Chapter 17:
The Final Break (1962–1965)

In the spring of 1962, after thirty-six years, all forms of direct contact between Otto Kirchheimer and Carl Schmitt, including sending letters or offprints, came to an end once and for all. The trigger for this was a conflict sparked by the unsuccessful attempt of George Schwab, an American student, to obtain a PhD at Columbia University with a dissertation on Carl Schmitt. This conflict was in the offing as Kirchheimer was preparing to move from the New School for Social Research to Columbia University. After the final break between Kirchheimer and Schmitt, their relationship shifted to second-order observations, i.e., they no longer communicated with each other directly but only via third parties. Neither of them initiated personal contact again before Kirchheimer's sudden death in November 1965. What Schmitt, who survived Kirchheimer by two decades, said about Kirchheimer changed markedly in the 1970s, and this contributed to Kirchheimer subsequently being viewed as a groundbreaking "Left-Schmittian."

1. Kirchheimer as a professor at Columbia University

During his time at the New School for Social Research, Kirchheimer succeeded in renewing his contacts at Columbia University from the early 1940s. After Franz L. Neumann had died in a car crash in Europe in September 1954—Kirchheimer included a moving obituary in his review of the posthumously published collection of Neumann's essays in which he emphasized their common and permanent efforts to come up with "new analyses of the progressive and regressive tendencies in society" (Kirchheimer 1957d, 382)—Kirchheimer's most important contact at Columbia University, where he hoped to obtain a position, was Neumann's student Julian H. Franklin. In March 1960, Dean David B. Truman asked Kirchheimer whether he was interested in working at Columbia's De-

partment for Public Law and Government as a visiting professor the following academic year.[1] This chair had been vacant since Neumann's death.[2]

Kirchheimer continued to pay attention to current events and developments in Germany, not least with a view to obtaining a position there. The Basic Law had not provided for reinstating people who had been persecuted by the Nazi regime for political and "racial" reasons in their previous professional positions—in contrast to Article 131 of the Basic Law, which benefited Nazis who had worked in the civil service. Émigrés who wanted to return to Germany had to take action themselves. This applied to citizenship, too. Kirchheimer was one of those who refused to apply for his German citizenship to be reinstated. His reasoning was that it had been the German state that had robbed him of his German citizenship during the Nazi years, and not his own doing. Consequently, he saw it as the duty of the German state to reinstate his citizenship automatically.[3]

In 1961, Carlo Schmid's efforts to establish a second chair of political science in Frankfurt were successful, and he put Kirchheimer at the top of the short list of candidates for the position. Kirchheimer received the offer from Frankfurt in August 1961.[4] He was delighted and negotiated for more than six months, with extensive correspondence about the following questions: his status as a *Beamter* (civil servant) since he was a US citizen and this status was reserved for German citizens; his later pension entitlements; and the compatibility of two part-time positions, one in Frankfurt and one in New York. Everyone involved on the German side was surprised when he eventually rejected the offer in April 1962.[5] The reasons he gave Schmid and Adolf Arndt were his family situation and his health. "In principle," he wanted to "turn his back" on the US, he wrote, but after consulting with his wife, he had committed to spend longer periods in the US on a regular basis until his son Peter had finished school. He also had to consider how to finance Peter's college tuition; he was planning to attend Columbia, and his tuition would be reduced provided that his father was a professor there. He thanked Schmid for his support and said he was "quite sad about this affair" because he had had high hopes for it.[6] Because of his family situation, he would have had to commute between Frankfurt and New York and his "health would not have withstood commuting for 4 years à la [Carl Joachim] Friedrich."[7] Visibly indignant, Carlo Schmid made no secret of his disappointment.[8] In May 1963, Marxism scholar Iring Fetscher accepted the chair in Frankfurt.

1 Letter from David B. Truman to Otto Kirchheimer dated 4 March 1960. Otto Kirchheimer Papers, Series 2, Box 2, Folder 34.

2 Letter from Richard Herpens to Otto Kirchheimer dated 14 April 1960. Otto Kirchheimer Papers, Series 2, Box 1, Folder 29.

3 Hanna Kirchheimer-Grossman in a conversation with the author on 10 September 2021.

4 Letter from Hessian Ministry of Culture and Education to Otto Kirchheimer dated 29 August 1961. Otto Kirchheimer Papers, Series 2, Box 1, Folder 79.

5 Letter from Otto Kirchheimer to Hessian Ministry of Culture and Education dated 13 April 1962. Otto Kirchheimer Papers, Series 2, Box 1, Folder 79.

6 Letter from Otto Kirchheimer to Carlo Schmid dated 3 May 1962. Otto Kirchheimer Papers, Series 2, Box 2, Folder 10.

7 Letter from Otto Kirchheimer to Adolf Arndt dated 19 May 1962. Otto Kirchheimer Papers, Series 2, Box 1, Folder 12.

8 Letter from Carlo Schmid to Otto Kirchheimer dated 10 May 1962. Carlo Schmid Papers, Reg. No. 756.

On 23 May 1962, the Dean of the Graduate Faculty of the New School of Social Research thanked Kirchheimer during his "last meeting with our Faculty."[9] Kirchheimer took a permanent position at Columbia University, and his arrival as a member of the faculty was announced in late April 1962 along with that of historian Peter Gay.[10] Kirchheimer was now Professor for Government in the Department for Public Law and Government.[11] He was not required to teach undergraduates, only graduate students and doctoral candidates. There are few traces of his work in faculty, department, or various university committee meeting minutes. Yet these do provide evidence that he intensively supported the interests of the students.[12] Kirchheimer also served as his faculty's Adviser for Foreign Political Institutions and Political Theory.[13] He successfully recruited colleagues and friends who were important to him to spend time at Columbia University as visiting scholars and professors. For example, it was thanks to his initiative that his former cellmate Paul Kecskemeti, now of the RAND Corporation, came to the department in 1963 and John H. Herz in 1965 as visiting professors.[14] Arkadij Gurland, who had been appointed professor of political science in Darmstadt, Germany, in 1962 thanks to Kirchheimer's vigorous support, spent a semester at Columbia in 1964, and the two jointly taught the research seminar "Studies in the theory and practice of modern government."[15] In the winter term of 1965, Kirchheimer co-taught this course with Juan Linz,[16] who later became a leading researcher on the collapse of authoritarian regimes in Latin America and on political transformations toward liberal democracies.

Kirchheimer also devoted his efforts to applying for additional research fellowships and other opportunities to spend time in Germany. After completing his first spring term as a visiting professor at Columbia University early, he spent May to August 1961 at the Faculty of Law of the University of Freiburg as a Fulbright Professor.[17] He received funding to serve as a Fulbright professor in 1963, 1964, and 1965, too, at times obtaining a leave

9 Minutes, Executive Faculty Meeting on 23 May 1962. New School for Social Research: New School Institutional Collections. Graduate Faculty, Minutes. NS.02.17.02, Box 1, unprocessed collection.

10 Minutes of 27 April 1962. Minutes of the Faculty of Political Science 1950–1962. Special Collection, Columbia University Archives.

11 Columbia University Bulletin. The Graduate Faculties. Series 62, page 262. Special Collection, Columbia University Archives.

12 David Kettler in a conversation with the author on 17 May 2015.

13 See Columbia University Bulletin. The Graduate Faculties. Series 63, page 255. Special Collection, Columbia University Archives.

14 Columbia University Bulletin. The Graduate Faculties. Series 62, page 262 and minutes of 29 April 1965. Minutes of the Faculty of Political Science 1963–1970. Special Collection, Columbia University Archives.

15 Columbia University Bulletin. The Graduate Faculties. Series 64, number 8, page 277. Special Collection, Columbia University Archives.

16 Columbia University Bulletin. The Graduate Faculties. Series 65, number 3, page 284. Special Collection, Columbia University Archives.

17 Letter from Otto Kirchheimer to Carl Anthon dated 9 October 1960. Otto Kirchheimer Papers, Series 2, Box 1, Folder 62.

of absence from Columbia for an entire semester.[18] He spent the spring semester of 1963 as a visiting professor without teaching responsibilities at the Department of Government at Yale University in New Haven, Connecticut. In the meantime, Herbert Marcuse asked him whether he could imagine spending time at Brandeis University, which had been founded fifteen years before as a non-sectarian university sponsored by the Jewish community.[19] Kirchheimer turned him down politely, preferring to spent the academic year 1964/65 at home at his desk in Silver Spring as a fellow of both the Social Science Research Council (SSRC) and the John Guggenheim Foundation.[20]

Kirchheimer regularly spent time in Germany and attended international conferences there. The conferences where he presented the findings of his research on political parties and, in particular, his deliberations on the catch-all party to a larger academic audience for the first time were held in Europe, too. One of the outcomes of these new and renewed contacts was that Kirchheimer was pleased to serve as one of the official liaisons for the Fulbright programs for academic exchange with the US. He willingly provided formal invitations to scholars who needed them. His home in Silver Spring was open to guests and visitors from Germany, among them top SPD politicians such as Carlo Schmid, Fritz Erler, and Willy Brandt as well as trade union leaders such as Hans Böckler, Willi Richter, Hans Matthöfer, and Otto Brenner. Influential colleagues and friends from his generation, such as Richard Schmid und Otto Stammer, were his guests as well as younger scholars such as Wilhelm Hennis, Jürgen Habermas, Horst Ehmke, Helge Pross, and Peter C. Ludz, who subsequently took leading positions in West German academia.

