

Chapter 14:

Dealing with the Future—and the Past (1946–1948)

Otto Kirchheimer was included in the American plans for postwar Germany in addition to his work preparing the war crimes trials. He had great hopes for rapid denazification and swift reestablishment of a democratic and socialist Germany. Meanwhile, Carl Schmitt continued to live in Berlin-Schlachtensee after his interrogation by the Soviet military. He started to earn a living as a private legal consultant for the time being, hoping soon to return to a position as professor again. Both saw their hopes dashed within a short period of time.

1. Denazifying and governing occupied Germany

At the OSS, Kirchheimer was involved in plans for abolishing the Nazi laws as well as recommendations for suitable ones to replace them, including laws on the organization of the courts and other judicial institutions, the areas of criminal law and criminal procedural law, as well as public administration in general and the public service. His recommendations are documented in a number of *Civil Affairs Guides* and contributions to *Handbooks* which he prepared between early 1944 and August 1945. Some of his contributions to these official documents, which were classified top secret, are worth looking into since they touch on Schmitt and his work in various places.

The recommendations in the *Civil Affairs Guides* were based on longer *Handbooks* on the same subjects. As reference manuals to provide a factual basis, the *Handbooks* were primarily intended to present information about Nazi Germany in order to enable the US military government to make future decisions appropriate to the situation at hand. They covered geography and society; government and administration; financial, economic, commercial, and social policies; agriculture and mineral resources; communication systems, licensing of publications, and questions of censorship and freedom of expression; transportation systems; public services and public safety; education and culture; and churches and museums. These *Guides* had an impact on American policy in Europe. They were produced in Washington, DC, and after an internal approval process transmitted

overseas to the American Civil Affairs Training School in Shrivenham, England. They were to be limited to a maximum of twenty pages since they were designed for practical use in occupied Germany. In contrast to the *Civil Affairs Guides*, the *Handbooks* did not include any recommendations for politics or planning.

Already in early 1944, Kirchheimer was assigned to prepare a *Handbook* to serve as a basis for the recommendations on legal affairs in Germany in the *Civil Affairs Guides*. He was given only four months to complete this task. His *Handbook of Legal Affairs*¹ presented the judicial system in Nazi Germany, including the Reich Ministry of Justice, the bar association, criminal law, the system of administrative courts, civil law, commercial law, and the war-related measures in Germany through 1943. Produced in a rush, the *Handbook* endeavored to convey the absolutely sober tone and objectivity expected of R&A. Kirchheimer discussed factual matters with his co-workers in his division. The *Handbook* was copyedited by native English speakers. Nonetheless, Kirchheimer's analytical hand is apparent in the *Handbook*—not least because of direct references to some of his earlier works and a few brief passages taken from them (but not indicated as such).

There was particular emphasis on the extensive chapters on Nazi criminal law and the judicial administration—Kirchheimer had already conducted research and published multiple times on both subjects over the previous years. He now drew attention to long-term historical trends dating back to the mid-nineteenth century. This gave his readers the impression that Nazi legal policy was not only opposed to that of the Weimar Republic but also to that of the German Empire, which Kirchheimer described as a “liberal age” (319). It also rejected the notion that German history had somewhat inevitably resulted in Nazism.² He characterized Prussia's historical distinctiveness not by using the concept of militarism but that of the *Rechtsstaat*. Kirchheimer thus set a clear counterpoint to Carl Schmitt's historical interpretation in his 1934 book *Staatsgefüge und Zusammenbruch des zweiten Reiches* [The structure of the state and the collapse of the Second Reich],³ yet without mentioning Schmitt's name.

Kirchheimer reflected on the political views of the members of the judicial system in a relatively detailed section, linking up seamlessly with his writing from the 1920s. Politically challenged by the defeat in World War I and the November Revolution and financially ruined by inflation, “the judge felt humiliated by all these developments and instinctively sought to take revenge on those whom he held responsible for the evil days which had befallen him—the war profiteers, the foreigners, the radical workers. In following this course, he became a nationalist as well as a champion of the cause of the newly disinherited of the nation—the independent middle class” (259). Even though Kirchheimer strongly criticized the reactionary and authoritarian character of the German judicial system, the prosecutors and judges appeared to have the function of “a brake” (260) in the system of Nazi legal practice. Their attempts to hold fast to

1 See Kirchheimer (1944d). The following page numbers refer to this text.

2 In so doing, Kirchheimer, along with all of R&A, opposed the idea of a German-Prussian *Sonderweg* (special or unique path) propounded at the time by Robert Gilbert Vansittart and Hans Morgenthau, among others.

3 See Schmitt (1934f). See Chapter 7 for further details.

proper court proceedings at least lessened the totalitarian state's claim of unfettered domination.

Kirchheimer emphasized the existing “frictions” (261) between the justice system and the party. Although the early politicizing of the judicial system by the Nazi regime underscored the “all-embracing character” (261) of Nazism, it did not succeed in completely amalgamating the judicial system and the party, at least not until 1942/43. For this reason, Hitler's 1942 speech in the Reichstag on legal policy and the decision of the German Reichstag of 26 April 1942, which Kirchheimer interpreted as attempts to toughen legal policy, were mentioned multiple times in the *Handbook*. Kirchheimer characterized the national conservative legal experts who had offered their services to Nazism—besides Franz Gürtner, he singled out Erwin Bumke and Franz Schlegelberger—as representatives of an authoritarian but bourgeois era. He contrasted them with the type of the explicitly Nazi legal expert, mentioning Hans Frank and Roland Freisler by name. Kirchheimer's typology did not mention Carl Schmitt, neither directly nor indirectly.

One of the specific questions studied in advance by the occupation authorities in their planning was which Nazi German laws would have to be repealed and which ones could remain in force for the time being to allow everyday life to be reasonably governed. The question as to the personnel who was to develop the new laws and regulations in detail seemed at least equally important. In January 1944, Major General John H. Hilldring, who directed the newly established Civil Affairs Division within the US Department of War from spring 1943 on, tasked R&A with preparing recommendations for legal policy. Franz Neumann was the formal director of the project but had internally handed it over to Kirchheimer and Herz, who was to work under Kirchheimer's direction.⁴ Since the recommendations had to be harmonized internally with other branches of the OSS, competition between those branches made for friction. Nonetheless, the *Civil Affairs Guide: The Abrogation of Nazi Laws in the Early Period of Military Government*, for which Kirchheimer was responsible, was completed rapidly by March 1944.⁵ In a letter to Crane Brinton, head of the R&A Branch in London, from late March 1944, Neumann spoke in retrospect of “innumerable difficulties” between R&A and the other branches involved. He also complained of resistance from the Editorial Committee in which conservative American legal experts—he meant Ernst J. Cohn—rigidly defended property rights, overlooking “the need for political and social transformation”⁶ in Germany.

Kirchheimer's *Guide* listed the Allies' legal policy measures that were to be taken by the American military directly after occupying German territories. Kirchheimer quoted the ideals of the United Nations and the Moscow Declaration and applied the goals of their occupation policy for Italy (“that Fascism and all its evil influence and configuration shall be completely destroyed and that the Italian people shall be given every opportunity

4 Interoffice Memorandum dated 18 January 1944. Record Group 226, Entry 44, Box 2, Folder: Status of Reports. Records of the Office for Strategic Services, National Archives at Maryland.

5 Record Group 226, Entry 44, Box 2, Folder: Status of Reports. Records of the Office for Strategic Services, National Archives at Maryland.

6 Letter from Franz Neumann to Crane Brinton dated 30 March 1944. Entry 146: Miscellaneous Washington Files, Box 83, Record Group 226, Records of the Office for Strategic Services, National Archives at Maryland.

to establish governmental and other institutions based on democratic principles”⁷) to Germany. He linked these considerations regarding policies for freedom and democracy to aspects of security policy. Preventing “chaotic conditions” (229) was top priority.

The *Guide* begins with a brief analysis of the problem, followed by an extensive list of recommendations. Two groups of laws had to be abrogated immediately. The first was laws that contradicted the principle of all citizens being equal before the law. Kirchheimer placed all laws and other legislative rules that were expressions of racial discrimination in this category. The second was laws that restricted fundamental personal liberties as well as the liberties of certain social groups. This included immediate release of and care for all concentration camp inmates. However, the former concentration camp sites were to be kept available: “the facilities of existing concentration camps will be needed for the detention of the large numbers of active Nazis and similar categories of persons to be detained by MG for reasons of security” (245). Kirchheimer recommended the prompt release of political prisoners as well as a general amnesty with immediate effect. He also advocated for revoking the validity of any acts concerning Nazi symbols such as swastikas or uniforms without delay. Likewise, the enforcement of Nazi eugenic legislation “would seem undesirable even during [the] transitional period since it has been one of the mainstays of Nazi ideology and propaganda” (232). The 1934 Act for the Ordering of National Labor with its provisions on *Führer* and *Gefolgschaft* (subordinates, see Glossary) in enterprises had to be repealed at once.

Kirchheimer laid out in detail which particular laws were to be abolished immediately and which other measures were to be taken in judicial policy. Among others, these included the entire complex of “Aryan Legislation” (234), in particular, the Nuremberg Laws of 1935. The laws regulating expatriation were also to be declared invalid. Individuals whose German citizenship had been revoked—such as Kirchheimer himself—and who had taken on the citizenship of another country were not to be reinstated automatically as German citizens; instead, they would need to apply for German citizenship individually after returning to Germany. One argument against automatic restoration of German citizenship was that it might lead to unnecessary harm to former Germans who had chosen to reside abroad.

As for politics, Kirchheimer placed his hopes in a swift handover of political responsibility to democratic Germans. He apparently assumed that the majority of Germans had not agreed with the Nazi regime but had been oppressed by a “bellicose and rapacious minority” (238). The military government “has no desire to perpetuate its rule” (238) for which reason it was to commit to a program of “speedy restoration of liberties” (238). Restoration of democracy in Germany would be rapid “when the German people have gained some experience once more in the full development of social and cultural patterns of their own” (238). That was why the military authorities were to grant the Germans as many political freedoms and rights as possible. Following these fundamental considerations, Kirchheimer presented a detailed list of measures for restoring the freedoms of speech, assembly, and the press, as well as establishing political parties and organizations. The Nazi party and comparable successor organizations were to be disbanded and banned. The *Guide* ended with a list of sixty-five laws to be rescinded immediately. This

7 Kirchheimer (1944a, 230). The following page numbers in the text refer to this *Guide*.

included two laws as formulated in 1922 and 1925, both of which codified privileges for police officers of the *Länder* and members of the *Wehrmacht*.

Another group of measures where “immediate action seems imperative concerns the denazification of the judiciary” (232). At this point in his *Guide*, Kirchheimer used an argument that was founded in legal history and based on his own experiences during the Weimar Republic. It might seem at first glance that the fate of the German judiciary was not of immediate concern. For instance, it could be argued that the elimination of the *Sondergerichte* (see List of German Courts) for prosecuting political opponents had abolished the most objectionable parts of the judicial system and its most undesirable elements. Yet this was a misperception because it overlooked the historical role the judiciary had played in German politics after 1918. Kirchheimer listed multiple examples from the Weimar Republic and summarized: “Thus the judiciary constituted one of the chief benefactors of groups thriving upon aggressive nationalist policies” (232). The few members of the judicial apparatus who had remained politically neutral had been weeded out in the repeated and vigorous purges beginning in 1942 at the latest. Kirchheimer concluded: “it seems necessary that all the 12–13,000 judges and public prosecutors be suspended from office until each of them has been thoroughly investigated” (233).

