

Chapter 18:

Kirchheimer's Strategies for Debating Schmitt

Let us suppose for a moment that the anecdote mentioned in the Introduction were true and Carl Schmitt had actually asked Otto Kirchheimer “Are you coming as a friend or as an enemy?” when he unexpectedly visited him at his house in Plettenberg in November 1949. This question would have confronted Kirchheimer with a dilemma because each of the two possible answers would have validated Schmitt—at Kirchheimer’s expense. “Enemy” would have endorsed Schmitt’s views on Jews as eternal enemies, unwilling to forgive. Schmitt would have taken “friend” as confirmation that he had been forgiven by a Jew for his Nazi and antisemitic propaganda and activities.¹

Matthew Specter some years ago asked: “Can a political thinker like Schmitt be both intellectual friend and political enemy?” (Specter 2016, 427). This question is of particular significance for the case of Kirchheimer. Today’s avowed left-Schmittians answer this question in the affirmative, and this leads to one of the questions raised in the Introduction: can we consider Kirchheimer to be a forerunner of contemporary left-Schmittianism? If we follow Ellen Kennedy’s reading of Kirchheimer’s works, this question should be answered with a resounding yes. She claimed not only that Schmitt and Kirchheimer agreed on their theoretical apparatus even after the Weimar Republic but also that Kirchheimer adopted from Schmitt certain concepts, namely enthusiasm for decision-making and a specific logic of argumentation in exposing contradictions.² She also argued that they shared a dislike of liberal democracy arising from the methods and concepts with which they were in “convergence” (Kennedy 1987a, 37).

In the Introduction, I defined left-Schmittianism as the transformation of Schmittian concepts or categories into the framework of legal or political theories with emancipatory political intentions. Contemporary left-Schmittians such as Chantal Mouffe view Schmitt as a political “adversary of remarkable intellectual quality” from “whom we could benefit” (Mouffe 1999, 1) and propose to “think with Schmitt against Schmitt” (Mouffe

1 I owe the insight into this dilemma to discussions with Sandra H. Lustig.

2 See Kennedy (1987a) and (1987b).

2005, 14).³ Mouffe and other left-Schmittians of our time such as Andreas Kalyvas, Giorgio Agamben, and Daniolo Zolo are convinced that ignoring Schmitt's work would deprive contemporary political theory of essential and important insights. They claim that Schmitt offers unique resources for political theory, diamonds in the rough, so to speak. In the Introduction, I listed five of these which can be found in the rich literature by left-Schmittians: Schmitt's critique of universalism in international law, his antagonistic concept of the political, his theory of the exceptional state and sovereignty, his declaration of an irreconcilable antagonism between democracy and liberalism, and his critique of parliamentarism including his reflections on the relationship between homogeneity and democracy. It is striking that in one way or another, all five of these subjects had already been part of Kirchheimer's reception of Schmitt's work during the forty-year period in which he grappled with it. However, his evaluation of Schmitt's treatment of them was less positive than that of contemporary left-Schmittians.

Of course, some of Schmitt's statements, theories, categories, and concepts were important intellectual sources for Kirchheimer. But other intellectual sources—various strands of Marxism, Rudolf Smend's theory of integration, the critical theory of the Frankfurt School, and the empirical social sciences—became even more important for the evolution of his intellectual identity. Over the course of time, Kirchheimer reacted to Schmitt's work and political activities in various ways: with attempts at critical revisions, with harsh rejections, with an unmasking critique of ideology, or with sarcastic comments. In the late 1950s, he lost interest in even reading Schmitt's latest works. Upon closer inspection, we can distinguish five modes of reception. The first four correspond closely to the four phases of reception I distinguished in the Introduction. I call them cherry-picking and reframing, frontal attack, condemning Schmitt as a Nazi propagandist, and deliberate disregard. There is also a fifth type of reception that does not fit into the chronological order of these four phases and where Kirchheimer was undoubtedly motivated and inspired by Schmitt's work to move beyond the Schmittian horizon. I refer to this mode of reception as redirecting Schmitt's ideas beyond their original horizon. In those cases, Kirchheimer used certain statements or questions raised by Schmitt as starting points for new insights, albeit without making any direct reference to Schmitt. Kirchheimer's learning process over the course of time propelled his oeuvre far away from Schmitt's original concepts and theories. For this reason, it is inappropriate to characterize him as a godfather or theoretical patron of contemporary left-Schmittianism.

In the following sections of this chapter, I will first summarize and characterize Kirchheimer's five different modes of reception of Schmitt. Then, in conclusion, I will examine Schmitt's reactions to Kirchheimer's reception of him and turn my attention to the way he instrumentalized Kirchheimer for his own purposes.

3 Mouffe notoriously downplays the extremist nature of Schmitt's political position, calling him a "conservative theorist" who made a "compromise with Nazism" (Mouffe 2005, 4).

1. Cherry-picking and reframing

Cherry-picking and reframing is a strategy of reception that involves taking up distinctive concepts and theorems and placing them within a different socio-theoretical framework, thereby arriving at a different evaluation. Following in the footsteps of Ellen Kennedy, a number of authors have classified Kirchheimer's dissertation about the state theories of Bolshevism and social democracy as the very first extensive articulation of left-Schmittianism in political thought. They claim that the dissertation was "quintessentially left-Schmittian" (Scheuerman 1994, 24) and that Kirchheimer's line of argument "closely follows Schmitt's theorems" (Kohlmann 1992, 505–506). In the revised edition of his Schmitt biography, Reinhard Mehring calls Kirchheimer "the founder [...] of] a kind of Marxist left-Schmittianism" (Mehring 2022a, 198).⁴

However, upon closer inspection of some of the other sources underlying the dissertation, it appears that these authors took an incomplete view and jumped to conclusions. It is important to remember that Schmitt's work was not the only, not even the primary inspiration for Kirchheimer as a twenty-two-year-old doctoral student. His line of thought was a creative—or eclectic—mixture of theoretical fragments from both Schmitt and Rudolf Smend that he squeezed into the basic framework of Max Adler's socialist theory. Kirchheimer incorporated theoretical ideas and political concepts with their origins in conservative and right-wing political thinking. His dissertation shows particularly well how, at this point in time, he thought Schmitt's concepts and wording could be integrated into a Marxist horizon of thinking following Adler. As discussed in Chapter 2, the Marxist patterns in Kirchheimer's work clearly preceded the Schmittian figures of thought. Because he also incorporated concepts from Smend's theory of integration in his dissertation, the label left-Schmittianism is justified for his dissertation only to a certain degree. In my view, "left-Smendianism" or "Adlerism in constitutional theory" would be just as accurate.

Even from Kirchheimer's dissertation, it becomes apparent how fundamentally he and Schmitt differed in their general patterns of thought. Alfons Söllner and Karsten Olson have called these differences the contrast between an ontological and a historical sociological way of thinking.⁵ Schmitt argues ontologically when, for instance, he postulates the friend-enemy dichotomy or claims homogeneity is a prerequisite for the existence of a functioning democracy. Kirchheimer did not simply adopt Schmitt's concepts but rather engaged with them from an empirical sociological perspective and with an intention that is critical of ideology. Once we recognize these two fundamentally different ways of thinking, we see a subtle yet all the more significant shift in our understanding of how Kirchheimer dealt with Schmitt's writing.

This shift can also be illustrated with respect to their normative theories of democracy during the final phase of the Weimar Republic, as discussed in Chapters 5 and 6. Whereas Schmitt repeated his sharp conceptual distinction between democracy and *Rechtsstaat* with all his polemical verve, Kirchheimer's understanding of these two elements had a

4 Similar assessments are to be found in the interpretations of Tribe (1987), Scheuerman and Caldwell (2000), and Mehring (2007).