Kirchheimer's relationship with the core members of the Frankfurt School who had returned to Germany remained troubled. His contact with Jürgen Habermas, twenty-five years his junior, who had been Adorno's assistant at the Frankfurt Institut für Sozialforschung since 1956, developed differently and more positively than that with Horkheimer and Adorno. Reading Helmut Ridder as a student, Habermas had become aware of leftist legal experts from the Weimar Republic such as Hermann Heller, Franz L. Neumann, and Kirchheimer (see Ridder 2005, 373). He had met Kirchheimer in person via Neumann's new partner Helge Pross, who also worked at the institute in Frankfurt (she later became one of the first female professors of sociology in Germany and a pioneer in gender studies). In his 1958 essay "Zum Begriff der politischen Beteiligung" [On the concept of political participation], Habermas drew on writings of Kirchheimer's on the transformation of the liberal *Rechtsstaat* to the social welfare state. Habermas also referred to Kirchheimer's newer works on political parties, parliaments, and the decline of the opposition in Western democracies in his *habilitation* dissertation *The*

18 Kirchheimer's appointment card at Columbia University states "leave without salary" for the autumn semester 1964 and the spring semester 1965. Appointment Card Otto Kirchheimer. File 159/9. Special Collection. Columbia University Archives.

19 Letter from Herbert Marcuse to Otto Kirchheimer dated 14 October 1963. Otto Kirchheimer Papers, Series 2, Box 1, Folder 110.

20 Otto Kirchheimer, Curriculum Vitae (1965). Private collection of Hanna Kirchheimer-Grossman (Arlington).

Structural Transformation of the Public Sphere, and he sent him a copy of the book.[21] In 1961, Kirchheimer visited Habermas in Heidelberg, and when the latter was preparing for his first professional trip to the US in the spring of 1965, he mentioned Kirchheimer as his main liaison for New York in his application for funding (see Müller-Dohm 2014, 177) and visited him in Silver Spring that summer.[22]

2. The conflict over George Schwab's dissertation

The conflict that ended direct contact between Kirchheimer and Schmitt erupted over a dissertation about Schmitt's oeuvre by a doctoral student at Columbia University. Born in Lithuania, the student, George David Schwab, belonged to an interwar generation of young Jews who had been lucky enough to escape from persecution in the Holocaust by fleeing to the United States. In New York, he met Franz L. Neumann and decided to study political science as a graduate student at Columbia University. After Neumann's death in 1954, Herbert L. Deane, professor of political theory, became Schwab's supervisor. Deane had written his dissertation with Neumann and recommended Schwab to write a master's thesis about Schmitt. Then he encouraged him to write his PhD dissertation about Schmitt, too. With Carl Joachim Friedrich acting as liaison, Schwab contacted Schmitt in October 1956. On 22 January 1957, he informed Schmitt of his plan to visit him in Plettenberg. Schmitt agreed. In February, Schwab confirmed his intention to write his dissertation on Schmitt's work during the Weimar Republic and the early Nazi period. He arrived in Plettenberg for a two-month stay in April and came back for another visit in the fall of the same year.

Schmitt was immediately impressed by Schwab, who was twenty-six. The same year, he wrote enthusiastically to Ernst Jünger: "In particular, the young American from Columbia University in New York has taken a room at the nearby Hotel Ostermann for 2 months and goes on long walks with me. The diligence with which he is writing his book on me is exemplary."[23]

Schmitt also revealed in the letter that he was supporting the project because he harbored specific hopes for its reception: his motive was to counter Peter Schneider's book, which Kirchheimer had praised so highly, with a work he himself had not authorized. The study by the American Schwab "humiliates the European Peter Schneider from Zurich, who cautiously avoided talking to me or even seeing me although he explicitly aims to show the 'arcanum' of Carl Schmitt, as he says, in his book."[24] Schmitt was apparently

21 See Habermas (1958, 1962) and letter of thanks from Otto Kirchheimer to Jürgen Habermas dated 6 October 1962. Otto Kirchheimer Papers, Series 2, Box 1, Folder 69. On Habermas's reception of Kirchheimer, see Buchstein (2019b).

22 Jürgen Habermas to the author on 10 March 2018. In a note on the development of the social sciences in the early years of the Federal Republic of Germany, Habermas mentioned Kirchheimer by name as one of those "who have made a big contribution to the dense web of personal and academic ties between here [Germany] and over there [in the US]" (Habermas 1992, 151).

23 Letter from Carl Schmitt to Ernst Jünger dated 29 May 1957 (Schmitt and Jünger 1999, 334). On Schmitt's *faible* for taking long walks with his visitors see Braunfels and Grajcarek (2023).

24 Letter from Carl Schmitt to Ernst Jünger dated 29 May 1957 (Schmitt and Jünger 1999, 334).

firmly convinced that a good book about him and his work could only be written in close cooperation with himself and with his approval.

Consequently, Schmitt made plenty of time for his guest over the following months and years. In his *Glossarium*, he mentioned "delightful conversations" with Schwab about questions of "being human"[25] and expressed his enthusiasm about Schwab agreeing with his legal opinion from 1945 about the war of aggression.[26] He encouraged Schwab to devote special attention to his role at the end of the Weimar Republic. For, during Schwab's stay in Germany, Schmitt was also working on his comments on his *Verfassungrechtliche Aufsätze* [Essays on constitutional law] in which he interpreted himself as a tragically failed savior of the Weimar Republic.[27] Schmitt authorized Schwab to translate texts of his into English. The first one (see Schmitt 1958b, 439), in 1958, was "Der Zugang zum Machthaber, ein zentrales verfassungsrechtliches Problem" [Dialogue on Power and Access to the Holder of Power] (see Schmitt 1947). Schmitt had succeeded in giving Schwab what a number of other younger visitors including Ernst-Wolfgang Böckenförde, Reinhart Koselleck, and Christian Meier had raved about all their lives, namely making them feel that he was truly taking them seriously and that he cared about teaching them. Schwab remained enthusiastic about the long and amicable conversations he had with Schmitt, as he wrote in his memoirs in 2021. In his long life, he had never learned as much from any other person and in such a short period of time about legal and political theory and international relations (see Schwab 2021, 145–158). In the summer of 1958, Schwab visited Schmitt again.

In his long letter to Kirchheimer dated 6 August 1958, Schmitt mentioned that he had a visitor from New York in his hometown Plettenberg. He described him using the following words:

> I had a visit for some months in the summer from a young student from New York, George Schwab, Columbia University, with whom I had very good conversations and whom I found very friendly. If you ever have the opportunity to speak to him—his teacher is Herbert A. Deane—Public Law and Government, Columbia Univ.—the author of the book on H. J. Laski—I would be interested in your impression of him.[28]

Schmitt apparently expected Kirchheimer to also be immediately impressed by the young student and that he would support him. Kirchheimer responded, but only briefly, one month later. Concerning Schmitt's visitor from New York, he wrote: "I do not know Mr. Schwab yet, but will try to get in touch with him when the semester has begun."[29] There is no indication, however, that they actually met at this early stage of Schwab's dissertation. Nor are any letters from Schwab in Kirchheimer's papers. In 1959, Schwab visited

25 *Glossarium* entry of 10 June 1957 (Schmitt 2015, 362).

26 *Glossarium* entry of 6 October 1957 (Schmitt 2015, 366).

27 See Chapter 16, p. 420.

28 Letter from Carl Schmitt to Otto Kirchheimer dated 6 August 1958. Otto Kirchheimer Papers, Series 2, Box 2, Folder 12.

29 Letter from Otto Kirchheimer to Carl Schmitt dated 4 September 1958. Carl Schmitt Papers, RW 265–7604.

Schmitt again for two months. The two discussed the hypotheses in his dissertation about Schmitt's work and his impact from 1930 to 1936 (see Schwab 2021, 173).

At the same time, Kirchheimer sounded out his chances for potentially leaving the New School for Social Research for a position at Columbia University. Deane had heard from Franz L. Neumann a few years earlier that Kirchheimer was familiar with Schmitt's work, and after Neumann's death, Deane believed that Kirchheimer was the only person he knew who was in a position to make a fair judgement about Schwab's project. So, he suggested to Schwab in the fall of 1959 that he discuss his work with Kirchheimer. The latter agreed without receiving any detailed information about Schwab's dissertation project from Deane. In late 1959 and the first half of 1960, the two had a few cursory conversations about the topic of the dissertation. Kirchheimer urged Schwab to take notice of the German literature about Schmitt, among them the recently published monographs by Christian Graf von Krockow, Jürgen Fijalkowski, and Peter Schneider.[30] At Deane's request, Kirchheimer joined the five-person dissertation committee at Columbia. Schwab sent his manuscript to Kirchheimer and received an official invitation to speak with him in his office shortly afterwards.

According to Schwab, Kirchheimer informed him at this meeting in late May 1960 "in a friendly manner" that he had "failed to understand Schmitt" and that he had to rewrite parts of the dissertation. Kirchheimer told him that he had made two main mistakes. First, he had failed to realize the extent to which Schmitt had helped pave the way for the destruction of the Weimar Republic and, second, Kirchheimer had stated that Schmitt was "already an anti-Semite during the Weimar period" (Schwab 2021, 175). He also instructed Schwab to include additional publications of Schmitt's from 1932 to 1936 that he had not yet considered and to engage with the relevant new secondary literature on Schmitt and the history of the Weimar Republic. In June, Schwab indignantly reported to Schmitt about the—in his view—disappointing conversation with Kirchheimer as the new member of the dissertation committee.[31] He initially considered submitting a petition to the president of Columbia University to have Kirchheimer removed from the committee for lack of impartiality but abandoned the idea because he realized it had no prospect of success. [32]

Kirchheimer did not take the dispute about Schwab's work lightly, either. He correctly assumed that Schmitt had been involved behind the scenes to make another attempt at political rehabilitation via the US. Kirchheimer reported about the matter one month later to Ernst Friesenhahn, asking him to keep the information to himself:

> One of the first doctoral researchers who arrived at Columbia with a finished thesis was Mr. Schwab. He wanted to enlighten the world in American English about Carl Schmitt's life and works, the young man had sat at CS's feet and had actually let himself be talked into believing that CS had actually always wanted to help the Weimar Constitution be

30 See Fijalkowski (1958), Krockow (1958), and Schneider (1957). On the controversial debate about Schneider's book, see Chapter 16, p. 417–419. Kirchheimer mentioned this later in a letter to Ernst Friesenhahn dated 20 November 1960. Otto Kirchheimer Papers, Series 2, Box 2, Folder 61.