Consequently, Kirchheimer concluded that “the activities of the courts must be suspended for a certain period” (233). Since civil jurisdiction had practically ground to a halt in Nazi Germany since 1943, such a hiatus would hardly amount to a change for the general public. Kirchheimer recommended that all judges and prosecutors be suspended for two months. The personnel records of all those suspended were to be reviewed, and new staff was to be recruited. No new appointments to positions of judge or prosecutor were to be made without a public hearing. The military government was also to consider for these positions those who appeared specially qualified without having the required professional qualifications, even if this might provoke resistance among the legal profession. All positions were to be filled only on a temporary basis. Overall, Kirchheimer estimated that altogether 9,000 to 10,000 positions would have to be filled with new staff. He thought this could be accomplished in just two months by only twenty officials processing seven cases per day each. Then, as now, this recommendation is astonishing for how unrealistic it was and how much it underestimated the necessary administrative manpower enforcing it.

In July 1944, Kirchheimer completed another *Guide* with the title *General Principles of Administration and Civil Service in Germany*.⁸ Neumann was originally supposed to prepare this but he decided to entrust Kirchheimer with the task. This *Guide* also examined the question of dealing with existing staff after Germany’s liberation from the Nazi dictatorship. Kirchheimer used the example of *Preußische Landräte* (Prussian head officials at the local level), 80 percent of whom had obtained their positions after 1933, to illustrate his estimate that approximately 7,000 higher officials in Germany would have to be terminated in the early phase of occupation. The numbers of staunch Nazis were also very high in the middle and lower ranks, which was why they were to be prohibited from moving into these newly available positions.

8 See Kirchheimer (1944b). The following page numbers in the text refer to this *Guide*.

For this reason, it would be necessary to consider the question of whether replacements could be found “outside the present ranks of the German Civil Service” (308). One source would be the civil servants who had been dismissed or demoted by the Nazis. Their immediate rehiring would be useful “both for psychological and for service reasons” (308). In addition, new civil servants were to be recruited from opposition groups even if they did not have the training required for their new positions. “Their wide range of political and social experience and the trust which the population places in them would amply compensate for their lack of formal training” (308). Members of resistance groups such as trade unionists, intellectuals, or the church opposition “should be given preference over members of the Civil Service in responsible nontechnical jobs” (315). According to Kirchheimer, the question of democratizing Germany essentially depended on the types of people serving in the civil service. The traditional narrow esprit de corps of the German bureaucracy had to be broken: “One of the ways in which its structure might be democratized may be the granting of the right for most classes of civil servants to organize on trade-union lines” (309). From today’s perspective, Kirchheimer’s optimism about the civil service after 1945 is striking. In retrospect, his proposals to perhaps rehire administrative personnel from pre-Nazi times as well as amateurs appear to underestimate the totality of the collapse of non-Nazi civil society in Germany.

Kirchheimer added to his general deliberations an extensive and detailed list of all the German agencies that would have to be abolished immediately. A second list included those that would have to be reorganized. He also recommended establishing a new health and welfare agency that would have to be organized at the national level, departing from the German tradition of federalism. He paid particular attention to the question of the civil servants who had been dismissed, believing that “no pension should be granted” (316) them. And he added: “Whatever the hardships which may be imposed on some of them, it would seem unjustified to grant former officials’ preferential treatment in the form of pensions” (316). This recommendation of Kirchheimer’s directly affected Carl Schmitt, among others, because university professors in Germany have the status of civil servants. Kirchheimer did not mention any names in this section of the *Guide*.

A *Guide* titled *Administration of German Criminal Justice under Military Government*⁹ of July 1944 also reflected the latent trilemma between rapidly handing over governmental responsibility to the Germans, the Allies’ security-policy considerations, and the revocation of individual Nazi legislative acts. Once more, Kirchheimer raised the question of an amnesty for individuals imprisoned by the Nazi regime. He considered it a particularly urgent problem and again highlighted the positive psychological effects of a speedy release of all political prisoners.

In this *Guide*, Kirchheimer explicitly addressed a fundamental reform of German criminal law. His recommendation here was that the entire system of German criminal law was “a problem whose solution may be left to the German people and is not a matter of concern for Military Government” (319). He derived this principle from international law. At the same time, it had “to satisfy the requirements of military occupation and to fulfill the purposes and policies of the United Nations” (319). Kirchheimer was full of praise for the criminal law of the Weimar Republic because it was to some extent “influenced by

9 See Kirchheimer (1944c). The following page numbers in the text refer to this *Guide*.

progressive reforms” (319). This development had been discontinued abruptly under the Nazi regime, and Kirchheimer listed in detail the changes in substantive and procedural criminal law made after 1933. His analysis was almost identical, in parts practically verbatim, to the articles he had written prior to his time at the OSS. He proposed “limited abrogation” (327) of all those penal provisions that violated human rights or posed a threat to the military security of the military government. He listed a number of laws, statutes, and decrees—more than fifty in total—in this *Guide* that were to be rescinded immediately by proclamation of the military government. These were to be replaced provisionally by laws and regulations existing before Franz von Papen’s government had taken power in May 1932. With this recommendation, Kirchheimer expressed a position he had already championed at the end of the Weimar Republic.

Since the political situation of an occupied Germany after the war was still unclear when he wrote his *Guide*, Kirchheimer devised two scenarios. The first assumed short-term occupation of Germany. Defining political crime and the machinery with which it had been implemented during the Nazi regime would prove to be a particularly difficult problem in this case. Kirchheimer advocated a broad concept of political crime that included hunger and destitution as well as violations of labor laws, for example in the case of forced labor, as motives for taking action. If occupation was brief, the military government would not have sufficient time and personnel to investigate all cases, so all criminals sentenced to less than eighteen months’ imprisonment should be granted amnesty, as well as all political prisoners. In the second scenario, with a longer period of occupation, the military government was to establish an agency responsible for reviewing longer sentences.

Finally, Kirchheimer devoted an entire section to the prosecution of Nazi offenders against German citizens. Even if it was likely that the top Nazi criminals would be tried as war criminals in Allied courts, plenty of other perpetrators would remain unpunished. Kirchheimer recommended that these cases were to be tried only in German courts. In cases of flagrant offenses, he assumed that a sufficient number of German prosecutors would be available to indict the perpetrators. It would be more difficult in cases where perpetrators invoked the doctrine of superior orders, or because the statute of limitations would have run in favor of the defendant, or because a Nazi amnesty may have intervened. Solving these problems was not the responsibility of the military government. It would be such a drastic intervention in the German system of criminal law “that the Military Government should not take such a step in the absence of a specific directive [...] from the political authorities” (343). On the organizational level, Kirchheimer proposed a division of responsibilities between German criminal courts and military government courts. The decision of the latter would be final in the event of conflicts about competences between the two courts.

Kirchheimer’s recommendations were not undisputed within the OSS. In an internal review of his *Civil Affairs Guide: The Abrogation of Nazi Laws in the Early Period of Military Government* of March 1944, Magdalena Schoch, an émigré like Kirchheimer, criticized his recommendations for not going far enough as they did not include some of the obviously discriminatory laws such as the *Reichstagsbrandverordnung* (Reichstag Fire Decree) and

the *Reichserbhofgesetz* (Reich Hereditary Farm Law).¹⁰ Whereas Kirchheimer was against automatically reinstating German citizenship to those who had been stripped of it and had called for them to have to apply for it in Germany, Schoch considered this an unnecessary burden on displaced individuals, many of whom were stateless. Instead, she demanded an agency be established to settle these cases.¹¹ Schoch's criticism was put even more succinctly in another considerably more polemic report by H. Bowen Smith of the Foreign Economic Administration (FEA): he considered the strategy of the *Guide* to entrust the Germans and not the Allies with certain matters as an unnecessary threat to the political mission of the US. If Kirchheimer saw the danger posed by a "bellicose and rapacious minority" of Nazis in Germany after liberation, Smith wrote, why was he advocating a rapid handover of governmental responsibility to the Germans? Smith also rejected banning judges and prosecutors for a predetermined period of two months. Instead, the courts should be reopened only very slowly as the Allies saw fit. Overall, he considered the *Guide* a "failure."¹²

Kirchheimer's reaction to this criticism was a kind of controlled offensive. In a report he signed jointly with Herz, he responded positively only to the criticism about dealing with individuals stripped of their citizenship. He had not devoted enough space to this matter because of the brevity of the *Guide*. Otherwise, he reiterated his position: which of the many Nazi statutes in the various areas of the law would also have to be rescinded or changed was a lesser problem than purging the staff and was to be decided later by the (anti-fascist) Germans themselves.¹³ Presumably after speaking with Kirchheimer and Herz, Neumann also raised "grave objections"¹⁴ to the FEA's proposal to include the *Reichstagsbrandverordnung* (Reichstag Fire Decree) and the *Ermächtigungsgesetz* (Enabling Act) of 24 March 1933 in the list of laws to be repealed immediately. That would automatically reinstate the second part of the Weimar Constitution and thereby implicitly also its first part. The basic rights that would then apply again—in particular, the constitutional provisions protecting property—would unnecessarily hinder the military government. Moreover, they would promise personal liberties that would apply only to a limited extent during the period of occupation. The two positions differed fundamentally in their assessment of the Germans' political activities: although both sides were convinced that German society was deeply permeated by Nazism, Neumann, Kirchheimer, and Herz

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- 10 The *Reichstagsbrandverordnung* of 28 February 1933 abolished some of Germans' civil liberties; the *Reichserbhofgesetz* of 29 September 1933 excluded "non-Aryans" from farming.
 - 11 See letter from Magdalena M. Schoch to David M. Levitan dated 7 April 1944. Entry 44: Civil Affairs Guides, Box 3, Record Group 226, Records of the Office for Strategic Services, National Archives at Maryland. Levitan was the Chief of the Property Control Division of the FEA and Chairman of the Draft Committee.
 - 12 Memorandum from H. Bowen Smith to David M. Levitan dated 11 April 1944, page 3. Entry 44: Civil Affairs Guides, Box 3, Record Group 226, Records of the Office for Strategic Services, National Archives at Maryland.
 - 13 Otto Kirchheimer and John H. Herz: Memorandum to Sherman Kent dated 9 May 1944. Entry 146: Miscellaneous Washington Files, Box 83, Record Group 226, Records of the Office for Strategic Services, National Archives at Maryland.
 - 14 Franz L. Neumann: Critique on FEA Guide: Elimination of Fundamental Nazi Political Laws in Germany of 10 May 1944. Entry 146: Miscellaneous Washington Files, Box 83, Record Group 226, Records of the Office for Strategic Services, National Archives at Maryland.

thought that the majority of democratic Germans, along with anti-fascist committees with close ties to trade unions, would seek to establish a new constitution with a democratic socialist orientation. This was why the further process of denazification was to be carried out by the Germans, not the Allies. Schoch and the FEA considered this expectation too optimistic and thought that the measures proposed by R&A were wrong.

