrote prolifically in the weeks, months, and years after Hitler came into power: speeches, front-page essays for the Nazi party press, articles for law journals, and a few relatively short books. At times, he even preempted the political developments.

Up until early June 1933, Otto Kirchheimer was able to follow the beginning of Schmitt's activities by reading his newspaper articles and through conversations with his remaining political friends in Berlin. The last time he met Schmitt in person before fleeing Germany was probably in November 1932, when they discussed *Legality and Legitimacy* at Schmitt's home. There is no indication that they met again in Berlin after that. They had no personal contact and no exchange of letters for the next 17 years, and their communication was indirect as they were far apart, both politically and geographically.

1. Kirchheimer's escape from Germany

After 30 January 1933, there were few opportunities for Otto Kirchheimer to participate in the opposition to Nazism within Germany. After the Reichstag fire during the night of 27 to 28 February, the police and the paramilitary wing of the Nazi party, the Sturmabteilung (SA; see Glossary), which had been granted police powers, launched into a first wave of arbitrary arrests and abuses. Kirchheimer had spent the evening of 27 February in the library of the Reichstag and had been one of the last people to leave the building. He feared that he would be considered a suspect for that reason.¹ The law firm of Fraenkel and Neumann recorded reports about the SA torturing the people arrested that night. A number of active leftist politicians fled the country. One of them was Kirchheimer's father-in-law, Kurt Rosenfeld. He was one of the first to be banned from his profession because of "communist activities" and persecuted by the SA, which is why he fled to Prague with a group of political friends (see Ladwig-Winters 2007, 248).

The waves of arrests and abuses assumed ever greater proportions after Georgi Dimitroff and the others allegedly responsible for the Reichstag fire were arrested on 9 March. Franz L. Neumann was among the approximately 50,000 people who were arrested and taken to mostly illegal camps where the SA and the SS abused them and murdered 500 to 600 prisoners. Roughly 65,000 people fled this orgy of violence during the first year of the Nazi regime, leaving the country, either legally or illegally. Then developments unfolded in rapid succession. On 14 March, the government banned the Republikanische Richterbund (Republican Judges' Association). On 7 April 1933, the *Gesetz zur Wiederherstellung des Berufsbeamtenurts* (Law for the Restoration of the Public Civil Service) was passed as well as a *Rechtsanwaltsgegesetz* (Law on Attorneys) that excluded "non-Aryan" lawyers or those "engaging in communist activities" from the bar.

Kirchheimer's friend Arkadij Gurland had succeeded in escaping to Belgium in April. He emphatically implored Kirchheimer to leave the country as soon as possible, too.² Yet Kirchheimer stayed. He was still in Berlin when, on 2 May, the SA henchmen occupied the building of the Deutscher Metallarbeiter-Verband (German Metalworkers' Union) on Alte Jacobstraße, where the law firm of Fraenkel and Neumann was housed, and terrorized its staff.³ The party leaders of the SPD moved their seat to Prague on 4 May; the official notification banning Neumann from representing clients as a lawyer was issued

¹ Information provided by Peter Kirchheimer on 3 May 2023.

² Ossip K. Flechtheim recounted this in a conversation with the author on 13 February 1988.

³ See what the then secretary Ella Müller recounted in Erd (1985, 55–57).

on 9 May and the book burnings were instigated on 10 May. To Neumann, these were unmistakable signs that it was time for him to leave the country. Fraenkel, on the other hand, decided to make use of an exemption clause in the *Rechtsanwaltsverordnung* (Regulation on Attorneys) that applied to soldiers decorated in World War I, enabling them to continue representing people suffering political persecution.⁴

Kirchheimer did not have that option. Still, he had not yet made plans to emigrate but wanted to wait and see what would happen and go underground for a while in Heilbronn, where his brother Friedrich (Fritz) lived. He was still hoping that Hitler's new coalition government would soon collapse.⁵ However, Friedrich Kirchheimer had assumed a leading position with the local branch of Dresdner Bank, and he threw Otto, who was begging for his protection, out of the house, stating that his brother's political troubles were his own fault and that he was unwilling to get dragged into them, and sent him back to Berlin.⁶ A few days later, on May 19, Kirchheimer was arrested in Berlin “on the suspicion of political machinations.”⁷ As chance would have it, he shared a cell in pretrial detention with Paul Kecskemeti, a young sociologist from Hungary who had come to Germany in 1927 and occasionally worked for the US news agency United Press as a correspondent (see Frank 2009, 444). The two had not met before but immediately became friends because of their shared interests in sociological theories.⁸ Kecskemeti was freed after the US embassy intervened with the German authorities; he insisted that he would accept the authorities' demand not to publish a newspaper article about his experiences in detention only if his “friend Kirchheimer” was released, too (see Kirchheimer-Grossman 2010, 60–61). As the Gestapo did not find any evidence against Kirchheimer, he was discharged along with Kecskemeti on 22 May.

His three days in jail finally made it urgently clear to Kirchheimer that he should follow Gurland's advice and leave the country as quickly as possible. One of the first things he did after his release from detention was to explore professional opportunities in the US. There were very few employment opportunities abroad for German legal experts like him, and hundreds of refugees who were qualified for academic positions were in a similar situation once they escaped from Germany. A handwritten letter of Kirchheimer's dated 25 May in which he turned in despair to Rudolf Smend read: “I would just like to inform you briefly that I tried to reach Prof. Friedrich in Heidelberg today, but found out

4 On Fraenkel's motives to stay in Germany for as long as possible, see Ladwig-Winters (2009, 106–109).

5 Ossip K. Flechtheim recounted this in a conversation with the author on 13 February 1988.

6 Hanna Kirchheimer-Grossman in a conversation with the author on 11 March 2016. Friedrich Kirchheimer managed to emigrate to Argentina in 1937.

7 The date is to be found in a letter from Staatspolizeileitstelle Berlin to the Geheime Staatspolizei (Geheimes Staatspolizeiamt) dated 1 February 1938. Auswärtiges Amt (German Federal Foreign Office), Politisches Archiv, RZ 214, R 99744 (69. Ausbürgerungsliste, Ausbürgerungsakte betreffend Otto Kirchheimer).

8 Kecskemeti's sociological interests were later also documented in English translations of Karl Mannheim's writings. Kirchheimer's papers in Albany include letters documenting the connection between the two over many years.

to my consternation that he had left [...] just 1/2 day before.”⁹ Carl Joachim Friedrich had been at Harvard University since 1926. He was responsible for German-American academic relations in the Akademischer Austauschdienst (Academic Exchange Service) he had co-founded¹⁰ and, consequently, also for granting scholarships to German-language early career scholars. Kirchheimer had introduced himself to him, referring to the fact that they both had connections to Carl Schmitt, on the occasion of a lecture by Friedrich at the Deutsche Hochschule für Politik in Berlin in the summer of 1931. He now implored Smend: “I would appreciate it very much if you were so kind as to inform Mr. Friedrich of my failure should you meet him” and added, “as soon as I have more clarity about where I can stay temporarily”¹¹ and “when I have an address, I will take the liberty of informing you, dear Herr Professor, of it.”¹² In other words, he informed his mentor Smend that he was planning to escape from Germany. In early June 1933, he went to see the Porta Nigra in Trier and, posing as a hiker, he fled across the unsecured border to Luxembourg and from there to France.¹³ Thus began his long and difficult exile.

2. Schmitt’s decision to support the Nazi *Führer* state

After some hesitation, Schmitt, in contrast to Smend, opted for the new *Führer* dictatorship at a time when it was already taking brutal actions against the opposition on the left. In retrospect, Schmitt described the experience of his initial involvement for the regime, namely helping to draft a law amending the constitution, as a “truly fabulously important moment” and he later also found much “joy in [his] work.”¹⁴ In the first few weeks of the new government, Schmitt kept a low public profile. In late March, however, he became involved in formulating legislation for the new regime, namely the *Reichsstatthaltergesetz* (Reich Governor’s Law) and hoped this work would lead to a personal introduction to Hitler. When Papen had promised Schmitt that he would be invited to a joint consultation on the law with Hitler, he noted in his diary: “Left very excited and exalted.”¹⁵ The law gave legal form ex post facto to the liquidation of the federal order by the NSDAP *Gauleiter*. Appointed by Hitler and reporting directly to him, a *Gauleiter* was a Nazi party official who governed a *Gau* (region) and held powers otherwise exercised by the state (see

⁹ Letter from Otto Kirchheimer to Rudolf Smend dated 25 May 1933. Rudolf Smend Papers, Cod. Ms. R. Smend A 441.

¹⁰ Founded in 1924/25 by Friedrich, the sociologist Alfred Weber, and the political scientist Arnold Bergstraesser, Akademischer Austauschdienst. Deutsche Vereinigung für staatswissenschaftlichen Studentenaustausch (Academic Exchange Service. German Association for Exchange of Students in Constitutional Law) was a precursor of the Deutscher Akademischer Austauschdienst (DAAD, German Academic Exchange Service).

¹¹ Letter from Otto Kirchheimer to Rudolf Smend dated 25 May 1933. Rudolf Smend Papers, Cod. Ms. R. Smend A 441.

¹² Letter from Otto Kirchheimer to Rudolf Smend dated 25 May 1933. Rudolf Smend Papers, Cod. Ms. R. Smend A 441.

¹³ Peter Kirchheimer recounted this in a conversation on 3 May 2023.

¹⁴ Schmitt in a 1971 conversation with Klaus Figge and Dieter Groh (Hertweck and Kisoudis 2010, 105, 106).

¹⁵ Carl Schmitt, diary entry of 4 April 1933 (Schmitt 2010, 278).

Schmitz-Berning 2007, 251, 313). Schmitt authored a legal commentary to this law in the form of a monograph shortly afterwards (see Schmitt 1933g). One outcome of this first specific project was his personal relationship with Hermann Göring, who quickly took a liking to him. Göring was a leading Nazi politician whom Hitler had appointed Reich Minister without Portfolio, Reich Commissioner for Air Transport, and Reich Commissioner for the Prussian Ministry of the Interior; on 11 April 1933, he was also appointed Prime Minister of Prussia. Göring became one of Schmitt's two powerful mentors from Nazi leadership circles.

Schmitt made his first public comment on the changed political environment on 1 April 1933. He published a piece on the *Ermächtigungsgesetz* (Enabling Act) of 24 March in the *Deutsche Juristen-Zeitung*, Germany's top law journal (see Schmitt 1933a). Even the day before the Enabling Act was passed by the Reichstag, Schmitt agreed to prepare a commentary explaining the new legal situation and seeking approval for it.¹⁶ From his previous perspective as an expert in Weimar constitutional law, he would have been compelled to reject the law as unconstitutional because of its far-reaching abolition of fundamental rights guaranteed by the constitution (see Koenen 1995, 235–239). Furthermore, he would have had to reject it because it had come into existence illegally since it had entered into force only on the basis of a previous change to the Reichstag's procedural rules, which were also unconstitutional. Yet Carl Schmitt, who was now politically active, believed that not only was the law acceptable but that it was urgently needed on the path toward the authoritarian state. He emphasized three fundamental special features of the law in his article. First, he stated that the legally disputed procedure of law-making was not a routine matter, but rather a decisive "turning point of relevance in constitutional history" (Schmitt 1933a, 456). Second, he stressed that the government of the Reich had obtained the right to enact not only new laws within the framework of the current constitution but also laws changing the constitution. And third, he highlighted that this right of the government, which the Reichstag had initially granted for four years, was not subject to any substantive limitations at all. Schmitt himself raised the question whether and to what extent the newly appointed ministers in Hitler's cabinet had their own scope for decision-making in relation to the *Führer* and his response was to use wait-and-see wording that gave Hitler free rein:

The extent to which, besides the political *Führer* rising above any limitations on his power, any change to these components of the current government of the Reich touches on its identity or even abolishes it is a political question which cannot be answered in advance and without regard to the situation. (Schmitt 1933a, 457)

With his commentary on the Enabling Act, Schmitt demonstratively took a stand for the new legitimacy of Nazism. A new state also required a new theory of the state, he claimed: "We should take care not to undermine the legal foundations of the new state using the sophistry of the old party state. Along with the state itself, constitutional law and the theory of constitutional law must be cleansed and renewed" (Schmitt 1933a, 458).