31 Letter from George Schwab to Carl Schmitt dated 11 June 1960. Quoted in Mehring 2020, 506.

32 Letter from George Schwab to Carl Schmitt dated 23 May 1961. Quoted in Mehring 2020, 506.

> protected and correctly applied, a kind of democrat in dire times. He was very discomfited when I announced that I would not accept his stupid scribblings, not even if modified, that as far as I was concerned, he could defend CS lock, stock, and barrel, but only if he emphasized his real doctrines and did not disguise him as a democrat and strict constitutionalist. CS had also made his personal correspondence file available to him, and he came to me with transcripts of letters, including approval from the other side, from Franz Neumann, on legality and legitimacy.[33]

In the summer of 1961, Kirchheimer and Schmitt had another exchange of two letters, as the conflict with Schwab was already smoldering. It was another five-line birthday letter in which Kirchheimer asked where Schmitt would spend the summer. He closed with the friendly phrase: "I would be pleased if there might be the opportunity to see you again."[34] Schmitt responded five weeks later and told him later that such a meeting would be impossible because of his own plans to spend the summer in Spain.[35] Instead of using the cordial form of address "*lieber Herr Kirchheimer*" as in his previous letters, he now opted for the formal salutation "*sehr geehrter Herr Kirchheimer.*" In November 1961, Kirchheimer's book *Political Justice* was published. Kirchheimer sent Schmitt a copy with the formal dedication "with best compliments, your OK."[36] Schmitt did not respond. This was their last direct contact.

In the final months of 1961, Schwab finished revising his doctoral dissertation. The defense in February 1962 ended in uproar. Since it was impossible to find any files on the matter in Columbia University's archive, the only source for this passage is Schwab's memoirs.[37] According to his report on the two-hour dissertation defense, the discussion was initially "boring" until Kirchheimer weighed in. He "mercilessly attacked" him (Schwab 2021, 177) and criticized the dissertation as a whole: Schwab had "failed to understand Schmitt's true role in Weimar," he had "turned Schmitt upside down" and had "written an apology of Schmitt." Kirchheimer rejected the sharp distinction in Schwab's work "between racial theory and Catholic anti-Semitism." He also accused Schwab of misinterpreting the principle of equal opportunity in the constitution. Finally, he criticized Schwab's fundamentally misguided understanding of Article 48 of the Weimar Constitution, as a result of which his codification of the emergency decrees in his dissertation was flawed. Kirchheimer explained in detail how Schmitt had paved the way for the Nazi regime with his theory of the emergency decrees. Schmitt had been "among

33 Letter from Otto Kirchheimer to Ernst Friesenhahn dated 20 November 1960. Otto Kirchheimer Papers, Series 2, Box 2, Folder 61. Neumann's letter, dated 7 September 1932, is published in Erd (1985, 79–80).

34 Letter from Otto Kirchheimer to Carl Schmitt dated 4 July 1961. Carl Schmitt Papers, RW 265–7605.

35 Letter from Carl Schmitt to Otto Kirchheimer dated 12 August 1961. Otto Kirchheimer Papers, Series 2, Box 2, Folder 12.

36 Copy of Otto Kirchheimer, *Political Justice*. Carl Schmitt Papers, RW 0265- 25665.

37 These and the following quotes of Kirchheimer's words are to be found in Schwab (1988a, 80–81), (2021, 175–178), and for Schwab's response to questions about this matter from Volker Neumann, see Schwab (1988b, 462). Richter (2001, 222–224) and Hitschler (2011, 19–21) base their descriptions of the defense on Schwab's memoirs, too.

the most prominent gravediggers of Weimar." [38] Schwab insisted in his defense that he had "not encountered any references to anti-Semitism prior to 1933" (Schwab 2021, 157) in Schmitt's work and that Schmitt had enthusiastically attempted to defend the Weimar Republic against both Communists and the Nazis. According to Schwab, Kirchheimer was also incensed that Schwab had briefly discussed his own 1930 article "Weimar—and What Then" in a footnote. Schwab had interpreted Kirchheimer's early Weimar writing as attempts to torpedo the Weimar Constitution. "Of all writings," Schwab later quoted Kirchheimer, "you had to single out those." Obviously, not only Schmitt's works but also some of Kirchheimer's were at stake during the defense.

Kirchheimer pronounced that Schwab's work had remained apologetic throughout. Schwab had not even remotely understood Schmitt's role in the destruction of the Weimar Republic, and moreover, the work included several factually incorrect and polemical attacks against critics of Schmitt. Since Herbert Deane and the other members of the committee had nothing substantive to contribute to the debate, they followed Kirchheimer's negative assessment. And they believed he had good reasons for it. Deane knew Kirchheimer from other discussions and valued his knowledge, academic tolerance, and fair judgment. The members of the committee also accepted Kirchheimer's objection that Schwab had failed to include the critical literature on Schmitt that had already been published in Germany, for example, the books by von Krockow, Fijalkowski, and Schneider. After the defense, Deane informed Schwab that he had failed, calling Kirchheimer the decisive voice because he was an "expert in the field" (Schwab 1988a, 81).

Schwab was stunned. He was personally disappointed by Deane, who had encouraged him time and time again over the past seven years in his work on Schmitt. He immediately reported extensively to Schmitt about the result of the defense in letters and during his next visit to Plettenberg. Enraged, he wrote to Schmitt that Kirchheimer had not accepted his description of Schmitt as a defender of the Weimar constitutional order.[39] He now considered Kirchheimer "an enemy you know" (Schwab 2021, 180) and abandoned any new attempt to obtain a doctorate at Columbia University on the same subject. Instead, he decided to write a new dissertation on neutral countries and nuclear weapons in a case study of neutral Switzerland. Kirchheimer died in 1965 and Schwab noted in his memoir: "With Kirchheimer out of the way, I could now peacefully focus on completing the new dissertation" (Schwab 2021, 195). He successfully finished it in 1968.

Even though Schwab viewed Kirchheimer as an "enemy" after his failed dissertation—even according to his own retrospective reports—there was obviously no ill will on Kirchheimer's part. His reasons were based on his factual objections—which the other committee members agreed with—to Schwab's interpretations. Overall, Kirchheimer had four substantive objections: first, Schwab had misunderstood crucial sections of the Weimar Constitution; second, he had misread Schmitt's role in the final days of the Weimar Republic; third, he had misrepresented Schmitt's antisemitism, thereby downplaying it; and, fourth, he had ignored the state of research in the critical literature

38 As reported by George Schwab in response to a question about this matter from Volker Neumann, see Schwab (1988b, 462).

39 See letter from George Schwab to Carl Schmitt dated 11 March 1962. Quoted in Mehring (2014a, 507–508).

on Schmitt. Concerning his academic standards, Kirchheimer wrote in his letter to Friesenhahn at an early stage of the conflict that he would not necessarily even have objected to a defense of Schmitt "lock, stock, and barrel," but only if Schwab had emphasized Schmitt's "real doctrines and did not disguise him as a democrat and strict constitutionalist"[40] before and after 1933.

However, both Schwab and Schmitt viewed Kirchheimer's substantive objections to Schwab's dissertation as a purely politically motivated attack on them. This was not the first time that Schmitt had taken criticism poorly and personally. Rudolf Smend had called him an "effective pacemaker of the violence-based Nazi system" in a 1960 article about the history of the Berlin Law Faculty. Schmitt felt offended and immediately broke off contact with Smend, whom he had known for more than forty years at the time.[41] Two months after Schwab's defense, Schmitt wrote to Ernst-Wolfgang Böckenförde: "I am sure you know that Kirchheimer didn't let poor George pass,"[42] He held Kirchheimer responsible for Schwab's failure and felt it to be an attack by Kirchheimer *ad hominem* and a stab in the back.[43]

3. Second-order observations

No personal contact between Kirchheimer and Schmitt is documented after Schwab's failed dissertation. Whether it was Schmitt who broke off contact or whether both sides had concluded that they no longer wanted anything to do with one another can no longer be determined today. Both, however, still followed the work and activities of the other. Although Kirchheimer refrained from contacting Schmitt again, he closely monitored the steps Schmitt took after he had rejected Schwab's dissertation. One year after the incident, he reported to Ernst Friesenhahn:

> By the way, our friend Carl Schmitt has managed again to take revenge on me semi-anonymously for not accepting his young man's doctoral dissertation. Signed 'C.S.,' he made an unfriendly comment in a German journal, I think it was '*[Die] politische Meinung*,' by saying more or less that the whole book [*Political Justice*] actually doesn't say anything more than my essay from 1955. I somehow also suspect that he was behind a 10-page polemic in a third-rate American law review.[44]

40 Letter from Otto Kirchheimer to Ernst Friesenhahn dated 20 November 1960. Otto Kirchheimer Papers, Series 2, Box 2, Folder 61.

41 The quote is to be found in Smend (1960, 542). On breaking off contact, see Mehring (2010, 150–152).

42 Letter from Carl Schmitt to Ernst-Wolfgang Böckenförde dated 6 April 1962 (Schmitt and Böckenförde 2022, 321).

43 See Schwab (1980a, 81) and Quaritsch (1999, 72).

44 Letter from Otto Kirchheimer to Ernst Friesenhahn dated 31 March 1963. Otto Kirchheimer Papers, Series 2, Box 2, Folder 61.