5 See Söllner (1987, 90–92) and Olson (2016, 96–97).

different conceptual structure. Schmitt derived the meaning of democracy from the postulate of equality. Kirchheimer rejected this view of democracy and treated the norms of equality and freedom as mutually dependent. Some contemporary left-Schmittians reject Schmitt's understanding of democracy, too. In their view—following Schmitt—the antagonism between a democratic logic of popular sovereignty and a liberal logic of individual rights is irreconcilable. Kirchheimer explicitly and rightly rejected this conceptual antagonism at the end of the Weimar Republic. His main argument was that democracy aspires to realize both collective autonomy and political equality, both individual freedom and social equality. His considerations about the normative core of modern democratic theory read like forerunners of Jürgen Habermas's ideas about the normative co-originality of democracy and the rule of law.⁶

Another example of Kirchheimer's strategy of cherry-picking and reframing during the Weimar Republic is how he simultaneously radicalized and modified a Schmittian term in *Weimar—and What Then?* In his *Constitutional Theory*, Schmitt had labeled the Weimar Constitution a "dilatatory formulaic compromise." Kirchheimer took his analysis and radicalized it into the formulation of a "constitution without decision." In other words, he began his considerations by picking up on the term Schmitt used, then placed it in a different theoretical framework, namely the Marxist theory of class struggle, and arrived at a pointed radicalization of Schmitt's original wording. Other Weimar examples are Kirchheimer's early writing about parliamentarism and democracy. To Schmitt, the ongoing structural change of parliamentarism was proof of the historical demise of parliamentarism; Kirchheimer interpreted the same process in a positive light, as a new phase of mass democracy. In a way, with this kind of reception, Kirchheimer exploited Schmitt's outstanding reputation, borrowing the authority of a prominent constitutional law professor to support his own argument—at least as long as it seemed to fit his purpose. He also exposed Schmitt as a bourgeois ideologist several times during the Weimar Republic. He raised this accusation, for instance, in his reflections on property rights and expropriation and in his critique of Schmitt's interpretation of Article 48 of the Weimar Constitution, where he described Schmitt as a supporter of an authoritarianism prepared to transcend the previous limits of the constitutional order in the interests of the ruling classes.

At the beginning of the new wave of left-Schmittianism, Andreas Kalyvas stated that modern democratic theory still suffered from the "absence of a systematic reflection on institutions, rules, and norms" (Kalyvas 1999b, 111). He called it a "scandal" that constituent power had received "neither the recognition it deserve[d] in contemporary constitutional jurisprudence nor its proper place in our political vocabulary" (Kalyvas 2005, 230). In order to overcome that alleged scandal and other shortcomings, Kalyvas suggested that scholars rediscover Schmitt's work on popular sovereignty in his Weimar writings. In my view, this suggestion leads modern democratic theory up a blind alley: the sovereign people in a Schmittian world cannot act as a unit because any and all institutional mechanisms are lacking. Against Kalyvas's exclusively democratic interpretation, Renato Christi has pointed out that Schmitt does not argue that the

6 See Habermas (1996).

sovereign people is the sole bearer of constituent power; he also affirms the legitimacy of the monarchical principle (see Christi 2011).

In contrast to Schmitt's thinking, Kirchheimer's democratic theory during the Weimar Republic embodied a fundamentally different understanding of the institutions of modern democracies. Schmitt attributed the legally unbound people the role of the actual sovereign against all established instances of political decision-making. He did not declare the sovereign people a *Staatsorgan* (organ of the state) because he saw the positive quality in the people's lack of formal status. In Schmitt's interpretation, the sovereign people did not act as a state organ even in referenda. The logical consequence of this idea is that no form of political organization whatsoever can be a people in the proper sense. Parliament, parties, interest groups, trade unions—they all falsify and thus restrict the original unbound sovereign power of the people. Democracy becomes an existential immediate matter of the people that is prior to any law or constitution. Because the people cannot act as a unit due to the lack of any institutional mechanisms in Schmitt's theory, his theory justifies in advance that specific actors—such as a revolutionary group, the army, or a charismatic leader—must fill this institutional gap. Contrary to Schmitt, Kirchheimer resolved the dichotomy between an unorganized and pre-constitutional people on the one hand and a constitutionally organized and thus restricted people on the other hand in favor of procedures that open up democracy to additional forms of political participation. This opening included not only political parties and interest groups but also an extension of democratic decision-making into the economic sphere.

Kirchheimer's reflections on international law, discussed in Chapter 4, are another example of his strategy of cherry-picking and reframing. In 1928, Kirchheimer was still very much under the spell of the theses on national sovereignty of Schmitt on the one hand and Soviet legal scholar Evgeny A. Korovin on the other, who had emphasized the uncompromising differences between capitalist and socialist countries in international relations. Kirchheimer soon turned away from this position and supported the League of Nations and its basic idea of long-term cooperation and peace among nation-states. Whereas Schmitt and Korovin insisted on the existence of an uncompromising heterogeneity of mutually exclusive legal systems—be they nation-based or class-based—Kirchheimer advocated a dynamic concept of homogeneity on the international level based on positive experiences of cooperation. He transposed Smend's theory of integration to the level of international relations, so to speak. To Kirchheimer, Schmitt's realist view of international politics was founded on a set of unproven ontological assumptions about never-ending struggles between nation-states. Both Kirchheimer and Schmitt saw themselves as anti-imperialists, albeit in notably different ways. Schmitt argued in favor of militant nationalism against the enemy of Anglo-American imperialism. He believed he had unmasked universalistic international law and the prospect of an institutionally secured world peace order as perfidious claims to power by what he considered to be the Anglo-American enemies. He believed the right of every state to wage war at any time must not be restricted. Kirchheimer, conversely, supported restrictions on nation-states attacking neighboring countries or oppressing foreign countries as colonies. He hoped that intelligently limited international law could be used as a weapon against the capitalist imperialism of his age.

Even in his Weimar works, Kirchheimer already argued for expanding the juridification of international politics. His position on international law included a normative argument against the Schmittian critique: every objection raised against the one-sided or selective application of universalistic standards in international law must already presuppose these same standards. Schmitt's hermeneutics of suspicion about universalistic international law smuggles moral-normative commitments into his purportedly "realist" diagnosis of international politics. Kirchheimer maintained this position and developed it even further over the following years. He countered the polemic unmasking put forward by Schmitt and other opponents of the war crimes trials after 1945 that international law was always only the instrument of the powerful with a detailed analysis of the conduct of the trials in his book *Political Justice* in 1961. From the perspective of a historiographer of the critical theory of the Frankfurt School, Kirchheimer can be seen as a forerunner of the political project of constitutionalization of international law advocated by Jürgen Habermas since the mid-1990s (see Habermas 2014), whereas contemporary left-Schmittians, with their critique of cosmopolitan international institutions and international law, oppose such a position (see Zolo 2002; Mouffe 2007; Odysseos and Petito 2007).

2. Frontal attack

Kirchheimer began launching frontal attacks against Schmitt early on, during the Weimar Republic. One way he did this was to capitalize on doctrinal shifts and internal contradictions in Schmitt's work. Kirchheimer presented Schmitt as a witness against himself. One example of this strategy is Kirchheimer's criticism of Schmitt's extensive interpretation of Article 48 to justify the presidential dictatorship at the end of the Weimar Republic, as discussed in Chapter 5. Kirchheimer was happy to remind his readers in 1931 and 1932 of Schmitt's works four years earlier in which he had promoted a strict regulation of emergency powers—a position that Kirchheimer and other defenders of the republic also supported. He developed an argument that continues to be relevant to this day for a critical discussion of attempts in contemporary political thought to once again turn Schmitt's theory of emergency power into a fundamental critique of modern constitutional democracies that discredits the *Rechtsstaat*. It should be borne in mind that Schmitt's famous first sentence in his *Political Theology*—"Sovereign is he who decides on the exception" (Schmitt 1922, 5)—turns the original intention of the theory of sovereignty on its head. Following Hermann Heller (see Heller 1927), Kirchheimer argued that the starting point for the doctrine of sovereignty was the problem of the creation of positive rights and not their cancellation in a state of emergency. It was a new theory about the legitimate source of positive law which subsequently led to the theory of popular sovereignty. Schmitt, in contrast, switched the doctrine of sovereignty from the production of laws to a strong executive's power to act, with its greatest moment dawning in the state of emergency.

