

## Chapter 9: From Leviathan to Behemoth (1938–1942)

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The year 1937 had seen both Schmitt and Kirchheimer begin new phases of their oeuvres. Suddenly degraded to the level of an average Nazi jurist, Schmitt sought out new and more anodyne subject areas in which he could distinguish himself in Nazi Germany. Besides international law—which will be discussed in Chapters 11 and 12—he focused on intellectual history and revised his previous interpretation of Thomas Hobbes's *Leviathan* in the process. In his 1938 book on Hobbes, Schmitt now saw him as unintentionally foreshadowing the liberal notion of the rule of law. He accused Hobbes of being misguided in drawing on Leviathan, the sea serpent from the Old Testament, as a myth because it could not prevail over the other biblical beast, the Behemoth, which symbolized rebellion and state collapse.

Kirchheimer, too, broadened the scope of his work. He was forced to do so simply because it was his only means of continuing to receive financing through Horkheimer's Institute of Social Research (ISR) in New York with the vague prospect of obtaining a position in the American academic system. Kirchheimer's studies in criminology account for the largest segment of this broader field of work. In his 1939 book *Punishment and Social Structure*, he briefly mentioned Hobbes in the context of intellectual history, and, like Schmitt, as a precursor of liberal thought. Kirchheimer linked this reference to the empirical question as to the remaining legal protection of the individual under the Nazi regime. He also expanded the liberal idea of protection by reformulating it as the question of social protection of individuals and the obligations of state economic and social policy that this entailed.

In this chapter, the mythical images of Leviathan and Behemoth in Hobbes's theory of the state symbolize four aspects in the works of Schmitt and Kirchheimer between 1937 and 1943: first, the changing role of Hobbes's *Leviathan* as the successful founder of the theory of the authoritarian state in Schmitt's work; second, the Behemoth as a symbol for Kirchheimer's empirical studies on the practice of criminal law under the Nazi regime; third, Schmitt's critique of the *Leviathan* in his search for a more suitable mythical concept to describe a political order engendering and maintaining unity; fourth, Kirch-

heimer's theoretical conclusions from his empirical analyses of the Nazi system that became part of Franz L. Neumann's seminal book *Behemoth* in 1942.

To Schmitt, Behemoth was a symbol of the pluralistic powers of a society destroying the uniform state. To Neumann and Kirchheimer, it symbolized the anarchical struggle for power playing out in the Nazi regime under the ideological mantle of state unity. Finally, it was Kirchheimer more than Schmitt who considered the return of Leviathan, steeped in liberalism, to be a desirable option.

## 1. Kirchheimer's early studies in criminology

The monstrous character of any dictatorial regime is reflected in its criminal policy and the way it treats prisoners. Otto Kirchheimer's studies on criminology included an investigation of this. Compared to other subjects, criminology played a lesser role in his Paris exile initially. He then expanded his studies in criminal law into empirical research on crimes and criminals. Kirchheimer published his first article on criminology in the September 1936 issue of the *Revue de science criminelle et de droit pénale comparé* (RSC). Focusing on reform policy, the journal was not established until the beginning of 1936 and was co-published by the Institut de criminologie (Institute of Criminology) and the Institut de droit comparé (Institute of Comparative Law) of the University of Paris. Kirchheimer wrote this first article, "Remarques sur la statistique criminelle de la France d'après-guerre" (see Kirchheimer 1936b),<sup>1</sup> in French.

In his article, Kirchheimer developed the hypothesis, inspired by Marxism, that there was a clear causal link between the special features of a society's social order and both the crime and the policy toward crime in that society. He used methods of empirical social research to prove his hypothesis. His argument against traditional legal scholarship was that the most recent experiences in the area of policy toward crime showed that the impact of laws and penal reforms on actual crime were overestimated beyond all measure. Kirchheimer also rejected the view championed by a "renowned German criminologist" (101), the Nazi Edmund Mezger, in the 1934 first edition of his textbook *Kriminalpolitik auf kriminologischer Grundlage* [Policy toward crime on a criminological foundation] that hereditary predispositions and individual weaknesses of will were the only factors determining criminal behavior (see Mezger 1934).<sup>2</sup> He positioned his "sociological hypothesis" (83) as an explanatory model to counter both points of view.

Kirchheimer used an abundance of figures and tables based on official French crime statistics data as well as criminological literature about France, the UK, the US, Poland, Switzerland, Austria, and Germany to support his arguments. He found confirmation of his "sociological hypothesis" for France concerning the frequency of the widespread criminal offenses of vagrancy and theft, which reflected "the changes in the economic conditions almost without fail" (85). Comparisons of the fluctuations in the frequency

<sup>1</sup> The following page numbers refer to this article.

<sup>2</sup> Kirchheimer misspelled Mezger's name as "Metzger" throughout the article, a very telling mistake in light of the fact that he had held the chair of Nazi criminal law in Munich from 1932 on (*Metzger* is the German word for butcher). On Mezger's work for the Nazi regime, see Thulfaut (2000).

of the prosecuted vagrancy offenses with the unemployment rates and the development of real wages—he prepared complex calculations specifically for this purpose—showed that they clearly correlated with one another. The reason he identified to explain why theft was the most listed crime in French statistics was that offenses committed by the lower social classes in France were apparently prosecuted more vigorously than fraud and forgery offenses committed by members of the upper classes.

What demands for improving legal policy did Kirchheimer believe could be deduced from these findings? He answered this question with an analysis of the *correctionnalisation* which had entered into force in France in March 1932. It was a legal reform replacing jury courts that also involved legal laypersons, with criminal courts consisting of three professional judges. He noted similar shifts in responsibility in other European countries, too, such as the Emminger amendments of 1924 in Germany. In France, the administration of justice was also reorganized. The latter resulted in significant declines both in acquittals and in convictions acknowledging attenuating circumstances. In other words, both cases amounted to more stringent punishments issued by professional jurists. Lay judges generally adjudicated cases more sympathetically.

Kirchheimer concluded that France needed far-reaching social changes. Considering the ongoing economic crisis, he thought that French society was in danger of “destroying the function of criminal law to protect its own society in the long run” (116). He described two ways to create alternatives to this rampant loss of security. One was the path taken at the time in several authoritarian and fascist regimes such as that in Germany. It consisted of continuing to “destroy the procedural guarantees” (116) of the defendants, combined with hoping for deterrence. Kirchheimer thought this path had little prospect for success, simply in view of current crime statistics. Conversely, he considered minimizing the social disparities characterizing French criminal law at the time to be the “only effective way” (116) to improve the situation. This included granting better rights to defendants under French procedural law. But, above all, it also included an economic and social policy reducing the social disparities in society. Only in this way “can one hope [to rescue] the liberal procedural system, one of the most noble features of the past epoch” (116) from the attacks of the representatives of a repressive and authoritarian policy.

After relocating to New York, Kirchheimer systematically continued to pursue the criminological research he had begun in Paris; its aim was to create security for individuals and society. Besides a few reviews of new books in criminology, his next major contribution to the field was his article “Recent Trends in German Treatment of Juvenile Delinquency”<sup>3</sup> in which he combined his knowledge of criminal law in Nazi Germany and his newly acquired competence in empirical criminology. He presumably wrote part of the article—or rather a draft in German or French—while he was still in Paris, with the aim of continuing and fleshing out “Remarques sur la statistique criminelle de la France d’après-guerre”; in any case, this impression arises from the statistical material, ending with the figures for 1936. In contrast, the legal sources he quoted date up until May 1938, which supports the assumption that he did most of the legal work in the first few months after arriving in New York. The article was published in the September issue of the *Journal of Criminal Law and Criminology*, the leading journal of criminology in the US at the time.

3 See Kirchheimer (1938a). The following page numbers refer to this text.

It was the first article that Kirchheimer was able to place in a US journal after relocating there.

Kirchheimer relied primarily on German sources for this article. He first described the legal situation, including the reformed juvenile criminal law which had entered into force in 1923, during the Weimar Republic, and which was the first legislation to focus on education and resocialization in dealing with juvenile offenders. The proponents of the official Nazi doctrine were up in arms about it and called for severe and uncompromising punishment of juvenile offenders. Nonetheless, “less dogmatic and less reactionary” (117) recommendations for changing juvenile criminal law prevailed after 1933. Kirchheimer stated that the draconian proposals for amending juvenile criminal law that were disseminated as propaganda after 1933 were mostly ignored in practice. Using official data, he refuted the rapid decline of juvenile crime which Hitler’s government claimed as a success. In all the years examined, the lower figures included in the official statistics were the result of amnesties for recently initiated criminal proceedings. Consequently, according to Kirchheimer’s analysis, there was no real improved protection from crime. He then meticulously evaluated the official data on punishment of juvenile offenders between 1931 and 1933 and demonstrated that although there were fewer acquittals and more prison sentences for juveniles, it was striking that imposing suspended sentences continued to be common practice.

Another subject Kirchheimer addressed was the situation of juvenile offenders behind bars. He described German jails as generally overcrowded and having dire hygienic conditions. The Nazi principles concerning execution of prison sentences were aimed at deterrence; consequently, the situation in jail was brutal. Yet Kirchheimer discovered an exception in handling juvenile offenders. The 1937 imprisonment guidelines applying to this group still referred to a responsibility for educating juvenile delinquents and leading them back to society. Kirchheimer identified the “spirit of these regulations” (123) in the provisions on sports and recreational activities for detained juveniles. These programs relied on suppressing any formation of spontaneous or stable groups. The juvenile detainees were forced into a hierarchical system of “strictly individual rewards and favors” (124). The only way for them to advance personally was through athletic achievements and proper behavior toward people ranked more highly. Vocational training in jail was not geared toward the real labor market. The training in the crafts and trades provided there was “a romantic gesture” (124) and served to keep the detained youths busy all the time rather than to prepare them for future work. As a result, juvenile offenders had few opportunities on the labor market after their release, which amounted to a new source of conflict for the regime.

Overall, Kirchheimer’s findings were ambivalent. The approach to handling juvenile offenders was “caught between the official reactionary slogans on the one hand and the honest desire of officials to save these prisons from some of the worst possible consequences of the new policy, on the other hand” (120). In 1938, Kirchheimer apparently assumed that juvenile crime in Germany would not disappear, neither through repression nor through indoctrination, but would continue to fester as a problem of stability for the Nazi regime. Therefore, he again emphasized—this time from a criminological perspective—that the Nazi regime was prone to internal conflicts.

These two articles of Kirchheimer's already display key approaches, subjects, and hypotheses of his monograph *Punishment and Social Structure* which was published in 1939. They include as the "sociological hypothesis" his explanation of criminal law, the administration of criminal justice, and the practices of punishment, which was based on theories of society. They also include a critical analysis of competing approaches for explaining crime, an analysis of comprehensive data on social statistics and crime, and the comparative perspective on other epochs and countries. Finally, they include embedding current tendencies in criminal law in a critical analysis of capitalism as well as an argument for reforms in society and legal policy in order to generate security for individuals on the path to creating security for society.

## 2. Thomas Hobbes and the authoritarian state in Schmitt's Weimar works

In contrast to Kirchheimer, Schmitt turned further away from empirical questions and devoted himself to speculative areas of intellectual history. His 1938 book about Thomas Hobbes's mythical image of the Leviathan was the first major fruit of this pursuit. Schmitt had expressed his thoughts on Hobbes several times after World War I and returned to this subject in 1937 after a hiatus of multiple years.<sup>4</sup> Although he did not undertake extensive and original research on Hobbes during the Weimar Republic, he contributed brief and pointed interpretations to the renewed debate about him in Germany. Viewing his pre-1933 images of Hobbes is worthwhile not least because it makes the contrast marked by his 1938 book even more distinct.