The polemic Kirchheimer mentioned was presumably the review of *Political Justice* by the anonymous author C. in the *Modern Law Review*.[45] There is no evidence or even merely any indication that Schmitt was involved in its publication (let alone that he could have been "C."). The case is different regarding the review in the journal *Die Politische Meinung* [The political opinion]. One of its editors was conservative publicist Rüdiger Altmann, who had studied under Schmitt in Berlin as a wounded veteran in the final semesters during World War II and had been in touch with him again from the mid-1950s onward (see van Laak 1993, 262–265). It was presumably via this connection that the journal accepted the review. Signed "C. S.," this has not been listed in the bibliographies of Schmitt's works to date. Not only Kirchheimer's statement (presumably informed by Werner Weber or Rudolf Smend), but equally the review's substance, language, and style support the assumption that it was authored by Schmitt. For example, it was characteristic of Schmitt to approach the reviewed book via the index and to refer to the dedication. The choice of wording is quite typical of Schmitt in multiple places as well.[46]

Schmitt began the review[47] by pointing out that Kirchheimer had dedicated the book to the victims of political justice. Schmitt added that to him "any and all political administration of justice is somehow suspect, in most cases an annoyance and a piece of folly" (94)—which was only partly an accurate description of the intention of Kirchheimer's book, however. Schmitt chafed at Kirchheimer's assessment of the case of Paul Jorns during the Weimar Republic. Prosecutor Jorns had been assigned to investigate the murders of Rosa Luxemburg and Karl Liebknecht. Kirchheimer agreed with the opinion liberal journalist Berthold Jacobs had expressed in 1928 that through his way of investigating the case, Jorns had aided and abetted the murderers and had helped them escape from jail. Jorns responded by filing a libel suit against Jacobs. Yet Jorns lost this case in multiple instances because of the facts presented. According to Kirchheimer, the *Reichsgericht* (see List of German Courts) applied a legal trick to avoid having to acquit the journalist once again. Schmitt contradicted this point, rejecting Kirchheimer's "attack" (94) on the court as "unjustified" (94).

Schmitt nitpicked about two minor errors in the index of names and one piece of incorrect information about a judge at the Nazi *Volksgerichtshof*. He caricatured Kirchheimer's argument in the book as an arbitrary concatenation of examples and names: "On page 26, he quotes the *Bundesgerichtshof*, presents Count Harry von Arnim, only to flash back to Henry VIII and then shift his attention to Hermann Göring" (94). Kirchheimer had "processed a downright improbably copious amount of material with unending diligence" (94). Yet this supposed praise was poisoned inasmuch as he judged him a few lines further down: "Incidentally, in his essay '*Political Justice*' […] the author stated his concerns in a considerably more concise and concentrated way" (94). The purpose of the book "might be for its author to gain influence on the law clerks in the American Supreme Court and thus on its decisions" (94). In other words, Schmitt insinuated that the German discussion would not benefit at all from the book. But he did recommend

45 Volume 26, 1963, pp. 456–459.

46 Reinhard Mehring (e-mail dated 7 December 2021) and Gerd Giesler (e-mail dated 8 December 2021) also support my claim of Schmitt's authorship.

47 See Schmitt (1962) for this and the following quotes.

two publications about state security and the constitution by other authors to the readers of *Die Politische Meinung*. Schmitt concluded his review with lukewarm praise: "In any case, Kirchheimer's book is interesting and instructive. Even if one does not agree with everything he says" (94).

Schmitt was known for his own particular way of approaching the subjects of the books he reviewed. That is why it is not surprising that he cherry-picked just a few points to comment on. But it is surprising how little he engaged with the concept of political justice and also the wider context of Kirchheimer's argument in his review. This raises the question how deeply Schmitt had even read the book. He is known to have made handwritten comments in the books he read, and as mentioned in the previous chapter, there are only very few comments of his in his copy of this book.[48] Apparently, he had read it superficially at best, and he did not reveal to his readers at which points—potentially including the Nuremberg Trials, asylum law, and Nazi criminal law, for example, none of which he even mentioned—he disagreed with its author. He did not devote a single word to Kirchheimer's critical analysis of the legal system of the GDR, either.

Three years earlier, he had responded quite differently when Kirchheimer had sent him an offprint of his essay on the concept of legality in East Germany. Kirchheimer later included this essay with only a few changes in his book *Political Justice*. In May 1959, Schmitt had written in a letter to Ernst-Wolfgang Böckenförde that Kirchheimer's essay was "exciting" and had urged him to read it.[49] Nothing about this recommendation is to be found in his review of Kirchheimer's book. Schmitt no longer praised Kirchheimer in any of his writing and stopped sending him offprints. Kirchheimer stopped sending Schmitt his publications, too. Schmitt's name was not even on the long list Kirchheimer sent to Günther Busch of Suhrkamp publishing house in 1964 of potential recipients of his book *Politik und Verfassung* [Politics and constitution],[50] which included his famous article "Weimar—and What Then?".

The German edition of *Political Justice* was published in March 1965 (see Kirchheimer 1965c). Arkardij Gurland had prepared the translation, which had taken more than four years because he had had to interrupt his work on it several times. In addition, Kirchheimer had made a number of additions to the text. Overall, the German text was 20 percent longer than the English one. Of course, there was no need to include positions on the fundamental debates among legal scholars in Germany in the American edition of the book. Yet Kirchheimer felt he had to take a position for the German edition. In 1965, the rifts between the two remaining major schools of thought on Weimar constitutional law, those following Schmitt and Smend, were as deep as never before. The publication of the *Festschrift* on the occasion of Schmitt's seventieth birthday in 1958, edited by former students of Schmitt's and legal scholars Ernst Forsthoff, Werner Weber, and Hans Barion, had sparked a new debate on the concept of the constitution and the meth-

48 Copy of Otto Kirchheimer, *Political Justice*. Carl Schmitt Papers, RW 0265, No. 25665.

49 Letter from Carl Schmitt to Ernst-Wolfgang Böckenförde dated 8 May 1959 (Schmitt and Böckenförde 2022, 199).

50 Letters from Otto Kirchheimer to Günther Busch dated 19 and 20 November 1964. Otto Kirchheimer Papers, Series 3, Box 2, Folder 68.

ods of interpreting the constitution in the Federal Republic of Germany.[51] The statism of Schmitt's school was countered by the proponents of Smend's theory of integration, who were simultaneously advocating for opening the field up to Western theories of democracy. Kirchheimer took the conceptual introductory passages of the German version of his book as an opportunity to refer to Smend and his idea about the potentially integrative functions of judicial procedures (see Kirchheimer 1965c, 22–24).[52]

By contrast, Schmitt was not mentioned explicitly even once in the German edition. Once again, however, a few passages read like silent dialogues with Schmitt, for instance, where Kirchheimer contradicted Schmitt's student Roman Schnur's interpretation of the history of French parliamentarism in the late sixteenth century as "large-scale neutralization" or attested that the parliament in Paris had successfully adapted to rapidly changing situations (see Kirchheimer 1965c, 660–661). In some passages of his defense of the Nuremberg Trials, to which he added multiple pages for the German edition, he had German critics of the trials speak, at times using Schmitt's vocabulary (see Kirchheimer 1965c, 473–510). Exercising less restraint than previously in his essays on political justice published in German, Kirchheimer now used the word *Feind* (enemy), a signal word of Schmitt's. The word appeared right at the beginning, in the first two sentences of the book, as well as in many other places (see Kirchheimer 1965c, 21, 206, 207, and 237). However, Kirchheimer never used the word *Feind* to signify enmity between individuals or groups of individuals but, rather, in the sense of a group's fundamental opposition to a political system. The term Kirchheimer used as a synonym for *Feindschaft* (enmity) was *systemfeindlich*, inimical to the system (see Kirchheimer 1965c, 243), thereby diverging from Schmitt's usage of the word *Feind* in a personalizing and existential way.

Schmitt continued to observe Kirchheimer's activities and publications from afar. In the following years, he went one step further, writing disrespectful comments about Kirchheimer in letters to his friends and young admirers. As mentioned above, he had realized that Kirchheimer had given advice to Hannah Arendt for her book on the Eichmann trial.[53] Writing to Roman Schnur, he described Kirchheimer as follows: "a superficially reformed Marxist, a kind of sociologist, a debunker of every non-Marxist ideology, but he is truly not a legal scholar in any sense of European jurisprudence."[54] In 1965, he wrote to Armin Mohler about the publication of the German edition of *Politische Justiz*: "[Kirchheimer's] book about political justice does not address the actual problem."[55] Yet, as in his review for the journal *Die Politische Meinung*, he failed to reveal to Mohler what he thought the actual problem of political justice was. Another thing Schmitt did was try to help Schwab get his rejected dissertation published by an American academic publisher. All of Schwab's attempts failed because of negative expert reviews. Furious, he and Schmitt accused Kirchheimer of pulling strings to prevent the publication.[56] There are no documents in Kirchheimer's papers at the State University of New York at Albany

51 See Günther (2004).

52 See Chapter 16, p. 444.

53 See Chapter 16, p. 439.

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

55 Letter from Carl Schmitt to Armin Mohler dated 26 August 1965 (Schmitt and Mohler 1995, 354).

56 See Richter (2001, 222–224) and Hitschler (2011, 19–21).

that would support this claim. In December 1965, Schmitt complained to Roman Schnur that "O. Kirchheimer [was] going after George Schwab."[57]

In 1968, Schmitt wrote to Forsthoff about the fact that no reputable publisher was willing to publish Schwab's book: "What is being done to me is a disgrace, but I do not want to share the glory of that disgrace with anyone."[58] It was only through Schmitt's personal intervention with his publishing house Duncker & Humblot that the text was published eight years later, in English, in Germany (see Schwab 1970).[59] Even in retrospect more than twenty-five years later, Schwab blamed a "[Kirchheimer's] hostile attitude toward Schmitt" (Schwab 1988a, 81) for the failure of his dissertation. He repeated the unfounded accusation that a negative attitude toward Schmitt in the United States, for which Kirchheimer had been instrumental, was the reason why his manuscript on Schmitt was not accepted by any recognized publisher, in his memoirs in 2021 (see Schwab 2021, 180).