In contemporary political theory, Giorgio Agamben reverses the sovereignty doctrine in his fundamental critique of sovereignty in a similar way (see Agamben 2003). He interprets the most extreme phenomenon of the state establishing lawless zones in the form

of concentration camps as a manifestation of sovereign power. He states that intentionally creating a permanent state of exception has become an essential practice in liberal democracies and that it is impossible to return to the rule of law. Agamben recently made this argument again in his critique of the modest measures taken by the Italian government against the SARS-CoV-2 virus in 2020 (see Agamben 2020). His extension of the semantic meaning of the state of exception leaves us—as William Scheuerman aptly put it—“with nothing more than the deeply mysterious suggestion [...] to ‘halt the machine’” (Scheuerman 2020, 294) by ceaselessly trying to interrupt “the working of the machine” (Agamben 2003, 87) rather than by preserving the rule of law. Whereas Agamben argues that “the task at hand is not to bring the state of exception back within its spatially and temporally defined boundaries” (Agamben 2003, 87), Kirchheimer was among those authors who advocated specific legal restraints on the executive for clearly defined situations of emergency; Clinton Rossiter in the US and Ernst Fraenkel in Germany argued in a similar way a few years later (see Rossiter 1949; Fraenkel 1964).

Even during the Weimar Republic, Kirchheimer went a considerable step further in his frontal attacks by declaring Schmitt's positions to be plain nonsense. An early example is the critical remarks in his dissertation on Schmitt's celebration of political myths. To Schmitt, fascist myths functioned as what Ernesto Laclau would later call a “floating signifier” (see Finchelstein 2022, 106). Kirchheimer declared Schmitt's theory of the myth to be a provision for unjustified glorifications of pre-logical irrationalism that recurred to French ethnologist Lucien Lévy-Bruhl, who had argued that such a mythical consciousness belonged to the emotional and spiritual world of “primitive peoples.”⁷

Another example is Kirchheimer's repeated criticism of Schmitt's eulogies about the President's impartiality, as discussed in Chapter 5. Kirchheimer took it for granted that every person who holds such an important office has his own political agenda. He blamed Schmitt for being—or pretending to be—naïve in denying this simple fact of political life. Schmitt's political activities during the final crisis of the Weimar Republic and his book *Legality and Legitimacy* in particular provoked Kirchheimer to lay out his frontal attack more extensively. He added another facet to the critical debate that explicitly aimed at questions of methodology, as discussed in Chapter 6. He explicitly raised the question about the status of the empirical social sciences for legal and political theory, coining the term “conceptual realism” to describe Schmitt's way of dealing with political and legal concepts. Kirchheimer used this label to demonstrate that Schmitt derived his knowledge of reality solely from his assertions about the internal logic of a basic idea inherent in the concept in question; in the process, empirical evidence about functional processes (and their problems) became irrelevant. Schmitt understood concepts as the embodiment of principles free of contradictions. Conceptual realism does not accept pragmatic justifications for political institutions. Judging by the doctrinal purity of Schmittian concepts, real political institutions that fulfill diverse, sometimes conflicting, and well-founded functions in practice were set up for failure. Kirchheimer demonstrated this line of Schmitt's thought with regard to parliamentarism, democracy, and constitutionalism. At the same time, he confronted Schmitt's theses with positive counterex-

7 Kirchheimer (1928a, 4), see also Lévy-Bruhl (1922, 94–97).

amples from the practice of other Western European democracies and accused him of ignoring the simple facts of political life in modern democracies.

Based on his critique of Schmitt's method, Kirchheimer rejected the way in which Schmitt insisted on the prerequisite of homogeneity for democracy. Following Schmitt's understanding of homogeneity would take democratic theory in a completely wrong direction, he asserted. His concept of social homogeneity was altogether different from Schmitt's concept of the homogeneity of the people. Schmitt's concept was one of the substantive homogeneity of a collective although he did not specify what "substantive" meant. As discussed in Chapter 6, Kirchheimer contradicted Schmitt and argued that all modern democracies accommodate a heterogeneous population by necessity. From class-divided England and France to multiethnic and multilingual Belgium and Switzerland, many heterogeneous democracies had flourished. He also noted that there appears to be a global trend in modern societies toward ever increasing heterogeneity. Kirchheimer stated that policies of social justice and political integration were required in order to prevent this heterogeneity from leading to the disintegration of society. Unlike Schmitt, Kirchheimer argued for a certain degree of homogeneity of social living conditions as the basis for a stable democratic state. Contrary to the revolutionary romanticism among a number of contemporary left-Schmittians, Kirchheimer advocated for a reformist program to achieve social justice.

3. Condemning Schmitt as a Nazi propagandist

After Hitler came to power in 1933, Kirchheimer's reception of Schmitt changed drastically, and he mainly condemned him as a Nazi propagandist from then on. Kirchheimer singled him out as the most intelligent of the legal theorists in Nazi Germany. From his exile in London and Paris, he reported in detail about Schmitt's current writing and activities to his international—albeit small—readership and continued to follow Schmitt's activities closely after moving to New York in 1937. In his comments on Schmitt's 1934 programmatic essay "On the Three Types of Juristic Thought" in his co-authored book of 1939, *Punishment and Social Structure*, Kirchheimer argued that Schmitt's theory of concrete-order thinking was the most influential legitimization of the Nazi regime in terms of legal theory, thus making an implicit statement on the question of continuity in Schmitt's work before and after 1933.

However, what is particularly noteworthy here is that when writing in exile, Kirchheimer seemed to show little particular interest in the question of continuity or discontinuity in Schmitt's work. One would expect Kirchheimer to have dealt with this subject more extensively, if only because of his earlier personal relationship with Schmitt and because he had occasionally referred to some of Schmitt's concepts in his own writing during the Weimar Republic. But only rarely did he indicate that Schmitt's seamless transition after 1933 may have been based on his Weimar theories of the state of emergency or presidential dictatorship. For the most part, he treated Schmitt's works from 1933 to 1945 strictly separately from his Weimar writings. In an article for an English audience in the fall of 1933, Kirchheimer even distinguished between Schmitt "the political theorist" and Schmitt "the Nazi partisan," (Kirchheimer 1933c, 534) implying that Schmitt had become

a Nazi propagandist and was no longer to be taken seriously as a thinker in the fields of legal and political theory. To this day, the secondary literature on Schmitt is almost as obsessed with the question of whether Schmitt's Weimar theories and his commitment to the Nazi regime are internally consistent as it is in disagreement about this (see Jestaedt 2018, 408). The key question is: To what extent did Schmitt's marriage to Nazism arise inherently from core elements of his theory, at least in part? Or, in other words: To what extent did his Nazi-era publications build on his Weimar writings about the liberal quest to take judicial and administrative actors under control?