¹⁶ Carl Schmitt, diary entry of 22 March 1933 (Schmitt 2010, 272).

On 7 April 1933, Hitler's government enacted the *Gesetz zur Wiederherstellung des Berufsbeamtentums* (Law for the Restoration of the Professional Civil Service) on the basis of the Enabling Act. Contrary to its official name, it actually served to abolish the professional civil service because its purpose was to dismiss all political opponents and individuals who were not of "Aryan" descent from the public service: the prerequisite for employment in the civil service was no longer exclusively professional qualification, but belonging to the *Rasse* (see Glossary) favored by the Nazis. This also pertained to the universities in Germany; the faculties of law lost 36 percent of their professors, for example (see Stolleis 1999, 254–299). At the Law Faculty in Cologne, where Schmitt had been a professor since accepting his appointment in the autumn of 1932, the law impacted Hans Kelsen. In mid-April, members of the faculty sent a subservient letter to the ministry in Berlin requesting to make an exception for Kelsen and to refrain from banning him from his profession because of his merits in World War I. Only one faculty member refused to sign the letter: Carl Schmitt. Instead, on 12 May, he published the article "Das gute Recht der deutschen Revolution" [The undeniable right of the German revolution] in the *Westdeutsche Beobachter* [West German Observer], a Nazi newspaper, in which he used antisemitic words to defend the civil service law against criticism:

The new provisions concerning public servants, physicians, and lawyers cleanse public life of non-Aryan *fremdgeartete Elemente* [elements foreign/alien to the *Volk*, in an exclusionary and antisemitic sense; *Elemente* was a contemptuous term for opponents; *Volk*: people/nation in a racial sense, of common blood and with a common destiny; see Glossary]. At last, the reorganization of admission to German schools and the establishment of a university student body of German descent secure the *eigenvölkische Art der deutschen Geschlechter* [German houses¹⁷ uniformity as a *Volk* of their own]. *Kein Fremdgearteter* [No one foreign/alien to the German *Volk*, in an exclusionary and antisemitic sense] should interfere in this great [...] process of growth. Such people would interfere with us, even if they might have good intentions, in a detrimental and dangerous way. We learn once again to differentiate. Above all, we learn to properly differentiate friend and enemy. (Schmitt 1933b, 28)

Previously, Schmitt had noted in his diary about the events in Cologne: "I did not sign the ridiculous submission of the faculty, what a wretched body, to take such a strong stand for a Jew while they cold-bloodedly let a thousand decent Germans starve and go to rack and ruin."¹⁸ Kelsen's Cologne colleagues' submission to the ministry was unsuccessful. In September 1933, Kelsen was sent into early retirement and went into exile in Geneva. Colleagues and former students of Schmitt's discussed his behavior in this matter widely, as they now understood the full extent of his support for the regime's policies.

Otto Kirchheimer had also read Schmitt's defense of the Law for the Restoration of the Public Civil Service in the newspaper a week before he was detained. The Law on Attorneys was adopted at the same time. Of the 3,400 lawyers in Berlin, the government classified over 1,800 as "Jewish" and excluded them from the bar. To Kirchheimer, this

¹⁷ Houses in the sense of: kinship groups of virtually noble lineage; emotionally charged term evoking mystical blood ties (see Translator's Preface).

¹⁸ Carl Schmitt, diary entry of 18 April 1933 (Schmitt 2010, 283).

law meant the end of his livelihood as a lawyer. The same applied to his wife Hilde Kirchheimer-Rosenfeld. After her father had fled the country, she had initially attempted to maintain his law firm. One of its clients was Ernst Torgler, who was charged with the Reichstag fire. She was also threatened for being an attorney for the *Rote Hilfe* and for defending Thälmann and Dimitroff; in mid-April, she fled via Switzerland to Paris with her two-year-old daughter Hanna.¹⁹ Kirchheimer had only been released from detention a few days earlier and had begun to prepare his escape into exile in France, following his wife and daughter, when Schmitt took aim at the émigrés on 31 May 1933 in another article for the *Westdeutsche Beobachter*. In his article “Die deutschen Intellektuellen” [The German intellectuals], Schmitt declared that German intellectuals who had emigrated and were criticizing the Nazi regime from their exiles could not in fact be considered part of the German nation: “They never belonged to the German Volk (people/nation in a racial sense, of common blood and with a common destiny; see Glossary). And not to the German spirit, either” (Schmitt 1933c, 32). He proclaimed: “They have been spit out of Germany for all time.” (Schmitt 1933c, 32) He welcomed the book burnings which had taken place three weeks earlier, verbally attacked émigrés’ critical comments about Germany as treason against the country and the Volk, sneered at the “Jewish relativism” of Albert Einstein’s theory of relativity, considered revoking émigrés’ German citizenship, and threatened further measures directed against them. He praised the laughing SA trooper as the idealized figure of the German man in the new Reich. Kirchheimer must have understood this article as a personal threat directed against him, too.

After the transfer of power to Hitler, people thronged to join the NSDAP. Schmitt waited in line for hours in Cologne and managed to submit his application to join the party and buy a party badge on 27 April,²⁰ just in time before the party enacted a freeze on new members, which was in place for a number of years. The official date he joined the party was 1 May 1933. With the support of Göring and Hans Frank, a legal expert and party member since 1923,²¹ with whom he had made friends in early 1933, Schmitt rapidly obtained a number of influential leadership positions in the regime’s legal system. Frank admitted Schmitt into the Akademie für Deutsches Recht (Academy of German Law), which he founded in the summer of 1933, and installed him as Reichsfachgruppenleiter der Hochschullehrer (Reich Director of the Professional Group of University Professors) in the Bund Nationalsozialistischer Deutscher Juristen (Association of National Socialist German Legal Professionals, BNSDJ), which had been founded back in 1928 as the organization of legal scholars who were members of the Nazi party.

In the autumn of 1933, Schmitt returned to Berlin, capital of the Reich, after only one semester in Cologne. Göring appointed him to the prestigious Chair of Constitutional Law at Berlin University. Schmitt moved into a villa at Schillerstraße 2 in Berlin-Steglitz. The same year, he became academic advisor of the Kaiser-Wilhelm-Institut für

19 Hanna Kirchheimer-Grossman in a conversation with the author on 25 April 2023.

20 Carl Schmitt, diary entry of 27 April 1933 (Schmitt 2010, 287).

21 In 1939, Hitler appointed Hans Frank Governor General of Poland, where people soon called him “slaughterer of Poles.” Frank was sentenced to death in the Nuremberg war crimes trials and was hanged.

ausländisches Recht und Völkerrecht (Kaiser Wilhelm Institute for Foreign Law and International Law). In May 1934, Frank appointed him lead editor of the *Deutsche Juristen-Zeitung*. A year later, he also took on the role of legal advisor of the University Commission, which was under the personal supervision of the Deputy *Führer* Rudolf Hess and was responsible for assessing *habilitations* and appointments to the chairs of law at all German universities. In early 1936, Schmitt was additionally appointed director of the "Academic Division" of the BNSDJ. Holding so many official positions, Schmitt had advanced to become the linchpin for academic study of law in the Nazi system and remained so for three years. For anyone seeking an academic career in law in Nazi Germany, there was no getting around Schmitt during this period.

In addition, Göring, who had taken control of Prussia in early April 1933, appointed Schmitt a *Preußischer Staatsrat* (Member of the Prussian State Council) on 29 May. The *Preußische Staatsrat* (Prussian State Council), newly established by Göring, had sixty-eight members, including well-known leading Nazis as well as prominent artists and scientists such as actor Gustav Gründgens, physician Ferdinand Sauerbruch, and conductor Wilhelm Furtwängler.²² Schmitt hoped this function would give him greater and more direct political influence. He figured that the institution of *Preußische Staatsrat* would be the first step toward establishing a *Führerrat* (*Führer's Council*), which would give him the opportunity to advise and assist Hitler himself. The ceremonial inauguration of the *Preußische Staatsrat* took place on 15 September 1933 in the auditorium of the University of Berlin. Schmitt spoke on "Wesen und Gestaltung der kommunalen Selbstverwaltung im Nationalsozialismus" [The nature and organization of home rule under National Socialism] in the presence of Prussian Prime Minister Hermann Göring, *Reichsführer* of the SS Heinrich Himmler, and SA commander Ernst Röhm. Göring subsequently appointed him to the position of rapporteur of a commission tasked with preparing a new municipal constitution.

During the Weimar Republic, Schmitt had already seen home rule as an attack by society on the unity of the state. The *Preußische Gemeindeverfassungsgesetz* (Prussian Municipal Constitution Act), which entered into force on 1 January 1934, followed this line of thinking; the explanations in a circular directive of the ministry were authored by Schmitt (see Blasius 2001, 106) and stated the guiding principle of the new law as follows: "A certain form of home rule corresponds to each form of the state."²³ The principle of the new state was that of unlimited responsibility on the part of the *Führer*. However, this did not imply the abolition of any or all forms of home rule, but rather the establishment of "truly National Socialist home rule."²⁴ The concept was then explained in detail. The head of a municipality was no longer elected by the citizens but appointed by higher state authorities after conferring with the *Gauleiter* of the NSDAP. There was no longer a representative body with the authority to make decisions, either; instead, merely members of the public volunteering in a consultative role. This arrangement was also in place in the major cities of Prussia. The local party organs and the highest-ranked SA and SS

²² On Schmitt and these three individuals mentioned in their roles as *Preußische Staatsräte*, see Lethen (2018).

²³ As cited in Blasius (2001, 107).

²⁴ As cited in Blasius (2001, 107).

leaders were members of these municipal councils as part of their official duties. Kirchheimer, too, was to examine questions of home rule a short time later in his Paris exile, but with an entirely different thrust.

Contrary to Schmitt's hopes, working on the municipal constitution was the only task he was assigned in his new position as a member of the *Preußische Staatsrat*, which was to convene only occasionally in the following years. The Nazi leadership did not develop it to take on the function of a *Führerrat* but, instead, limited it almost exclusively to representative duties. There are no expressions of internal reservations, much less aversion to the Nazi regime, to be found in Schmitt's diaries surviving from this period. Far from it. He even began to feel enthusiasm for Adolf Hitler, whom he had long held in contempt. After Hitler's speech concluding the *Leipziger Juristentag*, a conference for legal experts, on 3 October 1933, Schmitt wrote in his diary: "Wonderful speech by Hitler about the total state. Much comforted."²⁵

In the spring of 1933, Schmitt had consciously decided to help establish the Nazi regime in the areas of propaganda and organization. From the outset, he made it clear both to himself and to his audience that Hitler taking over the government amounted to a fundamental caesura in terms of legitimacy. The boundary of the parliamentary state based on the *Rechtsstaat* had been transcended in favor of a dictatorship legitimated on *völkisch* (of the *Volk*, chauvinistic-nationalistic, antisemitic; see *Glossary*) grounds. He was also well aware that the Nazi regime was an antisemitic state from the very beginning.