Nowadays, it is virtually impossible to determine which specific role Kirchheimer's list of Nazi laws to be rescinded played when the Special Legal Unit prepared its own list of laws in the spring of 1945. Both lists mention many of the same laws. A number of repeals recommended by Kirchheimer are also found in the laws enacted by the Allied Control Council (ACC) (see Hochstein and Schale 2021, 53–56). By contrast, the Allied denazification measures corresponded with Kirchheimer's proposals only to a limited extent. He had called for all judges and prosecutors to be dismissed for a limited period of time; the Allies limited this to "members of the Nazi party [...] and all other persons directly involved in the penal methods of the Hitler regime."¹⁵ The proposed two-month closure of all courts did not come about; the first *Amtsgerichte* (see List of German Courts) opened as early as May 1945. The most clear-cut difference between Kirchheimer's proposals and the early Allied Control Council laws is to be found in the handling of the Nazi laws on eugenics. Whereas Kirchheimer emphasized their background in *Rasse* biology and demanded they be repealed immediately, neither the Western Allies' military government nor, for a long time, the Federal Republic abrogated these laws.¹⁶

Awareness of the institutional positions of the CES and R&A within the OSS should prevent current-day readers of these documents from overestimating their real influence on practical US policy. The political impact of the studies and reports remained dependent on the ability both of the individual branch and of the OSS overall to prevail over other competing military and intelligence units. But even then, it was uncertain whether the analyses and recommendations resulted in the political consequences the staff members desired. Looking back on their work at the OSS, Kirchheimer's friends and co-workers from the years 1944 to 1946, such as John H. Herz, Carl Schorske, and H. Stuart Hughes, all expressed their frustration about the purpose of their work at the time. The intelligence provided by the OSS was only one factor among others and was usually ignored on the ground in the complex institutional arrangement of countless information sources and the at times chaotic decision-making processes.¹⁷

2. Schmitt's imprisonments and his return to Plettenberg

Carl Schmitt spent the first postwar months in southwest Berlin, which had suffered little destruction and was in the American sector. To his great surprise, he was arrested by the American Public Safety Division on 26 September 1945 and taken to the Interrogation Center in Berlin-Wannsee.

15 Allied Control Council Law No. 4 of 30 October 1945.

16 The decisions on sterilizations issued by the *Erbgesundheitsgerichte* were not repealed until 1998.

17 See Rainer Erd's interviews with Herz, Schorske, and Hughes; Erd (1985, 153–165).

Schmitt was not detained as part of the automatic arrest of all Germans the Allies considered to be a security threat because of their membership in a Nazi organization, as he falsely reported later (see Schmitt 1958a, 75) but at the behest of Karl Loewenstein, a former acquaintance from his Weimar days (see Bendersky 2007). Loewenstein was a German lawyer and political scientist with a *habilitation* who had had to flee the Reich in 1933. He was familiar with Schmitt's writing and had received and further developed Schmitt's *Constitutional Theory* in his own deliberations on the limits of constitutional amendments (see Lang 2007, 130–158). From August 1945 on, he was legal adviser to the American military government and the Allied Control Council in Berlin on matters of denazification (see Loewenstein 2023, 223–258). He had Schmitt's library and some of his Nazi writing seized to secure them as evidence in a potential war crimes trial.¹⁸

Kirchheimer and Loewenstein knew each other personally from the Weimar period and had stayed in contact in US exile since then. However, there is no evidence that Kirchheimer was involved in Loewenstein's actions against Schmitt. After Schmitt was arrested, Loewenstein prepared an extensive memorandum titled *Observations on [the] Personality and Work of Professor Carl Schmitt*. He made it available to the groups working in Nuremberg to prepare the planned Subsequent Nuremberg Trials, with the goal of putting Schmitt on trial. Whether the group around Neumann and Kirchheimer also received a copy of the memorandum can no longer be ascertained today.

In the memo, Loewenstein called Schmitt “one of the most eminent political writers of our time” and “one of those rare scholars who combine learning with imagination.” The crime Schmitt was accused of was that in his writing after 1933 he had become a “defender of totalitarianism” who “has done more to support the regime than most other people.” In particular, Loewenstein accused him of defending “the aggrandizement of Germany at the expense of weaker powers.” Schmitt is described less as a Nazi acting out of a strong sense of conviction but rather as a ruthless opportunist, including, and in particular, with respect to his relationship to Jews: “Suddenly he became an enthusiastic antisemite.”¹⁹ Loewenstein stated that Schmitt's arrest would be viewed as an act of justice by all Germans with a sense of responsibility and that his speedy release would have to be considered an attack against public opinion abroad and against emergent democracy in Germany. Loewenstein's memorandum had no negative consequences for Schmitt. It is no longer possible to determine the reason why the American authorities rejected Loewenstein's recommendation. After multiple interrogations and on the basis of favorable reports by colleagues who were his friends, Schmitt was released from the civilian detention camp in October 1946 after a total of twelve months.

Schmitt felt that his detention was deeply unjust and humiliating. Even though he was officially banned from writing, he succeeded in penning a number of brief texts during that time. These were published several years later in the booklet *Ex captivitate salus* [Salvation coming from captivity] and provide illustrative insights into how Schmitt per-

18 Karl Loewenstein: Library of Carl Schmitt. Memorandum dated 10 October 1945. Karl Loewenstein Papers. Box 28, Folder 1.

19 All quotes: Karl Loewenstein: *Observations on [the] Personality and Work of Professor Carl Schmitt*. Memorandum dated 14 November 1945. Karl Loewenstein Papers. Box 28, Folder 2.

ceived himself and the world in the postwar period.²⁰ Around six months later, on 17 March 1947, he was arrested again. This time, he was transferred to Nuremberg to be interrogated by Robert M. W. Kempner, assistant US chief counsel during the International Military Tribunal at Nuremberg; the first war crimes trial had begun there the previous November. The circumstances of this second arrest are largely unclear to this day. Perhaps Loewenstein's memorandum did play a role after all. But it is not even apparent from the surviving sources whether Schmitt was taken to Nuremberg as a potential defendant or a potential witness for the prosecution (see Quaritsch 2000, 16–27).

The second arrest was initiated by Robert M. W. Kempner, who had been dismissed from the Prussian civil service in 1933 by Schmitt's mentor Göring because of “political unreliability in concurrence with continued Jewishness.” Like Loewenstein, Kempner was familiar with Schmitt and his writing from that time. Ossip K. Flechtheim, who had collaborated with Kirchheimer at the Institute of Social Research, worked in the position of US army lieutenant colonel in the Berlin division of the American War Crimes Council for a year beginning in the summer of 1946. His task was to prepare the Subsequent Nuremberg Trials, in particular the Judges' Trial and the Wilhelmstrasse Trial (see Keßler 2002, 171). As a member of Kempner's staff, Flechtheim sent a letter to Schmitt ordering him to present himself for an interrogation with him. Schmitt had rejected Flechtheim as a doctoral candidate in Cologne in 1933 as a “*Fremdrassiger*” (a member of a foreign/alien *Rasse*, in an exclusionary and antisemitic sense).²¹ When Flechtheim interrogated him in Berlin, Schmitt invoked his role model Thomas Hobbes, “who would have made himself available to any regime as well.”²²

It was also Flechtheim who had had Schmitt transferred from Berlin to Nuremberg (see Wollenberg 1991, 106). Schmitt was listed in the directory of the Nuremberg detainees as a “leading Nazi propagandist in the field of International Law & Nazi theories” (see Tielke 2020, 36). As far as the historical facts can be reconstructed today, Schmitt took the opportunity arising from his interrogation by Flechtheim on 27 March 1947 to initiate contact again with Kirchheimer.²³ Schmitt must have been aware that Flechtheim knew Kirchheimer because he asked him about Kirchheimer's fate. He also asked Flechtheim to convey his best regards to Kirchheimer, which Flechtheim did when they met a few months later in Frankfurt.

We can only speculate about Schmitt's motives for this initiative. Perhaps he was hoping that Kirchheimer would help him, perhaps he was afraid that Kirchheimer could harm him, or perhaps he was just curious. After Schmitt had found a place to stay in his hometown Plettenberg in the Sauerland region after his first release from detention in 1947, he still regarded his situation as precarious and suspected “victors' justice” everywhere. He was unsure about his role in Kempner's strategy for the trials, whether he was

20 See Chapter 15, p. 364–366.

21 Schmitt later denied this version of how he had rejected Flechtheim (see Tommissen 1990, 144–147; Bendersky 2007, 23). Schmitt's version contradicts Flechtheim's written description of the events (see Keßler 2007, 77 and Keßler 2011, 150) and his statements in conversations with Jörg Wollenberg (see Wollenberg 1991, 105–107) and with the author on 13 February 1988.

22 Quoted in Wieland (1987, 108).

23 The following information is based on statements by Ossip K. Flechtheim and Lili Flechtheim-Faktor in a conversation with the author on 13 February 1988.

a possible defendant or whether he was to serve as an expert witness for the prosecution. In this uncertain situation, he may have hoped for some help from Kirchheimer. Another possible explanation for his attempt to contact him is related to his professional plans. Schmitt considered returning émigrés in particular to be responsible for him being banned from returning to a chair at a German university. At this point in time, he had not yet given up hope that he would be appointed professor again after his release, like many other professors who had had successful careers during the Nazi period. From right after the end of the war, he kept abreast of the policies of filling positions at universities in the Western zones, casting his net widely. He may have feared that Kirchheimer could harm his career prospects in academia. A third possible explanation is that Schmitt was merely wondering about Kirchheimer, without any particular ulterior motive. All three possible explanations are merely speculation.

In 1947, Kirchheimer was well aware “that C.S. was sent to a camp,”²⁴ as documented in a letter he sent Arvid Brødersen, his colleague at the New School for Social Research in New York, ten years later, thus confirming Flechtheim’s report indirectly. Kirchheimer made his first trip to Germany after the war in the summer of 1947.²⁵ During this trip, he was in contact with Karl Loewenstein, his colleague at the State Department, as well as with Flechtheim. He also met Rudolf Smend and his wife in Göttingen again and the two social democratic legal experts Carlo Schmid and Richard Schmid in Frankfurt. Even though there is no documentation of the subjects of their discussions, it is plausible that they talked about the prominent case of Carl Schmitt when they discussed current affairs. There is no indication that Kirchheimer contacted Schmitt at this time.

Schmitt arrived in Nuremberg six months after the Allies’ major trial against the top war criminals had ended. These proceedings were followed by twelve more trials addressing specific issues that were also held in Nuremberg. Schmitt’s interrogations by Kempner in Nuremberg must be viewed in this context. They focused on the question whether and to what extent Schmitt’s writing on international law constituted the offense of participation in preparing a war of aggression within the meaning of Article II of Allied Control Council Law No. 10 of December 1945 (see Quaritsch 2000, 16–26). Kempner interrogated Schmitt three times during the two months of his pretrial detention and gave him the opportunity to respond to multiple charges and questions in writing.²⁶ The German-language *Aufbau*, a newspaper of Jewish émigrés from Germany that Kirchheimer read regularly in New York, reported about Schmitt’s detention in Nuremberg on 2 May 1947. The article with the byline “c.m.” called Schmitt a “charlatan” who had justified everything “that had been committed by the state in Germany against the law and humanity” during the Nazi period. The author speculated that Schmitt seemed to be “slippery as an eel in escaping his deserved punishment” and was deeply satisfied that Schmitt was allegedly to be indicted in Nuremberg.²⁷

24 Letter from Otto Kirchheimer to Arvid Brødersen dated 2 March 1958. Otto Kirchheimer Papers, Series 2, Box 1, Folder 25.

25 More on this trip below.

26 All documents are collected in Schmitt (2000). Only some of them have been translated into English (Schmitt 1987).

27 All quotes c.m. (1947).

In the letters Schmitt wrote during his detention in Nuremberg, he called himself a “hostage.” It is worth noting that in the private setting of his numerous letters to his wife, he showed no indication that he felt his involvement after 1933 was problematic, much less that he had any sense of guilt—in keeping with his stance in public. He again saw himself put in a situation more dire than that of Europe’s Jews during the Nazi period. “What the Nazis did was beastly. But what is happening to me (and to thousands of honest Germans) is fiendish.”²⁸ In other letters, he complained that vindictive émigrés were destroying his files, thereby sabotaging his release. Yet in contrast to Schmitt’s expectations and the *Aufbau* journalist’s hopes, once Kempner had interrogated Schmitt and read the written statements he had prepared in response to questions, he no longer saw a reason to detain him in Nuremberg. Schmitt was released on 21 May 1947 under the condition that he serve as a voluntary witness to the prosecution.