Kirchheimer by no means intended to categorically halt the reception of Schmitt's work in the United States, as Schwab insinuated. In a peer review comment on a manuscript for the *American Political Science Review* sent to its editor Harvey Mansfield two years after the conflict over Schwab's work, Kirchheimer wrote: "Schmitt should be presented to the American Political Science Community and on the basis of the numerous German studies [already] existing." Two approaches were to be given preference: "One may treat Carl Schmitt […] either by studying his conceptual framework, including questions of logical consistency; or, by relating his concepts to the German political reality of his days."[60] He continued to include Schmitt in his teaching at Columbia University. On the reading list of his syllabus for the seminar "The Political Institutions of Divided Germany" (1962/63), he recommended that the students read Schmitt's *Constitutional Theory*, calling it the "most influential constitutional interpretation on [the] basis of antidemocratic-authoritarian theory."[61]

4. On partisans and political partisanship

Schmitt's gift to himself on the occasion of his seventy-fifth birthday in 1963 was the republication of his books *Dictatorship* and *The Concept of the Political*, both with brief retrospective comments. The only book of Schmitt's after 1950 which was not mostly retrospection was *Theory of the Partisan*, which was also published just in time for his seventy-fifth birthday. This is the only book from Schmitt's late oeuvre that has been received just as widely beyond his circles and still to this day as otherwise only his Weimar writings

57 Letter from Carl Schmitt to Roman Schnur dated 1 December 1965 (Schmitt and Schnur 2023, 575). Kirchheimer had died nine days before.

58 Letter from Carl Schmitt to Ernst Forsthoff dated 22 May 1968 (Schmitt and Forsthoff 2007: 261).

59 A number of reviewers accused the book of aiming to construct the apologetic legend that Schmitt had kept his distance from the Nazi regime, see Richter (2001, 224–226).

60 Letter from Otto Kirchheimer to Harvey Mansfield dated 4 June 1964. Otto Kirchheimer Papers, Series 2, Box 1, Folder 51.

61 Minutes of the Faculty of Political Science 1957–62. Special Collection, Columbia University Archives.

have.[62] *Theory of the Partisan* (see Schmitt 1963a)[63]—subtitled *Intermediate Commentary on the Concept of the Political*—was based on lectures Schmitt had held in Spain in 1962. He revealed in this work how strong his political sympathies for fascist Spain continued to be in an aside celebrating the civil war that followed General Franco's coup as a "war of national liberation" against "the international communist movement" (56).

Schmitt considered the substantive core of the book to be a continuation of his reflections on the concept of the political. He described the partisan as a type of fighter with high political intensity. The partisan's origins lay in the Spanish guerrilla resistance against Napoleon.[64] While the bourgeois took off his uniform in order to trade and make money in peace, the partisan took off his uniform in order to fight all the better. The partisan of the Spanish war fought against the universalizing impulses of the Napoleonic project. In his purest form, the partisan was a creature of agrarian provenance. Partisans were mobile and fast. But despite all their tactical mobility, they maintained their intimate relationship to a specific locality and the soil. Schmitt coined the term "telluric" (20) to describe this feature of the partisan. He gave several more historical and more recent examples of the occurrence of this type of fighter. However, he regarded the *Volkssturm* (a militia of poorly equipped civilian boys and men drafted by the Nazi regime in a last-ditch effort to defend the fatherland), to which he had been conscripted for a few days in early 1945, as a regular military corps (see 38–39) and thus not as partisans.

Schmitt demonstrated how difficult it was for the traditional law of war to deal with the phenomenon of the partisan. To Schmitt, the Prussian military expert Carl von Clausewitz was an outstanding author, the first to theoretically recognize and legitimize partisans in his writings on war. In my view, this assertion of Schmitt's is astounding because partisans had not played a particularly significant role during the war of the Prussians against Napoleon's forces. Yet Clausewitz was an important author to Schmitt inasmuch as he had a major impact on Friedrich Engels's and Vladimir Ilyich Lenin's thoughts on war (see Hohendahl 2012, 532–533). Schmitt revised the terminology about enmity he had previously used in *The Concept of the Political* with respect to the partisan. He now differentiated between three categories: the conventional enemy, the real enemy, and the absolute enemy. The conventional enemy corresponded to cabinet war, Schmitt claimed, which was subject to limits under international law that were so strong that it practically amounted to a duel that did not impact civilians and "could be conceived as a play" (88). It was only partisans who had reestablished war as a serious matter and had made the enemy a real enemy. The next step up was the absolute enemy. Schmitt attributed the theoretical foundation of absolute enmity to Lenin's theory of class struggle, enriched by Stalin's and Chairman Mao Zedong's theories on partisan warfare. The true partisan had not taken the step from the real to the absolute enemy. In this sense, as a "partisan of tradition," (Münkler 1992, 122) he, Schmitt—like the protagonist in the book *Forest Passage* by his friend, right-wing author Ernst Jünger (see Jünger 1951)—was

62 For a well-informed discussion of the general place of Schmitt's book in his oeuvre, see Llanque (1990).

63 The following page numbers refer to this text.

64 On the criticism that Schmitt did not include the irregular troops of the Thirty Years' War or the American Revolutionary War, see Hohendahl (2012, 531).

the last remaining proponent of the idea of real enmity; in Schmitt's view, the potential of the political relied on that idea. He considered leftist revolutionaries Ho Chi-Minh, Fidel Castro, and Che Guevara to be the most prominent authors of the day regarding the transition to the concept of the absolute enemy in the theory of war.[65] Thus, Schmitt made Marxism exclusively responsible for the turn to the concept of the absolute enemy.

Schmitt did not say a word about Hitler, however, as a hatemonger of absolute enmity. Nor—and this is hardly surprising—is there any reflection of Schmitt's own writing from the phase leading up to World War II in which he spoke of the "imminent, immutable, real, and total enmity" that "leads to the ordeal by battle of a total war" (Schmitt 1937a, 485). Nor did he mention the crimes of the *Wehrmacht* in the passages about its battles with partisans in the Soviet Union, Greece, or the Balkans (see 19–29). Rooted in the Prussian military tradition, the German *Wehrmacht* was unprepared for partisan warfare when it had invaded Russia, he claimed. It was only in late 1944 that the Supreme Command of the *Wehrmacht* had issued a guideline for fighting partisans that Schmitt praised as "extraordinary" (39). Before then, he alleged, they had been marauders "handled by the police" (33). Thus, Schmitt, too, continued to spin the postwar German legend of the "clean *Wehrmacht*," namely that it was not involved in perpetrating war crimes or the Holocaust.

As part of a new global order in which customary categories of war were losing relevance, partisans had become key figures of global history. At the end of his book, Schmitt conjured the apocalyptic image of entirely "new types of absolute enmity" (94) in modern technical industrial development. It was not enmity that caused the production of new weapons. Instead, it was the development of war technology that produced a need for new enmities and new concepts of the enemy. The new weapons technology had to be given meaning ex post. Schmitt's fear of the tyranny of technology in a nutshell: "absolute weapons of mass destruction require an absolute enemy" (93).

Schmitt ended his work on partisans with associative predictions: "Interested third parties" (75) would provide them with new weapons and other resources and would presumably instrumentalize them more and more often in the future. Thus, they would become a tool of the aggression of the international communist world revolution, a tool that could be manipulated. They would adapt to new technological circumstances with lightning speed, making them the means of their struggle. Schmitt spoke of the "technical-industrial partisan" (79) who would use the most up-to-date biological, chemical, or atomic weapons of annihilation. Schmitt believed that in light of nuclear weapons, partisan warfare with conventional weapons was the last refuge of real enmity. However, the only partisan Schmitt considered legitimate, namely the nationalist partisan, would be replaced by the urban guerilla fighter and the terrorist in the future. In this sense, Schmitt's *Theory of the Partisan* was a nostalgic book melancholically grieving the loss of the telluric and defensive true partisan and pessimistic about global politics.

In the late 1960s and the 1970s, under the formative influence of the Vietnam War, the guerrilla wars in Latin America, and leftist terrorism in Europe, Schmitt's work on partisans caught the attention also, and particularly, of radical left-wing circles in Italy,

65 On these assessments, see Münkler (1992, 111–141). Against Schmitt, he underlined the transitory character of the partisan as a precursor of a regular army in the theories of the authors mentioned.

France, and Germany.[66] However, the left-wing radicals' sympathy for it disregarded the fact that Schmitt wrote about the counterrevolutionary strategies to defend the colonial rule of Raoul Salan, the infamous founder of the Organisation armée ntuit (OAS, Secret Army Organization) who embraced terrorist methods in order to fight the Algerian National Liberation Front (FLN), with the same enthusiasm with which he had written about the political significance of the partisan alongside Mao. Nevertheless, the lawyers representing the German Red Army Faction (RAF) terrorists referred to Schmitt's book in their attempt to have their clients acknowledged in court as parties to a civil war (see Preuß 1989, 146–149). At the turn of the millennium, there was renewed interest in Schmitt's work on partisans. After the attacks of 11 September 2001 and the military response of the US, his associative prognoses on the methods of terrorism at the end of the book were hailed as prescient (see Scheuerman 2020). Among military experts, Schmitt is considered to be one of the first theoreticians of the new asymmetric or hybrid wars (see Münkler 2004).