Schmitt was not forced into any of his many and diverse activities at the time. Everything he did in the early years of the regime was of his own free will. He could have taken his older colleague Rudolf Smend as a role model, shifting his professional interests to niche topics and otherwise living a relatively undisturbed life under Nazism as a renowned conservative professor. No German scholar of constitutional law was persecuted after 1933 for being silent. Anyone writing articles supporting the regime wanted to be part of it—in whichever way. When Schmitt opted for the *Führer* state, he made new friends. But his decision also broke up a number of older friendships and severed old connections such as his relationship with Otto Kirchheimer.

3. Exiled in London and Paris

Kirchheimer's life in exile was entirely different from Schmitt's and the latter's successful career. He had fled Germany without any specific professional or financial prospects. After crossing the border to Luxembourg near Trier, he continued on to Paris, where one of his older brothers—a ballet dancer—had been living since the early 1920s. In Paris, he also met his wife Hilde Kirchheimer-Rosenfeld—they had been separated for two years at this point—their daughter Hanna, and his father-in-law Kurt Rosenfeld. The latter was forced to flee with his wife from impending political persecution in early March 1933. After Hilde had fled to her parents with their two-year-old daughter in mid-April, Otto Kirchheimer was the last family member to arrive in the French capital.

25 Carl Schmitt, diary entry of 3 October 1933 (Schmitt 2010, 305).

Besides Prague, Paris was the main refuge for political émigrés from Germany. France had been considered the traditional country of asylum in Europe since the nineteenth century, and leftist German intellectuals had viewed Paris as an exciting and livable city since the 1920s.²⁶ The first wave of emigration to France consisted mainly of scholars, physicians, lawyers, artists, and politicians; Jews and members of the opposition had immediately been banned from these professions in the first few months after Hitler took office. Most had had to leave their homes in panic with only a few belongings. They frequented the small number of émigré cafés in Paris but were unable to gain a foothold in the established Paris community.²⁷ Kirchheimer spent most of the next four years in Paris. A Francophile, he had often drawn on French legal theorists—for example, Carré de Malberg or Maurice Hauriou—although he never explicitly addressed issues related to France in his works during the Weimar Republic. Moreover, political ideas from the French Revolution had played a key role in arguing his leftist-socialist critique of the Weimar Constitution; time and again, he had juxtaposed the Weimar Constitution, which suffered from compromises, with the shining examples of the French revolutionary constitutions and their democratic vitality (see Schale 2011, 295–301).

Kirchheimer had arrived in Paris “almost penniless.”²⁸ After failing to secure financial support through his connection to Carl Joachim Friedrich, he was more fortunate shortly after arriving in Paris and obtained a stipend from the London School of Economics and Political Science (LSE) for several months. Franz L. Neumann had helped Kirchheimer secure the stipend. Neumann had been a legal advisor to the SPD party leaders, and as late as March 1933, he had written an extensive brief detailing that the special press orders following the Reichstag fire were unlawful (see Neumann 1933). After an SA squad had raided his law firm on 2 May, he left Germany for England by ship. He was acquainted with Harold Laski, a prominent member of the Socialist League, the leftist wing of the British Labour Party, through his party contacts. Laski had been a professor of political science at the LSE since 1926. Neumann had decided to start a completely new career and began working on a doctorate in intellectual history and political theory under Laski. He also advised Laski about how to help persecuted social scientists from Germany at the LSE.

Shortly after arriving in Paris, Kirchheimer visited London from 13 to 23 June 1933.²⁹ The UK had also become a refuge for scientists driven out of Germany, and a private solidarity fund, the Academic Assistance Council (AAC), provided some financial support.³⁰ Kirchheimer visited the LSE, which played a major role in the AAC, in order to establish personal contacts.³¹ Neumann introduced him to Laski; Kirchheimer had already acknowledged his writings on the theory of pluralism and on democratic socialism in

²⁶ See Badia (1998) and Frank (2000).

²⁷ On the difficult conditions of émigrés from Germany in Paris, see the descriptions by other exiles: Aufricht (1969, 120–125), Fabian and Coulmas (1982), and Sperber (1982, 45–61).

²⁸ Conversation between Hanna Kirchheimer-Grossman and the author, 25 April 2023.

²⁹ Certificate of Registration of the English Aliens Registration Office (original, owned by Hanna Kirchheimer-Grossman).

³⁰ On the emigration of German scholars to the United Kingdom, see Hirschfeld (1985).

³¹ The Academic Assistance Council (AAC) was established by William Beveridge, then Director of the LSE, in May 1933, to support scholars persecuted by the Nazi regime (see Beveridge 1959). The

his own work during the Weimar period. As a result of this trip, he was granted an AAC research stipend for a project in England on the constitutional theory and legal sociology in the works of the renowned US Supreme Court judge Oliver Wendell Holmes, left-wing Harvard legal theorist Felix Frankfurter, and the Marxist historian of the making of the US Constitution, Charles A. Beard.³² Kirchheimer spent the period from September to November 1933 as well as February and March 1934 in London as a research fellow of the AAC, making extensive use of the libraries there.³³

During his initial stay in London, Kirchheimer completed his first academic publication after escaping from Germany. It was a retrospective essay on the history and end of the Weimar Republic, titled “The Growth and the Decay of the Weimar Constitution” (see Kirchheimer 1933c). He also attempted to secure his future living expenses while he was in London and sought to make contacts through his acquaintances among the émigrés in London to help him. Besides Neumann, a few others from the former circle of the Berlin journal *Die Gesellschaft* had found refuge in London, among them Otto Kahn-Freund. Kirchheimer also met up again with Georg Rusche, a fellow student from his time in Münster. Rusche had received funding from the Institut für Sozialforschung (IfS) in Frankfurt to work on a major study on the links between unemployment, on the one hand, and crime and its sanctioning, on the other, and was supposed to work toward completing the study for publication in London on behalf of the institute.

Kirchheimer thanked Smend in a letter from England dated October 1933 for his “recommendation for the Academic Assistance Council”³⁴ and reported on his work plans: “I have also started collecting materials to work on comparative democratic constitutional law.” With respect to England, he noted that “at the moment when we are abandoning democracy once and for all, a whole lot of predemocratic institutions still exist here.” It seemed to him “—quasi surrendering intellectual integrity—, generally useless to attempt to pick out the major democratic [...] institutions as still conceivable at all in our period of transition.” Developing and formulating a democratic constitutional legal system that would take a less arbitrary approach would, however, “be difficult” in light of “Schmitt’s skill in luring [people into rejecting parliamentarism].” It was also ques-

AAC later became the Society for the Protection of Science and Learning (SPSL) and continues to operate as the Council for At-Risk Academics (CARA) to this day.

- 32 The AAC files indicate Kirchheimer’s field as constitutional law; reference is made to the fact that Kirchheimer had sought to obtain his *habilitation* in this area before fleeing Germany. These AAC memos are in the files of the Emergency Committee in Aid of Displaced German/Foreign Scholars, New York Public Library, New York. Otto Kirchheimer, Correspondence, b3.—The AAC also enabled the philosopher Theodor W. Adorno, who later joined the Horkheimer group in New York, to find employment at Oxford University in England in 1934 (see Müller-Doohm 2011, 283).
- 33 Concerning the dates, see the information provided in Kirchheimer’s application for US citizenship. Otto Kirchheimer Papers, Series 2, Box 1, Folder 1.
- 34 This and the following quotes are from the letter from Otto Kirchheimer to Rudolf Smend dated 16 October 1933. Rudolf Smend Papers, Cod. Ms. R. Smend A 441.—Rudolf Smend declined to be involved in the Nazi regime’s academic annihilation of Jewish scholars’ contributions in other ways, too. In the summer semester 1933, besides Schmitt’s *Legality and Legitimacy*, he also discussed Kirchheimer’s eponymous essay in his class on an equal footing (see editor’s note 296 in: Schmitt and Smend 2011, 90).

tionable “whether I can find a material basis for such a project.” He wanted to “write to Friedrich at Harvard” again concerning this matter.

It was finally his connection to the Institut für Sozialforschung (IfS), which Kirchheimer had established through the LSE while he was in London, that charted the path for his professional future. The IfS, which had been founded in Frankfurt in 1923, was financed by Hermann Weil, one of the world’s most eminent grain traders, with funds from a private foundation. Max Horkheimer had been appointed director of the institute in 1931 and had laid out a comprehensive research agenda in the social sciences and humanities titled “Interdisciplinary Materialism.” He was the new dominant figure at the institute and remained so into the 1960s, both in organizational and in programmatic matters.³⁵ The new program he proclaimed after taking office found its strongest expression in the contributions of the institute’s own *Zeitschrift für Sozialforschung* (ZfS, Journal for Social Research), which had been established in 1932. The institute’s leaders had already decided to begin preparing to emigrate after the Reichstag elections in September 1930, when the number of NSDAP parliamentarians soared from 12 to 107. In light of the tense political situation in Germany, the foundation’s endowment, which had been invested in securities, was transferred to the Netherlands as a precaution, and in the summer of 1932, the institute opened a branch in Geneva as “temporary emergency quarters” (Horkheimer).

After Hitler took power, the foundation in Frankfurt was replaced by the *Société Internationale de Recherches Sociales* (SIRES), which was based in Geneva, creating the legal basis for the foundation’s endowment to remain outside Germany. Only a few weeks later, these measures proved to be essential for securing the existence of the institute, as its building in Frankfurt was raided by the SA in March 1933 and the IfS in Germany was shuttered. Universities abroad showed their solidarity with the IfS. The École Normale Supérieure (ENS) in Paris offered to make space available for a branch of the exiled institute on rue d’Ulm. Horkheimer also accepted the LSE’s offer to make offices at the Institute of Sociology available to the IfS for another branch. The institute was determined to continue the work it had begun in Frankfurt. In early April 1933, Horkheimer wrote from Geneva to philosopher and literary critic Walter Benjamin, who had also fled to Paris, “we will try to continue our research and the journal as before, even more intensively because it appears that we will not be teaching at the university, which was quite time-consuming.”³⁶

When Horkheimer visited the London branch of the IfS in early 1934, Kirchheimer took the opportunity to meet with him and ask about a position or at least a temporary job at the institute in Paris. Horkheimer’s response was positive. Horkheimer then traveled to New York to explore whether the IfS should open another branch there. He decided to relocate the institute. The institute found a new home for its headquarters at Columbia University in New York in the summer of 1934. In New York, the institute was renamed (International) Institute of Social Research (ISR). Paris remained the main location of the institute in Europe until German troops invaded France in May 1940. Paris was of key importance to the ISR because in 1934, the Paris publishing house Librairie Félix Alcan had

35 On Horkheimer’s leading role at the institute, see Abromeit (2011).

36 Quoted in Wiggershaus (2010, 38).

agreed, in an act of solidarity, to enable continued publication of the *Zeitschrift für Sozialforschung* as a German-language scholarly journal. The Paris branch was headed by Paul Honigsheim up until 1936 and then by Hans Klaus Brill. The institute in Paris supported a number of scholars who had been forced into exile with larger and smaller sums of money and without applying strict criteria through its *Société Internationale de Recherches Sociales*. The monthly payments, which were actually disbursed on a more or less regular basis, were granted for independent research projects, essays, and reviews for the *Zeitschrift für Sozialforschung* and for specific research assignments for the institute's work on the *Studien über Autorität und Familie* [Studies on authority and family].³⁷

As of mid-1934, Kirchheimer received a small stipend and occasional extra payments from the institute in Paris,³⁸ as did economist Henryk Grossmann, historian Franz Borkenau, and Walter Benjamin, who had also all been forced into exile. The latter had called the Bibliothèque Nationale his “most coveted place to work.”³⁹ As Kirchheimer was affiliated with the Paris branch of the ISR, he was also entitled to a permanent library card. And, like Benjamin and others in the circles of the Paris branch of the ISR, Kirchheimer hoped to obtain a position at the institute—Benjamin finally succeeded in doing so temporarily in the autumn of 1937 (see Jäger 2017, 282). During the years of persecution, the foundation of the ISR supported over 130 scholars who had had to emigrate by providing larger or smaller amounts of money as well as guarantees for their residency status in the countries where they found refuge (see Wheatland 2009, 215–217).