After his release, Schmitt went to his birthplace Plettenberg in the Sauerland region in the American zone, where he lived in his family’s house with his wife Duška and their daughter and their housekeeper, who had all moved there from Berlin. Schmitt’s fear of being treated and sentenced with the same harshness and mercilessness that the Third Reich had exercised against its opponents had proven unfounded. He refused to undergo denazification proceedings and lost his professorship once and for all. His dismissal had been declared “with immediate effect” in a letter from Berlin University’s Rector Johannes Stroux to Schmitt dated 29 December 1945 as he had been a member of the Nazi party up until the fall of the regime.²⁹

Schmitt named his house in Plettenberg San Casciano after the place where Machiavelli had retreated after the Medici had banned him from the Florentine Republic. His drive and his productivity as a writer remained unwavering. A number of manuscripts were almost ready for publication, and he worked on several new ones. From August 1947 on, he also regularly entered notes in a diary he had titled *Glossarium*. He entered into increasingly extensive correspondence with some of his previous acquaintances. After losing his chair, he was not isolated and did not fall into poverty. Affluent friends and students founded an association for him named Academia Moralis. Its members supported him with a fixed salary and ensured that he was commissioned with well-paid legal opinions. Nevertheless, he briefly considered emigrating to Spain or Argentina in 1947/48.

In his interrogations by Robert M. W. Kempner, Schmitt had claimed that he sought to retreat from public life into the “security of silence”³⁰; it is not clear from the source material whether these are Schmitt’s or Kempner’s words.³¹ Some authors sympathetic to Schmitt made his supposed “path of silence and privateness”³² into an established topos.

28 Letter from Carl Schmitt to Duška Schmitt dated 1 May 1946 (Schmitt and Schmitt 2020, 200).

29 Letter from University President Johannes Stroux to Carl Schmitt dated 29 December 1945. Humboldt-Universität zu Berlin, Universitätsarchiv, Akten der Juristischen Fakultät, Nr. 159a, Prof. Dr. Carl Schmitt, Blatt 73.

30 Quoted in Wieland (1987, 105).

31 Quoted in Quaritsch (2000, 39–42).

32 The journalist Karl Korn in an article in the *Frankfurter Allgemeine Zeitung* in 1950, quoted in van Laak (1993, 127).

Yet it was a very telling silence; to be precise, it was simply posturing. The German historian Dirk van Laak differentiates various facets of the meanings of this “silence” from Schmitt’s own perspective (see van Laak 1993, 126–133). As van Laak writes, silence, as an immediate reaction after 1945, meant the absence of intense activity, a pause in a confusing time. It also had the meaning of refusing to provide information, thereby fundamentally refusing to acknowledge the right of any worldly authorities to pass judgment on misconduct; divine instances alone could do this. And finally, silence was a synonym for an elitist understanding of the relationship of the general public and an intellectual elite, an understanding that expressed itself in the concern that the stupid masses would either ignore or misunderstand him. Therefore, withdrawing into such “silence” was a way to shirk his individual responsibility for his past deeds. To Schmitt, silence was therefore not a passive status; instead, it was his way of “intentionally taking a position” (van Laak 1993, 128). Silence meant refraining from making statements.

Yet, rather than stopping writing, on the contrary, Schmitt’s “silence” produced a number of new publications. It simply meant being selective in what he said, and that was determined exclusively by his own estimation. Thus, it functioned as a protective cloak, safeguarding him from arguments in which opposing views were presented, and simultaneously opening up the space for establishing a small circle of people in the know surrounding themselves with secrets and legends.

Schmitt’s first postwar works were published in Spain and Portugal since the Allies had banned him from publishing in Germany. That ban was lifted after the founding of the Federal Republic of Germany on 23 May 1949 and so his first articles published in Germany appeared in newspapers and magazines later that year. The constitution of the new West German state, the Basic Law, guaranteed freedom of expression, and Schmitt was among the first to profit from this constitutional right. If we look at his work alongside what Kirchheimer was doing and writing about at that time, we see striking parallels in the selection of two subjects Schmitt addressed in particular detail up to 1949: international law and looking back at the Nazi past.

The most important subject for Schmitt was his theory of international law. He worked intensively on revising and completing his monograph *The Nomos of the Earth* that he had begun writing during the final years of the war. When Kempner interrogated him, Schmitt insisted on a rigorous dividing line between his works on international law and Hitler’s foreign policy. He had been an “intellectual adventurer” (Schmitt 1987, 103) and had been grossly misunderstood. Now, he claimed, he had to suffer as a result of that: “I take the risk. I have always accepted the consequences of my actions. I have never tried to avoid paying my bills.” He claimed his works on international law had always been nothing but a “serious scholarly [...] diagnosis” (Schmitt 1987, 104) with no connection to actual practice. He rejected Kempner’s accusation as unfounded that he had supported the theoretical underpinnings of German *Großraum* policy.

His first postwar publication in Germany appeared—anonously—in the summer of 1949. The Catholic magazine *Die neue Ordnung* [The new order] published his essay “Francisco de Vitoria und die Geschichte seines Ruhms” [Francisco de Vitoria and the history of his renown] (see Schmitt 1949b), an excerpt of *The Nomos of the Earth*. Expert readers immediately identified Schmitt as the author and vehemently criticized the fact that a long-standing propagandist of the Nazi regime was again granted space in maga-

zines (see van Laak 1993, 37–39). Between 1948 and 1950, Schmitt also wrote a *Repetitorium zum Völkerrecht*, i.e., a review course in international law for law students preparing for their examinations (see Schmitt 1948). The four-part course materials were published by a publishing house specializing in educational materials without indicating the author's name. Schmitt had taken on this project to improve his financial situation. Long-standing associates such as Werner Weber praised it highly in their book reviews—"originality and eminent skill" and "strong individuality" (Weber 1949, 819)—and did not reveal his name, either. The extensive course materials were partly based on his lectures during the Nazi period but were cleansed of Nazi vocabulary. Schmitt added chapters on the law of occupation and on postwar developments in international law.³³ He raised the question multiple times whether occupied Germany continued to be a state with full sovereign rights after unconditional capitulation and answered it in the affirmative—in contrast to Hans Kelsen (see Schmitt 1948, 726–728, 733–736, and 742–743).

Schmitt used unemotional language in his didactically structured educational text. Only in his discussions of the future expansion of international criminal courts did he switch to a sarcastic tone. Continuing his line of argument in his legal opinion supporting Flick, Schmitt accused the Nuremberg Trials—both those of the International Military Tribunal and the American Military Tribunal—of having introduced a historically unique system of criminal justice that was new to international law. Regarding the rulings of the Nuremberg courts, he emphasized that multiple defendants had been acquitted of conspiracy for a war of aggression (see Schmitt 1948a, 769–772); again, there was no mention in the book of the massacres and mass murders committed by the Germans. The fact that it was international courts handing down decisions, Schmitt asserted, had transformed the citizens' right to resist into "a duty to resist in the name of international moral judgments, and it amounted to dethroning the state" (Schmitt 1948a, 716). In contrast, *ius publicum Europaeum* was based on the inviolable right of all peoples to self-determination. Since the majority of Germans rejected the international courts, Schmitt's characterization of *ius publicum Europaeum* ultimately amounted to a general amnesty for all war crimes.

Schmitt's second major topic was dealing with the past, including his own. The term *Vergangenheitsbewältigung*—the German effort to come to terms with, or literally "overcome" the past—has become established in German. In September 1947, Schmitt noted the following in his *Glossarium*, his postwar diaries, about his own role: "Back then, in the years 1933–36, I abandoned less of myself and the dignity of my thoughts than Plato abandoned of himself and his thoughts because of his trips to Sicily."³⁴ Shortly thereafter, he wrote in his diary: "Annihilating feeling of betrayal." "Defeated? Oh no, annihilated and trampled."³⁵ He saw himself as a victim betrayed by Hitler on a personal level. The "true victims," he wrote in the spring of 1949, in Germany were the members of the Nazi party with a membership number higher than two million, for they were "the victims of the

33 On Schmitt's concept of belligerent occupation see Butha (2005) and Cohen (2007).

34 *Glossarium* entry of 26 September 1947 (Schmitt 2015, 14).

35 *Glossarium* entry of 8 October 1947 (Schmitt 2015, 22).

Nazis as well as the persecutors of the Nazis.”³⁶ Schmitt himself fulfilled his own criterion for being a victim of the Nazis since his party membership number was 2,098,860.

In his legal opinion for Flick, Schmitt had already narrowly defined the circle of perpetrators responsible for the Nazi system. He only qualified as perpetrators those individuals who had direct personal “access to the peak” (Schmitt 1945, 180). As executors, all the rest were mere participants without responsibility or culpability. Not a word is to be found about potential differences in the degrees of perpetration. Nor did he consider indirect access to the “peak,” for example through publications or as a consultant to a consultant who in turn had direct access to the “peak.” To Schmitt, actions based on economic interests were also no reason for someone to be considered a perpetrator in terms of criminal law.

In his responses to Kempner’s questions during his detention in Nuremberg, Schmitt explained his understanding of access to the power holder in more depth. He emphasized the fundamental abnormality of state organization and the legislative process under the “Hitler regime” (Schmitt 1987, 118). It was a new form of totalitarian dictatorship, and he had no experience in dealing with it. Because of the “most extreme concentration of all power in one hand,” he believed the question of access “became the most important internal political problem of the German *Reich*” (Schmitt 1987, 118). In his written statement to Kempner, he outlined a structural representation of the Nazi regime. After Hitler and his inner circle had de facto disempowered the various ministries, a “new ‘super-ministerial’ structure” (Schmitt 1987, 119) with a highly personal character of power had developed. Its personnel were recruited from “three ‘pillars’ of the regime: the party, the military, and the state” (Schmitt 1987, 119). Hitler’s orders and commands were implemented through these three control centers. Schmitt considered himself to have been outside the exclusive “essential circle of ‘loyalists’” (Schmitt 1987, 117) that constituted the core of the regime.

It would have been logical for Schmitt to flesh out his description of the structure of the Nazi system, which he had sketched out in only a few sentences, at this point. For one reason, because he painted a picture of a harmonious inner circle of the regime even though he had experienced firsthand that rivalries and intrigues had been commonplace within the ruling elites. And also because he had conjured up the image of a structural triad to describe the Nazi regime 14 years earlier. In the fall of 1933, he had offered the formula of the “unity of the tripartite structure of state, movement, and *Volk*” (Schmitt 1933d, 11). He considered the Nazi party to be the political body in which the movement had found its specific political form. Both of Schmitt’s triadic structural models are harmonious but they differ in that he replaced the *Volk* with the Reichswehr (the armed forces) in 1947. The model Schmitt had merely sketched out comes close to Kirchheimer’s structural model of the Nazi regime, although what had mattered most to Kirchheimer was the conflict dynamics between the main actors. Schmitt’s new description fulfilled the function of absolving himself of any and all political responsibility. In his interrogation by Kempner, Schmitt even went so far as to claim that the *Bund Nationalsozialistischer Deutscher Juristen* (BNSDJ) or Association of National Socialist German Legal Professionals in which

36 Glossarium entry of 5 May 1949 (Schmitt 2015, 181).

he had taken over a leading position in 1933, had “extracted, so to speak, from my mouth” (Schmitt 1987, 106) and against his will his writing in support of the regime.