Hobbes's theory of the state had increasingly engaged political theory and social philosophy in Germany from the second half of the German Empire onward. The pioneer of this new reception of Hobbes was sociologist Ferdinand Tönnies, the "founder of Hobbes studies in Germany" (Mastnak 2015, 968). Schmitt had been in contact with Tönnies in 1930 about Kirchheimer's *Weimar—and What Then?*<sup>5</sup> Tönnies had edited a number of Hobbes's works that were not known in German-speaking countries at the time and then, in his book *Thomas Hobbes. Leben und Werk* [Thomas Hobbes. Life and work] (see Tönnies 1925), first published in 1896, Tönnies presented Hobbes as a political thinker of the modern period. His book was of fundamental importance to the German discussion about Hobbes. Revised editions of the book, published in 1912 and 1925, laid the ground for a reception of Hobbes during the Weimar Republic that was to take different directions during a very short period of time. Suddenly, representatives of ideological streams across the board from socialist and radical democratic to liberal to right-wing authoritarian positions viewed Hobbes as compatible with their own political ideas.

The new line of interpretation leading to liberalism was launched by Tönnies and underscored by Leo Strauss and others, with different emphases, from 1930 on (see Strauss 1930). In the social democratic milieu that Kirchheimer considered his political home, it was Hermann Heller who claimed Hobbes from a leftist perspective for his theory of

<sup>4</sup> On Schmitt's changing interpretations of the works of Thomas Hobbes, see Rumpf (1972), Voigt (2009), and McCormick (1994) and (2016).

<sup>5</sup> See Chapter 3, p. 85.

a strong democratic state capable of enforcing social reform (see Henkel 2011, 362–365). Heller referred to Hobbes for his own definition of the state as a unit unifying a heterogeneous society. He also drew on Hobbes in his definition of democracy as a form of rule in which “the people as a unity rule over the people as a multiplicity. And through which the people as a unity become the sovereign person” (Heller 1927, 108). Of the Marxist social philosophers of the Frankfurt School, Max Horkheimer and Franz Borkenau supported Hobbes’s theory of the state with an ideological critical perspective of the democratic interpretation or continuation of its “explosive historical dialectics.”<sup>6</sup>

Schmitt took a different position and changed his view a number of times. In his 1919 book *Political Romanticism*, he had called both Hobbes and Descartes prototypical representatives of an “abstract rationalism” and “mechanistic world view” (Schmitt 1919, 80). Two years later, in *Dictatorship*, he presented Hobbes as the theorist who had argued with absolute clarity that there was no law outside or overriding the state. The logical consequence of the original role of the state to create laws was that “the state cannot do any wrong” (Schmitt 1921, 16).<sup>7</sup> Only the sovereign had the power to define what was useful and what was detrimental to the state. Since people’s actions were motivated by their understanding of good and evil, or of gain and loss, the sovereign “also [had to] have the decisive power over the opinion of the people” (17). For Schmitt, it was the logical result of Hobbes’ reasoning that “no private conscience exists in a state” (17) and that not only did all citizens have to obey the laws of the state but this also had to be their highest moral obligation. Following this line of interpretation, Hobbes’s state as a political unit was “by constitution, essentially a dictatorship” (17). Here, Schmitt deviated blatantly from Tönnies’s interpretation of Hobbes—which had become predominant—as a precursor, perhaps even the first representative of liberalism. But Schmitt did agree with Tönnies on another point: Tönnies was correct in observing that, compared to other works by Hobbes such as *De Cive*, “Leviathan is a political treatise more than one about natural law” (234). Seventeen years later, Schmitt was to focus on the distinction between the degree of persuasion through argumentation and the actual impact of Hobbes’s theory of the state in his book on Hobbes.

In his *Political Theology*, first published in 1922, Schmitt again presented Hobbes as a fundamentally important figure and as a paradigmatic thinker in terms of his methodology. He praised Hobbes as the “classical representative” of the “decisionist type” (Schmitt 1922, 33) in legal thinking, competing with juridic normativism. Schmitt considered himself an adherent of the decisionist type of legal thought, too. The decisionism he traced back to Hobbes was Schmitt’s own creation. It referred to the doctrine of the intrinsic value of legal decisions, disregarding the criterion of substantive correctness. Both in *Dictatorship* and in *Political Theology*, Schmitt also linked decisionism to the decision about a state of emergency. Decisionism was a personal type of thinking inasmuch as an individual or a group of individuals came to the decision about a state of emergency. He explained the personalism in Hobbes’s theory of the state by a transfer of the habitual ways of thinking along monotheistic lines prevalent in Christian Europe in the seventeenth and eighteenth centuries—according to which it was just a single god who

6 Horkheimer (1930a, 229), see also Borkenau (1934).

7 The following page numbers refer to his book *Dictatorship* (Schmitt 1921).

ruled the world—to the sphere of political thought. This was also why Hobbes, despite his nominalism, his strict natural scientific approach, and “his reduction of the individual to the atom” (Schmitt 1922, 47) postulated an individual person as the decisive final authority. Another consequence of this form of transfer was that Hobbes “heightened [his state, Leviathan …] into an immense person and thus point-blank straight into mythology” (Schmitt 1922, 47). Here, Schmitt can be understood as claiming that it was only this addition of mythology that unleashed the entire force of Hobbes’s theory in its readers’ minds.

Schmitt continued his hymns of praise in the original 1927 lecture “The Concept of the Political.” In the eponymous book published five years later, he praised Hobbes as “truly a powerful and systematic political thinker” who had drawn the simple consequences of political thought “without confusion and more clearly than anyone else” (Schmitt 1932a, 65, 67). At the same time, he clarified his position in various places where he viewed himself as a legitimate heir to Hobbes’s political thinking: his basic anthropological assumptions, his conception of the natural condition between states, his decisionism, his conceptual power, and his clear and systematic way of thinking (see Schmitt 1932a, 59, 65, and 67). He explicitly came to Hobbes’s defense countering Tönnies’s interpretation according to which Hobbes merely represented a type of thinking specific to his time based on free competition in early-stage capitalist society<sup>8</sup>—a line of interpretation expanded upon by Max Horkheimer and Franz Borkenau at the Frankfurt Institut für Sozialforschung (IfS).<sup>9</sup> In *Constitutional Theory*, Schmitt added a number of points to the list of Hobbes’s positives: the grounds given for founding the state on human reason alone, systematic absolutism, the rejection of mixed constitutions, the clear contrast to the traditional idea of the bourgeois *Rechtsstaat*, and his concept of representation (see Schmitt 1928b, 101, 182, 237, and 247).

In 1932, both Kirchheimer and Strauss had approached Schmitt to request his support for their applications to the Rockefeller Foundation for a research stipend. Strauss had shown Schmitt the as yet unpublished manuscript of his essay “Notes on Carl Schmitt, The Concept of the Political.” Following a discussion with Strauss, Schmitt agreed to support him and also arranged for the text to be published in a respected journal.<sup>10</sup> Strauss’s essay addressed the key hypothesis of his book on Hobbes, which was published in exile in 1936, according to which Hobbes was the actual “founder of liberalism” (Strauss 1932, 91). Strauss concluded from this interpretation, which was similar to that advanced by Tönnies and Horkheimer, that Schmitt remained “trapped in the view that he [was] attacking” (Strauss 1932, 104) despite his pointed criticism of liberalism. Strauss urged him in no uncertain terms to be more consistent and to depart from the horizon of liberal bourgeois thought.<sup>11</sup> That was a criticism that Schmitt took

<sup>8</sup> See Schmitt (1932a, 65).

<sup>9</sup> See Horkheimer (1930a, 216–221) and Borkenau (1934, 439–482).

<sup>10</sup> See Chapter 3, p. 97.

<sup>11</sup> To Strauss, overstepping the liberal horizon implied returning to ancient philosophy, see Meier (1996).

seriously; he sought to preclude it by hastily making some revisions to the 1932 book version of *The Concept of the Political*.<sup>12</sup>

Moreover, an idea is presented again that Schmitt had merely hinted at briefly in a footnote earlier (see Schmitt 1927a, 72) both in his eponymous lecture in 1927 and in the first version of the text, which was published as an essay, and that is not to be found when he had previously mentioned Hobbes. Schmitt introduced the idea in the thematic context of wars between states. When a people was no longer willing or able to organize itself successfully as an independent state, then foreign enemies took over political rule. The new ruler then decided who the enemy was by virtue of the “eternal relation of protection and obedience” (Schmitt 1932a, 52). Schmitt expanded this idea to the legitimacy of state rule, referring to Hobbes and his statement about the “mutual relation between Protection and Obedience”<sup>13</sup> in Hobbes’s *Leviathan*. According to Hobbes’s line of reasoning, the relationship between ruler and ruled could be summed up in the clear and simple formula: “No form of order, no reasonable legitimacy or legality can exist without protection and obedience. The *protego ergo obligo* is the *cogito ergo sum* of the state.” (Schmitt 1932a, 52) Hobbes, Schmitt claimed, had painfully experienced the truth of his own statement firsthand during the terrible times of the English Civil War.

### 3. Schmitt’s second thoughts about *Leviathan*

After 1933, Schmitt’s admiration for Hobbes, which he had expressed without reservation, yielded to a significantly more critical assessment. Schmitt began to distance himself from Hobbes not only by making numerous stylistic revisions in the new edition of *The Concept of the Political*, published in June 1933, in line with the ruling Nazi system (deleting references to Jewish authors; replacing wording to reflect Nazi terminology; using fewer words of foreign origin; changing the font on the book cover), but also reclassifying Hobbes within intellectual history. The “powerful and systematic political thinker” from the previous year’s edition (see Schmitt 1932a, 65) was demoted to “powerful and systematic thinker” (Schmitt 1933i, 47) and had to forgo the attribute “political,” which was eminently important to Schmitt.<sup>14</sup> Schmitt also removed the reference to Tönnies, who had publicly supported the Social Democrats at the end of the Weimar Republic as an act of protest against the Nazis. Yet those passages in which Schmitt reflected on the link between protection of citizens and their duty to be obedient remained unaltered (see Schmitt 1933i, 35).

In his preface to the new edition of *Political Theology*, written in November 1933, Schmitt suddenly made a radical shift with respect to where he positioned himself in methodological terms, resolutely turning away from Hobbes and the decisionism he had ascribed to him. Instead of distinguishing between the two approaches of normativism

<sup>12</sup> The revisions are described in detail by Walter (2018, 297–301).

<sup>13</sup> Thomas Hobbes in his English translation of *Leviathan* of 1651, quoted in Schmitt (1932a, 52).

<sup>14</sup> Heinrich Meier has shown that this change was also a reaction of Schmitt’s to Strauss’s criticism, see Meier (1995) and (1996). Schmitt gave the attribute “political” back to Hobbes in 1938 (see below).

and decisionism, Schmitt now differentiated between three paradigmatic approaches, adding a third one, “institutional type,” (Schmitt 1934i, 2) i.e., concrete-order thinking. After vehemently defending decisionism for years, he now began to criticize it. Since it focused on the moment, it notoriously ran the risk “of missing the stable content inherent in every great political movement” (Schmitt 1934i, 3)<sup>15</sup>—by which he meant the Nazi movement led by Hitler. After Schmitt had distanced himself from Hobbes in this passage, not a single reference to Thomas Hobbes and his work was to be found in his new texts written between 1933 and 1936.