Kirchheimer hoped he would continue to be able to obtain financial support from other foundations for his academic work in exile, too. He applied to the AAC again in autumn 1934, describing his project in his curriculum vitae in much the same way as he had a year earlier to Rudolf Smend:

All this time I have been collecting material for a greater work on democratical [sic] institutions. This work, based on the empirical material as evidenced by the experiences of the democratically governed countries in the last ten years, is intended to discuss the effects of democratical [sic] institutions and the possibilities of democratic ideas within the different structures of society.⁴⁰

This time, he did not receive any funding owing to the large number of academics in exile asking for support. Now he had to survive solely on the small amounts he received from the ISR fund as well as occasional fees he received from Gurland for research he conducted for exile news agencies in Paris on the economic situation in Germany.

37 The three-volume *Studien über Autorität und Familie* was published in Paris in 1936.

38 The date is provided in Kirchheimer's application for US citizenship. Otto Kirchheimer Papers, Series 2, Box 1, Folder 1.

39 Walter Benjamin in a letter to Theodor W. Adorno dated April 1935, quoted in Kambas (1983, 189).

40 Otto Kirchheimer, Curriculum Vitae (undated; around November 1934). The document is in the files which the London AAC left to the EC in New York. Emergency Committee in Aid of Displaced German/Foreign Scholars, New York Public Library, New York. I, A Grantees, 1933–46, Box 18, Folder 13 (Kirchheimer, Otto).—There is no additional material on Kirchheimer in the archive of the AAC, which is now housed in the Bodleian Library of Oxford University.

Kirchheimer's situation in Paris soon became increasingly difficult. Between 1933 and 1939, France had taken in roughly 65,000 émigrés from Germany, the largest number of any country by far (see Möller 1984, 48). This was despite the fact that the situation for émigrés in France was fundamentally different from that in most other countries where they found refuge. The legal provisions and administrative measures regulating residency and work permits made their social, economic, and cultural integration virtually impossible.⁴¹ The French residency regulations were still based on the laws on aliens from 1849 and 1893 which made it easy to order disfavored individuals to leave the country. Every foreigner had to apply for temporary residence with the prefecture of the relevant province within eight days of arrival. Applicants had to prove they had sufficient funds to support themselves. If they were granted residency, they receive a *carte d'identité*. The prefects were under the direct control of the Ministry of the Interior and could refuse residency, revoke it, or refuse to extend it without giving reasons. Rejected applicants were ordered to leave the country or deported to their countries of origin.

The first émigrés to arrive, including Kirchheimer, still benefited from a generous practice of granting residency that evoked memories of Karl Marx and the poet and essayist Heinrich Heine in the nineteenth century. Unlike most other European countries, France also permitted émigrés to engage in public political activity (provided it did not interfere in French internal affairs) and allowed self-employed businesspeople and artisans, academics, and journalists to work. However, refugees were seldom granted work permits owing to the difficult economic situation. French policy toward accepting refugees from Germany changed gradually in light of their rapidly rising numbers. As early as the second half of 1933, it was virtually impossible for new arrivals to stay in the country with a longer-term perspective.⁴² Further restrictions on issuing and renewing *cartes d'identité* were introduced when France experienced a wave of antisemitic and xenophobic actions in the course of a scandal involving financial fraud, and the ruling Radical-Socialist Party was replaced by a government of national unity under the leadership of the conservative Gaston Doumergue in February 1934. The regulations were tightened again in autumn 1934 after the French foreign minister and the Yugoslav king were assassinated in Marseille by Croatian nationalists who had entered France on forged German papers. This event immensely escalated xenophobia in France and, consequently, the French bureaucracy extradited émigrés from multiple countries to their persecutors. Many of those seeking refuge in France therefore traveled on to other countries, mostly to North, Central, and South America, after a time. Of the staff employed by the ISR in Paris, Franz Borkenau left for Panama and Henryk Grossmann for the US.

Eugene Anschel, his old friend from the German-Jewish Wandervogel movement, recounted in his memoirs how Kirchheimer lived in poverty in Paris:

41 On these aspects of the situation of German émigrés in France, see Vormeier (1981) and Fabian and Coulmas (1982).

42 For an overview of France's checkered policies with regard to taking in refugees between 1933 and 1940, see Badia (2002).

He was living a precarious existence. [...] He had a small room in a third-class residence hotel incongruously called 'Le Home', where I stayed with him during my visit. [...] He had friends and acquaintances among the German refugee intellectuals. Without a regular job he spent a good part of his days in the reading room of the Bibliothèque Nationale, doing work for the Institute of Social Research (Anscher 1990, 127).

Moreover, the German passport office in Paris had confiscated his German passport in 1935.⁴³ This automatically rescinded his German citizenship and made him stateless. All he had was residency papers that could be revoked at any time. He repeatedly moved from one cheap furnished room in downtown Paris to another if it was a little cheaper.⁴⁴ Any documents that might provide more information about the specific amounts paid to Kirchheimer by the ISR and the relevant time periods appear to have been lost. The institute's stipend apparently did amount to at least a minimal financial basis.⁴⁵ Kirchheimer officially enrolled as a student at the Faculté de droit of the Université de Paris in order to be able to do this work and his work for the ISR at the university libraries.⁴⁶ His personal circumstances were complicated. Although they were separated, both parents still felt responsible for their daughter Hanna. After fleeing Germany, she first lived in Paris and was enrolled at a Montessori boarding school in northern Italy in 1935.⁴⁷ A number of other German socialists and communists who were persecuted were concerned about their children's safety and enrolled them at this school. It was financed partly by the parents and partly from international solidarity funds. Hanna Kirchheimer-Grossman and her father's letters report that both parents regularly visited their daughter in Italy.⁴⁸ Otto Kirchheimer desperately sought a way out of this difficult financial, political, and family situation.

4. Schmitt as an ambitious theorist of the Third Reich

All of Schmitt's writings from 1933 to 1936 on questions of the internal order of the Nazi regime are now finally available in a single volume published in 2021 (see Schmitt 2021).

43 Letter from the German Embassy in Paris to the German Foreign Office in Berlin dated 8 November 1938. Bundesarchiv, Akten des Auswärtigen Amtes. Politisches Archiv, RZ 214, R 99744 (69. Ausbürgerungsliste, Ausbürgerungssakte betreffend Otto Kirchheimer).

44 He first lived in a room on rue Massenet, then with his wife on rue Lombards, then on rue Brancion. His last residence, in 1937, was a room of his own at 7, Square Grangé, rue de la Glacière, Paris III.

45 A letter from Neumann states that he received a monthly salary of just 2,000 French francs in 1937. Letter from Franz L. Neumann to Otto Kirchheimer dated 9 February 1937. Otto Kirchheimer Papers, Series 2, Box 1, Folder 122. – 2,000 French francs in 1937 is equivalent to roughly 450 euros in 2024.

46 Kirchheimer's *carte d'immatriculation* for the *année scolaire* 1936/37 at the Faculté de droit of the Université de Paris is owned by Hanna Kirchheimer-Grossman.

47 Conversation between Hanna Kirchheimer-Grossman and the author, 25 April 2023.

48 In his report to Franz L. Neumann, Kirchheimer wrote: "I had traveled to see my child for 10 days, I found everything to be in excellent order there, and I experienced only 2 car crashes, but nobody was injured." Letter from Otto Kirchheimer to Franz L. Neumann dated 10 March 1937. Otto Kirchheimer Papers, Series 2, Box 1, Folder 122.

Previously, interested readers had to painstakingly track down the source material scattered throughout various publications. This editorial gap in the work of Schmitt, who has often been portrayed as a “classical representative of political thought,” obfuscated his impact in the Nazi period for a long time and encouraged apologetic characterizations of his work—particularly in English-speaking countries. The complete corpus of his shorter, longer, and monographic works, numbering over sixty in total, reveals that and how Schmitt changed his linguistic style to that of Nazism over time. Throughout virtually all his publications in the early years of the new regime, Schmitt used key Nazi terms that were by no means ambivalent: On the one hand, he railed against “corrupt parliamentarism,” the “*Parteibonzen*” (derogatory term for the bosses of the democratic parties in the Weimar Republic, see Brackmann/Birkenhauer 1988, 41) in the “*degenerierte Weimarer System*” (degenerate Weimar System, *System* was a derogatory term for the Weimar Republic), the “*artfremde Geist*” (spirit/intellect [itself derogatory] foreign/alien to the *Volk*) of “*fremdrassige Rabulisten*” and “*fremdrassige Literaten*” (shysters and literati of a foreign/alien *Rasse*, in an exclusionary, antisemitic sense) who, as “demons of *Entartung*” (degeneration or decline due to biological or cultural factors; see Glossary), were “poisoning the brains” of Germans. On the other, he extolled “the voice of German blood,” purging of “*nichtarische fremdartige Elemente*” (non-Aryan elements foreign/alien to the *Volk*; *Elemente* was a contemptuous term for opponents), and “annihilation of enemies of the *Volk*”, combined with singing the praises of “our SA and SS” and the “national revolution” whose goal was the “*Gleichartigkeit* [see Glossary] of the German *Volk*,” which was to be achieved by “eliminating all *Fremdeartete*” (all those foreign/alien to the *Volk*, in an exclusionary, antisemitic sense). The words quoted here are not “ambivalent,” nor does their semantic content amount to merely tactical “concessions to Nazism” (Bendersky 2004, 23), as Joseph Bendersky in his book on Schmitt would have readers believe. This is the language of Nazism plain and simple (see Translator’s Preface and Glossary for more detail). Schmitt’s choice of words emphatically refutes the proposition often put forward in the secondary literature by Bendersky and other authors that the difference between Schmitt and Nazism was that he had not argued along the lines of biologistic racism. Moreover, new and informative studies on Schmitt’s activities are now available that make it possible to accurately reconstruct his impact and his role in the Third Reich. These studies enable scholars to more precisely map Schmitt’s position within the field of Nazi ideology production, which was by no means homogeneous.⁴⁹

Among the variety of issues that Schmitt discussed in the early years of the Nazi regime, six in particular piqued Kirchheimer’s interest during his exile in Paris.