However, it is less apparent what Schmitt's work added in a systematic sense to the concept of the political and, in particular, to the theory of enmity. To begin with, the lack of figures of the enemy is striking, whereas he did discuss these in his previous works. He did not mention the "total enemy" (see Schmitt 1937a, 481) at all, as he had in 1937. Nor did he discuss the "true enemy" he believed he had identified in the assimilated Jew, as he had noted in his *Glossarium* in 1947.[67] Moreover, it remains unclear what the difference between the real and the absolute enemy was supposed to be, as Schmitt considered both to be partisans. And finally, the question arises whether it is even possible to intensify the friend-enemy dichotomy, which he had first detailed in his *Concept of the Political*. After all, Schmitt had defined enmity as the "ultimate distinction" with the "utmost degree of intensity" (Schmitt 1932a, 26) as early as 1932. In a purely logical view, such a concept of enmity cannot be intensified. Schmitt did not solve this problem in his *Vorwort* (Foreword) of 1963 to the new German edition of *The Concept of the Political*, either, where he once again listed the three different kinds of enemies and emphasized the importance of distinguishing between them precisely (see Schmitt 1963b, 17).

Kirchheimer did not engage with this part of Schmitt's oeuvre. He did not have a copy of the book on partisans in his library. Nonetheless, his writing includes a counterpoint to deliberations of Schmitt's from that work. Schmitt viewed partisans as technically adept and fanatic lone wolves but thought that the partisans of the guerrilla wars in Indochina had fallen into dependence on interested third parties, that is, the communists in the Soviet Union and China.

Kirchheimer, by contrast, did not see them as belonging to such fixed categories. He had sympathized with the student protest movement against the US war in Vietnam from the outset and was in animated exchange with Herbert Marcuse about this. He was exposed to this issue at his own university more directly because of his son's political ac-

66 A radio interview that Joachim Schickel, then a revolutionary Maoist, had conducted with Schmitt on partisans in May 1969 contributed to Schmitt's popularity on the political left in Germany, see Schmitt and Schickel (1969).

67 *Glossarium* entry of 25 September 1947 (Schmitt 2015, 14).

tivism.[68] Kirchheimer's letter to the editor published in the *Washington Post* on 27 March 1965 shows how strongly he disapproved of US military policy. In the letter, he rejected domino theory, which had been used to justify the war. Reminding readers of Spain under Franco during and after World War II, Kirchheimer claimed that historical experience showed that countries often structured their alliances differently than assumed ex ante. He believed there was no reason to be convinced that the partisan units in North Vietnam, which felt they were pressed to form an alliance with China because of the demands of the war, would necessarily take China's side in an open political constellation in the future. Kirchheimer cited the early successes of the policy of détente with the Soviet Union in Europe as an alternative to the war in Indochina. He closed his letter to the editor with the rhetorical question, "is it in the long-range interest of a conservative power to tear up the last shreds of international law under dubious pretexts?" (Kirchheimer 1965d, 654). Schmitt assumed, in Cold War diction, that China and the Soviet Union were pulling the strings behind the partisan battles in Indochina. Kirchheimer, conversely, advocated not underestimating the fact that future political developments were still open to surprises and unpredictable turns.

Whereas Schmitt had not clarified the inconsistencies of his concepts of the enemy in his new foreword to *The Concept of the Political*, it does include a passage worth mentioning on the subject of political justice:

> Such a report [on the impacts of *The Concept of the Political* to date] would have to include the development of the views on political crimes and political asylum and on the justiciability of political acts and decisions concerning political questions by the justice system. It would have to take into account the fundamental question of the judicial process, that is, an examination of the extent to which the judicial process itself, as a process, necessarily changes its material, its object, and transforms them into a different aggregate state (Schmitt 1963b, 13–14).

And Schmitt continued: "All this goes far beyond the framework of a foreword and can only be suggested here as a task." (Schmitt 1963b, 14). He presented the desideratum he had formulated as a subject on which work had only just begun and did not mention that it corresponded astoundingly closely to the substance of Kirchheimer's *Political Justice*, which he did not reference, either. Once again, Schmitt wasted an opportunity to enter into a dialogue with Kirchheimer about the subject at hand.

In 1964, Hasso Hofmann published *Legitimität ntui Legalität* [Legitimacy against legality], which dealt with the development of Schmitt's theories until the 1940s and soon became a "milestone" (Neumann 2021, 11) in Schmitt studies. His general thesis was that there was a certain continuity in all the changes in Schmitt's work: the permanent search for new sources of legitimacy which trump legality. His thesis was an extension of the interpretation by Karl Löwith, his doctoral supervisor. Löwith had called the continuity in Schmitt's approach "occasionalist decisionism" (see Löwith 1935, 32–61). After Schmitt

68 In the spring of 1965, Peter Kirchheimer was one of the campus activists resisting the university's involvement with the Reserve Officer Training Corps (ROTC). Peter Kirchheimer in a conversation with the author on 3 May 2024.

had read Hofmann's book, he wrote on a notepad: "sterile echo of [Karl] Löwith's, [Leo] Strauss's, Kirchheimer's criticism." Schmitt had clearly recognized with this note that all three of those named were in agreement in their criticism of him, despite their other differences. They criticized his rapid adjustments to new political situations as well as his methodological approach. Kirchheimer, however, was the only one who also brought in the perspective of the empirical social sciences. Schmitt ignored these differences among the three authors.

5. Against consumer society

Schmitt concluded his letter to Kirchheimer on 6 August 1958 with a historico-philosophical thought: "perhaps history does not consist of a continuous 'flow', but of quantum-like 'epochs' in which the same situation is repeated again and again until a leap into another 'epoch' is successful."[69] Although Kirchheimer contradicted him—as quoted above—with the words "I do not believe in the repetition of similar situations; too many qualitative changes have taken place," he, too, added a gloomy prognosis: "I do not dare imagine what the general process of dulling people's minds and the limitless ability of the next generation to be manipulated will bring."[70] Although the background to the social theories propounded by Kirchheimer and Schmitt was quite different, they did share—to a certain extent—this culturally pessimistic view.

Schmitt could not and would not reconcile with the social and political realities of the Federal Republic of Germany. His disapproval included the rapid and successful development of the economy celebrated as the "economic miracle" and the country's public culture that focused on private consumption. Time and again, his *Glossarium* entries underlined his rejection of that preoccupation of postwar West German society. Schmitt found it nothing less than repugnant because this development thrust aside the serious nature of the political, and he again took up thoughts and motifs with which he had already railed against "economic rationalism" and "irrational consumption" (Schmitt 1923b, 14) in *Roman Catholicism and Political Form* in 1923. He even turned to the Frankfurt School's critical theory to find allies in renouncing modern consumer society. He quoted Jürgen Habermas, Adorno's assistant at the time: "consumption is the continuation of production by other means," indicating his agreement.[71] A week earlier, he had noted sarcastically: "pure consumer society. I suppose that will become the foundation of happiness."[72]

Schmitt used dramatic-sounding words to express his assessment of the situation, which he considered hopeless, to longstanding confidants, such as the Spanish legal historian Álvaro d'Ors: "Germany's situation today is dreadful. Much worse than most peo-

69 Letter from Carl Schmitt to Otto Kirchheimer dated 6 August 1958. Otto Kirchheimer Papers, Series 2, Box 2, Folder 12. Schmitt used identical wording three weeks later in a letter to Ernst Jünger (Schmitt and Jünger 1999, 353).

70 Both quotations in letter from Otto Kirchheimer to Carl Schmitt dated 4 September 1958. Otto Kirchheimer Papers, Series 2, Box 2, Folder 12. The second quote is similar to Kirchheimer's statements about France after de Gaulle took power (Kirchheimer 1958a, 399 and 1959a, 429).

71 *Glossarium* entry of 25 August 1956 (Schmitt 2015, 352).

72 *Glossarium* entry of 17 August 1957 (Schmitt 2015, 351).

ple suspect because they let themselves be bedazzled by the economic miracle. As an old man, I suffer terribly from this and feel veritable Cassandra depressions." In the same letter, he revealed the extent to which his cultural pessimism was fed by right-wing conservative thoughts and motifs: "Those calling themselves Christian in Germany today are more concerned with remaining anti-fascist and agreeing with the leftist slogans than with the courage of finding themselves."[73] Schmitt assumed that the social and political stability of German postwar society was brittle and could collapse into a new crisis at any moment.

Although the wording is less dramatic, Kirchheimer's writing from the 1960s contains a number of melancholy statements about the mentality of affluent consumer society that was taking hold in the US and before long in West Germany, too He followed and sympathized with the activities of the civil rights movement in the US and supported his daughter Hanna as she protested.[74] He voted for the Democrats in the presidential elections in 1960 and 1964 although he disagreed with Lyndon B. Johnson's foreign policy. And from the early 1960s on, Kirchheimer occasionally intervened in the discussions about day-to-day politics in the US with letters to the editor of the *Washington Post*. All his sympathies for the emerging protest movements notwithstanding, his writing lacked both the cautious optimism he had had with respect to the political culture of the Federal Republic of Germany and the specific tone expressing a sense of a new social beginning that had started to spread at US universities from the early 1960s on.

A fatalistic tone is clearly evident in some of Kirchheimer's later works. For example, in his 1962 article "Expertise and Politics in the Administration," he spoke of the "shadow of general barbarism which threatens us daily" (Kirchheimer 1962c, 372). He ended his last major essay on party research in 1965 by emphasizing the functional gap that was becoming apparent because of the transformation in the political systems of Western democracies and opening up the political space for the future success of populist parties and groups. He finished the article with the prognosis: "we may come to regret the passing—even if it was inevitable—of the class-mass party, as we already regret the passing of other features in yesterday's stage of Western civilization" (Kirchheimer 1966a, 371). His posthumously published essay "The *Rechtsstaat* as Magic Wall" in the *Festschrift* for Herbert Marcuse had the following ending:

> A generation which has lived through Auschwitz and Hiroshima and was indifferent or powerless to prevent them, and which is prepared to see bigger Hiroshimas, has no cause for complacency about its preservation or even enlargement of some orderly forms of living. It may have forgotten the essential: there must be life for life to be worth living (Kirchheimer 1967a, 312).

