

## Chapter 15: Renewed Contact and Controversy (1949–1956)

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The year 1949 saw the establishment of two German states, the Federal Republic of Germany (FRG) in the West and the German Democratic Republic (GDR) in the East. Each state claimed to be the only one representing German statehood and both constitutions provided for their counterpart's accession. Initially, this changed little in the lives of Kirchheimer and Schmitt. The latter had given up hope of being able to return to a German university. He now focused on expanding an “invisible college” (van Laak 1993, 209). From the 1950s on, he carefully selected and brought young academics into this circle. Among them were men—and all of them were men—who were to become important in the intellectual history of the Federal Republic of Germany, among them historians, philosophers, and legal scholars including Reinhart Koselleck, Odo Marquard, Hermann Lübbe, and Ernst-Wolfgang Böckenförde.<sup>1</sup> In 1950, Schmitt also began to go on the offensive with multiple publications. He optimistically banked on receiving the civil service pension he was entitled to in accordance with Article 131 of the Basic Law when he turned sixty-five in 1953. With the substantial support provided by Academia Moralis, a special account set up on his behalf by a group of entrepreneurs, he was already living an unconstrained and independent life as a private scholar. In the meantime, Kirchheimer struggled increasingly with his work at the State Department. Despite the fiasco in Frankfurt, he did not want to abandon his desire to be a professor in Germany entirely. His wife Anne opposed this aspiration of his and his cautious attempts to make it a reality; she “didn't want Peter to be raised in Germany. [...] My son should be an American boy.”<sup>2</sup>

During his third visit to Germany in the autumn of 1949, Kirchheimer attended the reestablishment of the Vereinigung der Deutschen Staatsrechtslehrer (German Association of Professors of Public Law) in Heidelberg on 21 October 1949; he and Karl Loewenstein were present as guests from abroad. There he met Rudolf Smend and Ernst Friesen-

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<sup>1</sup> The work and the eminent influence of this “invisible college” are described in detail in van Laak (1993, 179–240).

<sup>2</sup> Anne Kirchheimer in a conversation with Frank Schale, 6 October 2002 (personal communication between the author and Frank Schale).

hahn, his friend from Schmitt's circle in Bonn; the two had corresponded closely in the following years, exchanging views about Schmitt multiple times. Kirchheimer also met Social Democratic legal scholars Carlo Schmid, Adolf Arndt, Hermann Brill, and Martin Drath again on this occasion as well. Carl Schmitt had not been invited to Heidelberg for the formal reason that he was not a professor; the same applied to Ernst-Rudolf Huber. Ernst Forsthoff, the other particularly prominent student of Schmitt's, declined to attend. Political reasons were behind Schmitt's exclusion, which Smend had previously explained in a newspaper article: "all too eminent standard bearers of the Third Reich" (Smend 1949, 17) were to be barred from the association. Along with his two Nazi rivals Otto Koellreutter and Reinhard Höhn, Schmitt was explicitly denied membership on a permanent basis in 1950 (see Stolleis 2012, 85–88). Schmitt was outraged both by Smend's article and by his former student and assistant Friesenhahn. Before the Heidelberg conference, the latter had given his inaugural lecture as rector of the University of Bonn on the subject of public law scholars and loyalty to the constitution, with Kirchheimer in attendance. Friesenhahn stated that Article 5, Paragraph 3 of the Basic Law, according to which the freedom of teaching did not release any person from allegiance to the constitution, had been included in the constitution "because of the activities of certain public law scholars prior to 1933" (Friesenhahn 1950, 9). Schmitt rightly felt that Friesenhahn meant him, among others. Contemporaries said that his exclusion from the German Association of Professors of Public Law rankled him more than any other right up until the end of his life (see van Laak 1993, 36–38).

A month after the Heidelberg conference, Kirchheimer visited Schmitt unannounced at his home in Plettenberg. After 17 years, almost to the day, they first saw each other again in person on 27 November 1949. Three and a half years later, in June 1953, they met once more in Cologne. As already mentioned in the Introduction to this book, much has been written in the secondary literature about Kirchheimer's visit to Plettenberg.<sup>3</sup> Various authors have claimed that Kirchheimer visited Schmitt at his home in Plettenberg not only once but several times on a regular basis. This assertion has developed a life on its own and can be found in many scholarly contributions on Schmitt and Kirchheimer as evidence of their close personal ties and their renewed friendship. A closer look at the archival sources, however, reveals a different image not only of their two meetings and their relationship in the postwar years in general but also of the circumstances and political context of those meetings.

After the visit in 1949, they began corresponding again. Only twelve letters have survived in the archives, ten from Kirchheimer to Schmitt, and two from Schmitt to Kirchheimer.<sup>4</sup> Schmitt kept all the letters he received; in terms of a typology of literary estates, he was the "paradoxical case of someone who was chaotic but who never threw anything away" (Mehring 2014a, 526). Kirchheimer rivaled him in terms of the chaotic aspect, but he threw away a lot. Moreover, he sometimes used the backs of letters and envelopes for

3 See, among others, van Laak (1993, 135), Quaritsch (1995, 72), Wiggershaus (1995, 470), Mehring (2014a, 432), Bendersky (2016, 137), and Tielke (2019, 377).

4 Schmitt's letters are dated 6 August 1958 and 12 August 1961. Kirchheimer's letters are dated 4 May 1952, 8 September 1952, 27 November 1952, 28 January 1953, (probably) February 1953, 28 March 1953, 1 July 1953, 25 July 1958, and 4 July 1961.

taking notes. So, whereas it is safe to assume that all of Kirchheimer's communications to Schmitt have survived, most of the letters from Schmitt and greetings Schmitt sent along with his books must now be considered lost. Since Kirchheimer apparently thought that most of his correspondence with Schmitt was not worth keeping and discarded it once he had read it, some of the subjects and events mentioned in Schmitt's letters must be inferred from Kirchheimer's replies. It can be deduced from Kirchheimer's letters to Schmitt that at least five letters he received from Schmitt between spring 1952 and February or March 1953 have been lost.<sup>5</sup> There is little hope that these letters and additional notes Schmitt may have attached to offprints he sent to Kirchheimer may yet be found because Kirchheimer's estate has been thoroughly reviewed and catalogued at the German and Jewish Intellectual Émigré Collections at the University of Albany. Adding the twelve surviving letters and the five (at least) lost ones from 1952/53, we arrive at a total of less than twenty letters from the postwar years. The first documented written contact was from 22 November 1949, when Schmitt sent a copy of one of his essays to Kirchheimer.<sup>6</sup> The first surviving letter is dated 4 May 1952 (written by Kirchheimer as a response to a lost letter from Schmitt), the last one is dated 12 August 1961 (written by Schmitt).

Now, Schmitt was a prolific writer of letters. His papers include between 15,000 and 20,000 letters he received from the early twentieth century until his death in 1985,<sup>7</sup> and he presumably wrote roughly as many letters himself. Compared with the published correspondence between Schmitt and other legal scholars of Kirchheimer's generation such as Ernst Forsthoff and Ernst Rudolf Huber, which run to hundreds of letters each,<sup>8</sup> the number of letters he exchanged with Kirchheimer after the war is small.

Viewed together with material from other archives and information from interviews with people involved at the time, their correspondence sheds light on the facts about their relationship after 1945, most importantly indicating that Kirchheimer visited Schmitt in Plettenberg only once; that they met again only once, namely in Cologne in 1953; and that their correspondence was sparse.<sup>9</sup>

## 1. Amnesty as amnesia

According to Schmitt's *Glossarium*, one of the first books he read after his release from detention in Nuremberg was, in the autumn of 1947, *The Managerial Revolution* by American

<sup>5</sup> The lost letters were from early 1952, June 1952, autumn 1952, late 1952, and February or March 1953.

<sup>6</sup> List by Carl Schmitt about mailing complimentary copies. Carl Schmitt Papers, Versandliste, RW 265–19600. Neither the copy of the essay nor a note or letter which Schmitt may have attached to it have survived in Kirchheimer's estate.

<sup>7</sup> I owe this information to Gerd Giesler, e-mail dated 20 December 2022.

<sup>8</sup> The number of letters between Schmitt and Kirchheimer is similar to the exchange between Schmitt and Smend in the same period of time (twenty-one letters). Schmitt and Forsthoff exchanged 148 letters in the period between 1952 and 1965 (the year of Kirchheimer's death).

<sup>9</sup> With respect to the visit, my research confirms the information George Schwab provided to Ellen Kennedy, namely that Kirchheimer visited Schmitt in Plettenberg only once (see Kennedy 1987a, 392).

popular political theorist James Burnham (Burnham 1941). Among other things, Burnham gave a functionalist rationale for the existence of political opposition. He claimed opposition was useful in democracies because it offered citizens a way to legally vent their anger and also give the government food for thought. Schmitt called this view “optimism about opposition, optimism that is full of contradictions.” He was only able to understand this view within the interpretive framework of his geopolitical ideas about *Raum*, which he had developed from the late 1930s on: “That is still a maritime empire’s notions about *Raum* and about opposition, an empire whose social group in power can divide the riches of the Earth among itself, with a free ocean.”<sup>10</sup> This was based on Schmitt’s theory that Great Britain was not a traditional state in the continental sense, but a maritime empire (see Schmitt 1956, 59–65). In addition, he presumably thought that Great Britain, as a predatory maritime country, could afford to allow an opposition to exist. With this dictum, Schmitt directly linked up with his writing on parliamentarism from the 1920s in which he had criticized the idea of political equal opportunity of government and opposition as “metaphysics” of notions of balance (see Schmitt 1923a, 41). Conversely: a political system with a real opposition, he claimed, had to remain alien to Germany’s continental existence.

A political system had been established in the Federal Republic of Germany that was based on securing personal liberties and thus on the institutional guarantee of political opposition. As Carlo Schmid, one of the fathers of the constitution, wrote in his memoirs thirty years later, “some [council members] likely also had Carl Schmitt’s theory of the state” in mind as an invisible text during the deliberations of the *Parlamentarischer Rat* (Parliamentary Council) on the future Basic Law (Schmid 1979, 335). However, Schmitt’s *Constitutional Theory* remained one of his texts that was not to develop formative power (see Lietzmann 1988). During consultations about the future competencies of a constitutional court, Adolf Süsterhenn of the CDU practically implored the gathering with the words: “We are not afraid of the danger of the domination of political decision-making by the judiciary as conjured up by the namesake, spelled with a double ‘t,’ of our esteemed colleague Carlo Schmid.”<sup>11</sup>

Throughout his life, Schmitt made no secret of the fact that he considered the Federal Republic of Germany unworthy of recognition. In his *Glossarium*, he continued to complain of the “demise of Germany” and the “destruction of identity” of the German Volk and called the Federal Republic a “pseudo-sovereign state” that suffered the “existence of a worm in rotten wood.”<sup>12</sup> He wrote in his *Glossarium* on 21 September 1949: “In medieval theory, the just war meant that the victor had the right to enslave the subjects of his opponent and to seize his land; today, with more highly organized forms of mass domination it means above all: determining the constitution and regime of the defeated.” (Schmitt 2015, 205) He gave an example of what he meant by this in a letter to Ernst Forsthoff after the latter had failed to receive an appointment as a professor in Frankfurt: “What was

<sup>10</sup> *Glossarium* entry of 16 March 1947 (Schmitt 2015, 32).

<sup>11</sup> Speech by Adolf Süsterhenn during the deliberations of the Parliamentary Council on 8 September 1948. Minutes of the meetings of the Parliamentary Council, second meeting, 8 September 1948, 25.