This was all to change after Schmitt was sidelined in December 1936. In the autumn of 1937, on the occasion of the 300th anniversary of René Descartes’s *Discours de la méthode*, Schmitt gave the lecture “The State as a Mechanism in Hobbes and Descartes” in Berlin (see Schmitt 1937c). Two further lectures followed in January and April 1938 in which he presented the new findings of his research in intellectual history. The book based on these lectures, *The Leviathan in the State Theory of Thomas Hobbes—Meaning and Failure of a Political Symbol*, held special meaning for its author, as revealed by the date in the introduction: 11 July 1938 was Carl Schmitt’s 50th birthday. The publication was his birthday present to himself, so to speak. He again addressed almost all of the points he had made about Hobbes prior to 1933. However, he revised a number of interpretations, coming to a more critical overall assessment of Hobbes’s accomplishments in constitutional theory. In an April 1938 letter to Rudolf Smend, Schmitt revealed his claim to originality in the question posed in his book: “Why has nobody ever reflected on what Leviathan actually means as a symbol and a political myth?”<sup>16</sup>

Yet Schmitt’s book is also a response to the discussions about Hobbes during the Nazi period.<sup>17</sup> This debate was brief, and it was triggered by a controversy in France. In 1935, Joseph Vialatoux, a Catholic proponent of natural law, had declared Hobbes to be the mastermind of the totalitarian state of Bolshevism and Nazism. Countering him, René Capitant, a French jurist who had been friends with Schmitt since the late 1920s, drew attention to the elements of the rule of law in Hobbes’s political theory. Schmitt reacted directly to this debate in his Berlin lecture in 1937.

In a prominent speech, Nazi legal scholar Paul Ritterbusch had followed the individualistic interpretation, arguing that Hobbes’s natural condition could not be transcended in a purely rationalist way; that would also require a strong ideological motivation (see Mastnak 2015, 982). In another contemporary publication, German sociologist Helmut Schelsky declared Hobbes compatible with the activist thinking of Nazism. Schelsky rejected the interpretation of Hobbes’s theory as mechanistic rationalism. Instead, he applauded him, placing him in the same rank as Nietzsche as a “thinker of political action” (see Schelsky 1938, 193)—meaning highly intense political activity—who aimed to create political unity by means of the resolute will of a leader and to maintain it by instructing

<sup>15</sup> It is one of the ironies in the contemporary debates about Schmitt that Strauss complained to a friend from his London exile in October 1934 that Schmitt had turned away from decisionism and embraced concrete-order thinking “because of arguments in my review, which, of course, he does not quote.” (Quoted in Meier 1995, 138).

<sup>16</sup> Letter from Carl Schmitt to Rudolf Smend dated 14 April 1938 (Schmitt and Smend 2011, 96).

<sup>17</sup> See Jänicke (1969), Rottleuthner (1983), and Voigt (2009).

the population. Schmitt did not directly contradict Schelsky's activist characterization, but he made clear in his book that he thought the ways to influence people through education or instruction were limited (Schmitt 1938a, 36).<sup>18</sup> He took Schelsky's interpretation as an opportunity to formulate the guiding questions of his book: Was the myth of Leviathan created by Hobbes "a faithful restoration of the original unity of life" (11), and had this mythical image "battling the Judeo-Christian destruction of the natural unity" (11) proven successful or not? Schmitt's book had a special position in the long series of interpretations of Hobbes because of how it "handled its subject [Hobbes], bringing it up to the present, with its author identifying with it." (Jänicke 1969, 402). In the sections in which he reconstructs Hobbes's theory of the state, Schmitt's book was not even original—it was innovative at best with respect to some of his previous hypotheses regarding Hobbes. Again, Schmitt used Hobbes primarily as a source of prompts to expand on his own views.

If we take Kirchheimer's external perspective on the polycratic power structure of Nazism as the starting point for reading Schmitt's book and link that perspective to Schmitt's personal experiences of defeat in the schemes and struggles of the competing groups and factions of the Nazi regime, then six topoi emerge; the subject of Schmitt's increasingly caustic antisemitism will be addressed separately in the next chapter of the present book.

First, from the above-mentioned perspective, it is striking that Schmitt—similarly to Schelsky and, before him, Strauss—presented Hobbes less as an abstract and almost timeless systems thinker, instead emphasizing his polemical side, a reflection of his time, more strongly than before. In contrast to his works on natural law, *Leviathan*—as Schmitt had postulated a year earlier in his lecture on Descartes—was a "preponderantly political treatise" (94), in other words, in Schmitt's language, a text that had particular opponents in mind. Hobbes's purpose with his theory of the sovereign state had been to crush the "medieval pluralism" (71) of the feudal lords, the clergy, and the estates. Schmitt called the feudal estates and the clergy "indirect powers" (73) competing for power and provoking an open or latent civil war. They were unable to offer security or protection to the individual. Hobbes's theory of the state, Schmitt stated, was formulated specifically to counter these "old opponents," who could be named. Politically speaking, Schmitt's criticism was directed first and foremost against the Roman Catholic as well as the Presbyterian clergy in England, which were unduly claiming power—and here, his historicizing view matched that of Tönnies (see Tönnies 1925, 256–266).

Second, it is striking how clearly Schmitt again emphasized the relationship between protection and obedience. The state was responsible for the protection and the security of those subject to the state. If protection ceased, then the state also ceased to exist, and any duty to be obedient ceased to apply. Schmitt now even declared the relationship between protection and obedience to be the "cardinal point" (113) of Hobbes's theory of the state, overshadowing everything else. And he later added a sentence following Ferdinand Tönnies, namely that that relationship "permits a very good reconciliation with the concepts and ideas of the bourgeois constitutional state." (72).

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18 The following page numbers in the text refer to Schmitt's *Leviathan* book.

This—third—leads to the observation that Schmitt no longer equated Hobbes's construct of the state with a dictatorship as he had in 1921; much less did Schmitt go so far as to declare once more that there was no such thing as a private conscience in a state. Instead, he underscored—now even explicitly referring to Tönnies—the elements of the *Rechtsstaat* in Hobbes's theory. Schmitt also tacitly followed Tönnies's interpretation (see Tönnies 1925, 263, 266) in that he focused on the passages about miracles in Chapters 26, 37, and 42 of *Leviathan* for his political interpretation of the book. Here, Hobbes explained that a citizen always had the liberty to believe or not to believe those actions declared to be miracles; after all, because of the realities of human existence, thoughts were free. Schmitt stated that when it came to believing in miracles, Hobbes committed a “non-eradicable, individualistic proviso” (56) with his “distinction between outer and inner” (53), between acting or speaking in public and thinking or believing in private.<sup>19</sup> Schmitt considered Hobbes's granting of internal freedom of belief to be a “rupture of the otherwise so complete, so overpowering unity” (56) of his theory of the state. In terms of intellectual history, Schmitt interpreted this crack as a starting point for what later became liberalism. Schmitt now followed Tönnies's liberal interpretation of the concept of law, too, emphasizing the ban on *ex post facto* laws. He wrote that the well-known formula *nulum crimen sine lege* could be traced back to Hobbes, “including its linguistic character” (73). In addition, he even declared Hobbes to be the actual progenitor of modern legal positivism, placing him on the same level as John Locke. In other words, Schmitt interpreted Hobbes as the founder of everything he had rejected in a large number of lectures and articles over the previous five years as entirely incompatible with the spirit of Nazism.

Fourth, Schmitt combined the liberal reading of *Leviathan* with his well-known hypotheses inimical to pluralism. The “wonderful armature” of modern state organization required a “uniformity of will and uniformity of spirit” (74). This need ran counter to the spirit of the liberal constitutional state that Hobbes had unleashed. In the process, Schmitt developed his own understanding of Hobbes's *potesta indirecta*, bringing it up to date. The old opponents of the state, the indirect powers, namely the clergy and the estates, had succeeded in reappearing in the twentieth century in their modern forms as political parties, social interest groups, churches, and trade unions, taking advantage of and enjoying the protection of the guarantees of the *Rechtsstaat*. It is also evident that Schmitt meant the Weimar Republic and not Nazism here from his comment that the indirect powers had seized control over the legislative process via the parliament, for which reason they believed “they had placed the Leviathan in harness” (73). The unity of the state had thus been destroyed from the inside out. To describe the condition of anarchy allegedly arising from this process, Schmitt turned to the mythical image of Leviathan's biblical adversary, the Behemoth, at a different point in the book. The Behemoth symbolized the “revolution” (21), civil war, and anarchy. It was the symbol of the non-state. In Hobbes's words, “one of the monsters, the Leviathan 'state' continuously holds down

<sup>19</sup> In my opinion, the function of Hobbes's separation of internal and external was to enable the subject to obey a supposedly or de facto non-Christian sovereign without having to abandon their Christian faith for this reason. This function was the decisive motive for the inaccessibility of the internal in Hobbes's thinking, not an honorable and respectful reservation vis-à-vis the internal. Nor was it resignation in the face of the factual impossibility of entering the internal.

the other monster, the Behemoth ‘revolutionary people’ (21)—incidentally, a juxtaposition that Schmitt could have taken from Tönnies’s interpretation (see Tönnies 1925, 61). There are no indications—or even merely suggestions—that Schmitt, in mentioning the reappearance of the indirect powers, was alluding to the polycratic structure of the Nazi regime’s rule with the competitive relationships between the party, the executive branch, the *Wehrmacht*, and other groups.

Fifth, Schmitt articulated the main topic of the book in its subtitle *Meaning and Failure of a Political Symbol*. This centered around the relevance and role of the myth in Hobbes’s theory of the state. Schmitt claimed that the arguments of the traditional theories of legitimation were based on the myth of the monarchs’ divine origins. Hobbes had radically swept aside this myth, declaring that all rule was man-made. Nonetheless, he had not wanted to abandon the mythical element entirely, which Schmitt believed was evident from the efforts the author had taken with the artistic design of the frontispiece. Schmitt had highlighted the enormous power of myths time and again in his Weimar writings from 1923 onward. He thought that the myths of the Bolshevik, fascist, and nationalist movements were vastly superior to the rationalism of parliamentary democracy in the political struggle (Schmitt 1923a, 79–83). He also began his 1940 anthology *Positionen und Begriffe* [Positions and concepts] with the political theory of the myth and concluded it with a 1939 essay on the myth of the Reich. Moreover, Schmitt placed his book on Hobbes within this mythopolitical arc—whereby he still situated him at the rationalist opposite pole of political thinking up until 1933.