Hasso Hofmann has correctly pointed out that all left-Schmittians are united in negating such continuity (see Hofmann 1995, xi). Hofmann himself, in his groundbreaking doctoral dissertation about Schmitt's work, argued that there was "a certain continuity in all changes" (Hofmann 1995: xv) in Schmitt's writing. The continuity is the permanent, never-ending search for new sources of legitimacy which always surpass existing legality. Hofmann's book—first published in 1964—is an extension of how his doctoral supervisor Karl Löwith read Schmitt in 1935. At the time, Löwith had found a temporary safe haven in his exile in Rome and took the time to analyze one of Schmitt's recent works in detail. Löwith interpreted Schmitt's efforts to make the revised 1933 edition of *The Concept of the Political* more appealing to the rulers of the regime as proof of Schmitt's "occasionalist decisionism" (see Löwith 1935, 32–61). It is striking that Kirchheimer, in his Paris and New York exile, came up with a parallel version to Löwith's interpretation of continuity in changes, albeit in a Marxist version of a critique of ideology. The main continuity he identified in Schmitt's changes was the ideological function of Schmitt's writing: in his theories, Schmitt had always represented the interests of the powerful economic and social groups in society. Schmitt had done so during the Weimar Republic and had continued his militant partisanship for the ruling classes with his new doctrines after Hitler came to power. Kirchheimer's assessment can be read as an echo of Hermann Heller's angry interjection during the trial *Prussia vs. Reich* in November 1932 before the *Staatsgerichtshof* (see List of German Courts), when he called Schmitt's way of constructing his arguments in defense of the coup against the Prussian government pure "situational jurisprudence."⁸

Kirchheimer's view of Schmitt after 1938 is documented only in a few scattered statements in articles and reports he wrote at the Institute of Social Research (ISR) about criminal law and the legal order and political system of Nazi Germany, as discussed in Chapters 9 and 10. In these articles, he emphasized the continuities of the Weimar Republic and National Socialism in terms of their social bases. He argued that both systems were founded on certain compromises in the distribution of power and influence between the heads of the industrial and the agricultural monopolies, the state bureaucracy, and the military. During the Weimar Republic, working class organizations had had the opportunity to participate in these negotiations, too. At the end of the republic, the struggles for power escalated into a situation akin to civil war. Kirchheimer interpreted the year 1933 as the takeover of state control by one civil war party in the interest of the industrial and agricultural monopolies, thereby wresting their power posi-

8 Interjection from Heller, 17 October 1932, quoted in the trial's stenographic transcript (Brecht 1933, 469).

tions from the working class. At the ISR, Kirchheimer openly contradicted Pollock's and Horkheimer's theory of stable state capitalism. Conversely, he emphasized the fragility of the Nazi regime. In his view, Hitler had not established a stable political order but, rather, a system of constant rivalries between different power groups. The future stability of the regime depended exclusively on successful imperialist policies. In light of this, Kirchheimer evaluated Schmitt's work during the Nazi era from the perspective of Marxist critique of ideology. In my view, his analytical approach in this phase of his academic career made too many concessions to a simple functionalist version of Marxist critique of ideology.

After Schmitt had turned his main interest to international law in 1937, Kirchheimer gave his reception a new twist. He was of the opinion that Schmitt's *Großraum* (literally: large space, inherently linked to geopolitics and Nazi Germany's expansionist policies; see Glossary) theory had become the most important ideological soundtrack to Nazi Germany's warring imperialism. Kirchheimer did not believe that Schmitt's new thoughts on international law provided intellectual stimulation to seek out further and fruitful alternative ideas. Instead, as discussed in Chapters 11 and 12, he viewed Schmitt's *Großraum* theory as the product of a jurist who was aligning his work with the Nazi regime's situational political needs, lock, stock, and barrel. He accused Schmitt of even being willing to pay the high price of accepting basic and obvious theoretical contradictions in order to keep his official positions in Nazi Germany. Again, Kirchheimer no longer treated Schmitt as a theorist to be taken seriously, but as a propagandist.

The lack of theoretical precision that Kirchheimer accused Schmitt of can also be found, but to a lesser degree, in some of his own interpretations of Schmitt. In 1943/44, Kirchheimer emphasized the economic and technical organizational aspects of Schmitt's *Großraum* theory. He asserted that Schmitt's theory had a rational core inasmuch as it soberly articulated changes both in the domestic German and in the international capitalist system. Owing to the high level of cartelization, monopolization, electrification, and rationalization of German industry, transitioning to the economy of the *Großraum* had become imperative for the ruling classes. Kirchheimer viewed Schmitt's theory as being in line with the major trends in German monopoly capitalist society. It is striking, however, that in his interpretation of Schmitt's theory of the *Großraum*, he ignored its differences to purely *völkisch* and *Rasse*-based *Lebensraum* theories of Nazi authors such as Werner Best and Reinhard Höhn.

4. Deliberate disregard

With the beginning of the postwar period, Kirchheimer's strategy in his reception of Schmitt's work changed again, now becoming deliberate disregard. It should be noted here that during his exile in Paris, Kirchheimer had turned his main research focus not only toward Nazi Germany but also toward Western democracies, in particular, France and the United States. Whereas traces of Marxist critique of ideology can be found in some of his works from this period,⁹ they are overshadowed by his detailed empirical

9 See Kirchheimer (1958a), (1959b), and (1962c).

studies in which he addressed what he had previously described as Schmitt's primary methodological shortcoming: the empirical deficit of Schmitt's works. Kirchheimer implemented empirical analyses of political institutions and political processes and transformed his methodological approach from normative legal and political theory to a political theory that takes up the findings of empirical political science.

After 1945, Kirchheimer did not discuss any of Schmitt's activities or articles from the Nazi era in public at all; nor did he ever discuss any of Schmitt's postwar articles or books such as *Ex captivitate salus*, *The Nomos of the Earth*, *Hamlet or Hecuba*, or *Theory of the Partisan* in his writing. He treated Schmitt as if he were an author of the Weimar Republic only. This focus was a statement: he did not consider the theoretical content of any of Schmitt's works during the Nazi regime to be intellectually valuable enough to merit renewed critical examination. He apparently came to the same conclusion about Schmitt's postwar works, and alluded only briefly to Schmitt's *Nomos of the Earth* in a sentence summarizing his criticism of Schmitt (and already quoted above on page 418) in 1957:

The lack of any clear-cut criteria for differentiating between *nomos* and violence; the discrepancy between the traditional liberal concepts of classical international law and the decisive rejection of an *artfremd*¹⁰ and disintegrating liberalism as part of the domestic constitutional order; the brooding omnipresence of the people's constituent power and its incapacity to act as a constituted organ; the indeterminate character of the values underlying concrete decisions; and the conjunction of a relativistic openness to a variety of historical interpretations with an ever-present negation of the rule of law (Kirchheimer 1957b, 348).

Part of Kirchheimer's reception of Schmitt was his veritable campaign against the renaissance of Schmitt's Weimar writings in legal thought in the early phase of the Federal Republic of Germany. As discussed in Chapter 15, he attacked the four most prominent avowed Schmittians at German universities, Ernst Forsthoff, Werner Weber, Ernst Rudolf Huber, and Joseph H. Kaiser— Kirchheimer and the first three had studied at the same time under Schmitt in Bonn—in a number of publications between 1951 and 1956. Using the same blueprint against all four of them for his interpretation and criticism, he attacked their support of a strong state. He rejected in particular their criticism of both the influence of political parties and the pluralism of political interest groups. Kirchheimer underpinned his criticism by accusing these academics of lacking empirical evidence, of using anti-pluralist reasoning, and of being stuck in Schmitt's outdated thought patterns and authoritarian attitudes from the Weimar era. Ultimately, these accusations were aimed at Schmitt himself. But his criticisms had an additional subtext: whereas he portrayed the four scholars as being more or less uncritical epigones of Schmitt, he considered himself as being capable of analyzing Schmitt's oeuvre in a critical and independent way.

In 1958, Kirchheimer and Schmitt discussed their differences briefly in an exchange of letters. Schmitt had sent Kirchheimer a copy of his collection of essays,

10 Here, Kirchheimer used the German word *artfremd* specifically as a term from Schmitt's vocabulary, meaning foreign/alien to the *Volk*, in an exclusionary and antisemitic sense; see Translator's Preface.