<sup>12</sup> *Glossarium* entry of 1 March 1954 (Schmitt 2015, 309).

visited upon you in Frankfurt troubles me as being a case in point of our actual constitution, the *geistigen Morgenthauplan* [the Morgenthau Plan of the mind] under which we must live and find our way in West Germany today. After all, the injustice inflicted on you goes far beyond an individual appointment.”<sup>13</sup> The two yea-sayers in 1933 were naysayers in 1949/1950. Unlike most right-wing and conservative public law scholars in Germany, who eventually made their peace with the new state order, Schmitt continued to reject it right up until the end of his life. In his view, it was not even a state, but a pseudo-sovereign entity that would necessarily result in the destruction of German identity and, consequently, the demise of Germany. Even after the Federal Republic had overcome the economic crisis of the 1960s and the new state had lasted longer than the Weimar Republic and the Third Reich put together, Schmitt’s rejection and contempt remained unchanged.

In his published works, however, he struck a more moderate tone. During and after the consultations of the Parliamentary Council in 1948/49 about the new constitution of the future Federal Republic, Schmitt published the article *Gegenwartsfragen der Verfassung* [Constitutional questions of our time] and a six-part series of articles *Das Grundgesetz der Bundesrepublik Deutschland* [The Basic Law of the Federal Republic of Germany], both under a pseudonym (see Schmitt 1949c and 1949d). The magazine *Eisenbahnerzeitung* (for teaching and educating railroad staff) where Schmitt’s articles appeared had a lay readership to whom Schmitt was to explain the new German constitution, for a large fee. Against Hans Kelsen, he posited that the Reich continued to exist after Germany’s unconditional surrender in 1945—a view that quickly became the prevailing opinion in West German public law.

Schmitt emphasized that because of its genesis, the Basic Law was not a normal democratic constitution but, rather, a provisional solution—yet he did not bring up his strong concept of willful and revolutionary constitution-making from his *Constitutional Theory* of 1928 to argue against it. He gave a factual presentation of the institutional structure of the Federal Republic according to the constitution—but he did not put his usual hostile stance toward federalism and pluralism in writing here, either. He singled out five innovations in the constitution: first, the great importance of liberal fundamental rights and the protection of fundamental rights; second, Article 21 with its potential for the militant defense of liberal democracy; third, the constructive vote of no confidence in Article 67 which made the Weimar practice of negative votes of no confidence impossible; fourth, Article 139 on the status of occupation, whereby Schmitt considered the denazification measures mentioned there to be a considerable limitation of West German sovereignty; fifth, he devoted considerable space to the competencies of the *Bundesverfassungsgericht* (Federal Constitutional Court) at several points and explicitly called it “the

<sup>13</sup> Letter from Carl Schmitt to Ernst Forsthoff dated 20 May 1950 (Schmitt and Forsthoff 2007, 72). The Morgenthau Plan of August 1944 was a proposal propagated by US Treasury Secretary Henry Morgenthau, who was Jewish, to transform Germany into an agrarian state after the war to preclude the country’s remilitarization. Kirchheimer, Neumann, and Herz at the OSS emphatically opposed the plan. Although it was never implemented, it played a key role in the propaganda of Nazi Germany in the final year of the war. To this day, the proposal is one of the subjects of right-wing extremist propaganda in Germany against the Western Allies, combined with antisemitic propaganda.

guardian of the constitution" (Schmitt 1949d, 194). In contrast, he downplayed the role of the parliament. Because of the strong position of the *Bundesverfassungsgericht*, Schmitt felt that what mattered most were the individuals serving on it and the procedure for determining its composition (see Schmitt 1949d, 178 and 193).

These comments echoed Schmitt's earlier criticism of the Weimar *Staatsgerichtshof* (see List of German Courts), which he had called an "arena of the pluralistic system" (Schmitt 1931b, 153). They also foreshadow his later criticism of the judiciary in the Federal Republic allegedly dominating political decision-making. He also used his explanations of the constitution for his own ends, stating that it was unconstitutional for the state to massively cut civil service pensions (see Schmitt 1949d, 180). Schmitt's series of articles did not claim to be scholarly legal writing but was designed to provide an overview for readers without a legal background. Overall, he presented himself as a well-informed and factual legal scholar who viewed the Basic Law from the perspective of a comparison with the Weimar Constitution.

Schmitt's entries in his postwar notebook *Glossarium* clearly reject the Basic Law. While he was working on the series of articles, he noted, "Do they still not understand that a Basic Law is today in itself something much more vile than an organizational statute?"<sup>14</sup> On the occasion of the fifth anniversary of the failed assassination attempt on Hitler that took place on 20 July, 1944, he wrote, "When reading the Bonn Basic Law, I am imbued with the amusement of an omniscient old man."<sup>15</sup> A letter to his wife from this time also evidences that Schmitt was not serious about his factual description. He wrote her that his second article about the Basic Law in *Eisenbahnerzeitung* had been faulted for "still being too critical." He closed this passage sighing, "It is difficult to strike the right tone"<sup>16</sup> when writing about the new German constitution.

Readers of the *Glossarium* can trace how Schmitt gradually switched back into a combative mode, all his self-pity notwithstanding. He formulated slogans of German resistance against the victorious powers of the world war and their alleged German lackeys. "We are vanquished, thrown to the ground, subjugated, quartered, and trampled." Yet the German *Volk* was not yet annihilated: "We are occupied, but not conquered. Only he can conquer who knows his prey better than it knows itself."<sup>17</sup> Resistance began with standing up for oneself intellectually. According to Schmitt's *Glossarium*, this effort to resist meant refusing to participate in "constantly and repeatedly churning up the garbage can" of history and not responding to accusations of crimes. Those who demanded such answers from the Germans merely wanted to "enjoy their very personal revenge."<sup>18</sup> Instead, Schmitt asserted, a sweeping amnesty was needed because amnesty was one of "the most foundational positions of that which one can call justice."<sup>19</sup> In April 1949, he wrote the following about the goal of his personal efforts: "For myself and my *Volk*, I am seeking abso-

<sup>14</sup> *Glossarium* entry of 25 April 1949 (Schmitt 2015, 176).

<sup>15</sup> *Glossarium* entry of 20 July 1950 (Schmitt 2015, 196).

<sup>16</sup> Letter from Carl Schmitt to Duška Schmitt dated 5 October 1949 (Schmitt and Schmitt 2020, 321).

<sup>17</sup> *Glossarium* entry of 14 March 1948 (Schmitt 2015, 86).

<sup>18</sup> *Glossarium* entry of 4 December 1947 (Schmitt 2015, 43).

<sup>19</sup> *Glossarium* entry of 5 December 1947 (Schmitt 2015, 43).

lution from the crime.”<sup>20</sup> This was the complete opposite of what Kirchheimer imagined to be the only practicable way to make Germany a country deserving respect again.

In November 1949, Schmitt intervened in the contentious public debate about dealing with Nazi criminals in the Federal Republic with his article “Amnesty or the Force of Forgetting,”<sup>21</sup> which was published anonymously. It appeared in *Christ und Welt* [Christians and the World], one of the most widely circulated weekly newspapers with a conservative Protestant orientation and a large readership among the ruling CDU. Schmitt’s piece was reprinted in multiple conservative and right-wing newspapers in the next two weeks. He superimposed an interpretation of an international civil war over all the events of World War II, claiming that that civil war had not come to an end even after the cessation of military operations. The defining characteristic of civil wars was that the other side was treated like criminals, murderers, saboteurs, and gangsters. Schmitt had thus fabricated an interpretive framework, and he placed the denazification procedures conducted by the Allies—in his words: “Denazification was Cold Civil War” (92)—within this. There were only two ways out of such a confrontation: annihilation of the enemy—which Schmitt insinuated was the aim of the communists while failing to mention his fellow Nazis in this context at all—or the “Force of Forgetting” (92). Schmitt’s next step was to lecture his readers on the broad historical context. In his interpretation, the lesson from the history of civil wars, ranging from the Peloponnesian Wars to the English Revolution during the lifetime of Thomas Hobbes, was that the conflicts could be brought to an end only with an amnesty.

Schmitt’s idea of amnesty included unmistakable recommendations for the debate about policy concerning the past: “The word amnesty means forgetting, and not only forgetting but also the strict prohibition against rummaging in the past and seeking cause for further acts of revenge and further claims of reparation” (92). He believed amnesty was not an act of compassion toward the defeated, nor was it merely a pardon. Amnesty was “a reciprocal act of forgetting” (93). This, according to Schmitt, was the only way to end the Cold Civil War “in a human way” (93). Schmitt’s argument went far beyond the calls for amnesty for Nazi perpetrators promoted in the Federal Republic at the time. He did not simply demand that the surviving victims should allow mercy to prevail. No, they should refrain from addressing their personal suffering in public life, let alone demanding compensation for stolen property or brutal treatment. Moreover, in Schmitt’s view, the memory of those murdered by the Nazi regime had to be erased, too. Only then could there be a new form of peace. Schmitt’s call for amnesty entailed complete amnesia concerning the atrocities of the past.

## 2. Evaluating the new West German democracy

After Kirchheimer was forced to acknowledge that his efforts toward targeted denazification in the Western zones had come to nothing, his latest attempts to obtain a permanent position at a university so that he could leave the State Department also failed.

<sup>20</sup> Glossarium entry of 4 April 1949 (Schmitt 2015, 173).

<sup>21</sup> See Schmitt (1949a). The following page numbers refer to this text.

All he managed to acquire was temporary teaching appointments at two colleges near Washington.

His main responsibility at the State Department was to prepare internal reports which were published only in exceptional cases. In September 1949, he completed his first longer analysis of the Federal Republic. Co-authored with Arnold Price, a State Department expert on European geography, it provided an interpretation of the results of the election to the first German Bundestag on 14 August 1949 (see Kirchheimer and Price 1949). It was the basis for Kirchheimer's essay "The Composition of the German Bundestag," written in the autumn of 1949 and first published in the journal *Western Political Quarterly* in 1950.<sup>22</sup> It is certainly worth reading this article because it shows two things with respect to a comparison with Schmitt. First, that Kirchheimer, too, viewed the events in the newly established Federal Republic through the lens of comparison with the Weimar Republic. And, second, that in contrast to Schmitt, who merely describes the normativity of the constitution, he prepared empirical studies of politics in the Federal Republic of Germany.

Kirchheimer embedded his analysis of the composition of the parliament in a benign assessment of the election result, which was shockingly disappointing for the Social Democrats. If we did not know from contemporary witnesses' letters and memoirs how disappointed Kirchheimer was about Chancellor Konrad Adenauer's victory because he had to acknowledge that the opportunities for democratic socialism in Germany had been laid to rest, we would read part of his election analysis as an approving commentary. Kirchheimer left no doubt that the Bundestag "can justifiably be called a truly representative body" (177). Turnout was 78 percent, only slightly below the average during the Weimar Republic. Schmitt, incidentally, belonged to the small minority who heeded the call of extreme right-wing groups to boycott the election. Kirchheimer's analysis of the composition of the Bundestag aimed to answer five questions: To what extent did the Bundestag indicate a break with the past in terms of its members? What was the role of leading politicians from the Weimar Republic in the new Bundestag? To what extent were former members of the NSDAP represented in the parliament? What business interests were represented in the Bundestag? What role did ethnic German refugees from the East play in the parliament?

In answering these questions, Kirchheimer arrived at some findings that seemed to surprise him. For example, despite the appearance of some of its leading politicians and although two-thirds of its members had already been politically active during the Weimar Republic, the new Bundestag was "no gerontocracy" (178). Concerning the Nazi past of Bundestag members, Kirchheimer stated laconically, "there are fairly large gaps in the information available about them, even though the biographical accounts have been furnished by the members themselves" (180). A small percentage had been employed by the Nazi regime's state apparatus, a larger percentage had held leading positions in the business and academic communities during the Third Reich. The number of those active in the resistance against the Nazi regime was significantly lower. And only 6.8 percent of the members had returned to Germany from exile. Kirchheimer mentioned the high percentages of civil service employees and the members' high educational status as a feature

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22 See Kirchheimer (1950a). The following page numbers refer to this text.

already present during the Weimar Republic. “[N]either political and social upheaval nor changes in the electoral system” (183) had been able to change this pattern.