Sixth, Schmitt took the question he raised at the beginning of *Leviathan* in multiple directions, namely what Hobbes had been trying to achieve for his otherwise very rationalist theory by adopting the mythical image of Leviathan. On the one hand, Schmitt presented an extensive genealogy of the biblical sea monster based on the history of the myth from pre-Jewish times to the Book of Job to Hobbes’s day. The purpose of this genealogy was for Schmitt to be able to state that in Hobbes’s lifetime, the myth of Leviathan as a biblical horror of evil spirits had lost its power and had been transformed in English usage into a humorous label for powerful and rich individuals, or large buildings and ships. In addition, he answered the question by analyzing the frontispiece of the first edition of *Leviathan* as well as the text, coming to the conclusion that Hobbes understood Leviathan in four different ways: as a great human being, a large animal, a machine, and a mortal god. As a result, the goal he had pursued by selecting this symbol had been watered down beyond recognition. Schmitt also hypothesized that a disastrous “*Mißgeschick*” (mishap)<sup>20</sup> had occurred when Hobbes had selected the mythical image of Leviathan. For one thing, Hobbes should have selected the symbol of land (Behemoth) instead of the symbol of the sea (Leviathan). For another, the metaphor of the machine

20 The translation of the German term “*Mißgeschick*” is missing in George Schwab’s English translation (page 79), see in comparison the 1938 German edition (page 119). Incidentally, a *Mißgeschick* happened to Schmitt himself when he analyzed the image in that he erroneously believed that he was in possession of the first edition of *Leviathan* of 1651. In fact, he owned an illegal reprint from the seventeenth century with a somewhat blurry frontispiece. Schmitt therefore felt compelled to use a copy of the book from the eighteenth century with a modified frontispiece “because it was more recognizable” (26) for his interpretation, see Bredekamp (2012, 46–47).

inherent to the symbol of Leviathan had contributed to Hobbes's notion of indivisible political unity being "destroyed from within" (85). Finally, Schmitt emphasized that neither England nor the UK had ever become a state to the same degree as the major powers on the continent. The English people had withdrawn from the continental type of state unity, drawing on its political instinct as a maritime and trading power. To Schmitt, the tragedy of Hobbes's theory of the state lay in the fact that it was felt to be an anomaly contrary to nature in his home country of England. On the European continent, the image of his Leviathan "ran aground" (81), too, because the sea serpent was not an adequate depiction of how the typically territorial shaping of power by military land powers had unfolded. Political myths, Schmitt asserted, had an "arbitrary historical force" (26), and Leviathan was a mythical name that could not be "cited with impunity" (53). Its image was so strong that it had its own impact independent of the person seeking to use it for their own purposes.

What follows from all this? Had Schmitt, with his liberal reading and his renewed emphasis on the relationship between protection and obedience, become a covert critic of the Nazi regime because of his negative experiences with the regime the year before, choosing his wording prudently? This does not appear to be the case because, at the exact same time, Schmitt continued to attack the guarantees of the *Rechtsstaat* in other publications, calling them typically Western, liberal thinking. A better way to understand the goal of his book is to read it against the background of the question Schmitt had grappled with incessantly since the Weimar Republic: the question of whether it was possible to realize a unified political order. Did the state achieve its unity by ending the civil war? Or could such unity be accomplished only by a party that had prevailed in the civil war? In other words, could state unity be founded upon neutralizing conflicts, or was an ideology encompassing the entire population necessary?

Schmitt tended toward the second alternative, referring in his book on Hobbes to the quest for a theory of the state achieving a "restoration of the vital energy and political unity" (81)—whereby "restoration" had to imply that this unity had already existed in the past and that "vital energy" spoke to a vitalistic dimension going beyond purely cognitive elements. This quest was taking place in a new epoch that Schmitt called the "technical age" (82). This was characterized by machines and technical procedures involving all of human life. The image of Leviathan no longer made a monstrous and terrifying impression on the mindset of a "total technology" (82).

On closer examination, Schmitt's central hypothesis about the failure of the symbol of Leviathan because of the separation of internal and external confessions of faith says virtually nothing about Hobbes, but a lot about Schmitt's own political thinking. In 1938, what were the theoretical alternatives for the foundation of a political order, given that the mythological grounding of the state in the symbol of Leviathan had failed? What other ways were there to establish political totality by means of mythologization? Returning to the bourgeois *Rechtsstaat* was not an option for Schmitt. But what then? Apparently, Schmitt did not want to simply relinquish the idea of the state according to Hobbes, instead seeking alternative ways to underpin the state mythologically. This interpretation is supported by the fact that at the end of his book, he heaped great praise on Hobbes despite his mythological blunder as "the great teacher in the struggle against indirect

powers" (86) whose teachings would come into full effect only in the fourth century after he had created his work.

Why so much praise for Hobbes if his concept of the state belonged in a museum? What alternatives could there be? To Hobbes, the power of the sovereign representative was "so much more than the sum of all the participating particular wills" (33). Yet his myth of Leviathan had ultimately failed because he "did not unequivocally conjure up a definite and a clear enemy" (85). Only by taking recourse to "*das Elementare*" (the elemental)<sup>21</sup>—in this context, associated with a metaphysical and vitalist philosophy of life and, for Schmitt, again, the unequivocal differentiation between friend and enemy—could such a myth unfold its full "mythical force" (49). Schmitt granted Hobbes that his theory of the state had an "activist character" (85) even though systematic thoughtfulness prevailed—but only to object that not every case of philosophical activism was the same as political thinking. Schmitt was of the opinion that a state could not function in the absence of an activating myth. The image of Leviathan had to be replaced by a myth offering better ideological integrative power. Yet that new myth, he believed, was no longer necessarily coupled to the concept of the state.

Just as he was finishing his work on the book, Schmitt wrote a brief text on Thomas Hobbes's birthday. The wording of this greeting to the German Hobbes Society makes it clear that, to Schmitt, this was more than simply a gesture on that occasion. At that point, he suddenly believed once more that Hobbes was a "great political thinker"; the "undiminished force of his polemics" and the destruction of "opaquely evading all 'indirect powers'" could be properly understood only in Schmitt's day.<sup>22</sup> What Schmitt actually meant was revealed in his essay "*Völkerrechtliche Totalität und völkische Totalität*" [Totality of international law and *völkisch* totality], which was published the same month as the book. In the article, he showed his admiration for Hobbes: in his criticism of the papacy, the latter had recognized the international dimensions of influence through *potes-tas indirecta*. Hobbes became Schmitt's key witness for the right of any state to define its foreign policy enemy itself and to start a war against that enemy (see Schmitt 1938c, 621).<sup>23</sup> In the following years, Schmitt was to name Hobbes as a reference who systematically rejected the idea of universalist international law. Several months after his book on Hobbes was published, Schmitt had taken a further step in his deliberations. After the German *Wehrmacht* had invaded the rump Czech lands in the spring of 1939, he replaced the concept of the state with the concept of the Reich in his publications.<sup>24</sup> Schmitt's line of thinking in his book on Leviathan led, in direct consequence, to the "Reich" in a dual function, namely as an organizational formation of order and as an inspiring myth.

The reception of Hobbes under Nazism did not set in until later, unlike the renaissance of Hegel, and its extent was relatively modest—in retrospect, Schmitt's book can be considered its apex. Above all, however, this reception failed. And not only in Schmitt's

<sup>21</sup> The term "*das Elementare*" is also missing in George Schwab's English translation (page 49), see the 1938 German edition of the book, page 76. In this context, *das Elementare* is associated with a metaphysical and vitalist philosophy of life.

<sup>22</sup> All quotes are from Schmitt (1938b, 495).

<sup>23</sup> See, already referring to Hobbes, Schmitt (1937b, 51 and 68).

<sup>24</sup> See Schmitt (1939a) and Chapter 12 of this book.

book, but also in the contemporary reactions to his book in Nazi Germany. Otto Koellreutter penned an essay a few weeks later in which he viewed Schmitt's book as evidence that Nazism could not be explained from the perspective of Hobbes's theory (see Koellreutter 1938). Even if Ernst Forsthoff, Schmitt's former student, published a more positive review in 1941 (see Forsthoff 1941),<sup>25</sup> Koellreutter's verdict had put an end to Hobbes being well received under Nazism (see Rottleuthner 1983, 252). Schmitt himself did not argue on the basis of Hobbes's theory of the state again until 1945. Instead, he attempted to legitimize Nazi Germany using the concept and myth of the Reich and his theory of the *Großraum*.<sup>26</sup>

After 1945, Schmitt misrepresented his book on Leviathan as a sign of his internal resistance. He even placed it on the same level as Ernst Jünger's *On the Marble Cliffs*<sup>27</sup> (see Schmitt 1950a, 22). In 1947, to prove this claim, he even misquoted from his 1938 book, insinuating his internal resistance to the regime.<sup>28</sup> Helmut Schelsky, Schmitt's younger competitor in interpreting Hobbes at the time, made a similar point in retrospect. Schelsky was one of the most influential sociologists in Germany after 1945 and became the conservative antagonist of Theodor W. Adorno and other members of the Frankfurt School. In 1979, he attested that Schmitt had attempted to "unterjubeln [smuggle] the reason of the *Rechtsstaat* into [the actions of] the dictatorial sovereign" (Schelsky 1979, 150). In other words, Schelsky claimed that Schmitt had turned into a defender of the bourgeois *Rechtsstaat* in 1938, but without using this term. Various authors later subscribed to this absurd assessment.<sup>29</sup> Considering the book *Leviathan* as a hidden sign of internal resistance is as far-fetched as the parallel to Jünger is wrong. Rudolf Smend expressed his distance to the book in his letter thanking Schmitt for sending it to him with the following words about the concluding passages: "More restrained in the future—all one can do is limit oneself to showing alternatives, and perhaps we disagree on that matter."<sup>30</sup> They most certainly did.

25 Referring to the Prussian state of the eighteenth and nineteenth centuries, however, he contradicted Schmitt's central hypothesis that a state that permitted freedom of conscience was damned to perish in the further course of history.

26 See Chapters 11 and 12.

27 In his 1939 novel *On the Marble Cliffs*, Jünger described the life of outsiders in a totalitarian dictatorship. The first-person narrator lives a secluded life with his family on the marble cliffs of a great lake and devotes himself to botanical science. Their idyllic life is threatened by the erosion of values and traditions by the regime. The novel was understood as a parable of Nazism, written by an author in what was frequently called "inner emigration."

28 For details of how Schmitt misquoted himself, see Salzborn (2009, 158–159). On Schmitt's writings about Hobbes in his late work see Mehring (2023).

29 The main reception of the book in the English-speaking world by George Schwab (1996), Joseph Bendersky (1983, 245–247), and Tracy B. Strong (2008) followed in the footsteps of Schmitt's and Schelsky's interpretations.

30 Letter from Carl Schmitt to Rudolf Smend dated 10 July 1938 (Schmitt and Smend 2011, 99).

#### 4. Kirchheimer's Behemoth in *Punishment and Social Structure*

The book *Punishment and Social Structure* by Georg Rusche and Otto Kirchheimer, published in New York in 1939, has a back story of almost ten years.<sup>31</sup> In 1930, Georg Rusche had begun working on the book in Frankfurt at the Institut für Sozialforschung (IfS) and had continued his efforts up until 1934 after emigrating to London. After he had relocated to Palestine and the institute had no longer received word from him, Horkheimer desperately sought someone who was competent to complete the half-finished manuscript which had been sent from Europe to New York. Otto Kirchheimer seemed suitable to the institute's leadership because of his expertise in criminal law in Nazi Germany and his brief study on French crime statistics. Franz L. Neumann first contacted Kirchheimer on this matter on Horkheimer's behalf in early February 1937; Neumann was in New York, Kirchheimer in Paris. It had also been Neumann who had suggested Kirchheimer for the project at the institute since he was aware of his knowledge and his financial needs as well as his interest in establishing closer ties with the institute in order to enter the US. Kirchheimer gratefully accepted this new project. His extensive correspondence with Neumann in the following months was equally about substantive matters relating to his work on the book and the paperwork he required to enter the US (see Buchstein 2019a, 12–44).