Kirchheimer's writing from the final years of his life has been interpreted in different ways in the secondary literature because of passages like these. Some writers believe that the resigned, stoic, melancholy, pessimistic, or even fatalistic undercurrent dominated

73 Letter from Carl Schmitt to Álvaro d'Ors dated 12 February 1962 (Schmitt and d'Ors 2004, 200).

74 Hanna Kirchheimer-Grossman in a conversation with the author on 15 April 2019.

in his late oeuvre.[75] Yet there is also another way of reading it, which I, too, subscribe to. In this interpretation, his texts are seen as documents of his search for a theoretical approach sympathetic to the program of Max Horkheimer's early critical theory and with which Kirchheimer, with his criticism of capitalist mass society, came closer in substantive terms to the critical theory of his friend Herbert Marcuse.[76] This reading highlights the potential of Kirchheimer's late works to renew critical theory in terms of political science, and it is also supported by the fact that Kirchheimer frequently quoted Adorno and Habermas in his late writing, besides Marcuse. More important, however, are the convergences in matters of substance. When Kirchheimer wrote about what Adorno called political alienation (see Adorno 1963, 382), he more soberly called it "privatization" (Kirchheimer 1967b, 459). In the last pieces he wrote before his death, this tendency of privatization became the analytical center of his diagnoses of the precarious condition of Western democracies beneath the veneer of superficial stability.[77]

Although there seem to be some parallels in their criticisms of consumer society, it is abundantly obvious that Schmitt and Kirchheimer developed them on the basis of quite different fundamentals and that they were imagining completely different sociopolitical alternatives.

6. Kirchheimer's untimely death

When Kirchheimer began his tenure at Columbia University, he continued to commute between Silver Spring and New York, and in the summer months between the US and Germany. He continued to apply for, and receive, research fellowships. Columbia University granted him a leave of absence as a fellow of the Social Science Research Council for the winter term 1964 and as a fellow of the John Guggenheim Foundation for the summer term 1965.[78] The John Simon Guggenheim Memorial Foundation awarded him a research stipend for the academic year 1965/66 to continue his studies of parliamentarism and parties in Western Europe.[79]

Once his son Peter had completed high school and enrolled at Columbia in the autumn of 1964, Kirchheimer again faced the decision of whether or not to move back to Germany for good. Even his family cannot definitively answer the question whether he actually seriously considered moving to Germany permanently.[80] The subject came up time and again, and his wife Anne did not change her position: she did not want to return to the land of the murderers of most of her family. Kirchheimer was clearly flattered by the unceasing interest in him in Germany. He was particularly comfortable in discussions

75 See Herz and Hula (1969), Perels (1988), Kohlmann (1992), and Schale (2006).

76 See Söllner (1982, 1986), Scheuerman (1994), Heins (2006), and Buchstein (2020c, 2023b and 2024).

77 See Söllner (1982) and Buchstein (2020a).

78 Otto Kirchheimer, Curriculum Vitae (1965). Private collection of Hanna Kirchheimer-Grossman (Arlington).

79 Letter from Gordon N. Ray to Otto Kirchheimer dated 17 March 1964. Otto Kirchheimer Papers, Series 2, Box 1, Folder 3.

80 Peter Kirchheimer and Hanna Kirchheimer-Grossman in a conversation with the author in New York on 8 February 2019.

with younger people in Germany, be they students, doctoral candidates, or young professors.[81] Although he appreciated his American colleagues for their knowledge and specialization, he generally found them boring, whereas he did not tire of praising the more in-depth education of young German academics. For their part, they were—as Harry Pross, a former student of Kirchheimer's who later became an influential professor of journalism in Berlin, describes in his memoirs—"deeply impressed" time and again by Kirchheimer's ability to speak in a polished style, convince his audience of his positions, and do so with a dash of humor (Pross 1993, 159).

There was a parallel to Schmitt here. In their memoirs, the highly talented younger scholars of the law and the humanities who flocked to him in the 1950s and 1960s extolled Schmitt's extraordinary goodwill, his exquisite friendliness, and his ability to mesmerize his younger listeners with his rhetorical brilliance.[82] Schmitt also made an effort to nurture the relationships established in person through meticulously composed letters. In these letters, it was often less the clarity of an argument but more a way of establishing associations between ideas that incessantly promised to reveal secret or veiled realms and connections within the humanities, thus generating a special kind of personal attachment (see van Laak 1998, 216). Jacob Taubes called these letters from Schmitt eagerly awaited "messages in a bottle."[83] As philosopher Odo Marquard interpreted his memories of the many conversations with Schmitt, the old man sought to engage with the younger scholars "in order to be present in their minds, then and in the future, as the person he would have liked to have been" (Marquard 2013, 73).

Kirchheimer presented himself to the West German public as a "guest from abroad" (Kirchheimer 1965b, 96), for example, at the 45th Deutsche Juristentag in 1964. When he had repeatedly mentioned his interest in a permanent position in Germany to Horst Ehmke, Ehmke saw to it that he was offered one at the University of Freiburg. Ehmke and Konrad Hesse were both renowned students of Smend's who had come to the Faculty of Law in Freiburg and who were trying to bring together constitutional lawyers and political scientists who shared their mindset.[84] The University of Mainz also expressed interest in Kirchheimer. Ernst Fraenkel asked him in 1964 whether he wanted to assume the Chair of Political Science which was becoming available.[85] Kirchheimer rejected the offer. He wrote in a letter to Gurland: "Both Friesenhahn and Fränkel [*sic*] asked whether I was interested in Mainz, but I indicated that Frankfurt and Freiburg appear more appropriate."[86] Kirchheimer continued to favor Freiburg, where he had regularly taught during summers as a Fulbright professor from 1961 on, and which was not far from his former hometown Heilbronn in southwestern Germany. In late autumn of 1965, Ehmke, then the responsible Dean, officially offered him an appointment at the University of Freiburg.

81 Peter Kirchheimer in a conversation with the author on 31 January 2019.

82 See Seifert (1996, 116–118), Böckenförde (2011, 359–384), and Dunkhase (2019, 412–414).

83 Letter (undated, probably 1958) from Jacob Taubes to Carl Schmitt (Schmitt and Taubes 2012, 24).

84 See Günther (2004, 224), and Schefold (2012, 198–202).

85 Letter from Ernst Fraenkel to Otto Kirchheimer dated 27 May 1964. Otto Kirchheimer Papers, Series 2, Box 1, Folder 57.

86 Letter from Otto Kirchheimer to Arkadij Gurland dated 2 July 1964. Otto Kirchheimer Papers, Series 2, Box 1, Folder 68.

On 22 November 1965, in the midst of this turbulent life as an internationally renowned professor of political science, Otto Kirchheimer suffered a heart attack on an airplane just before it took off from Washington, DC, to New York. He died a few days after his sixtieth birthday. Kirchheimer had still been full of plans for new scholarly projects. Working with Helge Pross, he had begun to arrange for a German translation of Franz L. Neumann's book *Behemoth* (see Erd 1985, 129).[87] Because he opposed the American war effort against the Vietcong partisans, he wanted his next project to be about the problem of hegemony in international relations (see Herz and Hula 1969, xiii). He had also already made arrangements for a trip to the East, to the German Democratic Republic, the following year to collect materials for a study on that country's legal system.

Otto Kirchheimer was not an observant Jew, but he was committed to his Jewish identity.[88] His ashes were buried alongside those of his parents in the Jewish cemetery of his hometown of Heilbronn, as he had wished.[89] His wife Anne Kirchheimer died in Silver Spring in 2008, almost forty-three years after her husband, at the age of 93.

There are no reports on how Schmitt reacted when he learned that his onetime star student had died. Three years later, Jürgen Seifert, a young leftist assistant professor who had worked with Kirchheimer's friend Gurland in Darmstadt from 1963 on, explored questions about Kirchheimer in a letter to Schmitt. Seifert had been part of the group of young German students who had experienced Schmitt in person at a lecture in the mid-1950s and was immediately fascinated by him (see Seifert 1996, 115). They exchanged a few letters over the next few years and, in 1958, Schmitt made Seifert aware of some older works of Kirchheimer's. As an assistant of Gurland's, Seifert was also involved in translating *Political Justice* into German (see Kirchheimer 1965c, 16). After they had met in person to discuss the translation project, Kirchheimer told him about the conflict at Columbia University over George Schwab's dissertation.

Three years after Kirchheimer had died, Seifert asked Schmitt about him in a letter. Schmitt's response to a question—"did the two of you fall out?"—was brusque and hostile; he wrote: "My postwar relations to Mr. Kirchheimer started with his visit in Plettenberg (27 November 1949) and ended in the summer of 1961, when I found out details about his behavior in Schwab's doctoral procedure. […] the way Kirchheimer prevented the work from being accepted made me recognize an error I had made in 1927."[90] Schmitt wrote this response after he had consulted with George Schwab (see Mehring 2014a, 687). By this point in time, Schmitt viewed Kirchheimer as a persona non grata who did not even deserve to have received his doctorate from him fifty years earlier. It was only when Jürgen Seifert made a second attempt and announced in another letter that he only wanted

87 The fate of the book in Germany is scandalous. It took until 1977 for a German translation to be published. The book was translated into Hebrew and Spanish as early as 1943 (see Söllner, Wildt, Buchstein and Hayes 2023).

88 "Otto was never an observant Jew […] but he always identified himself as a German Jew. He strongly objected to name changes or other activities he considered to be a denial of a person's Judaism. At the same time, he often declared that Reform Judaism was not the 'real thing.'" (Kirchheimer-Grossman 2010, 63).