Kirchheimer found surprising continuities from the Weimar Republic in the election outcome, too. Neither the interim phase of the Nazi regime nor the new electoral law had left “any decisive imprint” (190) on the composition of the new Bundestag. Its image was “clearly one of restoration and return to old institutional patterns” (190). How was this to be explained? “[W]hat are the reasons for this *Wiederkehr des Gleichen?*” (return of the same, 191). Kirchheimer considered this to be an expression of younger Germans’ lack of interest in politics and a “deep-seated skepticism toward parliamentarism” (191), which reminded him of the crisis at the end of the Weimar Republic.

He was optimistic that because of the political parties comprising the Bundestag, it would presumably establish itself more as a working parliament than as a stage for extremists’ radical speeches, and it would therefore be possible to overcome people’s reservations against parliamentarism. At the same time, Kirchheimer identified a transition to a parliament composed of interest group representatives. He thereby disagreed with the demand voiced by Dolf Sternberger, one of the founders of political science at German universities, which was widely discussed by the West German public, that the members of the Bundestag were to be as independent as possible from political interest groups (see Sternberger 1950). Kirchheimer called such a return to the epoch of dignitaries as politicians unrealistic and also doubted that members of the Bundestag who were not bound to interest groups would automatically be more independent in their political judgment.

Only when Kirchheimer had conducted an empirical analysis of affiliations with interest groups did his critical view of the early Federal Republic become apparent, for he arrived at the finding that business interests had the strongest representation in the Bundestag: “business stands out with 9.9 per cent” (189). They were followed by interest groups representing ethnic German refugees from the East and the agricultural sector. The representatives of trade union interests and members of smaller professional organizations only ranked “rather low” (189). Kirchheimer described the Bundestag faction of the CDU/CSU, which elected Chancellor Adenauer, as dominated by the interests of agriculture and the major industrial trade associations. Their power corresponded “more to their economic power than to their numerical strength in the country” (192); thus, at the end of his essay, he in effect refuted his statement quoted above that the Bundestag was “a truly representative body” (177).

Reading Kirchheimer’s analyses of the early Federal Republic from Schmitt’s perspective, one can perceive them as attempts to explore the opportunities of stabilizing the country politically. Like Schmitt, Kirchheimer asked pointed questions about the continuities from the Weimar Republic. However, he emphasized the discontinuities which gave him reason to hope that a policy of social integration would prevent a repeat of the conflict-ridden Weimar era, whereas it seemed obvious to Schmitt that they would develop into a civil war scenario. This was one more reason why Kirchheimer, in contrast to Schmitt, fully acknowledged the legitimacy of the new Federal Republic of Germany.

### 3. Meeting face to face in Plettenberg

As described in Chapter 14, it was Schmitt who first took the initiative to make contact with Kirchheimer after World War II when he was transferred to Nuremberg by Ossip K. Flechtheim in 1947, asking the latter to convey his best regards to Kirchheimer. There is no indication that Kirchheimer responded. Two years later, Schmitt was able to get hold of a State Department postal address of Kirchheimer's in Germany; how he did so cannot be reconstructed on the basis of the archival material. He may have received it from Werner Weber, Rudolf Smend's colleague in Göttingen, who was close to Schmitt. Schmitt's papers document that he sent a copy of his essay on Francisco de Vitoria to Kirchheimer on 22 November 1949.<sup>23</sup>

A few days later, on November 27, Kirchheimer took Schmitt by surprise and stopped by at his home in Plettenberg for a visit that lasted two and a half hours. The secondary literature mentions very few trustworthy sources concerning this visit and its consequences for their relationship. The famous anecdote, first mentioned by Alfons Söllner (see Söllner 1996, 114), that Schmitt had asked Kirchheimer: "Are you coming as a friend or an enemy?" when he turned up at his doorstep has never been confirmed by the sources, and even Söllner himself has called it into question as a cleverly contrived allegory.<sup>24</sup> In order to shed light on the matter, additional sources have to be taken into account. These include the exchange of letters between Kirchheimer and Schmitt, letters which both of them wrote to third parties, and my interview with Wilhelm Hennis in 2009, with whom Kirchheimer had spoken extensively about his personal motive to visit Schmitt and to stay in contact with him occasionally.

How did Kirchheimer's visit come about? The documents in the archives do not help answer this question. As far as can be reconstructed today on the basis of the additional archival material mentioned above, the visit was a private undertaking during Kirchheimer's third trip to Europe for the State Department. His 1949 trip was longer than those in the previous two years. This time, he served as a consultant to the US High Commission for Germany (HICOG) in Frankfurt from early October 1949 to mid-January 1950, and he used his time in Europe to visit friends in France, the Federal Republic of Germany, and West Berlin. Posing as a private citizen, he visited East Berlin, the newly designated capital of the GDR.<sup>25</sup> His task during this trip to Germany was to prepare a study on the "Structure of present trade union organizations"<sup>26</sup> in the Federal Republic of Germany for HICOG's Office of Labor Affairs. Some of the trade unionists he visited were acquaintances from before 1933; others he met for the first time. Kirchheimer continued to be a member of the SPD and established a number of new contacts among younger

<sup>23</sup> List by Carl Schmitt about mailing complimentary copies. I obtained this information thanks to Gerd Giesler. This refers to the essay by Schmitt (1949b) which he later integrated into his *Nomos of the Earth*.

<sup>24</sup> Alfons Söllner in a conversation with the author, 21 April 2021.

<sup>25</sup> Hanna Kirchheimer-Grossman in a conversation with the author, 14 September 2021.

<sup>26</sup> Otto Kirchheimer, Curriculum Vitae (1965). Private collection of Hanna Kirchheimer-Grossman (Arlington).

Social Democrats. The daily *Tägliche Rundschau*, which was published in East Berlin, reported on 18 November 1949 on its front page that “a certain O. Kirchheimer” had been in the American sector of the city for some days and was supplying the West Berlin SPD with money from the US.<sup>27</sup> It can no longer be ascertained today to what extent this description was accurate, but it is not entirely implausible.

What exactly is documented about this visit? There are three sources about it from Schmitt. The first is a letter from 29 November 1949 to his wife Duška, who at the time was undergoing medical treatment in Heidelberg. Schmitt reported to her:

Day before yesterday, Sunday midday, a big yellow American car drove up, with ‘USA’ in bold letters. I thought I was going to be picked up [for interrogation or the like] once again. Anima opened the door. Who was there? I don’t think, dear Duška, that you would guess. It was Otto Kirchheimer. Fat, but otherwise unchanged. We had a good conversation for 2  $\frac{1}{2}$  hours, then he drove on to Düsseldorf. He works for the State Department in Washington and just wanted to see how I was doing. He was not satisfied with *Ex Captivitate [Salus]* because there was no explanation of what I did in 1933. I gave him the essay on [Francisco de] Vitoria. I enjoyed his visit. Incidentally, I don’t believe it is very meaningful. It was simply a stirring of human interest in my fate, nothing more. But it was that, and in that sense, it was still nicer than the typical behavior of the German colleagues.<sup>28</sup>

The second source is a letter by Schmitt to Ernst Rudolf Huber, his former assistant professor in Bonn. It is dated two weeks later and reads:

Do you remember Otto Kirchheimer? He is now with the State Department in Washington. When he visited me two weeks ago, he mentioned the conference of the German Association of Professors of Public Law. We agreed that an outburst of intellectual freedom and *dégradé* thinking as sublime as the one we experienced in 1930/32 is hardly to be expected again.<sup>29</sup>

Huber wrote back to Schmitt shortly afterwards and reminded him of their political differences:

Of course, I remember Otto Kirchheimer well. You may remember that we walked through the Tiergarten [park in Berlin] with him in November 1932, on the day of the Berlin transport strike that had been undertaken jointly by the Nazis and the communists. That remains a day of memorable topicality, leading to the abyss, to be precise.<sup>30</sup>

<sup>27</sup> “Amerikaner halten Westberliner Parteien aus!”, *Tägliche Rundschau*, 18 November 1949, p. 1.

<sup>28</sup> Letter from Carl Schmitt to Duška Schmitt dated 29 November 1949. Carl Schmitt Papers, RW 265–29926/46.

<sup>29</sup> Letter from Carl Schmitt to Ernst Rudolf Huber dated 10 December 1949. In: Schmitt and Huber (2014, 355).

<sup>30</sup> Letter from Ernst Rudolf Huber to Carl Schmitt dated 14 December 1949. In: Schmitt and Huber (2014, 356).

The third source from Schmitt is an entry in his *Glossarium*. He did not mention the visit itself, but he did mention a few weeks later that he and Kirchheimer had also talked about Ernst Friesenhahn, who had been a student of Schmitt's in Bonn at the same time as Kirchheimer and was now Dean of the Faculty of Law in Bonn. Schmitt noted that he was outraged when he learned from Kirchheimer that Friesenhahn "would not bring himself to visit a person like me [Schmitt]."<sup>31</sup> How trustworthy are the sources provided by Schmitt? His letter to his wife Duška obviously contradicts an entry in his personal mailing list about complimentary copies. According to this entry, he had sent Kirchheimer his essay on Francisco de Vitoria, but according to the letter to his wife, Kirchheimer already had had the opportunity to read *Ex captivitate salus* before he arrived in Plettenberg. The most probable explanation for this contradiction is that Schmitt had made a mistake when recording what he had sent to Kirchheimer in his personal mailing list.

Based on what Schmitt reported to his wife and to Huber, it is difficult to establish Kirchheimer's intention in visiting Schmitt. Was it primarily "a stirring of human interest" in the fate of his doctoral advisor, as the latter reported to his wife? Was Kirchheimer's main interest to find out what Schmitt thought about his own important role in establishing the Third Reich? Did he want to take up the opportunity to discuss this issue directly and in person with Schmitt? Was he primarily concerned with confronting Schmitt with his complete failure to grapple with his role in the Nazi regime in *Ex captivitate salus*, which Kirchheimer had already had a chance to read before he arrived in Plettenberg? Kirchheimer was not the only one to interpret Schmitt's book as proof of his stubbornness and unwillingness to reflect upon his actions.<sup>32</sup> Or did Kirchheimer have a different motive that had less to do with Schmitt and more to do with himself? There are two sources about the visit from Kirchheimer's side, one direct and one secondary.

The direct source is a letter Kirchheimer wrote almost ten years later. In 1958, he was asked by Arvid Brødersen about his personal relationship with Schmitt. Kirchheimer had known Brødersen, who had studied sociology in Berlin, since 1929; they later became colleagues at the New School for Social Research. Kirchheimer's reply was: "I neither saw C. S. in the period between 1932 and 1949 nor maintained any relations with him at all. After the war, when I was in Germany for the US State Department, I spoke with C. S. twice. 1949 and 1953."<sup>33</sup> He also told Brødersen:

As early as 1949, when he tried to justify his behavior after 1933, I told him that the authority for his actions could only be his conscience. I have held this view from the beginning, especially in 1947 when I heard in Germany that C.S. was sent to a camp. I still think today that nobody should be held criminally or pseudocriminally responsible for their writings or their intellectual production. To a writer, the authority is the

<sup>31</sup> *Glossarium*, comment regarding the entry of 4 August 1949. Stenographic addition by Schmitt dated 23 November 1949 (Schmitt 2015, 198). The date 23 November is incorrect; the addition must have been made after 27 November 1949. I am not blaming the editors—Schmitt's stenographic notes are extremely difficult to decipher.

<sup>32</sup> For the critical comments by Ernst Niekisch, see van Laak (1993, 78).