When Kirchheimer arrived in New York in November 1937, he had the manuscript with him; he had spent the previous nine months working on it and it was finalized in another five months with the aid of Moses Finkelstein, a young historian at City College in New York.<sup>32</sup> Finley, as he was then known, later reported that Kirchheimer wrote the new chapters in German and that he, Finley, translated them into English. In late 1937, Kirchheimer also contacted Nathan Leites, who had also managed to escape Germany and enter the US. Kirchheimer asked for his opinion and comments and subsequently made further changes.<sup>33</sup> The manuscript was finalized for printing in late 1938 after multiple rounds of editing. Rusche was not involved in completing the book, which gave rise to conflicts between him and the institute after its publication. When the book was published by Columbia University Press in early 1939, it became an unexpected success for Horkheimer's institute, which was still in the process of establishing itself in the US. Multiple newspapers and journals reviewed the book, almost without exception in a positive light, which brought the recently renamed Institute of Social Research "a small degree of fanfare." (Wheatland 2009, 143). Today it is without dispute a classic of critical

<sup>31</sup> On the convoluted genesis of the book, see the preface to the French reprint by Lévy and Zander (1994).

<sup>32</sup> Finkelstein later became a renowned classical scholar under the name Moses I. Finley. On the impact of his collaboration with Kirchheimer for his later work, see Perry (2014).

<sup>33</sup> Leites called attention to a few minor errors and, importantly, suggested that Kirchheimer should either be more explicit in his implied criticisms of Max Weber where he mentioned him briefly or use more neutral wording. See letters from Nathan Leites to Otto Kirchheimer (no dates). Otto Kirchheimer Papers, Series 2, Box 1, Folder 101.

criminology—not least because of Michel Foucault's praise for the book in his *Discipline and Punish*.<sup>34</sup>

Kirchheimer wrote six book chapters; Rusche had prepared the other seven, but Kirchheimer reworked them, in part extensively.<sup>35</sup> Despite all the effort put into revising the book, the resulting work did not really come together. Since the English translation was edited carefully, it is not owing to the style that there are differences between the individual chapters; instead, it is the form of reasoning, the nature of the substantive argument, which makes these differences stand out all the more clearly. All of Rusche's historical chapters focus on demonstrating the validity of his economic theory of punishment from the Early Middle Ages to the late nineteenth century, which he had already outlined in an article in the *Zeitschrift für Sozialforschung*. In contrast, Kirchheimer stresses the relevance of the political conditions for criminal law and penal policy in all the chapters he authored. There were also methodological differences. The parts based on Rusche's research primarily use economic labor market arguments. Those written by Kirchheimer also refer to the relevance of economic factors but the specific analyses are mostly from the perspectives of law and legal sociology. To put it bluntly, it is difficult to avoid the impression that two books were forced between the covers of one.

The book draws a historical line from the Middle Ages to the year it was completed, 1938. Comparing and contrasting it with Schmitt's humanities-based approach in *Leviathan*, three aspects of Kirchheimer's parts of *Punishment and Social Structure* stand out.

First, Kirchheimer's methodological approach employs a materialist analysis. In the introduction to the first chapter, he formulates the questions posed in the book as follows: "Why are certain methods of punishment adopted or rejected in a given social situation? To what extent is the development of penal methods determined by the basic social relations?" (3). Kirchheimer intended to prepare a materialist sociology of corrections, which aimed to remove the ideological veil and the legal pretense from the institution of punishment. He distinguished between a negative and a positive determinant in the enforcement of different types of punishment. The positive determinant was a given: the level of a society's economic development. That alone, however, was not sufficient to understand the historical transformations of forms of punishment because it would require incorporating the specific aims of punishment as a negative determinant, too. Kirchheimer's point, opposing Rusche's purely economic approach, did not become clear until the final paragraph of his introduction where he wrote that "social consciousness" (7) was acquiring an even broader field of action in the development of methods of punishment. How broad this field of action was and where its limits lay then became the key questions Kirchheimer attempted to answer. The focus of the chapters he wrote alone was on the negative determinants of enforcing different types of punishment, including, in the ninth chapter, the question as to the limits of modern prison reforms.

In this chapter, he describes the improvement in the lower classes' living standards and its impact on crime policy. He details how criminology had gained status as a new

34 On the reviews at the time and the book's later enormous reception, see Buchstein (2019a, 45–51) and Klingsporn (2024).

35 See Kirchheimer and Rusche (1939). The following page numbers refer to this book.

social science in the second half of the nineteenth century, aiming to curb criminal behavior. He makes the “political basis” (143) responsible for changes in criminal law and corrections, and in this context, he argues in the footnotes with Schmitt’s student Ernst Rudolf Huber’s criticism of the reforms in criminal law during the Weimar Republic. Using analyses of crime statistics, he then examines the development of incarceration in the period of relative prosperity up to the beginning of World War I in various European countries. His description of the outcomes of resocialization measures has a skeptical tone. To achieve deterrence, no reform program had been willing to relinquish the principle according to which the standard of living of those incarcerated had to be reduced. Thus, all reform programs ultimately remained caught in the contradiction between deterrence and rehabilitation, which in turn was an expression “of the antagonistic tendencies in society itself” (159). Kirchheimer saw that the development after World War I was also decoupled from the purely economic basic data and, in light of this, he refers primarily to some successes in humanizing corrections during the Weimar Republic. In Chapter 10, he analyzes the role of fines as a parallel to incarceration in more recent penal practice. He diagnoses extensive “commercialization of the penal system” (175) because of the prevalence of fines. His empirical finding was that the imposition of fines had increased along with the prosperity of a society. Thus, even though fines were politically feasible, their application had ultimately reached its limits in the material conditions of the lower strata of the population.

A second set of issues in clear contrast to Schmitt’s writings was the changes in the policies for meting out punishment in countries with fascist governments, which Kirchheimer analyzes in Chapter 11. He continues some of his previous deliberations on criminal law in the Third Reich, adding more recent literature from Italy and examples from the authoritarian regime in Poland. He describes the theory and practice of criminal law in the early years following the fascists’ takeover of power in Italy as being partly liberal initially because they provided defendants with a certain amount of predictability about the outcome of lawsuits against them. In contrast to Italy, the German regime had in 1933 immediately set in motion a radical shift away from a penal policy that was predictable to defendants. Only very recently had the authorities in Italy begun “to imitate the Germans” (181). The fascist doctrine now in force had replaced the “separation of law from morality, an axiom in the period of competitive capitalism” with “a moral conviction derived immediately from the ‘racial conscience’ (*Volksgewissen*)”<sup>36</sup> (179).

Against this background, Kirchheimer lays out in detail the Nazi theory of criminal law, the changes in criminal law and criminal procedural law made between 1933 and 1938, and examples from the practice of adjudication and corrections in the Nazi state. Analyzing official crime statistics, he demonstrates that the number of acquittals had plummeted, the average length of jail sentences had increased by one-third, the share

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36 One might argue about this translation by Kirchheimer. To a certain extent, *Volk* and *Rasse* certainly were interchangeable. Another option would be “conscience of the *Volk*,” adding a definition of *Volk* as “people/nation in a racial sense, of common blood and with a common destiny.” However, this might have been too unwieldy at this point in the publication (see Translator’s Preface and Glossary).

of sentences of imprisonment with hard labor had increased, and the conditions of detention had continued to deteriorate. He highlights the return to capital punishment as particularly striking and illuminates how fines were used as a means of systematic dispossession.

Kirchheimer's analysis shows that all these increases in the severity of penalties had originated in the time before Hitler came to power; the programs of the proponents of penal reform had already reached their limits during the Great Depression since sufficient funding for humane corrections was no longer made available. The various ways in which criminal policy had been toughened after 1933 were caused by the economic crisis as a result of which broad segments of the population had lost social stability. The Nazi legal theories, combining elements of a biologistic doctrine of *Rasse* and predestination with the principles of retributive justice typical of the classical German doctrine of criminal law, merely gave them a new ideological justification. Kirchheimer referred to the changes in Nazi criminal procedural law, for which Schmitt, among others, was responsible, and the weakening of the function of the defense. He also mentioned Schmitt's criticism of the "abstractions" of liberal criminal law and his concrete-order thinking, which he had presented in his 1934 booklet *On the Three Types of Juristic Thought*, as the most influential legitimization in terms of legal theory for the changes that had been made (see 250). Concrete-order thinking following Schmitt robbed the defendants of any remaining certainty that their criminal proceedings would have a fair outcome.

Kirchheimer argues in the book for a criminal policy that guarantees the safety of the individual and social stability in society and for the duty of the state to create these two things. This is the context into which Kirchheimer's assessment of empirical findings regarding the link between crime rates and penal policy should be placed. He scrutinizes the effect of sentencing policies on the crime rates in four countries: England, France, Italy, and Germany. On the basis of his analyses of the official statistics from 1900 to 1932, he found that harsher sentencing policies by no means lowered crime rates. On the contrary. He observed that in England, a policy of reducing sentences in favor of probation and fines correlated with a marked drop in the general crime rate. In addition, he counters the ideological self-descriptions of fascist penal policy with empirical evidence. Contrary to its propaganda, there were two limits to the fascist states' attempts to lower the crime rate by means of a more severe penal policy. One limit was due to the economic situation at the time. Times of economic crises lead to an increase in the number of crimes. The second limit was the general "rationalization which modern industrial society requires" (206). Such needs for rationalization blocked the full development of the ideological penal program in fascist states because it would mean wasting human resources. Kirchheimer argues that the realization of the fascist penal program was fully effective only in the (considerably expanded) area of political offenses. Overall, however, the societal need for rationalization ran counter to the universal expansion of a repressive system of corrections.

Now, leftist and left-liberal reform programs were also subject to limits because of the rationalization that modern industrial society required. All attempts to lower the crime rate solely by means of a penal policy relying on lighter sentencing and resocialization were unrealistic. Their success still depended mostly on the societal system: "The crime rate can really be influenced only if society is in a position to offer its members a certain

measure of security and to guarantee a reasonable standard of living" (207). Kirchheimer ends his book on a pessimistic note. Although progress in the social sciences had made the problem of corrections easier to understand and solve than ever before in human history, it seemed to him in 1939 that a fundamental improvement in corrections policy was "further away today than ever before because of its functional dependence on the given social order" (207).

The third point that is striking in his book is that Kirchheimer also discusses Hobbes. In Chapter 5, he gives a brief outline of the intellectual history of theories of punishment in the epoch of the Enlightenment. He praises the liberal heritage and makes Thomas Hobbes and his *Leviathan* the classical reference, even more important than the classical authors Beccaria and Montesquieu. For it was Hobbes who had already accomplished the separation of law from ethics as well as "a strict legal formulation of the idea of criminal culpability by placing it in close relationship with a legally defined fact" (73). Although Hobbes still passed moral judgment on human actions, its sphere of application was now limited, and moral judgments remained clearly distinguished from criminal sanctions. This separation was made easier by the principle of nonretroactivity in criminal law formulated by Hobbes in Chapter 27 of *Leviathan*. Kirchheimer extensively quotes passages where Hobbes cites the principle of the rule *nulla poena sine lege* (see 74). Thus, he declares Hobbes to be the precursor of Beccaria and the Prussian Civil Code of 1794.