89 Peter Kirchheimer in a conversation with the author on 3 May 2023.

90 Letter from Carl Schmitt to Jürgen Seifert dated 30 September 1968 (as cited in Seifert 1996, 120).

to ask Schmitt about it in a conversation that Schmitt gave a different answer: "A conversation about Otto Kirchheimer in unobjectionable openness would be a true blessing for me. The fact that you would like to make that possible is in itself a reason to be grateful."[91] Yet this conversation did not come about in the next few years because Seifert, who was active on the political left, was immersed in various political and professional activities, and as a result, he lost sight of his contact with Schmitt.

Several years passed before Schmitt began to mention Kirchheimer again in more positive terms. In the meantime, he had discovered that some of Kirchheimer's works had found new resonance on the political left in Latin America, Germany, and Italy. When Ingeborg Maus, a leftist political theorist with close ties to the Frankfurt School, received her doctorate in 1972, Schmitt congratulated her in a letter using the words: "At this moment, I am moved by the memory of Otto Kirchheimer's doctorate […] and by the joy I felt at the time of encountering dissent and understanding it."[92] The joy Schmitt expressed about Kirchheimer's objections at the time must have been a stirring of emotion occurring quite some time later. At least in 1928, Schmitt had noted a different emotion in his diary, his direct impression of the long evening they spent with Erik Peterson after Kirchheimer's doctoral defense: "Kirchheimer lacks any national sentiment, horrendous."[93] His letter to Maus continued: "even though he [Kirchheimer] was sure that he understood me better than I did myself."[94] I doubt that Kirchheimer would have said the same about Schmitt.

Schmitt continued to exchange letters occasionally with Ingeborg Maus, who had in the meantime finished preparing her dissertation on Schmitt's legal theory for publication (see Maus 1976).[95] In September 1975, he wrote her that he was angry that he had to serve as the last remaining scapegoat: "I am befallen by a kind of senile nostalgia when I remember the many conversations with Kirchheimer, Karl Korsch, and others from the autumn of 1932."[96] In 1976, he reported to Armin Mohler about another posthumous edition of essays by Kirchheimer. He took this as an opportunity to praise his own role in Kirchheimer's academic career and to lionize himself as a truly liberal-minded person:

> A new Otto Kirchheimer volume is being published by Suhrkamp […], with old material, including an excerpt from Kirchheimer's dissertation, which I accepted in Bonn in 1928; it is apparent: liberalism is a matter of the strong, not of the weak.[97]

Four years later, Schmitt gave his version of the story of his relationship to Kirchheimer an additional twist. In an oft quoted conversation with Rainer Erd in July 1980, Schmitt was apparently able to create the impression that Kirchheimer had endeavored time and again to stay in contact with him after 1945. At the time of the interview, Rainer Erd was a

91 Letter from Carl Schmitt to Jürgen Seifert dated 5 October 1968 (as cited in Seifert 1996, 120).

92 Letter from Carl Schmitt to Ingeborg Maus dated 24 January 1972 (as cited in Mehring 2013, 442).

93 Carl Schmitt, diary entry of 25 February 1928 (Schmitt 2018, 208). See Chapter 2, p. 65.

94 Letter from Carl Schmitt to Ingeborg Maus dated 24 January 1972 (as cited in Mehring 2013, 442).

95 Her book is still one of the best critical discussions of Schmitt's legal theory.

96 Letter from Carl Schmitt to Ingeborg Maus dated 24 September 1975 (as cited in Mehring 2013, 442).

97 Letter from Carl Schmitt to Armin Mohler dated 16 July 1976 (Schmitt and Mohler 1995, 410).

young staffer at the Institut für Sozialforschung who was interested in the history of the Frankfurt School's critical theory. He had visited Schmitt unannounced in the summer of 1980 to ask him about Franz L. Neumann. Schmitt was happy to speak with him but insisted that he refrain from taking notes and recording the conversation (see Erd 1985, 14). From then on, what Erd reported about his conversation with Schmitt has lived on in the form of an intensifying rumor. It has been repeated in conversations, including the assertion that Kirchheimer had visited Schmitt at his home in Plettenberg several times. What Erd reported about his interview with Schmitt was mentioned for the first time in writing by Volker Neumann in a 1981 essay (see Neumann 1981, 239). Since then, it has been quoted routinely whenever the subject of the resumption of personal contact between Kirchheimer and Schmitt has come up.

More than forty years after the interview, Rainer Erd recalled that Schmitt's responses had been as friendly as they had been vague. However, Schmitt had taken great pains to express "a certain esteem for him [Kirchheimer]."[98] Schmitt was ninety-one when he spoke with Erd, and one might attribute his account of Kirchheimer's visit and his efforts to keep in touch to memory loss. Yet this is contradicted by the fact that his mental faculties at the time were described as still very sharp (see Mehring 2014a, 530–533). Erd also saw no indication that Schmitt was confused or afflicted by dementia. It is more likely that it was just another attempt of Schmitt's to control the narrative about himself and Kirchheimer.

7. Conclusion: Becoming Schmitt's friend posthumously

The controversy about Schwab's dissertation made for a turbulent finale of the contacts between Kirchheimer and Schmitt. Even at this grand finale, it was typical of their relationship that they did not confront each other directly about it but again used communication channels via third parties to express their mutual displeasure. In Schmitt's view, Kirchheimer's rejection of Schwab's doctoral dissertation at Columbia University was an attack directed personally against him. He felt that Schwab was a scapegoat who had to suffer from this attack. The fact that Kirchheimer so vehemently rejected Schwab's work can be explained not least by his assumption that Schmitt was pulling strings in an attempt at political rehabilitation in Germany via the United States. Kirchheimer was already aware of Schmitt's strategic intentions throughout their communication in the 1950s, and Schmitt had already informed Kirchheimer about Schwab in a letter in August 1958. The controversy around Schwab's dissertation between May 1960 and February 1962 was fueled by Kirchheimer's suspicion that Schmitt wanted to instrumentalize him in his function as a committee member. In the event that the apologetic interpretation of Schmitt's role at the end of the Weimar Republic had been accepted in a dissertation at Columbia University, Schmitt would have been rehabilitated. And, moreover, with Kirchheimer's active participation—a person whose biography as a Jew and an author of the left made him a person above suspicion. Kirchheimer was not willing to partake in

98 E-mail from Rainer Erd to the author dated 25 March 2021.

this game and took an unapologetic stand against it. Schmitt, in return, communicated Kirchheimer's stance as a personal attack against him to the members of his circle.

Kirchheimer's professional career finally took off in the 1960s. His book *Political Justice* brought him mostly positive reviews[99] as well as the professorship at Columbia University. The revised German-language version of the book was published in autumn 1965, for which he also received a great deal of praise, among other authors from future West German President Gustav Heinemann.[100] He also published a number of articles in prestigious journals and was a regular reviewer for the *Washington Post*. His research on the transformation of opposition in modern democracies and his thesis on the emergence of a new type of political party he called a "catch-all party" put him at the forefront of political science in the US. The last four years before his death marked a brilliant high point in his academic career. In the summer of 1965, he had decided to accept the offer of a professorship in Freiburg, Germany; his unexpected death in November put an unhappy end to this plan in which his friends and colleagues in Germany had placed high hopes. Schmitt also experienced a certain high point in his career in the first half of the 1960s, albeit outside of academia. With his book *Theory of the Partisan*, he had proven once again that he had an ntuittion for upcoming topics: this book received wide attention beyond his own circles in the years that followed, not least a new readership among the younger generation in the radical leftist camp.

Kirchheimer and Schmitt did not discuss Kirchheimer's book *Political Justice* in the 1960s—nor did Kirchheimer take the opportunity to discuss Schmitt's *Theory of the Partisan,* although he was interested in the American warfare against the Vietcong. Schmitt wrote dismissive remarks about *Political Justice* in letters to some of his friends. A few months after the conflict over Schwab's dissertation, he published a disparaging book review that did not bear his full name. It reads as if Schmitt wanted to take revenge on Kirchheimer, and Kirchheimer had easily figured out that it was authored by Schmitt. Schmitt's preface to the new German edition of *The Concept of the Political* would have provided a potential starting point for a new dialogue between the two. He wrote that it would be important to explore to what extent the judicial process itself as a procedure changes its substance and object and transfers them to a different aggregate state. It is striking how his wording corresponded to Kirchheimer's research program in *Political Justice*. However, Schmitt left this connection unmentioned. He presented the subject as still in its infancy and thus missed another opportunity to enter into a critical dialogue with Kirchheimer. The latter, on the other hand, gave no indication in his book about the extent to which it was inspired by Schmitt's considerations on political justice in his *Constitutional Theory*. He, too, refrained from openly discussing his old partner's theory in controversial dialogues with him.

A few years after Kirchheimer's untimely death, Schmitt realized that some of his works had found new resonance on the radical political left from the late 1960s on. At this time, he started to speak more positively again about Kirchheimer, whose writing was also rediscovered by authors on the political left. Schmitt had verbalized rosy memories in his letters to Ingeborg Maus and Armin Mohler in the 1970s, and he certainly did

99 See Klingsporn and Wilke (2019, 61–64).

100 See Klingsporn and Wilke (2019, 66–69).

so again in his conversation with Rainer Erd in the summer of 1980. Erd left Schmitt with the Impression not only that Schmitt had always held Kirchheimer in high esteem, but also that Kirchheimer had continued to keep in touch with Schmitt after 1945 and had visited him multiple times. As early as 1949, Schmitt had reported in a letter to Ernst Rudolf Huber, Kirchheimer's fellow student in Bonn, that he and Kirchheimer had both praised the "outburst of intellectual freedom and dégagé thinking as sublime as the one we experienced in 1930/32."[101] With Erd's later report about his own visit in Plettenberg, the kitschy legend about the great unanimity between Schmitt and his leftist student Kirchheimer, about their reconciliation that had bridged all their political differences and all the crimes of the Nazi period, became popular in left-wing circles, too.

101 Letter from Carl Schmitt to Ernst Rudolf Huber dated 10 December 1949 (Schmitt and Huber 2014, 355).