The first is Schmitt’s characterization of the Enabling Act as the decisive “turning point of relevance in constitutional history” (Schmitt 1933a, 456) as already mentioned above. The law had transferred a measure of constituent power to the government of the Reich. In retrospect, Schmitt interpreted the Reichstag election of 5 March 1933, after which the coalition of NSDAP and DNVP was able to continue to govern, not as an optional election but as a clear plebiscite in favor of Hitler, the *Führer*. With this legitimating basis, the Enabling Act had become a “provisional constitutional act of the new Germany”

49 See Blasius (2001) and (2009), Mehring (2014a, 275–348), Neumann (2015, 303–374), and Mehring (2021).

(Schmitt 1933d, 8). Thus, the Weimar Constitution was de facto no longer in force, although officially it was (and remained so until the capitulation in 1945). Schmitt rejected all attempts “even merely to grasp today’s constitutional situation with the norms, concepts, or categories of the former *Weimarer System* or its constitution” (Schmitt 1933f, 242; “*Weimarer System*” was a derogatory term for the Weimar Republic). In contrast to his students Ernst Rudolf Huber and Ernst Forsthoff, Schmitt also argued against the idea of a new written constitution for the Third Reich. Demands like this, he asserted, were a “notion of a constitution inimical to National Socialism” (Schmitt 1934c, 27). The new constitution, he stated in his essay “Ein Jahr nationalsozialistischer Verfassungsstaat” [One year of the National Socialist constitutional state] published in early 1934, consisted of Hitler’s appointment as Chancellor of the Reich, the Enabling Act, and the laws enacted thereafter. After the NSDAP Reich Party Convention in Nuremberg of September 1935 under the propaganda motto “Party Convention of Freedom,” Schmitt added one more component: the Nuremberg Laws with their discriminatory legislation against Jews as the “constitution of freedom.” At the same time, he elevated the NSDAP to the role of “*Wächter des völkischen Heiligtums*” (custodian of the *völkisch* sanctuary) and “*Hüter der Verfassung*” [Guardian of the constitution] (Schmitt 1935a, 283).

Second, Schmitt described the transfer of power to Hitler as a political occurrence that was strictly legal. He did not devote a single word to the terrorist and illegal measures used against members of the opposition from 30 January 1933 onward. Instead, he praised the “legality of our own National Socialist state” (Schmitt 1933f, 251) dictatorship; to Schmitt, acknowledging legality had an important function in securing power because, in the machinery of a large state, belief in legality was indispensable in order to keep the complicated apparatus running. What mattered was the unimpeded “mode in which the state apparatus of civil servants and public agencies functioned” (Schmitt 1933d, 8). The constitutional construct of legality ensured the loyalty of the civil servants and the military leadership and helped gain the trust of the bourgeoisie.

A third subject was Schmitt’s fundamental programmatic reorientation from purely authoritarian statism to a constitutional construct in which the NSDAP as the only party and Hitler as the *Führer* could be positioned in their appropriate place. In his short monograph *Staat, Bewegung, Volk – Die Dreigliederung der politischen Einheit* [State, movement, Volk – the tripartite structure of political unity] of autumn 1933, Schmitt suggested the formula of “unity of the tripartite structure of state, movement, and Volk” (Schmitt 1933d, 11). He considered the NSDAP, the only party existing in Germany from 14 July 1933 on after all others had been banned, to be the “political body in which the movement [had found] its special political form” (Schmitt 1933d, 13). At this point in time, when other Nazi professors of constitutional law were conceptualizing a constitution for the Third Reich which demanded that Hitler as *Führer* of the movement would be subordinate to the state and its laws (see Stolleis 1999, 351–353), Schmitt advocated for giving the *Führer* unlimited scope for decisions and actions. Right at the beginning of the monograph, he made it absolutely clear that the will of the *Führer* had precedence over all other institutions and rules; the will of the *Führer* was “the nomos of the German Volk” (Schmitt 1933k, 69).

Fourth, Schmitt promoted a fundamental methodological revision of legal thinking. In his programmatic essay “On the Three Types of Juristic Thought” published in spring

1934, he abandoned the decisionism he had previously championed in favor of concrete-order thinking. Decisionism was outdated as a method of legal thinking, he now asserted, since it was a type of personal thinking by an individual or a group of people. In decisionism, the reason why the law applied as it did was a process of the will, more precisely, a decision that was not necessarily derived from existing rules. Schmitt also criticized the concept of normativism based on rules and statutes, by which he meant Hans Kelsen's positivist theory of pure law. The characteristics of normativism were impersonality and objectivity. Rule was to be founded on norms, not individuals. The legal concepts of normativism were general concepts. According to Schmitt, however, because they were abstract, they disregarded the concrete order of life that people experienced as reality. He described legal positivism not as an independent form of legal thinking, but as a hybrid of decisionism and normativism. Schmitt called the third basic type of legal thinking, besides decisionism and positivism, "*gesundes, konkretes Ordnungsdenken*" (concrete-order thinking corresponding to the norm of the NSDAP; see Translator's Preface and Glossary) (Schmitt 1934h, 157). It developed in suprapersonal institutions. A precondition for this was a stable normal situation, a *situation établiée*. A necessary consequence of this was that concrete orders embedded the individual in a *Gemeinschaft* (see Glossary) that was structured hierarchically and served a particular purpose. This *Gemeinschaft* also implied strict rejection of individual rights. The original source of law concerning concrete-order thinking was lived normalcy, which also took place independently of positive norms. General clauses, which had already become more important during the Weimar Republic for some areas of the law, had become the "specific method" (Schmitt 1934g, 91) of this new type of jurisprudential thinking. They were "indeterminate concepts of all kinds, references to extra-legal criteria, and notions such as common decency, good faith, reasonable and unreasonable demands, important reasons, and so on" (Schmitt 1934g, 90).

Fifth, Schmitt published on questions of criminal law and criminal legal procedure. In his *Fünf Leitsätze für die Rechtspraxis* [Five guiding principles for legal practice], which he published in July 1933 and which were also printed separately as recommendations for the courts and public prosecutor's offices, Schmitt had taken up general clauses and called for interpreting the existing laws strictly in line with the principles of Nazism. The only measure to be applied during adjudication was the views of "*bestimmtgeartete Menschen*" (people of a certain *Art*, in an exclusionary sense) (Schmitt 1933h, 55) from the Nazi movement. In his article "*Nationalsozialismus und Rechtsstaat*" [National Socialism and the *Rechtsstaat*], which was based on a lecture for the BNSDJ, he gave more depth to his deliberations on criminal law. In the introduction, he made a fundamental distinction between a *Rechtsstaat* (state based on the rule of law) and a *Gerechtigkeitsstaat* (state based on a certain idea of what is just). He explained this differentiation to his audience using an example from criminal law. The traditional liberal state based on the rule of law was committed to the principle *nulla poena sine lege* (no punishment without law). A year after the Reichstag fire, Schmitt declared the ban on ex post facto laws to be one of the "formal methods, principles, norms, and institutions" (Schmitt 1934d, 25) to which the liberal state based on the principles of the *Rechtsstaat* was bound. Conversely, the *Gerechtigkeitsstaat* of the Nazis was aiming for the "obvious substantial justice of the cause" (Schmitt 1934d, 25), which found expression in the alternative princi-

ple *nullum crime sine poena* (no crime goes unpunished). Schmitt thus openly demanded that it should be possible to prosecute even those deeds using criminal law that were not deemed punishable according to the existing laws. He believed concrete-order thinking should replace liberal normativism in this area of the law too, and that the proper Nazi education of the judiciary should replace courts being bound to the law in adjudicating cases.

Schmitt's activities in this area were not limited to developing legal theories, but also included putting them into practice. In June 1936, his mentor Hans Frank appointed him chair of an *Ausschuss für Strafverfahrensrecht, Gerichtsverfassung und Strafvollzug* (Committee for the Law of Criminal Procedure, the Constitution of the Courts, and the Penal System) newly established within the BNSDJ. Schmitt's activities for this committee were to trigger his demotion within the Nazi hierarchy a few months later. In early 1936, Schmitt had already called the law of criminal procedure a core of constitutional law in a lecture on the tasks of constitutional history. He linked this to the hypothesis that a "bourgeois-legitimizing compromise" (Schmitt 1936a, 410) between the independent judge and the public prosecutor, who was bound by directives, was reflected in the traditional law of criminal procedure. In his new function, he prepared multiple opinions and proposals for legal reforms toward a fundamental reordering of the law of criminal procedure (see Schmitt 1936b),⁵⁰ demanding that the major lines of Nazi law of criminal procedure also had to be derived from the overall constitution of *völkisch* life. And in the case of Germany, this meant the *Führerprinzip*: "the antiparliamentarian organizational principle of the Third Reich according to which Hitler ruled not within the framework of a constitution, but as the alleged personification of the will of the Volk" (Schmitz-Berning 2007, 245); his authoritative decisions were correct by definition (see Glossary). Schmitt proposed, *inter alia*, that judges were to deliver verdicts "in the name of the *Führer*" rather than "in the name of the Volk." Other suggestions he made aimed at replacing legal remedies with decisions of a political authority to be newly created and appointing an NSDAP ombudsman for legal proceedings in cases where the party considered itself to be affected by the subject of the proceedings.

Finally, Schmitt declared that the *Führer's* will should have absolute priority; he did so in reaction to what was known as the "Night of the Long Knives" of 30 June 1934. That night, Hitler had adversaries within the party, including SA commander Ernst Röhm, murdered without a trial. In total, approximately eighty-five people were killed in various places within the space of three days. The murder operation, which was illegal under prevailing criminal law, was camouflaged by propaganda claiming that a "Röhm coup" was imminent. On 3 July, the government of the Reich promulgated a law which retroactively declared the murders and further breaches of the law to be legal because they were self-defense of the state. Hitler defended his course of action before the Reichstag on 13 July by stating, among other things: "In this hour, I was responsible for the *Schicksal* [see Glossary] of the German nation and thus I was the highest judge of the German Volk."⁵¹ The murderous massacre made an extremely bad impression both in Germany and abroad.

⁵⁰ For more on Schmitt's work in this commission and his proposals, see Gruchmann (2001, 994–1002).

⁵¹ Speech by Adolf Hitler before the German Reichstag on 13 July 1933, as cited in Fest (1973, 644).

Conservative supporters of Hitler were now definitively aware that they, too, could be on one of the *Führer's* next revenge lists. In this situation, Schmitt applied a kind of pre-emptive defense on his own behalf. As the new editor of the *Deutsche Juristen-Zeitung*, he published an editorial titled "Der Führer schützt das Recht" [The *Führer* is protecting the law] on 1 August 1934. It was an "unequivocal homage to the *Führer's* crimes" (Blasius 2001, 120) cloaked in the terminology of constitutional law.