It cannot be discerned clearly where Kirchheimer got the idea to give Hobbes such a prominent role in the book. He must have changed his assessment of Hobbes at some point, for in an essay completed in late 1932 he had criticized Hobbes's theory for allowing the sovereign to override individual liberties (Kirchheimer 1933d, 76). Considering Hobbes instead to be a genuinely liberal thinker along the lines of Tönnies's reception was part of Horkheimer's interpretation, as mentioned above. Another possible source is Franz L. Neumann, a close ally of Kirchheimer at the institute. Neumann had devoted an entire chapter to Hobbes in his doctoral dissertation *The Rule of Law. Political Theory and the Legal System in Modern Society*, which he had completed under Harold Laski in 1935. He opposed Schmitt's early interpretation of Hobbes in his 1921 book about dictatorship, instead advancing the hypothesis that rudiments of a genuine natural law were to be found in Hobbes's theory of the state which ultimately amounted to a limitation of state sovereignty and the recognition of liberal rights (see Neumann 1935, 100–113). If Kirchheimer had no opportunity to read Neumann's entire dissertation, he was in any case familiar with his 1937 article "The Change in the Function of Law in Modern Society" in the *Zeitschrift für Sozialforschung* in which Neumann summarized his interpretation of Hobbes (see Neumann 1937, 24–25).<sup>37</sup> One can only speculate whether Kirchheimer may also have been aware in his New York exile of Schmitt's new twist in his writings on Hobbes.

37 See also Neumann (1940, 346–347), where Neumann once again explicitly mentioned the "impossibility of retroactive legislation, especially in penal law" (Neumann 1940, 361).

## 5. Controversies over Nazism at the Institute of Social Research

At the same time as Carl Schmitt, in Berlin, began to interpret Nazi rule using a mythopoietical concept of the Reich, Otto Kirchheimer was involved in the internal debates at Horkheimer's Institute of Social Research (ISR) about the proper socio-theoretical categorization of Nazism in New York. The academic success of *Punishment and Social Structure* notwithstanding, Kirchheimer's funding as an employee of the institute was an ongoing issue, notoriously warranting his and the institute leadership's attention.

When it was foreseeable that the book would be completed by the end of 1938, he applied to the Social Science Research Council (SSRC) in New York for funding for a subsequent project, with Horkheimer's support. The proposal followed on from the empirical analyses in the three final book chapters. Horkheimer asserted that the project would fill an important research gap: "it has never been made clear whether there is a relation between a social stratification in a given society and the procedural treatment and the types of punishment."<sup>38</sup> The five-page exposé was titled *Criminal Law and Social Structure*. The study was planned to start at the beginning of the twentieth century. Although it was to focus on a comparison of seven European countries, Horkheimer assured the SSRC that "the corresponding American developments [would] always be kept in mind."<sup>39</sup> It was to investigate under what conditions which crimes and which groups of people were or were not criminally prosecuted. The second part of the project was to examine the various types of punishment once again. The SSRC's rejection arrived in the spring of 1939. Kirchheimer had no other option but to hope for alternative funding through Horkheimer's institute and participated intensely in the studies on Nazism which had just been incorporated into the work program of the institute from 1938 onward.

For the staff members of Max Horkheimer's institute who had fled Germany, the establishment and consolidation of the Nazi regime marked "the traumatic gravitational center of their entire academic and political orientation" (Dubiel and Söllner 1981, 8). Yet in the initial years after 1933, the institute's core team hardly worked on Nazism at all. One of the very few exceptions is an article by Herbert Marcuse on the struggle against liberalism in Nazi political thought.<sup>40</sup> The Weimar democracy, the welfare state, and, above all, the collapse of the Weimar Republic were not examined during the institute's first ten years, either. As late as early 1938, a few months after Kirchheimer's arrival in New York, this thematic gap was still apparent in the programmatic *Memorandum* in which Horkheimer outlined the ISR's research: the institute, he wrote, was concerned with developing a "comprehensive theory of society" (Horkheimer 1938a, 143). There was no mention of specific analyses of fascism or other political systems.

<sup>38</sup> Letter from Max Horkheimer to the Social Science Research Council dated 17 December 1938. Max Horkheimer Papers, Na 1, VI 11, 370.

<sup>39</sup> Max Horkheimer and Otto Kirchheimer: *Criminal Law and Social Structure. Research Project of Dr. Kirchheimer*. Max Horkheimer Papers, Na 1, IX 59, p. 2–7. —The project was planned to take eighteen months; the amount of funding applied for was \$ 4,000.

<sup>40</sup> Herbert Marcuse briefly discussed Schmitt in this article, but mainly with reference to his criticism of liberalism during the Weimar Republic (see Marcuse 1934, 4, 11, 21–23).

Almost two decades after the rise of fascism in Italy and more than ten years after the first major electoral successes of Hitler's party in Germany, the subject of Nazism was finally given priority on the institute's research agenda. After Nazi Germany had started the war in Europe, Horkheimer decided that besides antisemitism, the ISR should also address questions concerning the Nazi system's economic and legal order, class structure, culture, and state organization. He hoped that this thematic turn would augment the increasingly limited funding for the institute's staff with monies from US foundations. The institute's move toward research on Nazism kept the staff busy until the end of World War II, producing a series of publications with which the institute quickly made a name for itself in US academia—as Horkheimer had hoped. At the same time, however, profound differences between staff members in terms of political theory came to the fore, resulting in the dissolution of the institute. Kirchheimer was involved in these controversies from the outset and did not mince words when it came to criticizing positions held by Horkheimer and his inner circle that he considered to be misguided.

Although Kirchheimer knew that his employment at the ISR was precarious, he was certainly confident about the substance of his work there. He had grounds for optimism not least because he had been asked to do extensive groundwork for a programmatic essay envisioned by Horkheimer, which was published under the title "Die Juden und Europa" (The Jews and Europe). Horkheimer began work on the essay after the November 1938 pogroms in Germany; it was his first dealing explicitly with the subject of fascism. For almost a year, Horkheimer toiled away at the manuscript but did not agree to its publication in the institute's journal until after Germany's attack on Poland in September 1939—and only after considerable hesitation and several rounds of revision. The essay, which is the source of the famous dictum "Whoever is not willing to talk about capitalism should also keep quiet about fascism" (Horkheimer 1939a, 78), is a mixture of political observations, theoretical deliberations, and historical-philosophical reflections. The text is permeated with the fear that the fascist model of governance and a murderous form of antisemitism would sooner or later spread worldwide. Horkheimer advocated for a functionalist interpretation of antisemitism, which—in contrast to his views in the chapter on antisemitism in *Dialectic of Enlightenment*, his book co-authored with Adorno—assumed a primacy of economic factors for explaining the hatred of Jews.<sup>41</sup> According to this stance, the Jews were the circulation agents par excellence. They owed their emancipation solely to the fact that, as financial market actors, they were among the pioneers of capitalism, and, as lenders, they were indispensable in the sphere of circulation. As free circulation in the financial markets disappeared, the Jews were now "being run over" (Horkheimer 1939a, 89), thereby becoming superfluous.

Horkheimer also championed the same functionalist view in his theory of politics and his legal theory. To him, the sphere of circulation was simultaneously the actual social foundation of bourgeois democracy and the universality of the law. As the sphere of circulation became less important, democracy and ties to the universality of the law became obsolete, thus clearing the way for dictatorship and the abolition of the rule of law.

41 On the transformation of Horkheimer's functionalist interpretation of antisemitism and his transition to an interpretation rooted in the history of civilization, inspired by Adorno, from 1941 on, see König (2016, 220–244).

At Horkheimer's request, Kirchheimer had compiled a twelve-page manuscript providing an overview of empirical findings from various sectors of the economy in Italy and Germany, the two fascist states at the time, in the spring or summer of 1939 (see Kirchheimer 1939). With a variety of quantitative data, Kirchheimer documented a strengthening of private capitalism through reprivatizations under both regimes, the processes of concentration in various sectors at the expense of small and medium-size businesses, the reduction of wages and intensification of labor, the enduring importance of large-scale landholdings in agriculture, the failure of the expansion of the public administration, and increasing bureaucratization. Even if Horkheimer's published essay did not directly include any individual passages from Kirchheimer, let alone his tables of statistics, a precise reading clearly reveals that Kirchheimer's findings were incorporated into Horkheimer's statements about the role of business monopolies, increasing concentration in various sectors, and the expansion of the government apparatus (see Horkheimer 1939a, 79, 81, and 89).

When Kirchheimer's text and Horkheimer's use of it are compared, two things are striking. The first is the skill with which Horkheimer integrated into his general line of argument the loss of importance of the sphere of circulation in the two fascist states, which Kirchheimer had evidenced with copious data. The second is the degree to which he had massaged Kirchheimer's findings; the latter could probably hardly recognize his own work anymore. Horkheimer had made Kirchheimer's findings more pointed, to the extent that they expressed the complete disappearance of the sphere of circulation under fascism—which was not backed up by Kirchheimer's figures at all.

Kirchheimer's first longer article within the framework of the ISR's analyses of Nazism was published in the summer of 1940, in Issue 3 of *Studies in Philosophy and Social Science*, the first English-language issue of the previous *Zeitschrift für Sozialforschung*. The title of the article was "Criminal Law in National-Socialist Germany" (see Kirchheimer 1940b).<sup>42</sup> It is one of Kirchheimer's works most often quoted in the secondary literature on the Frankfurt School (see Buchstein 2019a, 51–59). Written in the complex political situation of the year 1939, the study stands up to later analyses of the development of criminal law in the Third Reich that were based on richer source material.<sup>43</sup>

Kirchheimer distinguished three phases in the Third Reich's theory of criminal law. In the first phase, an authoritarian theory of criminal law prevailed; this was expressed through weakening the status of the defense lawyer and imposing more severe sentences. The theoretical reasoning for the authoritarian theory of criminal law was based on the theory of free will according to which the objective characteristics of a crime were less important for sentencing than its subjective aspects, i.e., the alleged will of the perpetrator. In the second phase, with the proclamation of the racist state, the theory of criminal law was dominated by the phenomenological school of legal theory propagated at the University of Kiel. According to this theory, essentiality and intuition took the place of logical deduction as methods of legal assessment. It was not a particular crime or a particular will that made a person a criminal but the inner essence of their personality. Examination of the criminal's inner essence, their general predispositions, their pre-

42 The following page numbers refer to this text.

43 See the more recent works by Hartl (2000) and Pauer-Studer (2014).

vious convictions, and their character replaced scrutiny of the objective features of the crime. Kirchheimer knew the leading representatives of the Kiel School, including Ernst Rudolf Huber, Friedrich Schaffstein, and Georg Dahm, personally from the period during the Weimar Republic when he had had academic ambitions of his own. He began his remarks on the Kiel School by pointing out that their recourse to phenomenology “in its theoretical foundation” (445) was based on Carl Schmitt’s attack on general conceptions, on normativism and positivism, and on his argument for orientation toward a Nazi understanding of the concrete order of life. It was on this basis that intuition and essence had been introduced as the best methods of discovering the criminal agent. In his article, Kirchheimer presented a highly sophisticated analysis that demonstrated how closely he had kept up with the current debates in legal theory as well as with legal practice in Germany. The materials he worked with were laws, legal articles in German academic journals, and collections of rulings handed down by German courts. It is worth examining four aspects of his article in more detail.