During his twelve months in the internment camp in 1945/46, Schmitt was able to smuggle letters and short essays to his wife. As mentioned above, he published these diaries and essays several years later, in 1950 in a book titled *Ex captivitate salus*.³⁷ His prison writings, however, are quite different from the Italian communist Antonio Gramsci’s voluminous *Prison Notebooks*, not only because of their brevity. Their original title was *Salus ex captivitate*,³⁸ which made the reference to a well-known Bible passage in John 4:22 even more explicit. In the commonly used Latin version, the wording in this passage is “*salus ex Iudaeis est*”³⁹—Schmitt replaced the Jews bringing salvation with his detention (by the returning Jews, in his view) doing so instead. Nonetheless, the title might have prompted some of his readers at the time to take notice or even expect some self-criticism. They would have found nothing of the sort. Schmitt did not make a single statement about his complicity in the crimes of the Nazi regime, brusquely rejecting such an idea: “Whoever wishes to confess, go and present yourself to the priest” (61).

In place of a “confession”, Schmitt presented an attempt to justify his behavior that was virtually unparalleled in its hypocrisy and self-righteousness. The previously enterprising Nazi legal expert styled himself as a “contemplative person” (14) with keen observational skills and inclined to use “sharp formulations” (14) but lacking any practical ambitions. He commented on his role in the Nazi system using only a few general words. As a professor of constitutional law, he had had to be a “loyal citizen” (21) like everyone else as a matter of principle; he believed that, for this reason, “the mutual relationship that results from protection and obedience” (54) had applied to him until the end. He vehemently rejected the idea that there might be a duty to sabotage, much less resist a state, even if it is a terrorist one. At one point in his text, Schmitt added a methodological hypothesis to this argument reminiscent of his works on Hobbes: “The material” from which the scholar of public law assembled his concepts and upon which he relied “binds him to political situations” (47).⁴⁰ But Schmitt refrained from explaining why defending a government and not criticizing it should automatically follow from this reference to the political situation at hand.

Ex captivitate salus lacks any empathy for the victims of the regime. Schmitt cynically attested that those who—like Kirchheimer—were driven to emigrate enjoyed the divine benevolence of a “guardian angel” (18). He replaced his lack of compassion with all the more self-pity, speaking of his “persecutors” who had compiled “black lists” and “card files” (73). He claimed they had transformed the means and methods of the justice system into a total deprivation of rights, indeed “into means and methods of annihilation” (48). Schmitt transformed the perspective he had taken as one “of the vanquished” (29)—as he explained, referring to Tocqueville—into the privileged epistemic position of an objective standpoint. The hypothesis he left unsaid was that emigration had not entailed any increase in knowledge because the pain of the German defeat could not be sensed from

37 Schmitt (1950a). The following page numbers refer to this text.

38 Letter from Carl Schmitt to Armin Mohler dated 29 August 1948 (Schmitt and Mohler 1995, 47).

39 On this Vulgata quote and the theological debates within Christianity, see Gross (2000, 347–349).

40 See Chapter 9.

a distance. Schmitt even went so far as to consider himself to be the only remaining law professor on the entire planet who had recognized and experienced the allegedly occurring global civil war in all its deep-rooted causes and manifestations; he viewed himself as “the last knowing representative of *ius publicum Europaeum*” (60).

Ex captivitate salus is Schmitt’s most personal book. Yet it remains a mystery to the reader what exactly constituted the “*salus*” he acquired in the “wisdom of the cell” (62). It may have been a personal turn of Schmitt’s to the Christian faith, or his steadfast subjective conviction that as a person who had been defeated, he had an edge in terms of political knowledge. He saw his imprisonment as providing a space for solitary illumination. By contrast, the book’s strategic intention is easier to recognize. It is the passionate attempt to distance his writings from the Nazi context and to reinvent himself as a member of the German public.

Schmitt was right to anticipate that there would be a sympathetic audience for an unapologetic statement by a former Nazi member. His unwillingness to criticize himself was not merely a psychological matter. It was a reflected political decision. As of 1948, he sent more than 100 copies of his *Ex captivitate salus* manuscript to a wide circle of recipients. In a cover letter to legal scholar Luis Cabral de Moncada in fascist Portugal, Schmitt called it “my intellectual cry for help by a legal scholar in today’s global constellation.”⁴¹ Neither the manuscript nor the printed book is to be found in Otto Kirchheimer’s estate. He was not on the list of persons Schmitt had sent the manuscript to. But, as a matter of fact, Kirchheimer must have had an opportunity to read it prior to its publication in 1949. He probably received it from a former colleague who was on Schmitt’s mailing list, probably Werner Weber in Göttingen.⁴²

3. Post-Holocaust antisemitism

After 1945, Schmitt also worked intensively on two other subject areas that had close connections to Kirchheimer: the role of the (few) émigrés returning to Germany and Judaism. Both of these merged into a single topic in his hands. When Kempner had asked him repeatedly about his attitude toward the Jews and about the Holocaust, he had answered tersely, “It was a great misfortune and, indeed, from the very beginning” (Schmitt 1987, 53). When Kempner had responded that his allegedly purely scientific writing had ended in the murder of millions of people, Schmitt responded just as tersely that Christianity had also ended in the murder of millions of people.

None of Schmitt’s works intended for speedy publication in the early postwar years include open statements on Judaism; such statements are only to be found in his conversations, correspondence, and diaries. There is no difference between these and his public antisemitic tirades during the Nazi period. Even obdurate apologists of Schmitt were shaken by his postwar notebooks, his *Glossarium*, when this was first published in 1991. The corrected and revised second edition of 2015 includes even more drastic remarks

41 Letter from Carl Schmitt to Luis Cabral de Moncada dated 25 June 1948 (Schmitt and de Moncada 1997, 34).

42 See Chapter 15.

by Schmitt. There is a consensus among scholars that Schmitt wrote his *Glossarium* for posthumous publication.

In September 1947, several weeks after his release from detention in Nuremberg, he noted: “Jews will always be Jews. Whereas the communist can better himself and change. That has nothing to do with the Nordic Rasse, etc. The assimilated Jew in particular is the true enemy.”⁴³ Schmitt felt that when German society began opening up to Jews and enabling their social integration in the nineteenth century, it had been swamped by foreigners. It was the “tragedy” of Jewish assimilationism that Jews were unable to “be part of the great step from Goethe to Hölderlin.” Instead, the Jews developed an “infuriatingly unsuspecting feeling of superiority,” never even beginning to grasp “the step from *Begriff* [concept] to *Gestalt* [totality] and what that meant in the view of the German spirit.”⁴⁴ Schmitt called non-Jewish authors such as Thomas Mann “traitors to the spirit”⁴⁵ and Karl Jaspers and Gustav Radbruch, who attempted to spark a critical and public debate on the Germans’ responsibility for the mass murders, “liberated Germany’s pin-ups from the humanities.”⁴⁶

Schmitt drew a sharp and unbridgeable dividing line between “us Germans” and “the Jews” in his *Glossarium*, and he did so multiple times. When Robert M. W. Kempner wrote a piece in the magazine *Der Monat* about Nazi ideologue Alfred Rosenberg’s diary, which had just been found, Schmitt made the following comment: “What business of the Jews is that?”⁴⁷ He called the Nuremberg Trials the “enormous clattering fiasco of the justice system” and a Jewish-Bolshevik undertaking. He felt it was a “scandal” that in the trials, “Russian professional revolutionaries” and “Jewish émigrés” “were imposed on us as the yardstick of normal German behavior.”⁴⁸ He interpreted the trials as a “call for revenge”⁴⁹ as in the Old Testament. The image of the triumphant and vindictive Jew flares up once again in statements like these.

Schmitt viewed the Western zones and the newly emerging Federal Republic of Germany as constructs of Jewish revenge. The West Germans, he believed, were being “sacrificed to the émigrés,”⁵⁰ for “it is the returned émigré who makes the decisions in the Western half.”⁵¹ These émigrés were “unpredictable,” “mostly partially deranged in a moral sense,” and even demanded “300 percent exploitation of rights,”⁵² in other words, three times as much compensation as what they had lost. Formally speaking, the Americans were the new lords but, in fact, it was the Jews who were in power: “To this day, for 5 years, I have never spoken with an American [...], but only with German Jews, with Mr. Löwenstein [sic!], Flechtheim.”⁵³ He mockingly called the American occupying

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

44 *Glossarium* entry of 23 May 1948 (Schmitt 2015, 116).

45 *Glossarium* entry of 26 May 1949 (Schmitt 2015, 198).

46 *Glossarium* entry of 12 July 1949 (Schmitt 2015, 194).

47 *Glossarium* entry of 23 July 1949 (Schmitt 2015, 197).

48 *Glossarium* entry of 12 July 1949 (Schmitt 2015, 194).

49 *Glossarium* entry of 1 May 1948 (Schmitt 2015, 107).

50 *Glossarium* entry of 14 March 1948 (Schmitt 2015, 86).

51 *Glossarium* entry of 13 August 1949 (Schmitt 2015, 199).

52 *Glossarium* entry of 4 July 1949 (Schmitt 2015, 191).

53 *Glossarium* entry of 17 August 1949 (Schmitt 2015, 200).

force a “peculiar lord of the world” that was infiltrated by Jews: a “newfangled Yankee with its age-old Jews.”⁵⁴ The Jewish émigrés active in Germany, Schmitt wrote, refused to understand how the Germans of 1945 were living and suffering; instead they only wanted “to be right all along with their positions from 20 years ago.” Above all, however, they sought to “snag their compensation.”⁵⁵ The image of the moneygrubbing Jews is also to be found in Schmitt’s notes on financial compensation for victims of the Nazis: “In the meantime, we Germans are suffering because of compensation on open account.”⁵⁶

There is no mention of the Holocaust in Schmitt’s *Glossarium* except for a disgraceful note from August 1949 in which he first speaks of twelve million dead Jews only to reject this figure in the same sentence as a “horrific episode.”⁵⁷ By arbitrarily doubling the number of murdered Jews known at the time, Schmitt apparently sought to express that the precise number of victims did not matter. He interpreted the Nuremberg Trials as a perfidious Jewish annihilation strategy: “‘crimes against humanity’ is merely the most general of all general clauses to annihilate the enemy.”⁵⁸

At multiple times in his *Glossarium*, Schmitt equated the annihilation of European Jewry by the Nazi regime with his own professional situation after 1945: “Genocides, what a touching term; I experienced an example of it firsthand (translator’s note: in German: “*am eigenen Leibe*,” literally: on my own body): extermination of the Prussian-German civil service in the year 1945.”⁵⁹ He even called his own fate even harsher than that of the Jews in the Nazi period as he noted in August 1949, using the superlative: “But when it comes to me, people are committing the most shameless *Ideocidium*,”⁶⁰ in other words, the most shameless murdering of his political ideas. The statements quoted above show, in the apt words of Raphael Gross, a “new strategy of political antisemitism after the Holocaust” (Gross 2000, 352), namely styling oneself as the actual victim.

4. Kirchheimer’s struggle with the FBI

Schmitt’s antisemitic assumption that a few Jewish émigrés from Germany had been able to control the policy of the American administration appears all the more absurd in light of the fact that these émigrés had been in the spotlight of the FBI. Kirchheimer had to struggle for almost ten years with a secret service that had put him under suspicion and he had reasons to believe that he might soon lose his job.

Once the Allies had defeated the Axis powers, the OSS no longer had a *raison d’être*. President Harry Truman, newly in office, issued Executive Order 9621 on 20 September 1945, dissolving the OSS as of 1 October. William Donovan’s attempts to secure the OSS’s continued existence in peacetime were unsuccessful. The individual departments were integrated into other government agencies. The Research and Analysis Branch with its

54 *Glossarium* entry of 17 August 1949 (Schmitt 2015, 200).

55 *Glossarium* entry of 14 March 1948 (Schmitt 2015, 86).