In a nutshell, Schmitt first offered a justification for the murders based purely on constitutional law: thus, Hitler had protected the unity of the authority of the state from a looming second SA revolution. But then he made his constitutional law constructs more foundational. The role of the *Führer* was not that of a "republican dictator" (Schmitt 1934e, 200) who would resign after ending a crisis; instead, a *Führer* grew organically out of the *Lebensrecht des Volkes* (right of the *Volk* to life). Hitler had identified the enemies of the state who had violated their duties of loyalty toward him. In complete agreement with Hitler's Reichstag speech, Schmitt proclaimed the will of the *Führer* to be a direct source of law. The events of the previous days had shown: "When the *Führer* directly creates law as the highest judge in the moment of danger by virtue of his being the *Führer*, he is protecting the law from the most egregious abuse." (Schmitt 1934e, 200) And he continued: "The true *Führer* is always also a judge. The role of judge flows from the role of *Führer*. Anyone who seeks to separate the two or even have them oppose each other makes the judge either a counter-*Führer* or the tool of a counter-*Führer* and seeks to turn the state upside down with the help of the judicial system" (Schmitt 1934e, 200). Schmitt's conclusion was: "In actual fact, what the *Führer* did was genuine jurisdiction. It is not subject to justice, but, rather, was the highest justice itself" (Schmitt 1934e, 200). Characterizing the *Führer* as the highest judge was an implicit criticism of the retroactive legalization of the murders through the law of 3 July, which he considered a superfluous legacy of liberalism. With his Nazi interpretation, Schmitt surpassed even Nazi practice. This far-reaching position of his was met with rejection in the Nazi state's ministerial bureaucracy, however; the only official to support him was State Secretary of the Prussian Ministry of Justice Roland Freisler (see Gruchmann 2001, 453–460), who later headed the infamous *Volksgerichtshof* (see List of German Courts). Schmitt did not say a word in his editorial about the victims of the murder operation; besides Schleicher, whom he had given legal advice for a longer period of time prior to 1933, they also included other people from the conservative milieu who were close to him, such as Edgar Jung and Ferdinand von Bredow.⁵²

Never again in his long life did Carl Schmitt write so much and give as many lectures in so short a time as in the initial years after power was handed over to Hitler. He published short monographs, articles, and legal commentaries downright obsessively in which he accompanied and legitimized the consolidation of the Nazi regime. In producing such legitimization, he was not the only German constitutional law professor to largely

52 The earlier secondary literature occasionally reflects the opinion that some wording in this article might indicate that Schmitt might have demanded that at least the murderers of Schleicher and Bredow were to be punished (see Bendersky 1983, 213–217; Koenen 1995, 612–616). This interpretation has been rejected with nuanced arguments by Mehring (2014a, 320–325) and Neumann (2015, 339–341).

welcome the new *Führer* state as if in a “creative frenzy” (Stolleis 1999, 320). What distinguished Schmitt from most of his colleagues, however, was “his intellect and his ability to formulate, which enabled him to capture the new situation in memorable formulas more rapidly and more effectively than others” (see Neumann 2015, 309).

There is a long-standing debate in the secondary literature on Schmitt about the extent to which he actually identified with all Nazi doctrines in his publicly vaunted dedication to the Nazi state or whether he was actually advocating for a political agenda of his own, an attempt that failed flagrantly due to his naivete about realpolitik—similarly to the philosopher Martin Heidegger in this regard. Representatives of the latter line of interpretation are able to rightly point out that at the end of the Weimar Republic and the beginning of the Nazi era, Schmitt was closer to the group of conservative statists than to the streams of the NSDAP that considered themselves a revolutionary movement beyond statehood. In addition, Schmitt’s connections to the conservative Catholic milieu of the Weimar Republic have been underscored in this context.⁵³ Schmitt was not a “conservative revolutionary” in the sense of resisting Nazism, but rather a conservative who was formatively influenced by the German Empire and who had volunteered to serve the Nazi revolution.

The six facets of his oeuvre mentioned above show Schmitt as an eager Nazi. The personal motives for his activities have been analyzed in the biographical literature on Schmitt multiple times and with different accentuations. Yet Schmitt’s personal motives are beside the point here. From a perspective like Kirchheimer’s, Schmitt’s impact alone was of interest, namely as an ardent and eloquent protagonist of the Nazi *Führer* state.

The fact that Schmitt quickly managed to stir up opposition among other Nazi ideologues is an integral part of his enormous public impact. When he attempted to secure the Nazi regime by means of constitutional law, it did not go down well with long-standing Nazis among his colleagues in the legal profession that he, who had only just joined the party, assumed the role of a better interpreter of Nazism, especially compared to them. For instance, he firmly rejected attempts in constitutional law to differentiate between permissible and impermissible deviations from the Weimar Constitution, which had been modified by the Enabling Act, in laws promulgated by the government of the Reich. Not only did he reject these attempts, but he also considered them to be practically acts of sabotage against Nazism (see Schmitt 1933d, 6–8). In Volker Neumann’s apt words: Schmitt “put on airs as the authentic interpreter of Nazism and handed out political grades” (Neumann 2015, 324). Neumann also pointed out that after joining the party, Schmitt used language identifying himself with the Nazis—for example, “we, the National Socialists,” “us, the National Socialists,” and “our SA and SS”—downright obnoxiously, thereby enraging the party veterans among the Nazis even more. All of this behavior of Schmitt’s made long-standing Nazis despise and envy him. Their feelings intensified even more when they saw the eloquent Schmitt, under the protection of Hermann Göring and Hans Frank, overtake them as they wrangled for positions in the Nazi state hierarchy.

53 This aspect is emphasized by Meier (1994) and Koenen (1995).

5. Kirchheimer as a theorist of democratic alternatives

Once Kirchheimer had fled to France, the German journals and magazines that had published his work in the previous five years were no longer in reach for him as author. Unlike 1919, 1933 had been a “turning point for all legal journals” (Stolleis 1999, 299) in Germany. All journals on public law experienced exceptional pressure from the Nazi regime because of their evidently political nature. The journals that continued to exist were placed under the control of the Reichsschrifttumskammer (Reich Chamber of Literature). Within a short period of time, all editors of law and sociology journals who were Jewish or politically disfavored were replaced by supporters of the Nazi regime. Social democratic, communist, and other left-wing journals and newspapers were banned in the Reich.

If he was to continue publishing and not only writing to satisfy his own academic curiosity, Kirchheimer had to find new journals. Some exiled authors, particularly journalists and writers, found opportunities to publish in the German-language exile press, primarily in Paris and Prague. Kirchheimer’s father-in-law, Kurt Rosenfeld, founded the Internationale Presseagentur gegen den Nationalsozialismus (International Press Agency against National Socialism, Inpress) in the early summer of 1933. Based in Paris and New York, Inpress was a trilingual news service that supplied international newspapers with reports from and about the German Reich.⁵⁴ Kirchheimer’s estranged wife Hilde occasionally worked there and had him write and edit news items for Inpress from time to time to supplement his income from the ISR. Arkadij Gurland also helped him find paid work. On occasion, he assisted with data collection for a *Documentation de Statistique Sociale et Economique* in Paris. In addition, he helped Gurland write articles for the business section of the weeklies published by the socialist Max Sievers and disseminated illegally in Germany.

Kirchheimer’s first publication after fleeing Germany was his essay “The Growth and the Decay of the Weimar Constitution.”⁵⁵ The article appeared in the November 1933 issue of the *Contemporary Review*, published in London. The journal was well established in English intellectual circles; its orientation in the 1920s and 1930s was leftist-liberal. Harold Laski, who taught at the London School of Economics and had granted Franz Neumann academic refuge after he had fled Germany, and who introduced Kirchheimer to George P. Gooch, the journal’s long-standing editor, occasionally published there. The article provided an overview for the British audience of the entire history of the Weimar Republic.

Kirchheimer reiterated his model of three development phases from 1919 to 1924, 1924 to 1930, and 1930 to the handover of power to Hitler’s government. The points he focused on and his assessments of individual political actors remained virtually identical to his Weimar writings. But now he put more emphasis on three aspects: the failures of fundamental political reforms in the early postwar years; the potential of the republic to be stabilized in the middle phase; and the severe impacts of the Great Depression on German domestic policy. Kirchheimer also reiterated his opinion that the Weimar Republic

54 On Inpress, see Schiller et al. (1981, 77–79) and Langkau-Alex (1989, 204–205).

55 Kirchheimer (1933c). The following page numbers refer to this text.

had essentially already come to its end with the Brüning government: “While political liberty was still alive, democracy had gone with Brüning’s coming into power” (533). A direct path had led from Brüning’s “liberal-minded dictatorship” (533) to the Nazi’s erection of a “totalitarian State” (533), which would leave no sphere of human life outside the scope of a centralized powerful government.

In order to explain the rapid political transformation to his British readership, Kirchheimer pointed out Carl Schmitt’s preeminent responsibility for providing the legal legitimation for the totalitarian regime: Schmitt had developed a doctrine according to which it was the incontrovertible destiny of every democratic system of government to lose itself in internal struggles between various groups until it was worn down to such an extent that it was replaced by a dictatorship. The political doctrines followed the course of events by constructing a new system of political thought. Kirchheimer asserted that Schmitt was crucial to the new ideological constructions. He summarized Schmitt’s theory for his British readers as follows:

Professor Carl Schmitt, who is the theorist of the Nazi Constitution just as Hugo Preuß was the theorist of the Weimar Constitution, developed a doctrine of the totalitarian state amalgamating the ideas of its being the necessary and the ideal goal of historical evolution (533).

When mentioning Preuß’s name, Kirchheimer was alluding to the programmatic ceremonial lecture Schmitt held in January 1930, which Kirchheimer had attended. Preuß had been a left-liberal politician and bourgeois Jewish scholar whom Schmitt had revered as the father of the Weimar Constitution in this lecture (see Schmitt 1930c). Kirchheimer stated that Schmitt’s “sympathy with the totalitarian idea was so formal and general in nature that it equally favoured the Bolshevik and Fascist forms of government” (533). He only sided with the Nazis after it was obvious that they had come to power. With these words, Kirchheimer implied that Schmitt might well have sided with the communists if they had come into power. In any case, he described him as an opportunist who would have sided with any totalitarian dictatorship.

Kirchheimer also made a distinction between Schmitt as “nothing but a political theorist” and Schmitt as “a Nazi partisan and official framer of Nazi constitutional laws” (534). He obviously took pleasure in using Schmitt’s vocabulary to support leftists’ paths of resistance against the Nazi regime, which he supported. In his former role as a political theorist, Schmitt had interpreted the “totalitarian idea” in a way that would “justify even the fiercest enemies of his actual party” (534). In Schmitt’s political theory, any form of government that emphasized its own power and advocated for dominance of the state over all other social forces could be considered to be totalitarian. The conclusion Kirchheimer drew from such a broad way of defining the totalitarian state was opposed to Schmitt’s. The concept of a totalitarian state “might even be true of a democracy, leaving a reasonable sphere of political freedom to the individual” (534). To Kirchheimer, the fact that it was possible to interpret the idea of the totalitarian state in a diametrically opposed way demonstrated once again that the totalitarian idea did “not represent any substantial political conception at all” (534).

This raises the question as to the genuine contribution of Nazism to German political theory. Kirchheimer thought it was an attempt to base all government institutions on a theory of *Rasse*. The Nazi concept of a *Blutgemeinschaft* (*Gemeinschaft* founded on *Blut*; see Glossary) was closely connected to the concept of the *Führer*, via a “primitive conception of giving obedience and receiving protection” (534). Kirchheimer called both the theory of the *Führer* and the references to the German *Volk* in Schmitt’s Nazi writings an expression of “primitivity of thought” (534). This type of political and legal thought would turn German society into a place with convictions once held by prehistoric tribal societies and of feudal and religious communities of the Middle Ages.

Over the following two years, Kirchheimer wrote three articles about three different subjects: constitutional courts, the problem of sovereignty, and the role of municipalities within the state. All three subjects had also been taken up by Schmitt, either during the Weimar Republic or in his role as legal commentator for the Nazi regime on the six issues mentioned above. In all three cases, Kirchheimer wrote in a kind of internal dialogue with Schmitt, sometimes mentioning his name and sometimes omitting it. In all three cases, he attacked Schmitt’s positions and contributed to the analysis and the theory of democratic alternatives to the totalitarian state. Specifically, these articles address the Supreme Court of the United States, the theory of sovereignty, and the role of municipalities within the French state. These subjects themselves contain references to Schmitt’s writings.