First, Kirchheimer describes the massive expansion of the areas in which criminal law was then applied to encompass areas of society previously not subject to it; the expansion went so far as to include foreigners’ acts on foreign soil. Second, he sketches the recourse to *gesundes Volksempfinden* (assessment of a matter in accordance with the Nazi *Volksgemeinschaft* governed by the will of the *Führer*; see Glossary) as the legal standard, which had advanced into the wording of individual laws and which required judges to use the purported will of the *Führer* as orientation. Third, Kirchheimer also notes “remarkable restraint” (449) in the legal practice of the *Reichsgericht*—after severely criticizing it in his Weimar days—in invoking precisely this *gesunde Volksempfinden*. The remaining “normativists” (446)—as Kirchheimer called these judges, using a term from Schmitt—at that court were following the letter of the law more closely. Kirchheimer saw this as a legal policy conflict between the “conservative” (448) normativists on one side and the “extremists” (448) on the other within the Nazi legal community. The extremists oriented their work toward Schmitt’s methodological postulate of concrete-order thinking. Conversely, an “evident tendency to maintain rationality in the realm of criminal law” (450) was to be seen in the decisions of the *Reichsgericht*. Kirchheimer considered this to be a type of rationality following Max Weber: “This rationality requires that the statute is preserved as a main focus for the decisions of the individual cases” (450). However, this rationality was suspended whenever the matter in question concerned central ideological goals of the regime, the Nazi *Rassepolitik* (policy on *Rasse*) in particular. Fourth, at the institutional level, Kirchheimer describes the further suspension of judicial self-administration beginning in the second half of the 1930s. The dismissal and forced resignation of judges, several organizational changes, for example the establishment of *Sondergerichte* (special courts for political and especially serious crimes, feared for their swift and severe rulings that could not be appealed), amendments to the Code of Criminal Procedure, and above all the new wartime decrees “mark the last stage in the transformation of the judge from an independent agent of society into a technical organ of the administration” (462). Kirchheimer considered these more recent developments to be a third phase in the development of Nazi criminal law. In this phase, the “fight between normativism and the concrete conception of life” (463) in legal theory ever since Germany had attacked Poland had been settled. The new and “recent campaign for ruthless extermination” (463) of the

population in the conquered areas was legitimized using the argument that such practices were the authentic expression of the concrete conception of life as a German.

Yet even this dense and grim description of the situation of criminal law in Germany did not prevent Kirchheimer from seeking potential rifts within the Nazi penal system, which appeared compact from the outside. He found them less in the ideological space of the controversies within legal theory, which were continuing to fester under the surface, but rather at the level of “departmentalization” (462) of judicial policy and the societal fault lines underlying it. The increased efficiency of the state and industrial machinery was paid for by the “complete subordination of man in his productive relationships to the disciplinary and penal machinery built up by the special services and by private combinations invested with the garments of public authority” (462). It was at this point that the inroads of the state on the daily life of the average appeared to be most striking and that “the exclusive predominance of strict power relationships [would] most likely create frictions” (462). Kirchheimer thought it difficult to see how the official goal of improving public morality could be achieved by a state founded on an oppressive political organization supervising and directing all spheres of life.

While Kirchheimer was working on his first article for *Studies in Philosophy and Social Science*, the conflicts at the ISR about the proper socio-theoretical categorization of Nazism were intensifying.<sup>44</sup> Perhaps it was Horkheimer’s creative overinterpretation of Kirchheimer’s commentary on his article on the Jews and Europe in 1939 that prompted Kirchheimer to criticize him more openly from then on. The first instance of this was in May 1940 regarding Horkheimer’s manuscript “The Authoritarian State,” in which Horkheimer followed Friedrich Pollock’s hypotheses on the transition from monopoly capitalism to state capitalism, even down to the wording of individual passages (Horkheimer 1940, 106). He subsumed both the Nazi and the Soviet systems under the rubric of state capitalism. To Horkheimer, the authoritarian state was a societal form *sui generis*, with socialist and capitalist components. The difference between the authoritarian state and capitalism, he claimed, was in the control of the economy through the political system and the suppression of market competition; the difference between this and socialism was the long-term oppression of the masses and their economic exploitation.

Horkheimer was particularly critical of labor movement organizations. In his opinion, bourgeois institutional structures had prevailed in proletarian mass organizations as a result of the successful corporative integration of the working class into the state apparatus in the 1920s. Even during the Weimar democracy, oligarchical tendencies and the organizations of capital and labor had converged, and fascism was now able to benefit from this. Considering such a comprehensive mechanism for integration and oppression, Horkheimer saw no option for the labor movement to act as organized political opposition; instead, he expected a long period of rule for the authoritarian state. He pointed to the intellectual power of “critical theory” as well as to spontaneity and “human will” leaping out from human history and into the realm of freedom and solidarity as the only opposing forces and the last remaining glimmer of hope (see Horkheimer 1940, 107). His deliberations had consequences that touched the core of previous collaborations at

44 On this famous debate, see Wiggershaus (1995, 280–302).

the ISR. If, in the spirit of Walter Benjamin's hypotheses on the philosophy of history, the only purpose for a better world was to escape from the continuum of a history of decline, then the empirically observable societal tendencies and the specific actions of political actors would lose their significance for theory production. For this reason, Jürgen Habermas saw Horkheimer's essay as the beginning of his departure from the collective work at the ISR (see Habermas 1986, 167–169).

Horkheimer's manuscript had been circulating internally among his colleagues since the spring of 1940. Kirchheimer also contributed an internal memorandum with the opposite hypothesis to the internal debates at the institute, directly attacking Horkheimer's deliberations at several points. He referred to Horkheimer's "undisguised optimism with respect to human nature,"<sup>45</sup> despite expressing pessimistic expectations of the future, and criticized Horkheimer's reference merely to a will to freedom as the source of political changes. Above all, however, Kirchheimer objected to Horkheimer's systematic rejection of political mass organizations. These organizations were indispensable, he claimed, in the struggle to bring down the authoritarian state. If such an overthrow were to be brought about, then certain organizational "hardenings" which Horkheimer had criticized had to be tolerated. Finally, Kirchheimer developed an antithesis to Horkheimer's criticism of the bureaucratic administration of society, asserting that it was important to differentiate between bureaucracy as an instrument of domination and bureaucracy as an instrument for providing services. The latter, he claimed, would be essential in a free society of the future with a "socialist subsistence economy," so it was all the more important to contemplate the political forms of organization of such a society.

The discussion with Horkheimer about "The Authoritarian State" and also about his later essay "The End of Reason" proceeded by letter after Horkheimer had moved to his new domicile on the West Coast in the summer of 1942. This written discussion again illustrates his and Kirchheimer's opposing perspectives on fascism's mechanisms of exercising power. Although in a letter dated June 1942 Kirchheimer initially agreed with Horkheimer's criticism of the naive social democratic concept of progress in its struggle against fascism, his subsequent disagreement was sparked by Horkheimer's hypothesis that fascism shook the foundations of bourgeois anthropology because it taught individuals to fear things worse than death. According to Kirchheimer, the fear of death had historically been suspended time and again under different regimes but Nazism did not belong "in this category" because "the focus here seems to be on self-preservation of the individual." Thus, Nazism remained entirely within the scope of bourgeois anthropology. Kirchheimer assumed "conversely" that in fascism "nothing has remained of the individual besides self-preservation and fear of death, which are zealously fostered and cultivated by the 'pseudogroups' as *aréna dominationis* (the arena of domination)."<sup>46</sup>

45 This and the following quotations can be found in Kirchheimer (1940a).

46 All quotations in the letter from Otto Kirchheimer to Max Horkheimer dated 24 June 1942. Max Horkheimer Papers, Letters VI, 11 and 328. In his response, Horkheimer conceded that he took this empirical objection "very seriously." Nonetheless, he wanted to continue following up on the suspicion that designating self-preservation under fascism "as mere residuals of the bourgeois character do not do justice to the matter" and, in this context, referred to his current work on "fundamental philosophical questions" within the framework of the "project on dialectics" he was planning (let-

In 1941, Kirchheimer was given the opportunity to present his own view of Nazism more extensively in two essays intended to appear in the institute's journal, "The Legal Order of National Socialism" and "Changes in the Structure of Political Compromise." Yet this did not proceed without difficulties. Kirchheimer worked on these essays while the debate at the ISR about the appropriate way to understand Nazism had already erupted. Initially, the institute's leadership had planned to include the article on the legal order in the special issue of the institute's journal *Studies in Philosophy and Social Sciences* on Nazism but the text Kirchheimer submitted seemed too politically controversial to Horkheimer, so it was decided on short notice to publish the essay on the structure of compromise first. The essay on the legal order of Nazism was published in the following issue of the journal after being reworked multiple times (see Kirchheimer 1941d). The difficulties Kirchheimer faced before his essay on the structure of political compromise in the Nazi Reich, the first published on this subject, could find a place in the institute's journal can be reconstructed from various sources.

Kirchheimer had submitted a preliminary version of the text to the institute's director in the spring of 1941.<sup>47</sup> This version was criticized by Horkheimer and Adorno, and Kirchheimer was asked to fly to the West Coast so that they could all discuss the text. In May 1941, Kirchheimer spent several days in Santa Monica for "extensive discussions" about the text with Horkheimer, Adorno, and Herbert Marcuse.<sup>48</sup> Kirchheimer was asked to rework it to make his deliberations fit better into the theoretical approach championed by the institute's leadership. In July, Adorno reported to Horkheimer from New York that he was processing the essays for the special issue as intensively as possible and that he had "discussed Kirchheimer's with him in detail."<sup>49</sup> Pollock was assigned responsibility for Kirchheimer's essay on behalf of the institute's leadership. It is evident from a letter from Horkheimer to Kirchheimer that the fundamental differences between the latter and the institute's leadership in terms of political theory had not been resolved even after his trip to the West Coast: when Horkheimer asked how much progress Kirchheimer had made in revising the article, he called it "Klassenkompromisse im Staatskapitalismus" [Class compromises in state capitalism].<sup>50</sup> In other words, he wanted to read Kirchheimer's contribution from the perspective of the hypothesis of state capitalism he himself championed.

Kirchheimer stood his ground, however. On 11 July, he explained to Horkheimer that after various changes he thought the essay was now "finished,"<sup>51</sup> and Pollock would certainly inform him about this in more detail. The fact that neither Horkheimer nor Adorno was satisfied with Kirchheimer's contribution is clear in letters in which they considered

ter from Max Horkheimer to Otto Kirchheimer dated 6 July 1942, Max Horkheimer Papers, Letters VI, 11 and 320).

47 The first version is not to be found in the relevant archives in Frankfurt am Main and Albany.

48 Otto Kirchheimer in retrospect in his letter to Max Horkheimer dated 22 January 1943. Max Horkheimer Papers, Letters VI, 11 and 318.