56 *Glossarium* entry of 23 May 1948 (Schmitt 2015, 116).

57 *Glossarium* entry of 23 August 1949 (Schmitt 2015, 202).

58 *Glossarium* entry of 6 May 1948 (Schmitt 2015, 110).

59 *Glossarium* entry of 21 August 1949 (Schmitt 2015, 201).

60 *Glossarium* entry of 21 August 1949 (Schmitt 2015, 201).

1,655 positions became part of the State Department, and a majority of its staff members—among them Kirchheimer—were offered the opportunity to work in a division to be established there.⁶¹ Some of his close colleagues and friends at the OSS, such as Franz L. Neumann, Herbert Marcuse, John H. Herz, and Ossip K. Flechtheim, used this situation to obtain positions in academia.

Kirchheimer struggled with making that decision. Once his son Peter was born in 1946, he felt he had a duty to hold a job with sufficient pay to support his family and to set aside his academic aspirations if necessary. He reluctantly accepted an offer in the research division of the State Department as of 30 September 1945.⁶² His position at the State Department was officially designated as Research Analyst in the Department of State, Division of Research for Europe.⁶³ He worked in the Germany section, first under Neumann and later, from 1948 on, as section head. In 1950, he was promoted to the leadership position of Chief of the Central European Branch, Division of Research for Western Europe. He remained in this job until 1955.

One of Kirchheimer's duties was to travel to Germany to gather information on the ground about the political situation and to summarize it in reports for the State Department. He used these official trips for private visits, too. There was no one left of his family in Germany—they had either succeeded in fleeing to Argentina or had been murdered in the Holocaust—but he still had various acquaintances and political friends whom he visited on these occasions. On his first trip from March to July 1947, his first stop was in France,⁶⁴ where he met up again with old friends from his days in exile, among them Charles and Leonore David as well as Fritz Meyer, an antiquarian bookseller and friend since the 1920s; they had kept some of Kirchheimer's books after he had fled Paris in 1937 and returned them to him after the war.⁶⁵ From Paris he traveled to Berlin with Gurland⁶⁶ where they were to prepare a study on the political party landscape in Germany for the State Department as consultants to the Berlin Office of Military Government, United States (OMGUS).⁶⁷ The report formed the basis for the OMGUS report *Bureaucratization Trends in Postwar German Society*, which Kirchheimer wrote jointly with Gurland and sociologist Hans H. Gerth (see Kirchheimer, Gerth, and Gurland 1947).

One of the first people he visited in Germany was his former mentor Rudolf Smend, whom he met in Göttingen in July 1947. Unlike Schmitt, Smend had tried to continue

61 The institutional setup was somewhat more complicated: in 1945, the unit was first called the Interim Research and Intelligence Service (IRIS), from 1946 on the Office of Research and Intelligence (ORI), which was then incorporated in the Office of Intelligence Coordination and Liaison (OCL) and was renamed the Office of Intelligence Research (OIR) in 1947; see Müller (2010, 59–61).

62 Office Memorandum of US Government dated 7 December 1948, FBI, US Department of Justice, Federal Bureau of Investigation, File on Subject Otto Kirchheimer (unnumbered).

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

64 FBI, Report by Special Agent Patrick M. Rice on Otto Kirchheimer of 21 June 1950, page 20. FBI, US Department of Justice, Federal Bureau of Investigation, File on Subject Otto Kirchheimer (121–13351–5).

65 Peter Kirchheimer in a conversation with the author on 21 September 2019.

66 See OMGUS Order of 4 June 1947. Otto Kirchheimer Papers, Series 1, Box 1, Folder 1.

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

supporting Kirchheimer even after the handover of power to Hitler's government. And, in contrast to Schmitt, Smend had been no propagandist of the regime. In Göttingen, he had limited his work to matters of church law and maintained contacts with Christian resistance circles. In the spring of 1947, Kirchheimer had asked Pastor Martin Niemöller to convey some of his newer publications to Smend.⁶⁸ From then on, the two resumed close and regular correspondence. Kirchheimer often sent packages from the US to Germany and periodically visited Smend and his wife Gisela. In unpublished notes, Kirchheimer's long-time friend Eugene Anschel reported on the special emotional ties to Smend: "In Smend, Otto saw not only a scholar, but also an upstanding human being. After the war, he regularly sent Smend care packages; by contrast, he intentionally did not send any to Schmitt."⁶⁹

Smend proposed Kirchheimer as his successor in Göttingen. Kirchheimer was pleased but skeptical about his chances. He "doubt[ed] [...] that everyone familiar with my lectures and publications has a very positive view of my utility on the German university scene."⁷⁰ The ministry appointed Schmitt's former student Werner Weber to the chair instead of Kirchheimer, much to Smend's resentment.⁷¹ It was hardly surprising that Kirchheimer and Smend immediately took up the topic of Schmitt. Three years after their first postwar meeting, Kirchheimer wrote Smend that he agreed that it was necessary to introduce students to the work of Hermann Heller, which had fallen into oblivion. In the same letter, he emphasized the necessity they had both acknowledged of "combating Schmitt's conceptual framework and way of thinking"⁷² in German constitutional law.

From 1947 on, Kirchheimer traveled to Germany almost every year. In the summer of 1948, he spent several weeks in the Western zones, including a number of days in Heilbronn and Heidelberg in his old southern German home as well as in Frankfurt am Main. From October 1949 to January 1950, he again flew to Frankfurt for a longer period, this time as a consultant to the US High Commission for Germany (HICOG). His visits in 1951 and 1952 were not as long. He worked at the American Embassy in Bonn from February through May 1953.

Besides his work on legal opinions, reports, and various other internal papers for the State Department, Kirchheimer had begun in 1946 to publish smaller contributions in academic journals. He initially published his ideas in book reviews he wrote for *Political Science Quarterly*, *American Political Science Review*, and the *Yale Law Journal* on the subjects of France (see Kirchheimer 1946), opinion polls (see Kirchheimer and Price 1949), and the legal system of the Soviet Union (see Kirchheimer 1947 and 1949b). It was only in 1950 that he began publishing longer essays in academic journals again. In an interview fifty years later, Kirchheimer's wife talked about how he felt about his work at the State Department:

68 Letter from Rudolf Smend to Otto Kirchheimer dated 10 June 1947. Rudolf Smend Papers. Staats- und Universitätsbibliothek Göttingen, Nachlass Rudolf Smend, Cod. Ms. R. Smend A 441.

69 Handwritten note by Eugene Anschel from 1985 to John H. Herz. John H. Herz Papers, Folder 58.

70 Letter from Otto Kirchheimer to Rudolf Smend dated 4 May 1948. Rudolf Smend Papers. Staats- und Universitätsbibliothek Göttingen, Nachlass Rudolf Smend, Cod. Ms. R. Smend A 441.

71 For more about this attempt to have Kirchheimer appointed, see Günther (2004, 161–163).

72 Letter from Otto Kirchheimer to Rudolf Smend dated 9 June 1951. Rudolf Smend Papers. Staats- und Universitätsbibliothek Göttingen, Nachlass Rudolf Smend, Cod. Ms. R. Smend A 441.

“he got a well-paid job—but as soon as he had a chance, he left.”⁷³ His daughter used even stronger words: “He strongly disagreed with American foreign policy. And he hated this daily job and only did it for economic reasons.”⁷⁴ Kirchheimer had various reasons for disliking his work at the State Department.

For one thing, he was annoyed by the bureaucratic procedures in his everyday work at the State Department and by compiling and painstakingly revising analyses and recommendations, which he and many of his colleagues increasingly felt to be pointless, only to see them either shelved or not read at all by the upper echelons.⁷⁵ As he wrote in a letter to Rudolf Smend, he felt “marginalized; sometimes you can prevent something stupid, but that’s all.”⁷⁶ John H. Herz reported that Kirchheimer could not bring himself to vote for the Democrats in the 1948 election because he rejected the “bourgeois-capitalist system”⁷⁷ governed by Truman. When Republican Dwight D. Eisenhower took office in the White House and John Foster Dulles at the State Department in 1953, Kirchheimer felt even more strongly opposed to his job than before.

A second motive for his desire to change jobs was being able to work freely and without being censored as an academic. He wanted to work on subjects he himself was most interested in; for this reason, he had begun collecting material on political justice. In addition, he did not want to have to obtain permission from his superiors at the State Department for his academic publications (see Herz 1989, 13).

The third reason for his dissatisfaction, and the one burdening him personally most heavily, was his recent harassment by the Federal Bureau of Investigation (FBI). Kirchheimer had already experienced this in 1940. As US Senator Joseph McCarthy went after real or alleged communists, the intelligence services again focused their attention on Kirchheimer in 1948.⁷⁸ The immediate reason was his first wife, whose name after remarrying was Hilde Neumann. After their divorce, Kirchheimer avoided direct contact with her to the extent possible. He had received custody of their daughter Hanna and met Hilde only during her brief visits from Mexico to see her daughter and to reach an understanding with him about her schooling.⁷⁹ In April 1947, Hilde Neumann returned to Germany. She went to Berlin and rose to become one of the key figures alongside Hilde Benjamin⁸⁰ in establishing the justice system in the Soviet zone of occupation and the German Democratic Republic.

From then on, Kirchheimer took the utmost care not to be associated with his ex-wife. Except for questions of custody, he maintained no direct contact with her,

73 Anne Kirchheimer in a conversation with political scientist Frank Schale on 6 October 2002 (Schale’s personal notes).

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

75 A number of Kirchheimer’s colleagues said the same, see Erd (1985, 151–182) and Söllner (1986b, 30–33).

76 Letter from Otto Kirchheimer to Rudolf Smend dated 13 February 1949. Rudolf Smend Papers. Staats- und Universitätsbibliothek Göttingen, Nachlass Rudolf Smend, Cod. Ms. R. Smend A 441

77 Herz quoted in Söllner (1986b, 45).

78 On the role of the CIA and the FBI in the McCarthy years, see Jeffreys-Jones (1989, 137–170).

79 Anne Kirchheimer in a conversation with Frank Schale on 6 October 2002 (Schale’s notes).

80 Hilde Benjamin was Walter Benjamin’s brother Georg’s wife who was murdered in concentration camp Mauthausen in 1942.

merely following her career by reading East German newspapers available at the State Department and by talking with friends. For example, Gerhard Kramer, senior prosecutor in Hamburg, told him in 1947 that he had recently met Hilde Neumann in the Eastern sector of Berlin and that she had been “extremely unhappy” about Kirchheimer’s work for the US government; she called the US “a pre-fascist country.”⁸¹ Kirchheimer was piqued by such communications. He informed Kramer that he would be “most unwilling to see my name mentioned in any way—in private or in public—in any relationship or connection to that of Mrs. Neumann.”⁸²

An intelligence source in France had told the FBI in October 1948 that Kirchheimer had some links to communists in East Germany and had also had contact with communists during his exile in Paris.⁸³ As a result, investigations were initiated that wore on for a total of almost five years, with interruptions. His colleagues, supervisors, landlords, neighbors, and even the people delivering milk and newspapers to his door were questioned by FBI agents; multiple supervisors and colleagues in the State Department were asked for written reports, and undercover FBI staff attempted to obtain more information.

Kirchheimer himself was summoned to multiple interviews. These investigations weighed very heavily on him. He safeguarded his old SPD membership card as “anti-totalitarian evidence,”⁸⁴ akin to a political insurance policy. In the course of the investigations, the FBI confronted him about his contact with Daniel Guérin, a French historian of the French Revolution who sympathized with the anarcho-syndicalists, and had fabricated connections of Kirchheimer’s to Trotskyites in the US.⁸⁵ It is all the more remarkable how vehemently some of Kirchheimer’s colleagues—including Herbert Marcuse, Franz L. Neumann, and Fred Sanderson—emphasized his loyalty to American democracy when they were questioned.