The first article dealt with the role of the Supreme Court in the United States. Kirchheimer had already mentioned it several times in his Weimar writings. At the time, he had had a negative view of the Supreme Court and had blamed it for policies against the interests of the working class. In 1932, he had even provided Schmitt with references to works by leftist critics of the Supreme Court.⁵⁶ Schmitt had rejected proposals to establish a constitutional court in Germany because it would not create a juridification of politics, but rather a politicization of the judiciary. From 1933 on, he believed such proposals for political reform were no longer an issue. Constitutional jurisdiction, he wrote in his commentary on the *Reichsstatthaltergesetz* (Reich Governor’s Law) of April 1933, was “no longer of interest” (Schmitt 1933g, 26) because the *Führer* was now the only source of law in the German Reich.

Kirchheimer’s new contribution to this debate was his essay “Zur Geschichte des Obersten Gerichtshofes der Vereinigten Staaten von Amerika” [On the history of the Supreme Court of the United States of America]. This was obviously part of a plan he had mentioned to Smend in a letter in October 1933 to collect material for a comprehensive study of “comparative democratic constitutional law.”⁵⁷ The essay was published in late 1934 in issue 3 of *Zeitschrift für Öffentliches Recht* (ZÖR). It was in fact a publication by a German émigré abroad since ZÖR was the Austrian journal of public law, established in Vienna in 1914 on Hans Kelsen’s initiative. In 1934, *International Journal* was added to its title to enable its continued distribution in the German Reich and to keep Kelsen on the editorial board. The ZÖR was the place where other German émigrés including Karl

56 See Chapter 5, p. 158.

57 Letter from Otto Kirchheimer to Rudolf Smend dated 16 October 1933. Rudolf Smend Papers, Cod. Ms. R. Smend A 441.

Loewenstein, Hugo Sinzheimer, and Helmut Plessner were able to publish their work over the next few years.

Kirchheimer wrote the article⁵⁸ as a report for German-speaking readers about the controversies in the US legal literature on the Supreme Court. He also attempted to outline his own interpretation of the history and sociology of its impact. And even though he highlighted the limits of the Supreme Court's rulings with respect to property in the US, a distinct shift in emphasis can be discerned compared with his writings on the Supreme Court from the Weimar period.⁵⁹ This change in perspective was due not least to his reading of the works of Felix Frankfurter and Charles Beard with whom he shared the fundamental methodological concern that the history of the court had to be embedded in a “sociohistorical account” (117). Kirchheimer thought that the economic structures were particularly important—here, he drew in particular on the American Marxist Louis Boudin's works on legal theory which he had recommended to Carl Schmitt in November 1932. At the same time, the article was a response to the accounts and assessments of developments in public law in the US as represented by Carl Joachim Friedrich in German-speaking countries (see Friedrich 1931).⁶⁰

Against the background of Schmitt's position and form of reasoning during the Weimar Republic, Kirchheimer's essay reads like a completely opposite approach to the subject of constitutional jurisdiction. Right at the outset, he calls for a “sociohistorical presentation” (117) in which the institution of the Supreme Court was located as “an element of all that happens in society” (119). The Court had been established after the founding of the American republic. Referring to the first decision under Chief Justice John Marshall, the famous decision *Marbury vs. Madison* of 1803, in which the Court had for the first time claimed the competence to review the constitutionality of federal laws, Kirchheimer drew the historical parallel to the case in Germany in which Schmitt had represented the Reich against the *Land of Prussia*: “In this highly political situation, Marshall was faced with the same question as, for example, the German *Staatsgerichtshof* in the conflict concerning Prussia in 1932” (122). In Germany, the *Staatsgerichtshof* had failed. But not the Supreme Court. From the beginning, it viewed itself as a powerful political institution and spent considerable energy establishing and defending itself as such. Kirchheimer outlined the history of the Supreme Court in a phase model. In the first phase, the majority of its decisions favored the seigneurial aristocracy of the large Southern plantation owners. Around 1830, the Court took a turn to “competitive capitalism” (124). Kirchheimer emphasized that the Supreme Court had increasingly intervened in the social conflicts of the day, above all in the conflicts of interest between capital and labor. In a number of decisions about the right to unionize, limitations on working hours, and income tax provisions, the Court took clear positions favoring capital.

58 See Kirchheimer (1934a). The following page numbers refer to this text.

59 In his essays on property rights and expropriation, Kirchheimer described the jurisprudence of the Supreme Court as serving exclusively capitalist interests (see Kirchheimer 1930b, 339–340 and Chapter 3 in the present book).

60 On Friedrich's crucial role interpreting the political system of the US for German readers, see Lietzmann (1999).

Kirchheimer attributed a further transformation of the Court's jurisprudence in the early twentieth century to two factors. First, the tough intransigence with which Justices Oliver Wendell Holmes and Louis Brandeis worded their dissenting opinions for many years. Kirchheimer considered these dissenting opinions to be in stark contrast to how things worked in the courts of the Weimar Republic. Whereas the German courts acted as if they were nonpartisan actors, the fact that dissenting opinions were published in the US showed that its Supreme Court did not consider itself the sole guardian of the constitution but, rather, as part of a political process and open to future revisions of opinion. The second decisive factor for the transformation of jurisprudence was the "pressure of mass democratic movements" (128) during the presidencies of Theodore Roosevelt and Woodrow Wilson. It was because of this public pressure that, in contrast to its previous interpretations of the law, the Court had seen itself forced to rule that a larger number of social policy measures were in line with the constitution. Kirchheimer sharply criticized the Court's more recent rulings since they eliminated much of the legal basis for Theodore Roosevelt's government's stabilization measures.

Nonetheless, Kirchheimer concluded his article with cautious optimism. Arguing against Carl Joachim Friedrich, he stated that it would be a mistake to tie the Supreme Court's jurisprudence to certain values long term. This view was also misguided "because it involved a certain overestimation of the opportunities of a court to influence the course of political events" (131). Instead, Kirchheimer trusted that the Supreme Court would let most of the reform laws Franklin D. Roosevelt was planning stand if political pressure were exerted, as had been the case in the Wilson era. There was only one instance where Kirchheimer expected that the Court would not change course: the protection of private property would continue to take the "most outstanding position" (131) in the future.

Although Kirchheimer did not come to an overall conclusion about the Supreme Court's decisions at the end of his article, it is clear that he shared Kelsen's position in the controversy between the latter and Schmitt. For one thing, he emphasized that the Court had essentially become a protective wall against "individual state laws' reign of terror against the freedom of opinion" (130). And for another, he thought that the decisions of the Court that he criticized sharply in substantive terms could in principle be revised by mobilizing mass democracy for a "welfare state" (131) and recruiting new judges. Kirchheimer was remarkably accurate in his assessment of the Supreme Court's future jurisprudence. The "four horsemen," as the group of four conservative justices was called, continued to block Roosevelt's policies up until 1937, when the Court, under public pressure and in a different composition, allowed much of the New Deal reform agenda to stand. From 1939 onward, Harvard professor Felix Frankfurter was one of the new justices. And it was Frankfurter from whom Kirchheimer received a letter concurring with his article in October 1934. Frankfurter praised his knowledgeable and deep insights into the US Supreme Court, but corrected him on one point: "In time I ought to say however that you are a prophet rather than a historian in saying that the Supreme Court has already sustained the Roosevelt legislation. Not yet."⁶¹

61 Letter from Felix Frankfurter to Otto Kirchheimer dated 12 October 1934. A copy of the letter is in the files that the London AAC left to the EC in New York. Emergency Committee in Aid of Displaced

The second subject Kirchheimer examined had also been of intense interest to Schmitt in his Weimar writings: namely, the problem of sovereignty. His article “*Remarques sur la théorie de la souveraineté nationale en Allemagne et en France*” [Remarks on the theory of national sovereignty in Germany and France] appeared in French in 1934 and again took a comparative view.⁶² It was published in the journal *Archives de Philosophie du droit et de Sociologie juridique* [Archives of legal philosophy of law and legal sociology], which had been founded only four years previously and was published in Paris up until 1939. The journal was edited at the Sorbonne and sought to combine legal, philosophical, and sociological research. The members of the journal’s international advisory board included Germans Gerhard Leibholz, Gustav Radbruch, and Hugo Sinzheimer as well as Harold Laski from the LSE. Kirchheimer compared the theories of sovereignty in the French and German legal literature from the late eighteenth century onward from the perspective of intellectual history. Regarding the changes occurring during this long period of time, he was again concerned mostly with elucidating the crucial link between economic and social developments on the one hand and their political and legal implications on the other.

Kirchheimer emphasized the self-confident victory of the French bourgeoisie in the late eighteenth century, citing Emmanuel Joseph Sieyès’s theory of *souveraineté nationale*. In the course of the nineteenth century, the bourgeoisie had even succeeded in winning over the rural population who identified with the concept of the nation. Yet, according to Kirchheimer, not long after the victory of democratic sovereignty of the nation, the bourgeoisie in France had begun its constant struggle against this sovereignty and had begun to demand security privileges for its class. He identified this “contradiction between bourgeoisie and nation” (137) in the political theories of scholars ranging from François Guizot to Ernest Renan and noted that its formative power still persisted in contemporary France. Overall, however, he painted a positive picture of the French bourgeoisie in the nineteenth century. But, Kirchheimer alleged, this conflict had been intensified in recent years, and he expressed serious doubts about the stability of the French bourgeoisie’s democratic tradition. As evidence of his concern, he referred to Maurice Hauriou’s statement that the individualistic tendencies in France were becoming stronger, for which reason a national consciousness drawing clear boundaries to the external world was becoming increasingly important as a factor for integration; a view shared by Schmitt. Kirchheimer stated that such a position retracted the “democratic conception of sovereignty” (140) in favor of the propagandist establishment of a “front against the foreigner” (140). He insisted on defending the democratic conception of sovereignty against such tendencies of no longer defining the French nation with reference to the ideals of the French Revolution but, instead, through antisemitism and xenophobia, yet he refrained from making a prognosis.

Kirchheimer described the development in Germany to his French-language readers by clearly contrasting it to France. He called the history of the German bourgeoisie in the nineteenth century nothing but a disaster. The major theoretical designs of Georg

German/Foreign Scholars, New York Public Library, New York. I, A Grantees, 1933–46, Box 18, Folder 13 (Kirchheimer, Otto).

62 See Kirchheimer (1934c). The following page numbers refer to this text.

Wilhelm Friedrich Hegel, Friedrich Julius Stahl, and even Lorenz von Stein lacked the vigor that would have been necessary to finish off the concept of absolute monarchy. Concerning the legal debates during the Weimar Republic, Kirchheimer went into Hans Kelsen and Carl Schmitt in more detail. Kelsen had no problem abolishing sovereignty. Sovereignty did not exist, he claimed, but, rather, only legal mechanisms of attribution. At the end of these, basic rules were to be found that existed in international law, not in the constitutional law of individual countries. Following Heller—but not Schmitt—Kirchheimer criticized Kelsen for artificially separating the study of law from social reality and asserted that this separation disregarded the personal factor of government. Quoting Soviet legal theoretician Evgeny Pashukanis, he called Kelsen's approach “a kind of mathematics of the cultural sciences” which was, under the current political circumstances, damned to “remain pure theory forever” (147).