<sup>33</sup> Letter from Otto Kirchheimer to Arvid Brødersen dated 2 March 1958. Otto Kirchheimer Papers, Series 2, Box 1, Folder 25.

reaction of the audience and their own conscience. The question of employment sanctioned and paid for by the state is of course a different matter.<sup>34</sup>

According to this letter, the two did talk about the brochure Kirchheimer had written in 1935 and which had been illegally distributed under a pseudonym and in the guise of a series of publications by Schmitt that was widely read in the German Reich. Kirchheimer added to Brødersen on this topic that on this occasion Schmitt “told me, [that he] knew that I was probably the author.”<sup>35</sup>

The second source about the visit does provide an answer to the question about Kirchheimer’s motive. In the 1960s, Kirchheimer spoke with Wilhelm Hennis a few times about his visit to Schmitt. Hennis was a student of Rudolf Smend’s and, in those days, a member of the Social Democratic Party. Hennis recounted Kirchheimer’s reports about his visit in an interview with the author more than fifty years later in 2009.<sup>36</sup> Concerning the external circumstances—it was an unannounced visit; the big car; the military uniform<sup>37</sup>—the information provided by Hennis basically corroborates what Schmitt had written to his wife. He reported that Kirchheimer had read Schmitt’s *Ex captivitate salus* and was outraged by Schmitt’s unwillingness to grapple self-critically with his personal responsibility for the Nazi regime’s policies. According to Hennis, whose memories of his conversations with Kirchheimer were permeated with highly interpretive elements, Kirchheimer considered his visit to Plettenberg first and foremost a sign of “stolze Selbstbehauptung” (“proud self-affirmation”)<sup>38</sup> vis-à-vis Schmitt. By stopping by in Plettenberg on his way to Düsseldorf, Kirchheimer wanted to demonstrate to Schmitt the extent to which the political tide had turned, appearing in the uniform of a member of the American occupying forces and a big car driven by a chauffeur. Hennis’s interpretation of this was that Kirchheimer wanted to show that he, who in 1933 had been one of the people Schmitt had wanted to see driven out of Germany once and for all in his Nazi propaganda writing, had succeeded in surviving, and in a dual sense: as a Jew and as a leftist. He had weathered being persecuted by the Nazi regime and had now come back to his home country as a US citizen and in an important position serving the State Department. Hennis had talked about this with Kirchheimer several times, and I find his interpretation convincing.

Kirchheimer’s visit made waves. There was “continuing reserve” (Wiggershaus 1995, 470) toward Kirchheimer from the core group of the Frankfurt School after he had mentioned his visit to Theodor W. Adorno. Perhaps—but this is pure speculation—the visit

<sup>34</sup> Letter from Otto Kirchheimer to Arvid Brødersen dated 2 March 1958. Otto Kirchheimer Papers, Series 2, Box 1, Folder 25.

<sup>35</sup> Letter from Otto Kirchheimer to Arvid Brødersen dated 2 March 1958. Otto Kirchheimer Papers, Series 2, Box 1, Folder 25.

<sup>36</sup> Wilhelm Hennis in a conversation with the author, 26 September 2009.

<sup>37</sup> The fact that Kirchheimer appeared in an American uniform was also reported by Ernst Hüsmert, the administrator of Schmitt’s estate, see e-mail from Reinhard Mehring to the author dated 10 March 2019. Hanna Kirchheimer-Grossman insisted that her father disliked any military uniform and that he never had to wear a uniform while he was serving with the State Department (Hanna Kirchheimer-Grossman in a conversation with the author, 14 September 2021).

<sup>38</sup> Hennis used this expression in the conversation with the author, 26 September 2009.

was one of the reasons why Horkheimer and Adorno did not make the logical decision to ask Kirchheimer to be involved in reestablishing the Institut für Sozialforschung (IfS), which was preparing to relocate in Frankfurt. Schmitt, on the other hand, immediately wrote to his wife and Huber and proudly told his circle of friends and followers about it. The visit did not change his attitude toward returning émigrés. In June 1949, he had written the following about the philosopher Karl Löwith in a letter to Hans Paeschke, the editor of the journal *Merkur*: “the émigrés are unpredictable and mostly potentially deranged in the moral sense.”<sup>39</sup> After Kirchheimer’s visit, Schmitt also expressed his outrage about the way he felt he was being treated again. The conservative legal scholar Friedrich A. von der Heydte, whom Schmitt had dismissed at Cologne University in the spring of 1933 because he was a student of Hans Kelsen’s, had criticized Schmitt’s return to the public eye in the Federal Republic of Germany. On this occasion, Schmitt wrote in a letter to Ernst Forsthoff four days after Kirchheimer’s visit: “Never in the 12 years of the Hitler period was such a heinous and spiteful act committed against a Jewish colleague.”<sup>40</sup> A few weeks after Kirchheimer’s visit, on 12 January 1950, Schmitt entered the following in his *Glossarium*:

When we began to disagree, the Jews sub-introduced.<sup>41</sup> Today, these people who had sub-introduced themselves are experiencing restoration with colossal claims for restitution and repayments. But still, the sub-introduced are even worse than the returning émigrés who relish their revenge. They should be ashamed of accepting the dollar (Schmitt 2015, 221).

Two months later, on 17 March 1950, he commented about returning émigrés: “Those who did emigrate are declaring those who did not to be enemies of the country” (Schmitt 2015, 226). Schmitt’s militant hatred of Jews and émigrés was clearly still as virulent as ever.

#### 4. Schmitt’s return to the public eye

Schmitt had been banned from publishing under Allied occupation, but that ban was automatically lifted with the founding of the Federal Republic of Germany in 1949. He immediately contacted various publishers and, in the span of only a few months, he was able to present four monographs to the public under his own name: *Die Lage der europäischen Rechtswissenschaft* [The situation of European legal scholarship], *The Nomos of the Earth*, “A Pan-European Interpretation of Donoso Cortés,” and *Ex captivitate salus*. He had already written the first three during the final years of the war. The following almost forty years stand in stark contrast to this flood of publications, as there is nothing really new in Schmitt’s postwar oeuvre after 1950. Virtually without exception, Schmitt merely took

39 Quoted in van Laak (1993, 149).

40 Letter from Carl Schmitt to Ernst Forsthoff dated 1 December 1949. (Schmitt and Forsthoff 2007, 59).

41 The verb “*subintroduzieren*,” which Schmitt uses here, does not exist in German. As Schmitt used it in this particular context, it can be assumed to mean: “to come in and assume a leading position in place of us.”

up and pursued motifs from Weimar and deliberations from the Nazi period and interpreted and commented on his own work.

The booklet *Die Lage der europäischen Rechtswissenschaft* was based on lectures he had repeatedly given abroad in 1943 and 1944 and reworked in 1950. He continued to believe that the liberal concept of the law was unraveling, but now for a different reason than in his other writing after 1933. Because of the war, legislative procedures had been expedited in all European states, and new laws dealt with more issues, so legal scholars were stripped of opportunities to provide input. The task of guiding the economy had further accelerated legislative processes in the modern interventionist state. In light of this, Schmitt spoke of a “motorized legislature” (Schmitt 1950b, 404). He asserted that the law was “transforming itself into a means of planning, and the administrative act into an act of guidance” (Schmitt 1950b, 407). What options were there in this situation, which Schmitt felt was critical for legal thought? One way out was to draw on Romantic legal theorist Friedrich Karl Savigny and his early nineteenth century doctrine of sources of the law. The latter stated that “law as a concrete order” was not set out intentionally—as it was later also understood in the positivism criticized by Schmitt—but arose in an unintentional development. Only then was it recognized as such by professional legal experts, who proceeded to shape it into systematic forms. Schmitt believed that Savigny’s doctrine was particularly topical because it formulated an antithesis to the mechanization of the law. Turning to Savigny would enable legal scholarship to “distance itself” (Schmitt 1950b, 414) in a reflective manner from the legality of the state based on laws.

This text can be read as a modification of his concrete-order thinking at the beginning of the Nazi regime. Despite all his talk of a concrete order, Schmitt had been unable (or unwilling) to provide a substantial criterion for distinguishing an order that was concrete in the positive sense from one that was merely factually concrete. By referring back to Savigny’s doctrine of sources of the law, Schmitt overcame this shortcoming using institutional means: it was legal scholarship that decided what was the concrete order, and thus the law, in an order that had arisen in an unintentional development. For a law professor who had played a decisive role in legitimizing the destruction of the rule of law in Germany after 1933 to invoke legal scholarship as the guardian of a European awareness of the law, this “bordered on chutzpah” (Neumann 2015, 507).<sup>42</sup>

Schmitt’s studies on Shakespeare became his main work in the 1950s, even if he only finalized a few of them, and he did make at least some new points. Schmitt was a passionate theatergoer, and as a *Preußischer Staatsrat* (Member of the Prussian State Council) during the Nazi period, he had had the privilege of a box of his own in the Theater am Gendarmenmarkt, one of Berlin’s major theaters at the time, where he had watched the renowned productions of *Hamlet* and *King Lear* multiple times (see Mehring 2021, 241–253). Even in *The Nomos of the Earth*, Schmitt had explained the representations of characters in Shakespeare’s dramas with the advent of the “great men” (Schmitt 1950d,

42 The version of his lecture published in 1950 includes a final section that unequivocally no longer bears the signum of the years 1943/44. In that section, legal scholarship is described as the “final refuge of awareness of the law” (420), the validity of the principles of “recognition of the individual based on mutual respect” (422), and “due process of law without which no justice exists” (423).

144) to neutralize the religious conflicts of medieval Europe in the sixteenth and seventeenth centuries. In 1952, he wrote a brief preface to British literary critic Lilian Winstanley's book *Hamlet and the Scottish Succession*, which his daughter Anima translated into German. In his preface to the book, which had first been published in Great Britain in 1921, he self-confidently ignored the criticisms of Winstanley's interpretation that historians had raised at the time (see Höfele 2014, 15–25). Instead, he followed the author's argument and concluded that a play became a tragedy only if there was an "urgent historical presence" (Schmitt 1952a, 168) at the core of its plot. Shakespeare had used Hamlet's character to highlight the constellation of the conflict around the contemporary king, James I, and the audience of the day was fully aware of this. To explain this "theatricalization of one's own historical being" in Shakespeare's play to his readers, Schmitt mentioned the events of the "Night of the Long Knives" familiar to the Berlin theater audience of the summer of 1934.<sup>43</sup>

Four years later, Schmitt published the book *Hamlet or Hecuba: The Intrusion of Time into the Play*. Even the subtitle revealed the author's rejection of the theory of the autonomy of art. In Homer's *Iliad*, Hecuba was the wife of Priam, the last Trojan king, and became Ulysses's slave after her husband and sons had died. Because of her fate, she is considered to be the embodiment of the worst that can happen to a woman in war. In Shakespeare's *Hamlet*, her fate is the subject of a play within the play, and an actor portraying Hecuba must weep when declaiming the death of Priam. Hamlet wonders whether he should weep, too, but does not.<sup>44</sup> Yet Hecuba's fate and the question of empathy with the suffering of others played no role at all in Schmitt's interpretation, the title he selected for the book notwithstanding. Instead, he deciphered two intrusions of time in the play. One was tabooing the complicity of Mary, Queen of Scots, in the murder of her husband. Schmitt believed that in the piece, the murderous mother was to "be left exclusively to her own conscience. Strange revenge drama!" (Schmitt 1956, 14) The second intrusion was Shakespeare's transformation of the figure of the avenger into a melancholic inhibited by unceasing reflection. Schmitt's book made an argument both for the political stakes of art and the continued mythic foundation of politics.<sup>45</sup>

*Hamlet or Hecuba* was not met with applause from the experts in Shakespeare studies. Schmitt was furious about negative reviews and responded to two critical newspaper reviews of his book with the absurd accusation that the authors had criminalized him as a "disturber of the peace" and an "aggressor" (Schmitt 1957b, 138). Philosopher Hans-Georg Gadamer argued in his critique that he was sympathetic to Schmitt's idea of examining—from the perspective of a historian—how the relationships between the characters in a play were interwoven with the personal and political constellations of the time of its

43 Schmitt used this comment to set the stage for his interpretation of his essay "Der Führer schützt das Recht" [The Führer is protecting the law], which he launched soon thereafter and according to which this essay had been a covert and courageous criticism of the murders committed on 30 June 1934, which readers of a later era would be unable to recognize.