Kirchheimer’s FBI file became more voluminous over the years, and the investigations began to focus their attention on Neumann, too. Kirchheimer even registered as a Republican for the 1952 elections “for tactical reasons.”⁸⁶ The investigations were ultimately discontinued in March 1953 with no incriminating findings. In the end, the FBI was apparently convinced that he was not a communist but a social democrat who did not support the demand to nationalize important industrial companies in the US. On 19 March 1953, J. Edgar Hoover himself signed a note terminating the FBI’s investigations into Kirchheimer. Nonetheless, the suspicion of disloyalty dogged him as long as he worked for the State Department. Rumors were circulated that Kirchheimer was se-

81 Letter from Gerhard Kramer to Otto Kirchheimer dated 13 September 1947. Otto Kirchheimer Papers, Series 2, Box 1, Folder 92.

82 Letter from Otto Kirchheimer to Gerhard Kramer dated 8 May 1950. Otto Kirchheimer Papers, Series 2, Box 1, Folder 92.

83 Report: Results of Investigation as of 26 May 1950 (page 10). US Department of Justice, Federal Bureau of Investigation, File on Subject Otto Kirchheimer (unnumbered).

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

85 FBI Report by Special Agent Patrick M. Rice on Otto Kirchheimer of 21 June 1950, page 4. US Department of Justice, Federal Bureau of Investigation, File on Subject Otto Kirchheimer (121–13351-5).

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

cretly still in touch with his wife in East Germany—“they didn’t trust him.”⁸⁷ In 1955, he was again subjected to a “loyalty investigation” whose outcome was also in his favor.⁸⁸

5. Kirchheimer’s dashed hopes for a socialist democratic Germany

After the OSS had become part of the State Department, Kirchheimer was assigned fixed subject areas. An overview prepared by Neumann listed them as follows: constitutional problems, law, Catholics, trade unions, churches, and the French zone, which included his old home in southwestern Germany (see Söllner 1986b, 12). Kirchheimer traveled to Europe regularly to collect material for the reports on the French zone for the State Department. An important part of his trips was conversations with people on the ground, enabling him to reconnect with many of his old contacts and get to know the younger political actors in Germany at the same time. Even though he found uniforms abhorrent, he needed a US Army uniform to travel in the military zones (see Stiefel and Mecklenburg 1991, 133).

Kirchheimer prepared his initial studies on Germany for the State Department as the breakup of the anti-Hitler coalition was becoming increasingly visible. Analysts had already warned of this before the end of the war because they feared it would put democratic reconstruction at risk. Ever since the Potsdam Conference, it had been virtually impossible to mediate the conflicts. The diverging interpretations of the “eventual reconstruction of German political life on a democratic basis” stipulated in the Potsdam Agreement resulted in rapidly intensifying arguments about reparations and tensions concerning economic and/or political unity. The analysts who had previously worked for the OSS reacted to this constellation with “anti-anticommunism” (Hughes). Although they had no illusions whatsoever about the communists’ actions, which they characterized either as authoritarian or as totalitarian, they attempted to prevent the mutual security interests and political decisions in the East and the West from becoming a quasi-perpetual system conflict in order to retain some room for maneuver when negotiating new policies between the two adversaries that were now forming blocs. They failed miserably, however

In August 1946, Kirchheimer presented the report *The General Character of a Future German Government*.⁸⁹ He welcomed the American demand to retain German unity as well as the necessity to nationalize businesses, which was to be seen as implicit agreement with the land reform in the Soviet zone of occupation that was beginning. In his report, he discussed four general guidelines for a future political system for Germany: federalism, electoral law, parliamentarism, and basic rights. In light of the Basic Law of the Federal Republic of Germany, it is breathtaking to see how many structural elements of the new constitution were already formulated in Kirchheimer’s report.

87 Anne Kirchheimer in a conversation with Frank Schale on 6 October 2002 (Schale’s notes).

88 Report on Otto Kirchheimer via Army Courier of 20 January 1955. US Department of Justice, Federal Bureau of Investigation, File on Subject Otto Kirchheimer (100–400640–2.1).

89 See Kirchheimer (1946a). The following page numbers refer to this text.

Overall, Kirchheimer's considerations aimed to achieve a stable democracy. This included, among other things, clear conditions for peace that were to give a certain measure of self-confidence back to the Germans. At the same time, a certain skepticism about granting sovereignty rights too quickly was evident in passages indicating that social democracy alone "fully guarantees liberal-democratic policies in the Western zones" (341), whereas both the Communist Party of Germany (KPD) and the bourgeois parties—with the exception of the Christian Democratic Union (CDU) in Greater Hesse and Berlin—were ultimately "authoritarian parties" (341). The reasons behind making exceptions of the Berlin and Frankfurt local CDU parties were probably a combination of the role of former members of the resistance and the fact that majorities there supported the concept of Christian socialism. Kirchheimer pushed the US authorities to help form political coalitions of Social Democrats and the "left or progressive wing within the middle-class parties" (341), stating that "so far only one major party (the Social Democratic) has emerged which fully guarantees liberal-democratic policies" (341).

Here, we need to look at Kirchheimer's precise understanding of "liberal-democratic policies" in his report. He listed freedom of opinion and of assembly and the right to protection against arbitrary arrests and punishment, but not property rights. Unlike Schmitt with his fundamental criticism of federalism in his Weimar writings, Kirchheimer did support the idea of a centralized government, albeit with a federalist component similar to the solution found in the Basic Law. Kirchheimer was critical of the political system of the US, writing "it has been demonstrated in other federally organized countries like the US that under modern conditions major state functions increasingly devolve upon central government" (342). In a letter written from Washington to Herz and Gilbert in Wiesbaden, Kirchheimer claimed their preliminary reports "confirmed our thesis [...] that decentralization as provided by the Potsdam Declaration, really amounts to centralization on a regional level."⁹⁰

Another contrast to Schmitt's Weimar writing as well as to the political system of the US was Kirchheimer's advocacy for a parliamentary system and against a presidential one. A future president was to be restricted to purely representative functions with no real power to influence politics. Responding to the anticipated objection that a parliamentary system would be unable to defend itself against totalitarian parties, he wrote, "the danger of power being captured by a totalitarian or otherwise undemocratic party or group has traditionally derived from too much concentration of power in the executive, rather than in the legislative branch" (347). Nonetheless, Kirchheimer opposed both an overly comprehensive right of the parliament to self-dissolution and a vote of no confidence that was too easy to accomplish. He wanted to counter these by means of a mandatory waiting period between the proposal of self-dissolution and the vote on it and by requiring higher majorities for certain parliamentary decisions. Strangely enough, he did not go into the "constructive vote of no confidence" proposed by Ernst Fraenkel at the end of the Weimar Republic.

Kirchheimer also argued against the single-member constituencies electoral system of the US and UK. Proportional representation had not been the reason for the collapse

90 Letter from Otto Kirchheimer to Felix Gilbert and John H. Herz. Entry 81, Box 3, Record Group 226, Records of the Office for Strategic Services, National Archives at Maryland.

of the Weimar Republic and a single-member system would work out undemocratically by overrepresenting conservative middle-class parties. Kirchheimer's proposals already went in the direction of the system later used in the Federal Republic: a moderate electoral threshold and having single candidates elected by relative majorities in small election districts while utilizing remaining minority votes for additional minority representation. To Kirchheimer, such questions of electoral law were less important than the actual problem: "the internal structure of German political parties" (348).

In the report, the basic rights were initially defined as negative rights protecting against arbitrary acts by the executive. Kirchheimer took up the debate conducted during the Weimar Republic about binding all laws to the basic individual rights in the constitution. This time, however, he came up with a different answer than twenty years earlier. He argued for immunizing basic rights (personal freedom and integrity, freedom of expression, and freedom of assembly, among others) against the legislature. This is where his trust in the future parliamentary legislature had its limits. The greater significance of the basic rights compared to the Weimar Republic led him to support a constitutional court.

Another point is striking in the context of basic rights. The legislature was not to be bound equally by all basic rights because "the condition under which economic reconstruction in Germany must proceed will not permit absolute protection of private property" (349). This relativization of the alleged basic right to property echoed Kirchheimer's 1930 studies on Article 153 of the Weimar Constitution when he had crossed swords with Schmitt about the question of expropriation without compensation.⁹¹ The nationalization of private property, Kirchheimer asserted, was necessary for pragmatic reasons of rapid reconstruction, too. Moreover, large sections of the population would support such measures. Absolute protection of private property rights would serve only "reactionary forces as the remnants of the Junker class" (349). It is obvious that Kirchheimer wanted to leave the door open for a future democratic socialist Germany after the next elections.

A comparison of the text with Kirchheimer's works written for the OSS before 1945 reveals what the report does not mention: the liberal and emancipatory forces of democratic reconstruction he had previously invoked combined with the recommendation to give political responsibility back to the Germans as soon as possible. Neither is even mentioned here. Nonetheless, it is noteworthy how strongly Kirchheimer's deliberations and recommendations anticipated the decisions taken two or three years later by the Parliamentary Council about the Basic Law which had emerged from the three Western zones. Kirchheimer had had personal contact with several Social Democrats who were later members of the Parliamentary Council during his visits to Germany from 1947 on. Besides Ludwig Bergstraesser, Fritz Eberhard, and Otto Suhr, he had close friendly ties in particular to Carlo Schmid, the chief negotiator of the Social Democratic members of the Parliamentary Council. However, the extent to which Kirchheimer's ideas found their way into the consultations for the Basic Law through these channels cannot be determined today. According to John H. Herz, it was Kirchheimer's close relationship with

91 See Chapter 3, p. 86–91.

Carlo Schmid that helped create the mixture of centralism and federalism in the German Basic Law.⁹²

The report *Current Political Tendencies in Germany Bearing on Its Future Governmental Structure*⁹³ from the late summer of 1946 reflects Kirchheimer's skeptical interpretation of the first year of occupation, based on his view that denazification policy was entirely misguided. The Americans' early efforts had at least accomplished the goal of removing Nazis from public administration, the considerable shortcomings in mechanically reviewing the questionnaires notwithstanding. Conversely, transferring the authority for denazification to

German boards (purge tribunals) [...] has] met with such hostility and resistance on the part of what amounts to a coalition of Nazi sympathizers and conservatives, that frequently they have been prevented from functioning altogether. Intimidation of tribunal members through threats of economic boycott, social ostracism, and personal violence has been reflected in extremely lenient sentences imposed even upon active Nazis, many of whom are permitted to resume the administrative posts which they were forced to vacate under US procedures (355).

Such failures to purge the administrative bureaucracy had the effect of "re-Nazifying" the German public administration. Regarding the British occupation zone, Kirchheimer took up the concern mentioned in older OSS reports that the Western Allies might abandon denazification in light of the adversities involved in reconstruction and the looming confrontation between the Western democracies and the Soviet Union. He criticized the fact that the British had prioritized functioning public administration over systematic denazification and had used the bureaucracy as the technical guarantor of reconstruction, thereby continuing to apply the civil service law of 1937. He thought this was the "opposite of the desired effect" (354) measured against the goals of denazification.