His sharpest words, however, were directed at Schmitt. Despite his emphasis on sovereignty, Schmitt's contribution to legal theory had failed because he “never made the effort to postulate a theory of sovereignty in the context of the Weimar Republic” (148). Kirchheimer went on to examine Schmitt's decisionism. Schmitt's move away from decisionism to “concrete-order thinking” had not yet been published, and Kirchheimer had not yet been able to read the new foreword to Schmitt's *Political Theology* of November 1933 in which he had announced this revision. Quoting Schmitt's famous first sentence of *Political Theology* from 1922, that “[s]overeign is he who decides on the exception,” Kirchheimer accused Schmitt of using his theory of sovereignty to justify “the victor of the civil war” (148). Schmitt had never attempted to place his theory of sovereignty within the framework of the Weimar Constitution. This failure was “telling” (148), and Kirchheimer saw a somewhat practical reason for it: “Carl Schmitt has always represented the interests of all the powerful social and economic groups that never banked on using democratic reasons to justify their actual power, and he still does so today” (148). These groups could only be satisfied with a theory like Schmitt's that ascribed sovereignty to those actually in power to the exclusion of the traditional established democratic wording of the constitution. The decay of social order in Germany in the course of the economic crisis of the late 1920s lent this theory a semblance of justification.

Ultimately, Kirchheimer considered the changes to the “structure of capitalism” (148) to be causes for the current desire for a strong decision-making authority. Ever since Jean Bodin's day, sovereignty had been seen as the supreme legislative power. A type of legislation limited to a few general laws had been appropriate for the capitalism of the nineteenth century. The capitalism of the twentieth century, however, required the state to intervene in the economic and social realms on a daily basis. This form of regulation could not be achieved by general legislation alone but, rather, increasingly required decisions made on a case-by-case basis. In the fascist Germany of the day and in the writings of Schmitt, Forsthoff, and Koellreutter, this need on the part of the business community was met by means of general clauses. These economic interests were opposed to those of other social groups, in particular those of the “working class” (50). For this reason, their justification for sovereignty could not be a democratic one. The gap in justification was filled by the fascist theory of sovereignty with its return to its transcendent stance—except that the God-given king was now replaced by the concepts of the *Führer*, *Blut*, and *Rasse*. To illustrate his point, Kirchheimer quoted from works by Otto Koellreutter, Hans

Julius Wolf, and Carl Schmitt—and did not refrain from commenting in a footnote that Koellreutter had accused Schmitt's piece *Staat, Bewegung, Volk* of obvious "cynicism" (151).

The third subject of Kirchheimer's research during his exile in Paris was the municipal constitution and the role of municipalities within the state. Schmitt had also discussed this subject during the Weimar Republic and even in a leading role in the legislative process in the early stage of the Nazi regime. Unlike Schmitt, Kirchheimer took a comparative legal perspective on this subject, and he had democratic and socialist intentions. He began to write a paper titled "Die wirtschaftliche Betätigung der französischen Gemeinden und die Rechtsprechung des *Conseil d'État*" [The economic activity of French municipalities and the decisions of the *Conseil d'État*]. This was not published at the time. The essay survived in manuscript form—publication during Kirchheimer's lifetime has not been established to date.⁶³ References in the text indicate that it was completed in the spring of 1936. The original text, found among Kirchheimer's papers after his death, is the complete 12-page typescript with a few handwritten corrections he made. The fact that Kirchheimer attempted to have this essay published is evidenced by a number of letters. For example, Franz Neumann reported to him from New York in February 1937 that he had forwarded the manuscript to Felix Frankfurter as agreed.⁶⁴ In March 1937, Kirchheimer stated again that he, too, would seek an opportunity for its publication.⁶⁵

In his manuscript, Kirchheimer discussed the role of the *Conseil d'État* as a constitutional court for deciding questions of municipal law.⁶⁶ Taking up the municipalities' economic activities, he focused on an issue he had already discussed in various contributions during the Weimar Republic: whether and to what extent municipalities should have the right to run businesses. Like many other social democrats, Kirchheimer, too, considered municipal enterprises as a way to stand up to the capitalist private economic system.

As in Germany—Schmitt had sharply criticized this during the Weimar Republic as an attack by society on the sphere of the state—municipalities' economic activity had seen a considerable upswing in France, too. Kirchheimer argued, however, that the legal basis for this development in France had remained unclear. The proponents of municipal socialism referred to a parliamentary law from 1884, whereas the advocates of

63 The text was first published in 2018 in Volume 2 of Kirchheimer's collected works. See Kirchheimer (1936a). The following page numbers refer to this text.

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

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

66 The French *Conseil d'État* as an institution goes back to Napoleon, who established it in December 1799 following his coup. As a council of the state, it partly also exercised functions of the cabinet, but over the course of the nineteenth century, its actions were limited entirely to the field of legal policy. Unlike the US Supreme Court, it had a dual function in this role. First, it functioned as the supreme administrative court, thereby growing into the role of a constitutional court. It also consulted the government in legislative matters, taking on the role of a justice ministry that reviewed bills presented by other ministries. These two functions of the *Conseil d'État*, which had evolved over time, were defined more precisely by an act of parliament in 1872.

privatizing public enterprises and services invoked laws dating back to 1791. In this article, Kirchheimer first explained how the *Conseil d'État* had sided with the opponents of municipalities' economic activities in its jurisprudence. Taking advantage of the competencies it had attained through the Enabling Act adopted in the course of the French financial crisis of August 1926, the government of French President Raymond Poincaré had amended the 1884 law, thereby expanding the competency of municipalities to undertake economic activities. Referring to various rulings, Kirchheimer described how the *Conseil d'État* had acted toward the new legislation from the 1920s onward and explained that it "openly oppose[d] the will of the legislature" (185). He accused the *Conseil d'État* of "upholding the principles of the individualistic economic order" (186) one-sidedly and also of maintaining a "fundamental claim to control" (188) over municipal economic activities. Kirchheimer argued that it needed to "find its way back to the French tradition of unconditionally applying legally adopted laws and decrees" (190) instead of exercising "a veiled control 'of first principles' by interpreting the text" (190).

In other words, the *Conseil d'État* should finally clear the way for the municipalities' increased economic activity in the areas of public services and municipal housing. This program proposed by Kirchheimer was precisely the opposite of the municipal constitution of the Nazi Reich prepared by Schmitt.

6. Conclusion: Distant reading

The months between February and June 1933 were crucial for both Kirchheimer and Schmitt. After Hitler took office, after the Reichstag fire, after the Enabling Act, after the Reich Governor's Law, after the Law for the Restoration of the Professional Civil Service, and even after the Law on Attorneys that excluded "non-Aryan" lawyers from the bar, Kirchheimer still stayed in Germany, hoping that Hitler's government would soon collapse. Only after his three days in prison did he decide to flee to Paris in early June.

Like Kirchheimer, Schmitt was not sure initially whether Hitler's government would stay in power. For a few weeks, he hesitated to take a clear political position in public. But when the Enabling Act of 24 March 1933 convinced him that the new dictatorship would become stable, he decided to support it. In the secondary literature about Schmitt, scholars are still puzzling over the reasons why he associated himself with the Nazi regime. Reinhard Mehring even prepared a list of forty-two potential explanations in his biography (see Mehring 2014a, 282–284). The hypothesis proposed by some of Schmitt's critics between the 1950s and 1980s that his decision to support the *Führer* state could be traced all the way back to his Weimar writings⁶⁷ has not prevailed in the research as a whole. Schmitt in turn claimed after 1945 that he had collaborated because as a professional jurist, he had had to position himself on the foundation of the new legal facts in a positivist manner after the adoption of the Enabling Act: "For me as a jurist, as a positivist, a com-

67 For the German discussion at the time, see most prominently Fijalkowski (1958) and Sontheimer (1962).

pletely new situation began, of course, [with the Enabling Act].”⁶⁸ This wording suggests that he had internally maintained his distance from the brutal regime, was forced to collaborate, and had attempted to prevent the worst. His narrative was echoed and intensified in a number of publications, not only by right-wing German intellectuals such as Helmut Quaritsch and Günter Maschke, but also in the first two major books in English on Schmitt, by George Schwab and Joseph Bendersky.⁶⁹ Their apologetic narratives about Schmitt’s involvement in the Nazi regime can still be seen in the English-language literature on Schmitt to this day.

A different picture of Schmitt’s role in the consolidation phase of the Nazi regime emerges if we attempt to observe it from the perspective of an opponent of the regime who was forced into exile like Otto Kirchheimer. From that distant perspective, it becomes pointless to try to identify the specific personal motives for Schmitt’s involvement in Nazi Germany, some of which can perhaps be understood only at an individual psychological level. Kirchheimer disregarded Schmitt’s personal motives. He was not interested in whether or not Schmitt may have had second thoughts or his own political plans when he supported the regime, for example, trying to push events in a certain direction. Instead, Kirchheimer focused solely on a sober analysis of Schmitt’s actions and functions in the new regime. It was from such a distant perspective that Kirchheimer was the first person to identify Schmitt as *the “theorist of the Nazi Constitution”* in 1933.

We can only speculate as to whether Schmitt had Kirchheimer in mind when he said that the emigrants “have been spit out of Germany for all time” or when he stated that the emigrants “never belonged to the German *Volk*” and “not to the German spirit either” (Schmitt 1933c, 32). Schmitt criticized legal positivism as well as the insistence on the validity of liberal fundamental rights from the perspective of his *“gesundes, konkretes Ordnungsdenken”* (concrete-order thinking corresponding to the norm of the NSDAP; see Translator’s Preface and Glossary). It was a form of thinking in categories of suprapersonal collectivities. Schmitt asserted that the normative source of laws was what was known as lived normalcy, which took place independently of positive norms. Consequently, general clauses became the specific method of this new type of jurisprudential thinking. In Schmitt’s view, this specific kind of German juridical thinking was inaccessible for legal experts who were not part of the German *Volk*. It did not make sense to start a discussion with them. They were foreign to what the Nazis called the German spirit, and they would remain in this external position forever. They were strangers who could only think in non-German juridical ways. Thus, Schmitt’s mode of argumentation in dealing with those who were forced into exile can be characterized as a racism-based critique of ideology.

From his exile, Kirchheimer pursued his criticism of Schmitt in a different form of critique of ideology. He considered changes in the structure of capitalisms to be the main cause for the desire in Germany for an authoritarian political order and accused Schmitt

68 Schmitt in a 1971 conversation with Klaus Figge and Dieter Groh (Hertweck and Kisoudis 2010, 91).—This surprising self-description as a positivist, however, is not consistent with the fact that, in a radio interview on 1 February 1933, Schmitt again criticized legal positivism strongly (see Schmitt 1975, 114).

69 See Schwab (1970) and Bendersky (1983).

of using his theory of sovereignty to justify the victor of the civil war. Kirchheimer stated that Schmitt had already represented the interests of all the powerful social and economic groups in society during the Weimar Republic and was now doing so again under Nazi rule. Schmitt's theories of sovereignty and German legal thought as well as his rejection of the *Rechtsstaat*, constitutional courts, and municipal self-governance fulfilled the ideological function of justifying the rule of a small group of power holders in society. In his critique of Schmitt, Kirchheimer practiced a Marxist mode of critique of ideology. At the same time, he turned his academic interest to Western democracies, France and the United States in particular. Some traces of Marxist critique of ideology can be found in these studies, too, but they are overshadowed by detailed descriptions and thoughtful political analyses. In these works, Kirchheimer implemented what he had described as Schmitt's primary shortcoming in his critique authored together with Nathan Leites in late 1932: the empirical analysis of political institutions and political processes. In his articles and manuscripts written in Paris, his approach had begun to shift from pure legal and political theory to the inclusion of empirical political science.