49 Letter from Theodor W. Adorno to Max Horkheimer dated 2 July 1941 (Horkheimer 1996, 96).

50 Letter from Max Horkheimer to Otto Kirchheimer dated 27 June 1941. Max Horkheimer Papers, Letters VI, 11 and 349.

51 Letter from Otto Kirchheimer to Max Horkheimer dated 11 July 1941. Max Horkheimer Papers, Letters VI, 11 and 348.

removing the essay from the issue entirely.<sup>52</sup> However, this was not an option because of a lack of thematically suitable alternatives. For this reason, Horkheimer changed his mind several days later and asked Adorno to attempt to “adapt Kirchheimer’s article linguistically in such a way that it might appear in this issue.”<sup>53</sup> Adorno soon informed him that he had “already tinkered with it in New York.”<sup>54</sup> Horkheimer was obviously worried that the first English-language issue of the institute’s journal with a theoretical focus might appear to be too Marxist for an American readership. Consequently, he asked Adorno in late August to reconsider the article once again: “Please take another close look at Kirchheimer’s essay from a tactical perspective, especially the beginning and the end of it, [...] and please ask [Leo] Löwenthal, if necessary, to induce Kirchheimer to make changes or cuts.”<sup>55</sup> One week later, Adorno reported to Horkheimer, “I got along well even with wild Kirchheimer when I talked through his article with him.”<sup>56</sup> Another week later, Adorno added reassuringly: “I have studied Kirchheimer’s article again most precisely. I pushed through quite a few minor changes—all of them with a view to tactical censorship. I think we no longer need to worry about the issue.”<sup>57</sup>

Which parts of the text and which passages from Kirchheimer’s original manuscript fell victim to Adorno and Löwenthal’s “tactical censorship” and which additions and improvements were made to the text in the editorial process can unfortunately no longer be ascertained because the source material is incomplete. Regardless, in the version of the essay finally published, Kirchheimer made no mention of Pollock’s theory of state capitalism. Instead, he continued the analyses of the Nazi regime he had already submitted from 1933 on, elaborating in particular on the political structure of compromise in the Third Reich.

In his essay “Changes in the Structure of Political Compromise,”<sup>58</sup> Kirchheimer defined political compromise as the agreement between social groups about the system of government and the highest maxims of government action. He presented a three-phase model of the development of political compromise in the political systems on the European continent. In the first phase, liberalism, each social compromise is negotiated between members of parliament. In the second phase, mass democracy, social agreements are made between the major voluntary associations. In the third phase, fascism, the “heads of the compulsory estates” distribute state “power and booty” (264). Therefore, even if economic factors determine the underlying conditions of the social structure of

52 Letter from Max Horkheimer to Leo Löwenthal dated 21 June 1941 (Horkheimer 1996, 78).

53 Letter from Max Horkheimer to Theodor W. Adorno dated 13 August 1941 (Adorno and Horkheimer 2004, 188).

54 Letter from Theodor W. Adorno to Max Horkheimer dated 17 August 1941 (Adorno and Horkheimer 2004, 192).

55 Letter from Max Horkheimer to Theodor W. Adorno dated 28 August 1941 (Adorno and Horkheimer 2004, 208).

56 Letter from Theodor W. Adorno to Max Horkheimer dated 4 September 1941 (Adorno and Horkheimer 2004, 221).

57 Letter from Theodor W. Adorno to Max Horkheimer dated 13 September 1941 (Adorno and Horkheimer 2004, 228).

58 See Kirchheimer (1941a). The following page numbers refer to this text.

compromise, in the final analysis, it is political processes of negotiation in which specific political decisions are made.

Kirchheimer was of the opinion that fascism was a type of government whose “outstanding characteristics” seemed “at first glance” to be “greater independence and power” (273). In fact, fascism was a form of “domination by institutionalized monopolies” (274), which Kirchheimer attempted to explain in more detail using the example of Nazism in Germany. He characterized fascism as a stage in the development of capitalism in which individuals had lost their independence and the ruling groups alone were recognized as partners in forming political compromise. According to this model, the German economic system consisted of various monopolies in which competing elements merely had the status of oases. Such monopolies were to be found in three forms: the private monopolies in industry and agriculture, “the monopoly for industrial and agricultural labor,” and “a public monopoly under joint state and party control” (274). The three monopolies formed the “backbone of a new system of guarantees” (274); the traditional organizations of the labor movement were excluded entirely in this constellation, for which reason the capitalists had lost the need for “the pressure potentialities of credit control” (274).

The fascist regime actively promoted the formation of further monopolies and cartels. Kirchheimer took up observations here that had already featured in his initial working papers for Horkheimer and provided structural economic data as evidence of this process. Against this background, he described in a further step the results of direct processes of negotiation between the top representatives of industrial and agricultural sector groups, the state bureaucracy, the Nazi party, and the military in making and applying laws. It was characteristic of the structure of compromise under Nazism, he claimed, that Hitler acted in his role as the “ultimate arbiter” (287) in the struggle among these five powerful groups only if they did not reach a decision among themselves. The leadership could arbitrate these conflicts so successfully “only because the unfolding program of [international] expansion [had] given the various groups the possibility of extending their activities . . . and of satisfying their desires without too much need of getting in each other’s way” (287).

Kirchheimer emphasized the continuities of the Weimar Republic and Nazism in terms of their social bases. Both systems were founded on negotiating compromises about power and influence between the heads of the industrial and agricultural monopolies, the state bureaucracy, and the military. In one decisive aspect, however, the Weimar democracy and the Nazi regime were fundamentally different: the participation of the collective representation of labor in reaching compromise had been replaced with the Nazi party. With this description Kirchheimer openly contradicted Pollock’s and Horkheimer’s hypothesis of state capitalism. In contrast to Pollock and Horkheimer, he also underlined the fragility of the Nazi regime. In his view, fascism had established itself not as a stable political order in Germany, but as a system of constant rivalries between power groups that depended on expansion through military action and successful imperialist policies for its continued existence. If the tide of war were to turn against Germany, the system would be threatened by political instability.

Giving the example of competitive capitalism in the UK, Kirchheimer explained how economic and political institutional factors interacted. In this phase in the UK, money as the “all-embracing medium” (264) had left its mark on political institutions and set

the transformation toward mass democracy in motion. Kirchheimer explained the new constellation of conflict emerging in this way using the example of private control over central banks for state credit policy. Liberating central banks from political oversight was itself a political decision made in the interest of financial capital in order to be prepared to withstand potential leftist majorities in parliaments. The independence of central banks from government policy made it possible to keep governments and parliaments under control in modern mass democracies, thus limiting the latitude available to political alternatives. Kirchheimer described the policy-setting role of central banks in monopoly capitalism in more detail using the example of France in the 1920s and during the *Front populaire* after 1936, which he had experienced firsthand during his exile in Paris. He described the same pattern using multiple examples: as soon as the French electorate had shown left-leaning tendencies and the governments had initiated social reforms, the central bank had used its veto power and taken rigid countermeasures, making governments fall and all reforms vanish.

## 6. Conclusion: A message across the Atlantic

Kirchheimer's deliberations on the structure of political compromise in modern mass democracies and their institutional restrictions remained without positive resonance at the ISR; Adorno even considered cutting them from the article entirely.<sup>59</sup> Nevertheless, his analysis of Nazism took on great importance for formulating the position opposing Pollock's hypothesis of state capitalism at the institute. For these deliberations were also the basis of Franz L. Neumann's hypothesis of polycracy, according to which the Nazi system was characterized by notorious struggles between four pillars of power: monopoly capital, the state bureaucracy, the party, and the *Wehrmacht*.

The publication of Neumann's 1942 book *Behemoth: The Structure and Practice of National Socialism*, a comprehensive description and analysis of the Nazi system running to over five hundred pages, marked the culmination of polemics in the controversies at the ISR. Neumann countered Pollock's programmatic concept of "state capitalism" with that of "authoritarian monopoly capitalism" (Neumann 1944a, 473). The book, several chapters of which Kirchheimer had contributed to with his expertise in criminal and private law, became the standard work of research on the Nazi regime in the United States and the United Kingdom shortly after its publication. An updated version published in 1944 helped staff members of the US occupation authorities understand the Nazi regime following the liberation of Germany from Nazism.

In the two years between the first and second editions of *Behemoth*, Carl Schmitt took up his mythological topic once again in a brief article titled "Behemoth, Leviathan und Greif" (Behemoth, Leviathan, and Griffin) in *Deutsche Kolonialzeitung*, the monthly magazine of the *Deutscher Kolonialbund* (German Colonial Association). In a casual, grandfatherly tone, Schmitt told his readers about the sea monster Behemoth being replaced by Great Britain's maritime global supremacy, which he now called Leviathan. Then he

59 Letter from Theodor W. Adorno to Max Horkheimer dated 17 August 1941 (Adorno and Horkheimer 2004, 192).

guided his readers' attention to the current situation: Germany had established itself as the leading industrial power in Europe since the end of the nineteenth century, and it was at the cutting edge of weapons technology with its *Luftwaffe* (Air Force). The new element decisive for winning wars was no longer the sea but the air. Thus, the two mythical beasts Behemoth and Leviathan were joined by "a large bird," the "griffin" (Schmitt 1943, 526). The new nomos of the Earth could "only emerge through battle," and it could be that following air, fire as the fourth element would either bring the history of mankind to an end or have it begin anew.

Schmitt demonstrated not only in such speculations but also in his book on Hobbes that he did not consider political theory to be an activity resting on the premise of people exchanging arguments intersubjectively in order to learn from each other. He did not argue, he insinuated. This was in stark contrast to Hobbes's rigid and strictly scientific approach. In light of these methodological differences, it is difficult to understand why Schmitt held Hobbes in such great veneration. The philosopher Wolfgang Kersting boiled down Schmitt's relationship to Hobbes to the image of "picking flowers in a quarry" (Kersting 2009, 99). To Schmitt, Hobbes's oeuvre was like an old quarry he climbed down into, seeking wild and beautiful flowers. He plucked the blooms he was interested in, removing them from the settings of their arguments, and adorned himself with them.

The fragrance of some of the flowers Schmitt picked wafted further than intended. In his introduction to *Behemoth*, Neumann explained its unusual title, first discussing the monsters Leviathan and Behemoth against the background of Jewish eschatology. Then he mentioned Thomas Hobbes's books *Leviathan* and *Behemoth* as his references in intellectual history and explained why he had decided on *Behemoth* as the title of the book:

Since we believe National Socialism is—or tending to become—a non-state, a chaos, a rule of lawlessness and anarchy, which has 'swallowed' the rights and dignity of man, and is out to transform the world into a chaos by the supremacy of gigantic land masses, we find it apt to call the National Socialist system *The Behemoth*. (Neumann 1944a, xii).

Of course, the rich secondary literature on Neumann's book later picked up on it paralleling Schmitt's choice of title for his *Leviathan*.<sup>60</sup> Duncan Kelly even called Neumann's book a "continuation of his dialogue with Schmitt" (Kelly 2002, 491). Kirchheimer was involved in choosing the title for Neumann's book. In a 1988 conversation, Ossip K. Flechtheim, who had collaborated on the book as well as Kirchheimer and Gurland, speculated in retrospect that Neumann and Kirchheimer had jointly hatched the idea for the title as they worked hand in hand, day in and day out, in their offices on Morningside Park in uptown Manhattan. They had wanted to "get back at Schmitt" and send him a "message across the Atlantic."<sup>61</sup> Whether or not this anecdote is accurate—it is a fitting allegory for the change in how the Leviathan was politically coded as it was transformed into the Behemoth.

60 See Rottleuthner (1983, 247–251), Scheuerman (1994, 123–156), Kelly (2002), and Bredekamp (2016, 63–68).

61 Ossip K. Flechtheim in a conversation with the author on 13 February 1988.