The main subject of the report, however, was the elections and the party system emerging in the Western zones of occupation. Because of "considerable political apathy" (355), notably among the young generation, older actors were dominating that process, apparently aiming to reestablish the party system of the Weimar Republic. Kirchheimer paid special attention to the ethnic Germans expelled from Eastern Europe who accounted for a considerable fraction of voters in Bavaria. Their anti-Bolshevism would "constitute an influence toward rightist radicalism," which would strengthen a "growing trend toward a revived Nazism" (352). His assessments were prompted by the election to the constitutional assembly in Bavaria in June 1946 in which the CSU received a surprising 58.3 percent of the vote and the SPD only 28.8 percent. Kirchheimer saw continuities with the Weimar Republic here, using the last regular elections to the Bavarian *Landtag* in 1928 and 1932 as benchmarks. He assumed that the voters supporting the conservative and Christian parties at the time had cast their votes for the newly founded CSU, whereas the Social Democrats received almost the same share of votes. But where

92 John H. Herz in his response to Wilhelm Hennis at the Kirchheimer symposium in Berlin in November 1985.

93 See Kirchheimer (1946b). The following page numbers refer to this text.

were the NSDAP voters—6.3 percent in 1928 and 32.5 percent by 1932? Kirchheimer presumed that the overwhelming majority of them had voted for the CSU, prompting him to formulate the hypothesis that it would not be the SPD but rather the CDU/CSU that would play the key political role in postwar Germany.

Another piece of Kirchheimer's research from the first two postwar years was the length of a short book. In late 1947, he completed a monograph titled *A Constitution for the Fourth Republic* (see Kirchheimer 1947). It did not bear his name. In it, he described extensively the circumstances of the French constitutional process and assessed the constitution of the Fourth Republic in detail. Kirchheimer explained the substance of the constitution as the result of a political compromise between the strong social groups in the country, just as he had already explained the Weimar constitution. Parts of his analysis of the provisions of the French constitution read like a discussion of Schmitt's critique of the Weimar Constitution (see Schale 2011). He strictly rejected Charles de Gaulle's attempt to establish a presidential system, instead welcoming the stronger position of the legislative branch.

The book is also instructive in that Kirchheimer devoted almost three times as much space to the first—rejected—draft of the constitution as to the one that was ultimately adopted. The reason for this odd imbalance was likely Kirchheimer's sympathy for the parliamentary system of government, which the political left emphasized even more strongly there. He criticized that in the course of the consultations about the constitution, the new draft presented by the French Christian Democrats, in which the president was granted an at least symbolically more significant role, had prevailed. In Kirchheimer's view, future constitutional conflicts between the president and the parliament were virtually inevitable, and he doubted that the new constitutional order would be stable.

Overall, the reports from 1946 and his book on France document the beginning of the political disappointment Kirchheimer felt, despite their factual tone. He thought that the Western policy regarding occupation and the German resistance against denazification—Kirchheimer even spoke of sabotage—benefited conservative parties and the restoration of prewar capitalism and reactionary politics. At the same time, the democratic left in the Eastern zone was degraded to meaningless “figureheads” of the Socialist Unity Party of Germany (SED), either through pressure or “‘natural’ attraction” (Kirchheimer 1946b, 353). As early as the late summer of 1946, little was left of Kirchheimer's hopes for a socialist and democratic new order in Germany, despite his attempts to leave the door open for such a development in his recommendations. Nor did he have great hopes for the socialists succeeding in France. He was even more disappointed that the judicial system in Germany had no real new beginning.⁹⁴ Kirchheimer's colleagues at the State Department were aware of his increasing political disappointment. Looking back, his longstanding supervisor Eugene N. Anderson said in an interview about the years 1945 und 1946, “I think that Neumann and Kirchheimer expected too much too fast. If I have any criticism of the [...] émigré scholars, then that they expected results too eagerly, too rapidly. Things don't happen that quickly. I have Kirchheimer in mind in particular.”⁹⁵

94 On the transition of the judicial system in Germany between 1943 and 1948, see Lahusen (2022).

95 Quoted in Söllner (1986b, 31).

Kirchheimer intensified his efforts to leave the State Department for a job in academia. But it was exceedingly difficult for him to take this route. From the mid-1940s on, he had applied unsuccessfully for multiple teaching positions at various colleges and universities in the northeast US; but his only teaching experience had been a job for one semester as a visiting lecturer at Wellesley College in Massachusetts, where he had taught two courses in social change and social theory.⁹⁶

Out of the blue, he saw an opportunity to obtain a professorship in 1948 and was confronted with the serious possibility of returning to Germany at least temporarily. After 1945, a number of former students of Carl Schmitt's had become professors in West Germany. Those who had been forced to emigrate after 1933 had a more difficult time of it (see Stolleis 2012, 40–42). In April 1948, the Hessian Minister of Culture and Education, Erwin Stein (CDU), wrote a letter to Kirchheimer, asking him to “take on a position as visiting professor of public law” at the University of Frankfurt in the winter semester of 1948/49.⁹⁷ The position was to begin as a visiting professorship and later be made into a regular chair at the Faculty of Law. Kirchheimer responded and stated his interest. He had become the candidate preferred by the Frankfurt Faculty of Law and supported by Vice Dean Gerhard Schiedermaier, with whom he was acquainted from his years as a student with Schmitt in Bonn. Yet instead of receiving an invitation from Frankfurt University and before he could review and discuss this matter sufficiently with the university, his family, and his American employer, the offer dissolved into thin air. Hermann L. Brill was appointed in his place. Kirchheimer learned of Brill's appointment from the newspaper.

Although he held Brill, a courageous socialist resistance fighter against the Nazi regime, in high regard both personally and politically, he felt grossly misled by the course of action taken in Hesse. Outraged, he wrote in July 1948 to Ernst Friesenhahn,⁹⁸ who served as Dean of the Faculty of Law in Bonn, that he had heard nothing more about the offer from the university since Stein's letter except for various “newspaper polemics,” for which reason he had to assume that he had merely served as a “politically strategic” means in the dispute between the university, the government of Hesse, and the Hessian parliament. The “Brill case” caused quite a stir in the newspapers and the West German university environment in the summer of 1948. The debate centered around academic autonomy and the role returning émigrés were to play in restaffing the universities in the Western zones (see Klingsporn and Wilke 2019, 10–13). Frustrated, Kirchheimer remained at the State Department.

96 Otto Kirchheimer, *Curriculum Vitae* (1952). Otto Kirchheimer Papers, Series 2. Box 1, Folder 1.

97 Letter from the Hessian Ministry of Culture and Education to Otto Kirchheimer dated 6 April 1948. Otto Kirchheimer Papers, Series 2, Box 1, Folder 79.

98 Letter from Otto Kirchheimer to Ernst Friesenhahn dated 13 July 1948. Otto Kirchheimer Papers, Series 2, Box 1, Folder 61.

6. Conclusion: Different disillusion

Schmitt had to bury his hopes of being reappointed professor in Berlin or at any other German university as early as late 1945. As a former prominent Nazi propagandist who rejected any and all self-criticism, he was cast into the role of a pariah by official post-Nazi Germany. At the same time, he cultivated this role as an outsider who had not given in to what he called Jewish-American rule over Germany and started a lively correspondence with friends, political companions, and old colleagues that ultimately led to an “invisible college” in the 1950s. Kirchheimer too was active in creating a communicative network with former friends and political allies. Although Schmitt and Kirchheimer had no direct contact until November 1949, they did hear about each other indirectly from other people, starting with Schmitt’s greetings to Kirchheimer via Flechtheim in 1947. The only person who corresponded with both Kirchheimer and Schmitt during this time was Rudolf Smend.

Kirchheimer began to visit Germany in 1947. Besides a number of old friends from the Social Democratic Party, he soon got in touch with his former mentor Rudolf Smend and stayed in contact with him. He did not, however, contact Schmitt even though it would have been easy for him to visit him in the American zone. Kirchheimer spent most of his professional energy between 1946 and 1948 on memoranda, reports, and short books for daily administrative use by the State Department. After the loss of his prestigious professorship, Schmitt finished his book on international law and wrote a few essays. The establishment of the Federal Republic of Germany in 1949 guaranteed freedom of expression and lifted the Allies’ ban on former Nazis publishing, and Schmitt’s articles appeared almost immediately thereafter.

Nevertheless, the years between 1946 and 1948 again mark a number of parallels between Kirchheimer and Schmitt. Today, some of their writing from those years read like an indirect dialogue under the condition of personal absence. Both had realized the extent of the full defeat of Nazi Germany in 1945. Whereas Schmitt was imprisoned twice, Kirchheimer became part of the US State Department, planning denazification and the rebuilding of a democratic Germany. In Kirchheimer’s eyes, Germany’s future could be managed in a positive way only if the Germans were to develop an honest attitude to the war crimes and domestic crimes committed during the Nazi era. Schmitt’s denial was typical of many Germans of his time but he took the denial to its extremes. His writing and private notes lacked any word of empathy for the victims of the regime. He replaced his lack of compassion with self-pity, speaking of his “persecutors” (Schmitt 1950a, 63). He stated that the US State Department had transformed the means and methods of the justice system into means and methods of annihilation against people like him. To Schmitt, it was the expression of a policy of collective guilt against Germany. As a matter of fact, however, the US government and administration in occupied Germany never pursued such a policy. Kirchheimer in particular argued strongly against the assumption of a collective guilt of all Germans in his legal opinions.

Schmitt’s antisemitism remained as intense as ever, albeit now coupled with tearfulness and paranoia. In his view, the returning émigrés were either traitors and opportunists or Jews who wanted to take revenge, enrich themselves, or go after him directly. Owing to his position at the OSS and State Department, Kirchheimer was aware

of the full extent of German war crimes at an early stage. After being only partly successful with his suggestions for the Nuremberg Trials, he began to devote his energy to proposals for the denazification and the governance of occupied Germany. His main concern was the denazification of the German judicial system and civil service. Following the logic of his recommendations, anyone who had supported the regime as much as Carl Schmitt—of course, without mentioning his name in this context—was to be suspended from any job in the judicial or academic system in a new democratic Germany for the rest of his life. Whereas Schmitt saw such measures as Jewish revenge, Kirchheimer recommended them as a necessary element for building democracy in Germany and as a protection against an authoritarian backlash. It is not without irony that Kirchheimer was confronted with suspicions and ten years of political observation by the FBI at a time when Schmitt characterized the small group of émigrés as the real political power holders in the US administration in occupied Germany.

Whereas Schmitt strongly felt he was on the side of the defeated, Kirchheimer did not see himself in the glorious position on the victorious side. It took him less than a year to realize that prospects for a socialist and democratic new order in Germany were diminishing. Instead, the American military administration safeguarded capitalist private property, and large numbers of former Nazis were given the opportunity to return to their positions in the judicial system and civil service. Kirchheimer had no sympathy for the East German Socialist Unity Party, and his pessimism grew after the communists destroyed the liberal basic rights and established their dictatorship. He became increasingly disappointed politically and experienced his daily work in the State Department as frustrating. A comment of his in a 1961 essay on the relationship of expertise and politics can also be read as a bitter stocktaking of his work at the State Department:

How are we to evaluate the costs of modern military, paramilitary, diplomatic, and intelligence agencies, where it is questionable whether conclusions can be drawn as to the relation between input and output? [...] There is no proof that this or that form of political propaganda or of military preparation has brought the desired success. [...] And it is exactly in those areas where the relationship between input and output cannot be reliably determined that new projects abound and bureaucratic proliferation flourishes (Kirchheimer 1962c, 376).

Evaluating the success of Kirchheimer's work at the State Department depends on the yardstick used. If it is the creation of a democratic and socialist Germany, he obviously failed. Neither the US administration nor a decisive majority of voters in West Germany wanted to take crucial steps in that political direction. But if we orient our evaluation toward the normative and institutional elements of the West German constitution, put into effect two and a half years after Kirchheimer's recommendations, it is amazing to see how many of his proposals can be found in the Federal Republic's Basic Law that are still valid to this day.