Verfassungsrechtliche Aufsätze, stating proudly that he thought that his writing from the Weimar period was still as topical as ever. In his response, Kirchheimer brusquely rejected Schmitt's claim, explaining that he did not believe in the repetition of similar situations: too many qualitative changes had taken place in modern societies since the Weimar Republic. After this exchange, he stopped commenting on Schmitt's work in his publications in any explicit way.

5. Redirecting Schmitt's ideas beyond their original horizon

There is an additional component to how Kirchheimer dealt with Schmitt's writing that I have not yet discussed in more detail: some of Schmitt's publications served as a starting point for Kirchheimer to redirect Schmitt's ideas or concepts beyond the Schmittian horizon. Both Kirchheimer and Schmitt had an unmistakable sense of the context of *Lage* for the analysis of political and legal institutions. As explained in the Introduction to this book, the German metaphor *Lage* has a double meaning in the work of both Schmitt and Kirchheimer, simultaneously designating the bound aspect of a situation and its potential for change.

Kirchheimer did take up some of Schmitt's questions, ideas, and concepts as starting points for his own academic work—without attacking Schmitt explicitly or making any other reference to him but still provoking him. Four examples illustrate this: first, Kirchheimer's research on antisemitism at the Institute of Social Research in New York; second, his preparations for the Nuremberg Trials at the OSS; third, his research on political parties and interest groups; and finally, his late magnum opus, *Political Justice*.

With respect to the first example, I have argued in the previous chapters that the anti-semitic content of Schmitt's work is of greater importance than still assumed by the majority of his interpreters. I agree with the readings of Raphael Gross, Paul Bookbinder, and Nicolaus Sombart, who have all demonstrated how Schmitt was preoccupied with Jews and Jewishness throughout his life. Even during the Weimar Republic, antisemitism was of underlying significance for his criticism of parliamentarism, pluralism, the liberal concept of *Rechtsstaat*, legal positivism, and universal international law. Kirchheimer had been aware of Schmitt's antisemitic attitude during the Weimar Republic. However, antisemitism was not a subject of his academic work prior to his research at the ISR in 1942/43. It is striking to see that the antisemitism analyzed by Kirchheimer and the antisemitism practiced by Schmitt, which are both discussed in Chapter 10, overlapped on a number of issues. The first and particularly notable instance is the fact that Kirchheimer was focused on the role of Catholicism in his research on antisemitism. He was apparently the most suitable among the exiled members of the Frankfurt School to take on this specific aspect of the general topic since he was familiar with the theological debates in Catholic circles when he was a student of Schmitt's in Bonn. Secondly, in his research papers, Kirchheimer entered into the theological debates about Christianity and Judaism by making use of Erik Peterson's work, which he had also become familiar with through Schmitt in Bonn. The third link is Kirchheimer's emphasis on the institutional and ideological elasticity of the Catholic Church. This was a characterization he had obviously drawn from Schmitt's idea of the Catholic Church as a *complexio oppositorum* in his book

Roman Catholicism and Political Form, without mentioning the source, however. A fourth area where Kirchheimer touched on Schmitt's work was his evaluation of the political position of the Catholic Church with respect to the Nazi government. Kirchheimer was skeptical as to the role of the Catholic Church as a potential force of resistance against Nazi policies. This assessment is consistent with Schmitt's retrospective statement after the war that Hitler's government had gained official papal recognition through the Concordat between the Holy See and the German Reich. These four instances of overlap notwithstanding, the differences in the methodological approaches between Kirchheimer and Schmitt are clearly recognizable on this subject, too. In his book *Leviathan*, published in 1938, Schmitt drew on second-hand sources written by antisemites about the Kabbalah to construe a genealogy of the triumph of an international Jewry operating while concealed by masks. Kirchheimer, in contrast, undertook a sociological contextualization of the attitudes toward Jewish people in Europe. To him, Catholic antisemitism was a distinctly modern phenomenon, despite its initially religious sources. It had to be understood as an articulation of negative experiences of capitalist modernization.

The second example of Kirchheimer taking up the productive provocations in Schmitt's work without mentioning his name is his reflections on war crimes trials. Even when Kirchheimer was not aware of any works by Schmitt on a particular subject, it still served as an inspiration for him to redirect some of Schmitt's arguments beyond the latter's original horizon. In some cases, knowing Schmitt's way of thinking was sufficient for him to anticipate his arguments on a certain subject and then counter them with arguments of his own. This can be seen most clearly in his reflections on war crimes trials, as discussed in Chapter 13. Both Kirchheimer and Schmitt were lawyers, and both anticipated the trials against German war criminals. Their anticipation was also that of a prosecutor (or someone identifying with the prosecutorial role) having preempted the defense of a defense lawyer. Schmitt's first professional activity after the war, in the summer of 1945, was to prepare an extensive legal opinion for German industrialist Friedrich Flick, who feared prosecution at one of the Nuremberg Trials. Kirchheimer was not aware of this and never had the opportunity to read that legal opinion (it was not published until 1994). His recommendations for the best prosecution strategy, which he had written at the OSS the year before, read like responses to Schmitt's two main arguments in Flick's defense. Familiar with Schmitt's way of thinking, Kirchheimer accurately anticipated the defendants' main line of defense in the Nuremberg Trials in other cases, too. His knowledge helped him to identify the prosecution's main weak point against the defendants, which was the claim of merely obeying orders from superiors in order to shift responsibility away from themselves; Schmitt had indeed done this in his legal opinion for Flick.

Two main recommendations for the prosecution strategy illustrate how Kirchheimer anticipated what arguments Schmitt would use. The first recommendation in Kirchheimer's legal opinions at the OSS was a preemptive response to the claim he expected that the killings and other brutal deeds had not been unlawful under the Nazi regime, namely proposing "the principle 'selective retroactivity'" (Kirchheimer 1945, 523). According to this principle, all the laws, amnesties, and policy measures that protected Nazis from the consequences of their crimes were to be specifically rescinded. His list of retroactive rescissions of Nazi laws included *Rasse*-based legislation as well as the laws

to suppress political opposition. Only if these laws lost their validity retroactively would it be possible to prosecute the members of the official repressive agencies such as the *Volksgerichtshof* and the *Militärgerichte* (see List of German Courts) under criminal law. In his deliberations on selective retroactive revision of a defunct regime's legislation, Kirchheimer also referred to precedents from various countries, going into international law in more depth, examining how the US had dealt with the Southern states, and providing more recent examples from France, Denmark, and Italy. He also discussed the question whether the Nazi regime was constitutional. Kirchheimer followed the hypothesis that after 1933, Schmitt, too, had repeatedly proclaimed a revolutionary break with the order of the Weimar Constitution. A similar break had occurred with the defeat of Nazi Germany, thus giving the victorious Allies the political legitimacy to act legally.

The second recommendation deals with the problem of personal responsibility for atrocities. John H. Herz and Kirchheimer expected the strategy of the defense to be to declare that the accused had merely executed orders given by a few high-ranking superiors. After all, the Nazi legal doctrine of the *Führerprinzip* stated that superiors were responsible for the acts of their subordinates. Their counterstrategy stated that, while all authority and power was theoretically vested in Hitler, as the *Führer*, a considerable amount of discretionary power was still delegated to the group of *Untersführer* (see Glossary). Rather than being tools with no will of their own merely carrying out orders issued by Hitler and other top officials of the Nazi hierarchy, they were considered in Nazi legal writing to be active participants in the Nazi project. As such, they were responsible for formulating broad policies within the sphere of their particular jurisdiction. Quoting from a number of legal documents by Schmitt's former student and trusted colleague Ernst Rudolf Huber, Schmitt's protégé Hans Frank, and other Nazi legal scholars, Kirchheimer and Herz concluded that:

The more such policies involved a political aspect, the freer they were from any form of legal restraint, and the less likelihood was there that any specific orders would be handed down from the policy making leaders to their executory subordinates (Kirchheimer and Herz 1945, 464).