44 During the German Empire, the quote from Shakespeare became a well-known saying, but in slightly altered form. "That's Hecuba to me," said Chancellor of the Reich Otto von Bismarck in a famous speech before the Reichstag in 1887, seeking to express that he was entirely indifferent about the independence of Bulgaria, which was the subject of fierce public discussion at the time.

45 See Meierhenrich and Simons (2016b, 44–46).

creation. But Schmitt had “underestimated the difficulty of this task” and thereby succumbed to a “false historicism” (Gadamer 1965, 519).

Most contemporary interpretations of Schmitt’s book discuss intertextual aspects and Schmitt’s theory of tragedy, his aesthetics of reception, or his brief remarks on Walter Benjamin’s theory of baroque tragedy.<sup>46</sup> Schmitt has rightly been criticized for developing a criterion of the tragic in his book that only modern tragedy, not classical tragedy, can fulfill (see Heller 2019). In addition, I think Schmitt’s interpretation of the play should be understood mainly as an update to suit his own ends. I see an intrusion of urgent historical presence into Schmitt’s particular interpretation of the play in two senses. For one thing, his interpretation of the accepted taboo restated his argument for societally agreed amnesia regarding the murders during the Nazi regime. And for another, he made the character of Hamlet a symbol of the European intellectual characterized by the imbalance of thinking and acting and by paralysis through introspection. Hamlet, alias James I, was born “literally from the womb immersed in the schisms of his era” (Schmitt 1956, 27)—no wonder that he became so duplicitous and learned how to deceive his enemies. Schmitt attempted to place himself in the proximity of the threatened intellectual “great reader and writer of books” (Schmitt 1956, 28).

Another *Preußischer Staatsrat*, Gustaf Gründgens, played Hamlet in the theater productions that Schmitt had attended in Berlin. Gründgens enjoyed even greater success in the role of Mephisto in Goethe’s *Faust*.<sup>47</sup> What if Schmitt had declared Gründgens’s inimitably diabolical performance of Mephisto to be the archetype of the modern intellectual instead of Hamlet? He would have mapped out a much more accurate self-portrait of his own political role using Mephistopheles as a figure from Shakespeare’s plays (see Mehring 2021, 242).

Until his *Theory of the Partisan* in 1963, Schmitt did not publish any work as significant as his earlier oeuvre. As he aged, he was increasingly concerned with the “proper” way of reading his work (see van Laak 1993, 67–71). An important element of this self-referential nature of his late oeuvre was the tirelessness with which Schmitt “discovered” the destinies of thinkers from European intellectual history in whom he sought to see the “tragedy” of his existence reflected—among them Niccolò Machiavelli, Thomas Hobbes, Benito Cereno, Donoso Cortés, and Alexis de Tocqueville. Schmitt made literary and mythical figures such as Hamlet and Epimetheus into historical “archetypes” of his own destiny, too. He orchestrated the reception of his works, sending out a large number of copies of his writing and organizing reviews to be written by people in his circles.

There is one exception to be found among his more aesthetic writings and his comments written in retrospect, namely his 1952 piece *Rechtsstaatlicher Verfassungsvollzug* [Execution of the constitution under the *Rechtsstaat*]. Published under his name the same year in the form of an independent brochure, the text is based on a legal opinion he had prepared for the Buderus-Röchling steelworks (see Schmitt 1952b). The company wanted to take legal action before the *Staatsgerichtshof* of the *Land* Hesse (see List of German Courts) to prevent its nationalization under Article 41 of the Constitution of Hesse. In

46 See Höfele (2014), Pan (2016), and the contributions in *Telos* No. 153 (Winter 2010).

47 Klaus Mann, a son of Nobel laureate Thomas Mann, based his most famous novel *Mephisto*, which he wrote in his Amsterdam exile in 1936, on the career of Gustaf Gründgens.

a sense, working on the legal opinion “reinvigorated” (van Laak 1993, 137) Schmitt again, partly because he could link up to one of the legal topics he had worked on previously, and partly because the elite of constitutional law specialists was involved in the proceedings before that court and later the Federal Constitutional Court. Writing to Ernst Jünger, Schmitt described his own role in the proceedings as bringing “something new to the attention of the judges in great haste after things had been picked apart for two years.”<sup>48</sup> In his legal opinion, he did not dispute the legality of Article 41 of the Hessian Constitution but, rather, the legality of the specific instance of nationalization. Schmitt asked whether that article made it legal to directly dispossess property and stated that it did not. Nationalization required a law adopted by the parliament, he asserted, but such a law did not exist, for which reason this instance of nationalization was null and void from the outset. The judges at the *Staatsgerichtshof* of the *Land Hesse* came to a different ruling. They acknowledged the nationalization of some of the companies in the Buderus group but established considerable obstacles for its implementation. In practice, only some parts of the group were nationalized because of transactions within it as well as demands for large amounts of compensation. And overall, Schmitt was pleased to see his opinion prevail.<sup>49</sup> For, in 1965, the government of the *Land Hesse* transferred its own parts of the group back to the private owners. Ultimately, this legal battle became a milestone in German jurisprudence as an important victory of the conservatives in public law—even without Schmitt’s help.

## 5. Kirchheimer as a political scientist

With their decidedly empirical orientation, Otto Kirchheimer’s works from the 1950s stood in stark contrast to Schmitt’s legal normativism and his interpretations founded in the history of theater. Kirchheimer wrote a number of essays on the transformation of political orders in modern industrial societies. The geographical focus of these studies was on the newly established Federal Republic of Germany as well as on other Western European democracies, the US, and the German Democratic Republic. He was particularly interested in the changes to the party systems, the changing role of the parliamentary opposition, the influence of trade associations and interest groups, the strengthening of the bureaucracy and the executive, and the political attitudes and expectations of citizens in modern democracies.

Some of these works were nothing less than counterpoints to Schmitt; others piqued Schmitt’s interest. Among the studies Schmitt read immediately was Kirchheimer’s essay “The Waning of Opposition in Parliamentary Regimes,”<sup>50</sup> which was based on lectures he gave in the US and Europe in 1956. It was published in 1957 in *Social Research*, the journal of the New School for Social Research. The German translation by Gurland was published the same year in the *Archiv für Rechts- und Sozialphilosophie* (ARSP)—none other than the

48 Letter from Carl Schmitt to Ernst Jünger dated 24 March 1952 (Schmitt and Jünger 1999, 254).

49 Letter from Carl Schmitt to Ernst Forsthoff dated 2 August 1965 (Schmitt and Forsthoff 2007, 212).

50 Kirchheimer (1957a). The following page numbers refer to this text.

peer-reviewed academic journal of philosophy that Schmitt's younger students had established as a counterweight to the public law journal *Archiv des Öffentlichen Rechts*, which was published by students of Smend's.

First, Kirchheimer offered his readers a typology of various forms of political opposition in parliamentary democracies. The three types, which he described in detail using examples from various European countries, were “classical parliamentary opposition” (392), “opposition of principle” (392), and, as a third “counterconcept” (392), the waning of the opposition, which he observed in the majority of democracies of the day. When sketching out this third type, Kirchheimer drew on the description of constellations of coalitions in Austria and Italy after World War II. He considered Austria to be a model of the “elimination of major political opposition through government by party cartel” (300). He described extensively how it came about that the socialist and the conservative parties, which were roughly the same size, managed to agree on a system of carefully negotiated cooperation, thereby representing almost 90 percent of the electoral votes in total, and he listed the large number of details laid down in their coalition agreements. Kirchheimer used sharp words in his criticism of the Austrian model. Because of the pacts between the two major coalition parties, there was now an “absence of the opposition's control function” (305). He described Italy as a case in which the “opposition of principle,” the Italian Communist Party (PCI), was so strong that the other parties had formed a kind of defensive cartel that had led to serious distortions of parliamentary representation.

Besides the forces favoring such cartels, such as the specific party constellations in Austria or Italy, Kirchheimer considered the societal factor driving such coalitions to be the “emergence of a substantial new middle class” (311) in the modern industrialized countries. This continually growing class consisted of skilled manual workers, mid-level civil servants, and employees in very similar economic and social psychological circumstances. Their consumer expectations of constant increases in their material standard of living as well as the services they expected of the state were generally the same. Almost all the political parties considered the new middle class to be important in terms of electoral strategy and oriented their actions and their programs toward this target group which, for its part, expected the political community to quickly reward their electoral votes. These expectations in turn made it completely unattractive for any parliamentary party to take an oppositional role because it could satisfy the needs of its voters much more effectively by being part of the government.

The references Kirchheimer provided for his diagnosis of society were current works by sociologists David Riesman, Helmut Schelsky, and Siegfried Landshut. Unlike them, however, he did not assume that the trend toward a uniform middle-class society would encompass everyone to the same extent. Culturally speaking, modern society may have become a mass society, but socially, it continued to be a class society. Kirchheimer countered the hypotheses of the end of class society by stating that severe poverty and “*classes dirigeantes*” (313) continued to exist—yet they had hardly any opportunities for political representation; he mentioned some kinds of pensioners, low-level employees, and small business owners as those who had suffered most from the societal changes. These were the sections of society most likely to vote for the extreme right-wing “opposition of principle” parties. Overall, however, Kirchheimer believed that to the extent that the political

power of a party was measured by the satisfaction of the groups it represented, a parliamentary opposition designed for the long term had lost its projects for the future.

Kirchheimer used a number of metaphors for the “Waning of Opposition” in the title of his essay. The qualifying nouns “desiccation” (300), “erosion” (300), and “vanishing” (300) are to be found in a single paragraph and were intended to designate an irreversible trend. Kirchheimer’s conclusion was clear: the cartel-like coalitions in Austria and Italy would not remain exceptions specific to those countries; instead, grand coalitions were to be expected soon in other European countries, too. The trend was the same in almost all postwar democracies: freezing or fencing in any political opposition whose aim was beyond the framework of the existing societal order. This diagnosis was the greatest imaginable contrast to Carl Schmitt’s efforts to conjure up political disintegration and civil wars as the inevitable result of granting rights to the opposition and permitting a plurality of parties.

A second focus of Kirchheimer’s research was political parties. In comparative political science, a subdiscipline of political science, he is still known to this day for his studies on party typology. His diagnoses are part of the canon of political science, too, and the research literature unanimously credits him with coining the term “catch-all party.”<sup>51</sup> Kirchheimer’s writing on this subject is an amalgamation of personal observations, theoretical assumptions about changes in the social structure of Western societies, empirical sociology of parties, deliberations from the economic theory of politics, and numerous case studies he learned about from reading various European newspapers and traveling to various Western European countries.

Kirchheimer’s interest in questions of party typology had its roots in the Weimar Republic and was sparked by the condition of the Social Democratic Party of Germany (SPD) at the time. The term “catch-all party” occurs for the first time in Kirchheimer’s publications in his 1954 essay “Notes on the Political Scene in Western Germany.”<sup>52</sup> However, he did not yet use it consistently and as a fixed designation for this type of party, but only sporadically and metaphorically. He coined it in his effort to describe a transformation in the target group orientation of the Christian Democratic Union of Germany (CDU) and the SPD in the electoral campaign of 1953. He called the CDU a “conservative catch-all party” (262) because it had succeeded in winning votes even beyond the traditionally conservative milieus. At this point, he still considered it an open question whether “the SPD [would] develop into a catch-all mass party rather than a democratic working-class party” (263).

Kirchheimer’s innovative use of the term can be traced back further, to the intelligence reports about the GDR he prepared for the State Department in 1950. In a report dated 24 May 1950, he wrote the following: “The National Front has become the catch-all organization for political activities emanating from East Germany which are designed

<sup>51</sup> See, among a number of other authors, Sartori (1976, 138), Krouwel (2003, 24), Allen (2009, 636), Mair (2013, 82), and Llanque (2021).