Kirchheimer and Herz concluded from the Nazi legal literature that while superiors bore criminal responsibility for all crimes committed under their leadership, *Untersführer* bore criminal responsibility, too. They also concluded from Nazi doctrine that any person who had joined the SS (see Glossary) or the NSDAP voluntarily and had been in a superior position must be assumed to have had full knowledge of the practices and functions of the organization and could therefore not avoid sharing responsibility for certain criminal acts.

Another—and third—example of Kirchheimer taking up the productive provocations in Schmitt's work without mentioning his name at all is in his works after World War II about the state of Western democracies, which are discussed in Chapters 14 and 15. From Schmitt's perspective, Kirchheimer's articles on this subject can be interpreted as an attempt to fathom the future opportunities of Western democracies. With respect to the newly founded Federal Republic of Germany, Kirchheimer identified certain continuities

with the Weimar Republic, for instance, in the top politicians and in the election results. More important for him, however, were the discontinuities in which the Basic Law and the *Bundesverfassungsgericht* (see List of German Courts) played important roles for the stability and the future development of the Federal Republic of Germany. From these discontinuities, Kirchheimer became confident that a Weimar civil war scenario could be avoided, whereas Schmitt thought that the Federal Republic of Germany was nothing more than an updated version of the weak Weimar Republic and also lacked sovereignty. Nevertheless, several of the issues discussed by Schmitt in his Weimar writings remained on Kirchheimer's research agenda. Most of Kirchheimer's works on modern democracies seem to be motivated by the inspiration to contradict Schmitt's Weimar writings—yet without mentioning Schmitt's name. The most important issues Kirchheimer covered in these contributions include the theory and practice of the *Rechtsstaat*; the developments of parliamentary democracies; the role of political parties and interest groups; presidential democracy; the role of political opposition; constitutional courts; and the legitimate limits to constitutional changes—all of which Schmitt had also addressed.

In my view, Kirchheimer's research agenda in the 1950s and 1960s is best understood as an empirically based counterprogram to Schmitt's mixture of apocalyptic warnings and condescending malice in his critique of modern liberal democracy. To give another example of this in addition to others discussed in the previous chapters: contrary to Schmitt's reiterations of the old clichés on political parties as state-destroying organizations, Kirchheimer described them as primary agencies of political integration whose legitimacy lies in their ability to channel the political and social energies of their clientele into political action. He put his political hopes for democratic stability in a policy of social and political integration, thereby taking up the theory of integration by Rudolf Smend. In contrast to Smend's view, however, Kirchheimer was worried that integration might go too far. He expressed this concern in a number of articles beginning in the second half of the 1950s. This concern again brought him closer to the critical theory of the Frankfurt School and its philosophical critique of "total integration" (Adorno and Horkheimer 1944, x). Unlike Adorno and Horkheimer, Kirchheimer founded his critique of overly far-reaching integration on empirical findings. On the basis of his analysis of the cartel-like formation of political party coalitions in Austria and Italy in the 1950s, he predicted the spread of grand coalitions in other European countries, too. According to his analyses, almost all Western democracies shared the same trend toward catch-all parties and a freezing or enclosing of any political opposition that demanded politics going beyond the given social order of welfare state capitalism. This diagnosis runs completely counter to Schmitt's evocations of political disintegration and civil wars as inevitable consequences of political opposition rights, active interest groups, and party pluralism in modern mass democracies.

My fourth and final example of Kirchheimer redirecting Schmitt's ideas or concepts beyond the Schmittian horizon is the overarching subject of Kirchheimer's 1961 book *Political Justice*, discussed in Chapter 16. The initial question of the book closely follows considerations laid out by Schmitt in his *Constitutional Theory* of 1928. Yet again, Kirchheimer did not mention Schmitt in this context and arrived at completely different conclusions. Kirchheimer began his book *Political Justice* with a definition of the political as the degree of intensity of conflicts. Whereas Schmitt's ultimate aim was to unleash the friend-en-

enemy dichotomy of the political, Kirchheimer sought ways to restrain it. He may well have agreed with Adorno's verdict in *Minima Moralia* that Schmitt's friend-enemy dichotomy was the expression of a "consciousness that [makes] its own regression to the behavior pattern of the child, which either likes things or fears them" (Adorno 1951, 141). Beyond this psychological interpretation, in Kirchheimer's treatment of the administration of justice, the true art of dealing with political conflicts was not to intensify them but to allay them. In Schmitt's dismissive terms, Kirchheimer wanted to depoliticize political conflicts to a certain degree without neutralizing them altogether. Kirchheimer's reflections on the judicial procedures of political justice can be read as an alternative strategy for dealing with political conflicts.

Political Justice presented a set of examples of institutional means within the judicial system that provides opportunities for the articulation of adversary conflicts—and, at the same time, the opportunity to overcome these conflicts peacefully. At first glance, we might see similarities between Kirchheimer's position and the left-Schmittianism of Chantal Mouffe. In a number of books and articles, she argues that political identities consist of a certain type of we/they relations which can easily turn into a friend/enemy relationship.¹¹ In order to find an understanding of the friend/enemy distinction that is compatible with democratic pluralism, Mouffe transforms the alleged Schmittian diamond of antagonistic politics into a domesticated version of agonistic conflicts. She states that the mitigation of the potential antagonism that exists in social relations cannot be accomplished by transcending the we/they relationship, but only by constructing the we/they relationship in a different way. Conflicts are no longer to take the form of an antagonism—i.e., a fight between enemies—but that of an agonism, i.e., a dispute between adversaries. Adversaries view each other as belonging to the same political unit and sharing a common symbolic space. The conflicts between them are supposed to take place within the shared symbolic space of vibrant pluralistic liberal democracy within which they do not aim to destroy their opponents. Mouffe has rightfully been criticized because her theory of agonistic conflicts dilutes Schmitt's theory and his militant impulses beyond recognition.¹² Another criticism that has been made is that her assertion of never-ending agonism flirts with the regressive ontology of the Schmittian concept of the political which amounts to an essentialization of conflict. In my view, the main shortcoming of her reception of Schmitt is that she fails to answer the question as to which institutional constellations in particular facilitate the transformation from Schmittian antagonistic conflicts to pluralist agonistic ones.

Kirchheimer took a different approach to this question in his work on the administration of justice. To him, the ambivalence of political justice was not proof of the insurmountable paradoxes of the *Rechtsstaat* but offered the opportunity for political integration through the legal system. And again, he chose a Smendian framework. This led him to an understanding of political justice as a potential instrument for political integration in a democratic *Rechtsstaat*, provided that it is practiced reasonably and fairly. Not only did Kirchheimer direct the reader's attention to the institutional infrastructure

11 See Mouffe (1999), (2000), (2005), and (2023).

12 There is a vast body of secondary literature on Mouffe's revisionist reception of Schmitt. For a brief overview, see Specter (2016).

that is essential for processes that overcome the escalation of political conflicts, but he also constructed an example of how to accomplish this goal. His reflections offer a striking illustration of his integrative understanding of “the political” and his concern for the problem of how to institutionalize the articulation of political conflicts.