<sup>52</sup> See Kirchheimer (1954a). The following page numbers refer to this text.

to appeal to a non-communist public all over Germany.”<sup>53</sup> Here, the term “catch-all” appeared in an entirely different context; after all, the parties and mass organizations in the GDR had been forced to amalgamate into the *Nationale Front*. In a later memorandum for the State Department about the Bundestag election of 6 September 1953, he wrote “catch-all All-German bloc (BHE),”<sup>54</sup> and in his later analysis of the outcome of the election, “[w]ith the specter of a socialist government fading and potential conflicts within the CDU enhanced by its expansion into a middle class catch-all, centrifugal tendencies may be expected to arise.”<sup>55</sup> As for the performance of the Free Democratic Party (FDP), he added, “The FDP has managed to avoid major losses, but the general obliteration of denominational lines robbed the party of any chance of serving as a Catch-all for the Protestant vote.”<sup>56</sup> As he used the term, Kirchheimer could apparently envisage multiple possible “catch-alls” for various distinct groups of voters. Since he first used the term “catch-all” in these documents, it should be safe to assume that the wording “catch-all party” came about during coffee break discussions among Kirchheimer’s group at the State Department. Kirchheimer developed his new party typology from these initial conceptual exercises within a few years. His deliberations culminated in the 1960s in the essay “The Transformation of the Western European Party Systems” (see Kirchheimer 1966),<sup>57</sup> which was published posthumously.

## 6. At a distance: More correspondence and another meeting

Kirchheimer’s surprise visit to Plettenberg in November 1949 did not revive the close relationship from the late 1920s. Schmitt’s estate includes a reprint of Kirchheimer’s essay “The Act, the Offense, and Double Jeopardy” (Kirchheimer 1949a), which had been published in the prestigious *Yale Law Journal*, with a personal dedication “with best recom-

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53 Otto Kirchheimer, *The State of East Germany 1949–50*. Intelligence Report 5230 dated 24 May 1950, p. 12. National Archives at College Park, Maryland. General Records of the Department of State. Record Group 59. Intelligence Reports, 1941–1961 (National Archives Microfilm Publication M 1221).

54 Block der Heimatvertriebenen und Entrechteten (BHE, League of Expellees and Those Deprived of Rights). Otto Kirchheimer, *The West German Election Campaign*. Intelligence Report 6378 dated 13 August 1953, p. 2. National Archives at College Park, Maryland. General Records of the Department of State. Record Group 59. Intelligence Reports, 1941–1961 (National Archives Microfilm Publication M 1221).

55 Otto Kirchheimer, *The West German Bundestag Elections of 1953*. Intelligence Report 6426 dated 6 October 1953, p. 4. National Archives at College Park, Maryland. General Records of the Department of State. Record Group 59. Intelligence Reports, 1941–1961 (National Archives Microfilm Publication M 1221).

56 Otto Kirchheimer, *The West German Bundestag Elections of 1953*. Intelligence Report 6426 dated 6 October 1953, p. 5. National Archives at College Park, Maryland. General Records of the Department of State. Record Group 59. Intelligence Reports, 1941–1961 (National Archives Microfilm Publication M 1221).

57 For a detailed reconstruction of the hypothesis of the catch-all party in Kirchheimer’s oeuvre, see Buchstein (2020b, 113–137) and Llanque (2021).

mendations.”<sup>58</sup> It is no longer possible to determine whether Kirchheimer gave Schmitt the reprint during his visit or sent it later.

The next documented contact between the two of them is Schmitt's mailing of his booklet *Die Lage der europäischen Rechtswissenschaft* to Kirchheimer in March 1950.<sup>59</sup> He did not get a response. In November 1951, Schmitt sent him a catalog of his publisher's featuring his works.<sup>60</sup> Again, there was no response. In the spring of 1952, Schmitt took the initiative again and mailed him a copy of the legal opinion he had prepared for the Buderus-Röchling steelworks,<sup>61</sup> which sought to take action against its partial expropriation by the government of the *Land* Hesse. He knew that Kirchheimer was definitely interested in this topic since he had published a book and a few articles on the subject of expropriation during the Weimar Republic in which he had contradicted Schmitt. We can now no longer ascertain to what extent Schmitt was also aware that Kirchheimer had argued for far-reaching nationalizations in the memoranda he had prepared for the OSS and was sympathetic to the socialist 1946 Hessian Constitution.

This time, Kirchheimer responded in a letter dated 4 May 1952, his first response to Schmitt two and a half years after his visit in November 1949. He first expressed his condolences on the death of Schmitt's wife Duška. She had passed away about eighteen months earlier so these condolences indicate that the two had had no personal contact since then. In his letter, Kirchheimer went on to thank Schmitt for sending the legal opinion to Washington. However, he commented critically that he could not “fully agree with your differentiation between expropriation through law that was still permissible and [...] expropriation through reinterpretation of the constitution, which was not permissible.”<sup>62</sup> This, however, was the main point of Schmitt's line of argument to avoid expropriation, which did not prevail in the trial. Kirchheimer also very briefly commented on Schmitt's book *The Nomos of the Earth*. Since sales of the book had stalled in the autumn of 1952, friends of Schmitt's bought the remaining copies so that he could disseminate them free of charge. He mailed complimentary copies specifically to the US to become better known there (see van Laak 1993, 55). Kirchheimer had apparently also received one of these copies. The only mention of this in his letter to Schmitt dated 4 May 1952 was the vague comment that he had read it “with great pleasure.”<sup>63</sup> He closed his letter with the prospect of exchanging views about these subjects in a personal conversation if the opportunity arose.

Schmitt responded shortly afterwards, in June, seeking to discuss the role of the *Bundesverfassungsgericht* in the legal and political system of the newly established Federal Republic of Germany with Kirchheimer.<sup>64</sup> Kirchheimer responded three months later, on 8 September, writing just a few lines. In the meantime, the court in Hesse had rejected

58 Carl Schmitt Papers, RW 265–25658.

59 Mailed on 19 March 1950. List by Carl Schmitt about mailing complimentary copies. I obtained this information thanks to Gerd Giesler.

60 Mailed on 16 November 1951.

61 Mailed on 3 April 1952.

62 Letter from Otto Kirchheimer to Carl Schmitt dated 4 May 1952. Carl Schmitt Papers, RW 265–7598.

63 Letter from Otto Kirchheimer to Carl Schmitt dated 4 May 1952. Carl Schmitt Papers, RW 265–7598.

64 This letter has been lost. The contents can be reconstructed from Kirchheimer's letter dated 8 September 1952.

the claims of the Buderus-Röchling steelworks. Kirchheimer commented favorably on the decision. Regarding the *Bundesverfassungsgericht* in Karlsruhe, he wrote to Schmitt: “sometimes I take a look at the decisions from Karlsruhe; since the legislature did not give much thought to the inherent limits of constitutional jurisdiction when delineating them, the court has to take care not to reduce its entire jurisdiction to absurdity.”<sup>65</sup> This statement covers the concern already discussed in the consultations of the *Parlamentarische Rat* (Constitutional Council) that the newly established court would dominate politics in the Federal Republic in the future. This concern also referred to Schmitt’s diagnosis of a juridification of politics. In 1953, he noted in his *Glossarium* that the *Bundesverfassungsgericht* was in an unresolvable dilemma. It would either have to avoid all important decisions, thereby calling its own right to exist into question, or become “a breeding ground for apocryphal acts of sovereignty.”<sup>66</sup> Schmitt believed the court had opted for the latter. In his letter, Kirchheimer was more positive about the *Bundesverfassungsgericht*. He also called himself “schreibfaul” (lazy about writing, i.e., a poor correspondent) and that he preferred reading Marcel Proust and Graham Greene over memoranda from the State Department. He concluded his letter responding to Schmitt’s suggestion that they meet in person by agreeing that might be possible in late 1952 or early 1953, although he would be traveling extensively in Europe.

Kirchheimer’s longest postwar letter to Schmitt was dated 27 November 1952.<sup>67</sup> It, too, is a response to a letter from Schmitt which has been lost. Schmitt’s letter was presumably from October or early November 1952, since in his response to it, Kirchheimer mentioned Schmitt’s disquiet about a comment in a devastating critique by Golo Mann of *The Nomos of the Earth* which had been published in the October issue of the magazine *Der Monat*. Schmitt, who in his letters and diaries regularly made disparaging remarks about Golo Mann’s father, the “emigrant” Thomas Mann, and his family, once more felt he was being persecuted. Kirchheimer wrote him about Mann’s critique, “you need not be particularly unsettled by it—apart from the footnote.” In this footnote, Golo Mann had retracted his previous characterization of Schmitt as a “Nazi crown jurist,” replacing it with his assessment that Schmitt had interceded on behalf of the Nazi regime coming “from the outside,” which he considered no less disgraceful.<sup>68</sup> So once again, it posed the question to what extent Schmitt had been a staunch Nazi in his innermost being while frenetically supporting the Nazi regime; this matter was relevant to the reception of Schmitt.

65 Letter from Otto Kirchheimer to Carl Schmitt dated 8 September 1952. Carl Schmitt Papers, RW 265–7599.

66 *Glossarium* entry of 5 February 1953 (Schmitt 2015: 291).

67 Handwritten letter from Otto Kirchheimer to Carl Schmitt dated 27 November 1952. Carl Schmitt Papers, RW 265–7600. The following quotes are from this letter.

68 As already mentioned, the term “crown jurist of the Third Reich” was coined by Waldemar Curian, following up on Kirchheimer’s characterization of Schmitt (see Chapter 7, p. 211–212). The entire text of Golo Mann’s footnote reads as follows: “In issue 45 of this magazine, I called Carl Schmitt a ‘Nazi crown jurist.’ Although Schmitt at times sought to serve Nazism with his technique of thinking, he was too much of an outsider, which is why this characterization is not quite fitting; I hereby retract it for this reason. G.M.” (Mann 1952b, 89). This statement by Golo Mann is to be found as an aside in his comments on historian Ludwig Dehio’s hypotheses about European hegemonic struggle as the cause of World War II in the June 1952 issue of *Der Monat* (Mann 1952a, 329).

Instead, Kirchheimer suggested that Schmitt regard Mann's review as "an approach for a fruitful criticism—the relationship of your thinking to the question of historical reality."

Kirchheimer took Mann's criticism as an occasion to look back on his essay "Remarks on Carl Schmitt's 'Legality and Legitimacy,'" which he had co-authored with Nathan Leites exactly twenty years earlier.<sup>69</sup> He wrote to Schmitt:

You will remember that even in my co-authored essay from 1932 on legality & legitimacy, I tried to confront the conceptual realism with the actual tendencies of institutional development; that does not meet the internal consistency of your train of thought, but it may well shift the perspective somewhat.<sup>70</sup>

Kirchheimer directed his criticism at some of Schmitt's students, too:

When reading [Werner] Weber's little book [<sup>71</sup>], it became clear to me again that critical engagement with the conceptual structure of constitutional theory, which Weber took on board in toto, is overdue; what a pity that there doesn't seem to be anyone in Germany who is taking on such fruitful work; although German constitutional theory, to the extent that it exists intellectually, relies completely on your body of thought, it would benefit more from it if it complemented the act of receiving ideas with critical reception.

Concerning Ernst Forsthoff, Kirchheimer let Schmitt know that he had read Forsthoff's paper on the position of the political parties in terms of constitutional law but had serious doubts that Forsthoff did justice to the subject in the twentieth century, in light of his skepticism with regard to political parties.<sup>72</sup>

In all these points, Kirchheimer was fundamentally concerned with the relationship between Schmitt's general theoretical approach and the empirical "question of historical reality,"<sup>73</sup> which he criticized as being disconnected from one another. He had written the letter by hand on American Christmas-themed paper, embellished with some kitschy Renaissance-style angels. It animated Schmitt to note "Kirchheimer!" on it; he apparently found it as inappropriate as it was typical of Kirchheimer's behavior to turn a letter of Christmas greetings into a critical statement on political theory.

A year before Schmitt's 65th birthday in the summer of 1953, the editors of a planned *Festschrift* invited Kirchheimer to contribute a piece. He rejected the request, as did Ernst Friesenhahn.<sup>74</sup> Five years later, he explained his decision to Arvid Brødersen by noting that he sought to avoid the appearance of contributing to publicly enhancing Schmitt's

<sup>69</sup> See Chapter 6, p. 151–157.

<sup>70</sup> This quote and the following ones are from the handwritten letter from Otto Kirchheimer to Carl Schmitt dated 21 November 1952. Carl Schmitt Papers, RW 265–7600.

<sup>71</sup> This refers to Weber (1951).

<sup>72</sup> In this article, Forsthoff calls for party office and parliamentary mandate to be made incompatible, among other things, see Forsthoff (1950, 23–25).

<sup>73</sup> Handwritten letter from Otto Kirchheimer to Carl Schmitt dated 21 November 1952. Carl Schmitt Papers, RW 265–7600.

<sup>74</sup> Letter from Otto Kirchheimer to Ernst Friesenhahn dated 15 November 1952. Otto Kirchheimer Papers, Series 2, Box 2, Folder 61.

reputation among German constitutional theorists.<sup>75</sup> Meanwhile, in late 1952, Schmitt had sent him the German edition of Lilian Winstanley's book *Hamlet and the Scottish Succession* for Christmas in 1952.<sup>76</sup> Kirchheimer thanked him on 28 January 1953 without going into Schmitt's peculiar interpretation of the theme of Hamlet or his remark about what became known as the "Night of the Long Knives" in 1934. In his lost letter to Kirchheimer, Schmitt had obviously suggested another personal meeting with Kirchheimer, and the latter responded positively to this but without making any concrete suggestion.<sup>77</sup>

Kirchheimer contacted Schmitt again in February 1953 from the residence of Richard Schmid, President of Stuttgart's *Oberlandesgericht*. He told him that he would be in his vicinity for professional reasons, presumably in April or May, and would give him a telephone call to arrange a meeting, should the occasion arise.<sup>78</sup> Schmitt responded to him immediately but this letter has been lost, too. On 28 March, Kirchheimer suggested to Schmitt that they meet in Düsseldorf or that he visit him in late May.<sup>79</sup> They ultimately met for a few hours in Cologne in June 1953.<sup>80</sup> Schmitt was accompanied by his daughter Anima. No documents about this encounter seem to have survived. It was the last time they met in person. Shortly after the meeting, on 1 July 1953, Kirchheimer sent Schmitt a letter for his 65th birthday. He told him that he had enjoyed meeting Schmitt and his daughter "recently in Cologne." He added: "Too bad we're both on opposite sides of the pond."<sup>81</sup> In my view, the friendly statements in this letter by Kirchheimer are not to be taken literally but should be interpreted as platitudes because the exchange of letters between the two came to an end for five years after this. Although Schmitt mentioned to journalist Winfried Martini in September 1953 that he wanted to ask Kirchheimer about the whereabouts of sociologist Heinz Otto Ziegler, who he—Schmitt—thought had emigrated to the United States (see Burkhardt 2013, 123),<sup>82</sup> nothing is to be found in the relevant archives relating to this question. The only contact between the two was to continue sending each other copies of reprints, albeit rarely.

In his response to this birthday letter, Schmitt sent Kirchheimer a copy of the first bibliography of his own work, which Belgian sociologist Piet Thomissen had compiled.<sup>83</sup> The next envelope that Schmitt received from Kirchheimer was labeled "printed matter": the typescript of a book review by Kirchheimer about politics and the constitution in the

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

76 This letter has been lost. The book is in Kirchheimer's estate in Albany.

77 Letter from Otto Kirchheimer to Carl Schmitt postmarked 28 January 1953. Carl Schmitt Papers, RW 265–7601.

78 Letter from Otto Kirchheimer to Carl Schmitt [no date; presumably February 1953]. Carl Schmitt Papers, RW 265–7593.

79 Letter from Otto Kirchheimer to Carl Schmitt dated 28 March 1953. Carl Schmitt Papers, RW 265–7594.

80 The exact date could not be determined.

81 ("Schade, dass der grosse Teich doch eben ein sehr wirkungsvoller Graben ist.") Letter from Otto Kirchheimer to Carl Schmitt dated 1 July 1953. Carl Schmitt Papers, RW 265–7602.

82 Schmitt was obviously not aware that Ziegler had died in military action in May 1944.

83 Mailed on 15 July 1953. List by Carl Schmitt about mailing complimentary copies.

history of the United States,<sup>84</sup> with no accompanying card or comment.<sup>85</sup> According to the surviving material in the archives, Kirchheimer sent Schmitt a reprint of his essay “Politische Justiz” [Political justice] in 1955 (Kirchheimer 1955b) and Schmitt sent him a copy of his book *Hamlet or Hecuba* in 1956 (Schmitt 1956). It seems that no letters were attached to these mailings, and apparently, neither side was particularly inspired to arrange another personal meeting after the one in Cologne.

## 7. Kirchheimer as a professor of political science in the US

Kirchheimer's contacts with his former colleagues from the Institut für Sozialforschung were complicated, which had negative impacts on his prospects for a professorship in Frankfurt. He remained close friends with Gurland, Neumann, and Marcuse; the families vacationed together, and up until his death, Kirchheimer regularly welcomed Marcuse to stay over at his place in Silver Spring.<sup>86</sup> However, his relationship with Max Horkheimer, Theodor W. Adorno, and Friedrich Pollock, who had returned to Germany, was more problematic. None of these three attempted to hire Kirchheimer at the reestablished Institut für Sozialforschung in Frankfurt. Pollock and Kirchheimer had never been friends.<sup>87</sup> Adorno considered him politically suspect because he had visited Schmitt; their correspondence dwindled to almost nothing after this.<sup>88</sup> Horkheimer and Kirchheimer had become downright hostile; from Kirchheimer's perspective, this was because he had been treated poorly by Horkheimer in New York.

The intensity of these hostilities on Kirchheimer's part is illustrated by an episode about “the chest in the basement” (Wiggershaus 1995, 534) with a complete set of copies of the *Zeitschrift für Sozialforschung* that later became one of the well-known anecdotes about the Frankfurt School.<sup>89</sup> Copies of the journal were not automatically made available to new staff members in Frankfurt but were kept in a locked chest in the basement (see Habermas 1980, 415). Kirchheimer played a key role in making all staff members aware of this old journal and making the articles on the early critical theory published in it accessible to them.<sup>90</sup> He was angry about Horkheimer's ban on student protests against an upcoming visit by Chancellor Konrad Adenauer to Frankfurt University and sought to keep the memory of critical theory's radical political past alive. Kirchheimer asked Wilhelm Hennis, who was supposed to begin working as an assistant professor for Carlo

84 Published a few months later, see Kirchheimer (1954d).

85 Carl Schmitt Papers, RW 265–7605.

86 Peter Kirchheimer in a conversation with the author, 27 April 2023.

87 Leo Löwenthal recounted this in a conversation with the author on 5 October 1988.

88 All that is to be found in Adorno's papers is a brief exchange of letters: in 1954, Kirchheimer asked him, in English, to send the manuscript of Adorno's lecture at the Deutsche Soziologentag (Conference of the German Sociological Association) in Heidelberg, and Adorno sent it to him, writing “what are you up to?” in the cover letter. Theodor W. Adorno Papers, Aa 1, 11 (K1).

89 See, among others, Wiggershaus (1995, 544), Dahrendorf (1989, 878), Albrecht et al. (1999, 264), Specter (2010, 31), and Link (2022, 256).

90 The following description is based on a conversation with Wilhelm Hennis, 26 September 2009. This episode is also reported almost verbatim in Schlak (2008, 47–49).

Schmid in Frankfurt in 1953, to purchase copies of the journal still available in a used book store in Paris and to display them in the library. Word soon got around in Frankfurt about the existence and availability of the journal. Thus, members of the younger generation at the Institut für Sozialforschung, including Horkheimer's assistant Alfred Schmidt and new staff member Jürgen Habermas, obtained easy access to the key works from the early days of critical theory. According to Hennis, Kirchheimer was particularly amused to watch Habermas criticize Horkheimer's political and philosophical positions in the early 1960s, armed with the older writing of the Frankfurt School. Against this background, it is hardly surprising that Kirchheimer's contact with Horkheimer remained sporadic from then on; it was limited to "obligatory" letters with best wishes on milestone birthdays and other absolutely necessary communications. His contribution to the 1955 *Festschrift* on the occasion of Horkheimer's 65th birthday was his essay "Politics and Justice," which had previously been published in a slightly different version in *Social Research*, in a translation by Gurland (see Kirchheimer 1955a and 1955b).

In the US, on the other hand, when a temporary position became available at the Graduate Faculty of the New School for Social Research in New York in 1954, Kirchheimer suddenly had reason to hope that he would be able to finally leave the State Department for a university. Alvin Johnson, President of the New School for Social Research, which had been founded in 1919, had established the Graduate Faculty in 1933 as the University in Exile for academic refugees from Europe. Most of its core group were veterans of practical politics from former democracies in Europe, and their research interests were oriented toward political practice. The German staff was recruited mainly from three institutions: Frankfurt University, the Kiel Institute for the World Economy, and the Deutsche Hochschule für Politik (German Academy for Politics) in Berlin. Prominent German sociologists and social democratic intellectuals such as Hans Speier, Albert Salomon, Arnold Brecht, Eduard Heimann, Hans Simons, and Frieda Wunderlich had found academic refuge there right from the outset.<sup>91</sup>

Kirchheimer was already familiar with the New School. He had received a research stipend from the Graduate Faculty from March to July 1942 to work on "Contemporary Legal Trends," and this had enabled him to keep afloat financially for several months. It also helped that his friend John H. Herz had been invited to the Graduate Faculty as a visiting professor in 1953. The position of full professor of political science had remained vacant, and it was Herz who proposed hiring Kirchheimer as his successor.<sup>92</sup> Karl Loewenstein also put in a good word for Kirchheimer with Dean Hans Staudinger.<sup>93</sup> The latter liked the idea, and the Faculty decided in March 1954 to offer Kirchheimer the position for comparative government for the academic year 1954/55. Among the reasons given for selecting him, Kirchheimer's employment at the State Department as Chief of the Central European Branch was especially important. The New School was hoping for connections to

<sup>91</sup> On the history of the Graduate Faculty at the New School for Social Research, see Friedlander (2019).

<sup>92</sup> John H. Herz in a conversation with the author, 15 November 1985.

<sup>93</sup> Letter from Karl Loewenstein to Otto Kirchheimer dated 13 June 1955. Otto Kirchheimer Papers, Series 2, Box 1, Folder 104.

political practitioners and, in particular, to potential funders in the capital, Washington. So, it appears they were not very familiar with Kirchheimer after all. Kirchheimer was able to take a leave of absence from the State Department for his tenure at the New School. The faculty's decision explicitly stated that it "should be pointed out to Dr. Kirchheimer that this appointment is only a temporary one."<sup>94</sup> Kirchheimer accepted the offer gratefully and without hesitation. Another plus was that a number of colleagues he already knew from his Berlin days during the Weimar Republic were at the New School.

Kirchheimer's professional prospects improved once again in spring 1955. The position of full professor of political science at the Graduate Faculty was still vacant. The New School had initially selected Gerhard Leibholz, a judge at the *Bundesverfassungsgericht* who also taught at Göttingen University, for this position at the urging of Arnold Brecht and Hans Staudinger. In light of the disputes around Leibholz at the *Bundesverfassungsgericht*, his supporters at the New School anticipated that he would welcome the opportunity to accept their offer. Whether the New School was poorly informed about Leibholz's personal plans or that they had unrealistic expectations about how attractive a chair in New York would be for an established German professor, the New School was surprised when he rejected the offer and felt pressured to rapidly fill the position, which had been vacant for some time. Staudinger proposed to the faculty to offer it to Kirchheimer. Only a week later, the Faculty decided "unanimously to recommend to the Administration and the Board the appointment of Dr. Otto Kirchheimer as Full Professor in the Department of Political Science."<sup>95</sup> The position was to be limited to two years initially but would then—provided there were no serious reasons against this—become a tenured position.