The story of the relationship between Kirchheimer and Schmitt spans almost forty years. Again and again, both authors kept a keen eye on the theories, concepts, and political partisanship in each other's essays and books. Through the lens of Kirchheimer's reception of Schmitt's works, the latter appeared as a willful destroyer of the Weimar Republic and as an eternal opponent of the democratic *Rechtsstaat* who attempted to delegitimize it in various ways throughout his life. From the beginning, Kirchheimer had no illusions about the fact that Schmitt's intellectual interventions were never simply arm-chair debates but inevitably had specific political goals. Despite the courteous tone of their interactions from 1928 to 1932 and from 1949 to 1961, Kirchheimer viewed Schmitt not only as a political enemy but also as an intellectual enemy.

Through Schmitt's lens, on the other hand, the young Kirchheimer of the Weimar Republic was an author who deserved praise as a leftist radical whose writing served as testimony of the seriousness of the socialist threat, as discussed in Chapters 3 and 5. During the Nazi regime, Schmitt completely ignored Kirchheimer's works both from the Weimar era and later. After World War II, he quoted him again occasionally and praised his Weimar writings in particular—at least until the clash in 1961/62 that resulted in the final rupture of their personal relationship. At no point in his reception of Kirchheimer's work did Schmitt take Kirchheimer's intellectual development seriously. Instead, as shown in Chapters 15 and 16, he never stopped treating him like a caricature of a left-wing enemy of the Weimar Constitution and as a Jew unable to fully understand his own, superior, way of concrete-order thinking.

The controversies with Schmitt were not constitutive of Kirchheimer's identity as a political scientist and legal scholar. Starting with his dissertation, he took a critical stance toward Schmitt's concepts and theories and integrated multiple quite different works by other authors and schools of thought into his own theoretical aspirations. His reception of Schmitt's work evolved from cherry-picking and reframing to frontal attacks, to condemning Schmitt as a Nazi propagandist, and to deliberate disregard of Schmitt's influence on his own work when he redirected Schmitt's ideas and concepts beyond the original Schmittian horizon, without attacking Schmitt or even making reference to him.

Overall, Schmitt's statements, theories, categories and concepts were obviously an important intellectual source for Kirchheimer throughout his life—even if primarily to contradict Schmitt, however. But other intellectual sources became more important than Schmitt for the evolution of his intellectual identity. These sources include various strands of Marxism, Rudolf Smend's theory of integration, the critical theory of the Frankfurt School, and the empirical social sciences, all of which he received creatively. Nevertheless, Kirchheimer's reception of Schmitt is also an illustration of the eminent difficulties in attempting to separate Schmitt's theoretical concepts and impulses from the overarching context of his legal and political thought. Kirchheimer experienced a learning process that led him far away from Schmitt's original concepts and theories. As discussed in Chapter 3, he had already realized during the Weimar Republic that his original intention, namely to make productive use of Schmitt's key concepts in order to

fill some gaps in left-wing political thought, was a lost cause. He also had a sharp eye on the risks of Schmitt's concepts, albeit transformed by authors (like himself) from the left: exalted metaphors of the state of emergency; polemics against discussion, compromise, and mediation; the enthusiasm for decision-making; disregarding findings in the empirical social sciences that did not fit his theory; and, above all, at the methodological level, a style of theorizing that he criticized as conceptual realism. Kirchheimer had already dealt with these five diamonds proposed by contemporary left-Schmittians as he grappled with Schmitt throughout his life. When he tried to polish them, they crumbled in his hands. Clearly, these diamonds were not forever.

Now, this statement is not intended to be an absolute verdict against all attempts to make productive use of Schmitt's work. Unlike those authors who primarily warn of Schmitt as a dangerous mind who is not worth reading, and also unlike those authors who dilute Schmitt's concepts beyond recognition, Kirchheimer was right to take parts of Schmitt's work seriously as diagnoses of problems. But in responding to these problems, he completely broke with Schmitt's theories and concepts. With his selective and sovereignly independent approach to Schmitt's work in his articles on political parties, the vanishing of opposition in Western democracies, and in his book *Political Justice*, as discussed in Chapters 15 and 16, Kirchheimer is a role model for how to deal appropriately with the productive elements in Schmitt's writings today. I see such a selective and highly independent approach to Schmitt's work in Andrew Arato's democratic reinterpretation of the role of the *pouvoir constituant* in constitutional theory (see Arato 2011), in Andreas Kalyvas's brilliant reconstruction of the origins of the *ius publicum Europaeum* from the colonial encounter between Europe and the non-European world (see Kalyvas 2018), or in Benjamin A. Schupmann's liberal theory of militant democracy (see Schupmann 2024). Schmitt's concepts, however, are no necessary condition for their arguments.

When Kirchheimer broke with Schmitt's theories and concepts, his work also moved well beyond Schmitt's theoretical horizon. The fact that he completely abandoned Schmitt's concepts and theories makes him a non-Schmittian, if not an anti-Schmittian. Thus, in my view, Kirchheimer does not fit the role of a godfather or theoretical patron of contemporary left-Schmittianism. If anyone wishes to assign him that role nonetheless, then this means formulating a paradox: Otto Kirchheimer—the person more familiar with the work, activities, and person of Schmitt than anyone else on the political left—was the first left-Schmittian who was no longer a Schmittian at all.

6. Conclusion: Defining Legacies

Schmitt ignored Kirchheimer's barrage of criticism most of the time, at least in his publications. But it does not take much imagination to assume that these criticisms became a subject of their numerous discussions during the Weimar Republic. Nonetheless, whenever Schmitt felt compelled to make public statements about Kirchheimer during that time, he chose to praise him highly. Similar to Kirchheimer's strategy of cherry-picking and reframing, Schmitt placed Kirchheimer's theses in the context of his own frames of reference. He praised Kirchheimer's book on expropriation as particularly instructive because it served him as additional evidence of the threat of socialism. He recommended

Kirchheimer's book *Weimar—and What Then?* even more strongly. In Schmitt's eyes, its critical analysis of the constitution was evidence of the socialist movement's political vitality and determination to fight. His assent to parts of Kirchheimer's *Legality and Legitimacy* was also aimed at declaring the crisis in the republic to be unstoppable. He did not even shy away from misquoting Kirchheimer, a breach of academic standards. Schmitt's reception of Kirchheimer during the Weimar Republic followed one general pattern: he made him a witness from the left supporting his own criticism of the republic, someone who delivered additional credibility to his own warnings about political instability and the outbreak of a civil war.

Not surprisingly, the way they received each other's works changed completely between 1933 and 1945. Whereas Kirchheimer continued to deal with Schmitt, the latter did not say a single word in public about his former partner in dialogue. Schmitt made sure not to mention the name Otto Kirchheimer even once in *Positionen und Begriffe*, the collection of his essays that was published in 1940 and included twenty articles from the Weimar period. Schmitt carefully avoided quoting any of Kirchheimer's works, old or new. In none of his publications, letters, or diary entries did he respond to any of Kirchheimer's exile writing, the sole exception being in 1935, when he asked the Gestapo to go after those responsible for the camouflage brochure.

Here, I would like to point out a remarkable parallel between Schmitt's retrospective analysis of the Nazi regime and some of Kirchheimer's works written in exile. In his responses to Robert M. W. Kempner's questions during his detention in Nuremberg in 1947, Schmitt emphasized a fundamental abnormality of the state organization and the legislative process in Nazi Germany. He presented to Kempner the outline of a structural model of the Nazi regime according to which Hitler and his inner circle had disempowered the various ministries and had created a superministerial political structure from scratch. Its personnel was recruited from three pillars of the regime: the party, the military, and the state. Hitler's orders and commands were implemented through the controlling power of this political structure. Schmitt described his own role in this system as an outsider of the exclusive circles of loyalists that constituted the institutional core of the regime. His model of polycratic personalism sketched out for Kempner has striking similarities to Kirchheimer's structural model of the Nazi regime as a polycracy. However, what had mattered most to Kirchheimer was the conflict dynamics between the main actors, whereas Schmitt wanted his new model to absolve himself of any political responsibility.

After the founding of the Federal Republic of Germany in May 1949, Schmitt was pleased to witness some of his former students obtain prestigious professorships. He did not comment on Kirchheimer's criticism of the renaissance of Schmittianism in German legal thought. He did not even complain about it in letters to him. Instead, he began to quote Kirchheimer again, putting him in a positive light. Similar to his "art of quoting" during the Weimar Republic,¹³ some of his benevolently worded citations again contained inaccuracies and distortions of meaning. He also invited Kirchheimer to discuss

13 As discussed in more detail in Chapter 5, p. 129, Schmitt had misquoted Kirchheimer in his book *Legality and Legitimacy* (see Schmitt 1932h, 14), thereby changing the meaning of Kirchheimer's statement. Schmitt had added a general diagnosis in line with a theory of decline to Kirchheimer's state-

his (Schmitt's) Weimar writings once more. In his two surviving postwar letters to Kirchheimer, he also proposed new subjects such as de Gaulle's coup d'état in France, the role of the opposition in the Federal Republic of Germany, the welfare state, and constitutional jurisdiction. And, in fact, Kirchheimer did discuss all of these subjects in his works—but he did so without direct contact with Schmitt and without referring to him in any of his publications.

Schmitt's furious reaction to Kirchheimer's role in the rejection of George Schwab's doctoral dissertation at Columbia University in 1962 changed how he received Kirchheimer from then on. As discussed in Chapter 17, Kirchheimer had raised a number of substantial objections to Schwab's manuscript: Schwab had ignored the state of research in the critical literature on Schmitt, he had misunderstood crucial sections of the Weimar Constitution, he had misread Schmitt's role in the final days of the Weimar Republic, and he had misrepresented Schmitt's antisemitism. The doctoral committee agreed with this overall assessment of the weaknesses and factual errors in Schwab's manuscript. As Kirchheimer had made clear in his letter to Ernst Friesenhahn at the time, quoted in Chapter 17, his own critical stance toward Schmitt notwithstanding, he would have accepted Schwab's dissertation if it had met general academic standards.

As I understand it, Kirchheimer's insistence on the factual errors in Schwab's failed doctoral project was also part of a broader issue: it was about Schmitt's future reception in the research community in the United States and in Germany. Up to this point in time, Schmitt was largely unknown in the American academic field of legal and political theory (see Richter 2001). Consequently, the first accepted academic monograph to emerge from one of the most respected American universities would have a formative effect on Schmitt's image in the English-speaking world. And that, in turn, would probably have repercussions on the German reception of Schmitt. Kirchheimer rightly suspected that Schmitt had tried to instrumentalize Schwab, whose dissertation Schmitt intended to be a clever move to further his own political rehabilitation in Germany via the United States. Kirchheimer was not willing to partake in this game and took an outspoken stand against it. Schmitt, in turn, viewed Kirchheimer's rejection of Schwab's dissertation as an attack directed personally against himself, disregarding the manuscript's shortcomings. Not only had Kirchheimer thwarted his plans for rehabilitation, he had also broken the loyalty Schmitt may well have expected from him as his former doctoral student. Therefore, he saw Kirchheimer's rejection of Schwab's dissertation as an act of treason and deceit. This would have confirmed *ex post* his view of Kirchheimer as one of his archenemies.

After Schwab's failed dissertation, Schmitt bitterly complained about Kirchheimer in letters to members of his circle, as documented in Chapter 17. Schmitt wrote his last letter to Kirchheimer in August 1961. After that, Kirchheimer sent Schmitt a copy of *Political Justice* in November 1961. He did not contact Schmitt after Schwab's failed dissertation, nor did Schmitt contact him again. Schmitt spoke only negatively about Kirchheimer for the next few years. He even called his former doctoral student to be "not a legal scholar in any sense of European jurisprudence."¹⁴

ment about a negative development of the Weimar Republic that could still be remedied; there was no such diagnosis of unstoppable decline in Kirchheimer's original article.

14 Letter from Carl Schmitt to Roman Schnur dated 24 October 1963 (Schmitt and Schnur 2023, 542).

But both still followed the work and activities of the other after the final break. Schmitt even wrote a malicious critique of *Political Justice*. It was published anonymously (and has been unknown to Schmitt researchers to date, see Chapter 17). Nevertheless, Kirchheimer soon found out that Schmitt was the author. In contrast to Schmitt's allegations and suspicions, he by no means intended to categorically halt the reception of Schmitt's work in the United States or to practice *damnatio memoriae*. On the contrary, he even continued to include original texts from Schmitt in his teaching at Columbia University right up until his death in November 1965.

As also mentioned before, there is no record of how Schmitt reacted when he learned of Kirchheimer's untimely death. Several years passed before Schmitt began to mention him again in positive terms. The *Lage* had changed again in the 1970s in some Western democracies, and Schmitt had discovered that some of his older and more recent works had begun to find new resonance on the political left in Italy, France, and Germany. In light of this, Schmitt opted for a positive reception of Kirchheimer. That decision of Schmitt's was to become the start of the legend of an enduring friendly relationship between Kirchheimer and Schmitt. Kirchheimer's visit to Schmitt's home in Plettenberg in November 1949 and their meeting in Cologne in June 1953 became crucial elements of this narrative. Since the early 1980s, a number of authors have claimed—without any documented evidence—that Kirchheimer was the one who contacted Schmitt first after 1945 and that he visited Schmitt multiple times. This narrative has developed a life of its own and can now be found in almost all scholarly contributions that deal with Schmitt and Kirchheimer, regardless of their author's position on the political spectrum.¹⁵

As far as I have been able to reconstruct the history of this narrative, Schmitt himself was its original source. In his conversation with Rainer Erd in July 1980, Schmitt was apparently able to create the impression that it was Kirchheimer who repeatedly wanted to stay in contact with him after 1945 and who visited him several times. Articulating to Erd his great esteem for Kirchheimer was part of Schmitt's attempt to create and control the narrative. It would not have been Schmitt's first such attempt. Reinhard Mehring has shown how he attempted to direct and influence the reception of his books and essays as early as the 1920s (see Mehring 2018, 123–125). After 1945, Schmitt became a virtuoso in presenting his oeuvre in ways that served his own political interests with respect to his past. He drew on his early contacts and exchanges with Leo Strauss and Walter Benjamin as evidence that he had always held Jewish scholars in high esteem, and even shrewdly insinuated that he had influenced their works.¹⁶ A number of Schmitt's students, biographers, and editors followed the self-interpretations and legends he propagated. Once these efforts of his had succeeded, and a few years after Kirchheimer's death, he began to include him in his gallery of deceased alibi witnesses and circulate the legend that the driving force behind their contacts after 1945 had been Kirchheimer.

This story later coagulated into a narrative that overshadowed their enduring enmity, remaining vague in its details but leaving the impression of a friendly relationship between Kirchheimer and Schmitt that had overcome all personal and political turbulences,

15 The literature is listed in the Introduction.

16 See Gross (2000, 12 and 346), Mehring (2014b, 137–152), Bredekamp (2016), Palmier (2019, 411–417), and Suuronen (2022, 5–6).

even the Shoah. This narrative ultimately turned young and devoted admirers of Schmitt into champions of the legend of, in late Reinhart Koselleck's words, a "good friendship"¹⁷ with Kirchheimer that, he claimed, proved that in fact, Schmitt had nothing at all against Jews. Schmitt's narrative, and such parroting of it, resurrect Kirchheimer as a posthumous witness for Schmitt.

Schmitt himself might well have summed it up as follows with a variation on the well-known introductory sentence of his book *Political Theology*: sovereign is he who successfully instrumentalizes the dead for his own purposes.

17 Schmitt and Koselleck (2019, 377). On Koselleck's reluctance to face Schmitt's antisemitism, see Lethen (2020).