At the age of 50, Otto Kirchheimer finally felt he had achieved a goal he had been pursuing ever since he had planned to begin his *habilitation* in 1932 in Germany: a proper position as an academic at a university. He was formally welcomed as a new member of the Graduate Faculty in November 1955 alongside the philosopher Hans Jonas.<sup>96</sup> Writing to Smend, he proudly described his position as "successor of Arnold Brecht's."<sup>97</sup> The professorship was for comparative government. Kirchheimer also taught criminology and the political system of the US at the New School from 1955 to 1961.

## 8. Criticism of Schmittianism in German legal thought

Schmitt never publicly articulated his criticism of the Basic Law in much detail. People knew about it from conversations but had no written text to draw on. The actual criticism of the Basic Law and its interpretation by the *Bundesverfassungsgericht* came from the circle of his students who had subsequently become professors. Kirchheimer engaged with

<sup>94</sup> Minutes, Executive Faculty Meeting of 3 March 1954. New School for Social Research: New School Institutional Collections. Graduate Faculty, Minutes. NS.02.17.02, Box 1, unprocessed collection.

<sup>95</sup> Minutes, Executive Faculty Meeting of 18 May 1955. New School for Social Research: New School Institutional Collections. Graduate Faculty, Minutes. NS.02.17.02, Box 1, unprocessed collection.

<sup>96</sup> Minutes, Executive Faculty Meeting of November 1955. New School for Social Research: New School Institutional Collections. Graduate Faculty, Minutes. NS.02.17.02, Box 1, unprocessed collection.

<sup>97</sup> Letter from Otto Kirchheimer to Rudolf Smend dated 7 January 1956. Rudolf Smend Papers, correspondence with Kirchheimer.

them multiple times. He articulated his criticism of Schmitt and his students not only in conversations with German friends and in letters but also in shorter publications. He chose book reviews as his way to intervene in the German debates on constitutional theory. The first one was a review of Werner Weber's 1951 book *Spannungen und Kräfte im westdeutschen Verfassungssystem* [Tensions and forces in the West German constitutional system] for the *American Political Science Review*. In 1948, Weber had accepted an appointment to a chair of public law in Göttingen. Rudolf Smend had preferred his former student Kirchheimer for this position instead and expressed his concern to Kirchheimer about his new colleague because of his close ties with Schmitt. It was clear from Kirchheimer's response that he shared this concern.<sup>98</sup> He also told Smend about the review he intended to write about Weber's book. He summarized the essence of the review as follows: "I do not think it is very productive to deal with the current circumstances in Germany using Carl Schmitt's scarcely modified conceptual framework from the years 28–32."<sup>99</sup> Moreover, he agreed with Smend that "[Hermann] Heller [was] more productive than C.S. in the long run."<sup>100</sup> In April 1952, he asked Smend to hand the text of his then completed review over to Weber "with a proper remark"<sup>101</sup> so that, in all fairness, Weber would not find out about it only indirectly once it had been published in the United States.

The review of Weber's book was a frontal attack.<sup>102</sup> Kirchheimer probably sensed that Schmitt was full of praise for Weber's fundamental criticism of the West German constitution.<sup>103</sup> In his introduction, Kirchheimer called Weber an "intelligent and lucid writer" (220), only to add that he remained "hopelessly caught" in the "conceptual framework erected by Carl Schmitt in the late twenties and the early thirties" (220) in his efforts to analyze the political system of the new Federal Republic of Germany. Readers of the book encountered all of Schmitt's "old clichés" (220): the incontestable authority of the state, a strong and neutral executive branch, an elite at the head of state administration, and criticism of pluralism of political parties as well as of the political influence of interest groups. Kirchheimer commented sarcastically that, in hindsight, the Weimar Constitution suddenly came off as not all that bad in Weber's tract, but this served only to pave the way for an all the more vehement attack on the newly established system of the Federal Republic of Germany.

Kirchheimer countered Weber's charge of the Basic Law's misguided perfectionism by pointing out that Weber had blocked his own ability to realistically assess the functioning of the West German system because of his Schmittian conceptual framework. Weber's "complete acceptance of Carl Schmitt's conceptual framework and scale of values has stood in the way of a dispassionate analysis of the interplay between constitu-

<sup>98</sup> Letter from Otto Kirchheimer to Rudolf Smend dated 9 June 1951. Rudolf Smend Papers, correspondence with Kirchheimer.

<sup>99</sup> Letter from Otto Kirchheimer to Rudolf Smend dated 1 February 1952. Rudolf Smend Papers, correspondence with Kirchheimer.

<sup>100</sup> Letter from Otto Kirchheimer to Rudolf Smend dated 25 October 1951. Otto Kirchheimer Papers, Series 2, Box 2, Folder 19.

<sup>101</sup> Letter from Otto Kirchheimer to Rudolf Smend dated 1 April 1952. Rudolf Smend Papers, correspondence with Kirchheimer.

<sup>102</sup> See Kirchheimer (1952b). The following page numbers refer to this text.

<sup>103</sup> Letter from Carl Schmitt to Ernst Forsthoff dated 4 March 1952 (Schmitt and Forsthoff 2007, 86–87).

tional order and the social reality of the Bonn state" (220). Neither his excessive criticism of the status of the political parties in the Basic Law nor of the federal order laid down in the Basic Law was convincing, Kirchheimer claimed. Contrary to Weber's reiteration of the old clichés, Kirchheimer described the political parties and interest groups as the primary agencies of political integration whose legitimacy rested "in their ability to channel the political and social energies of their clientele of unions, economic associations or churches into political action" (221). For this reason, it was to be considered positive that they were mentioned explicitly in the Basic Law.

Three years later, Kirchheimer attacked Ernst Forsthoff, the most prominent Schmittian in Germany. He did so in his essay "Parteistruktur und Massendemokratie in Europa" [Party structure and mass democracy in Europe], published in Smend's journal *Archiv des öffentlichen Rechts* in 1954.<sup>104</sup> In a letter to Forsthoff, Schmitt had praised and thanked him for his work on parties.<sup>105</sup> Kirchheimer took a different position. He bluntly rejected Forsthoff's proposal to shield parliamentary party groups from the influence of their party leadership by making it legally incompatible to belong to a parliament and simultaneously hold a party office (see Forsthoff 1950). This proposal was based on the "mistaken assumption" (241) that it was only the parliamentary party group, not the entire party, that was tasked to design policy. If differences between authorities of the parliamentary party groups and the parties themselves arose in current-day parliamentary democracies, this was a clear indication of deeper social and political discrepancies. These would be resolved through splits between parliamentary party groups and the headquarters of political parties and the establishment of new ones, which did not require restrictions by the state.

Kirchheimer's review of the book *Wirtschaftsverwaltungsrecht* [Administrative law concerning trade and industry], published the same year by Ernst Rudolf Huber, a third student from Schmitt's circle in Bonn and later Nazi theorist, was slightly more moderate.<sup>106</sup> This may have been because Kirchheimer knew that Huber had distanced himself from Schmitt's antisemitic activities during the Third Reich. However, Kirchheimer diagnosed a certain Schmittian intellectual legacy in Huber's writing, too, describing his "continuing belief in the possibility of a neutral state with the functions of an arbitrator" (267) and criticizing, as a consequence of this, the anti-trade-union tendency of such convictions. At the same time, Kirchheimer saw the fact that the Basic Law was indeterminate in terms of economic policy, which Huber championed, as somewhat problematic for the author since he refrained from working through the various, and partially competing, imperatives of constitutional law in the context of their "proving themselves over the course of history" (268). Instead, Huber took refuge in conceptual arguments without asking himself "to what extent any correspondence [existed] between the conceptual schema and social reality" (269).

In the summer of 1956, Kirchheimer again picked a fight, this time with a professor of the younger generation, Joseph H. Kaiser, who was one of the Schmittians at the University of Tübingen and later became a confidant of Schmitt's and one of the administra-

<sup>104</sup> Kirchheimer (1954b). The following page numbers refer to this text.

<sup>105</sup> Letter from Carl Schmitt to Ernst Forsthoff dated 14 August 1950 (Schmitt and Forsthoff 2007, 76).

<sup>106</sup> Kirchheimer (1954c). The following page numbers refer to this text.

tors of his estate. His discussion of Kaiser's book *Die Repräsentation organisierter Interessen* [The representation of organized interests] was an uncompromising attack.<sup>107</sup> It started with a critique of Kaiser's methodological approach. Instead of seeking orientation in "empirical social research, which [was] being conducted in the Anglo-American and increasingly also in the Romance cultural region" (271), and instead of limiting his work, as Huber did, to legally classifying social phenomena according to the constitutional order as objectively as possible, Kirchheimer alleged that Kaiser wove "rich material from the history of ideas and contemporary history into a predetermined conceptual schema, persistently adopting Carl Schmitt's ways of thinking and forms of presentation" (271). Kaiser's argument, he stated, was based on a "concept of the political rooted in the autonomy of state and society" (271) that, when discussing the role of societal interest groups, inevitably arrived at the hypothesis that pressure groups undermined the character of the state institutions.

Toward the end of his critique of Kaiser, Kirchheimer provided insight into his own skeptical view of the role of the individual in modern society. If Kaiser was calling for a strong state because it alone could protect individuals from excessive claims by intermediary institutions, Kirchheimer had a more "ambivalent" view (275). States as well as interest groups could "easily and almost unnoticeably" (274) make service provision and protection become intertwined, as well as harassment and oppression. The best protection of the individual, he claimed, consisted in exploiting organizational rivalries and spaces between institutions. It was hardly surprising in the current "lull of the postfascist age and in the neighborhood of the Bolshevik sphere" (275) that many people sought to elude being organized by the state and in interest groups. This was the reason why Kirchheimer countered Kaiser's argument for a strong state with the point "that the individual, the state, and the societal apparatus were to work together sufficiently" (275).

Kirchheimer had attacked the four most prominent avowed Schmittians at German universities in the 1950s: Forsthoff, Huber, Weber, and Kaiser. He used the same blueprint for his interpretation and criticism for all of them, namely denouncing them all for propounding a false theory of the strong state and pointing out the lack of empirical evidence for their deliberations. Kirchheimer forced all four into the model of the Weimar controversies. His accusation that they had all remained stuck in an outdated pattern of thinking, both mentally and in their arguments, was ultimately aimed at Schmitt. His criticisms also had another subtext. Whereas he regarded the four scholars he criticized as more or less uncritical epigones of Schmitt's, he considered himself capable of critically receiving Schmitt's oeuvre with incomparably more independence.

## 9. Conclusion: The new constellation

By the mid-1950s, Schmitt and Kirchheimer's relationship had become established in a new constellation. The tables had turned. Schmitt had not succeeded in returning to a professorship, whereas Kirchheimer had finally realized his dream—which he had had at least since 1932—of becoming an academic at a university. Schmitt, conversely, tended

<sup>107</sup> See Kirchheimer (1956a). The following page numbers refer to this text.

to his “invisible college” from his base in Plettenberg. Within a short space of time, Kirchheimer succeeded in establishing a reputation in the US as a well-informed and sharp-witted political scientist.

It cannot be stated with certainty today why Kirchheimer paid Schmitt a visit at his home in Plettenberg in November 1949. If we follow Wilhelm Hennis—and I see no reason to doubt his key statements—then Kirchheimer had wanted to demonstrate to Schmitt that the political tide had turned. He also wanted to demonstrate to Schmitt that he, who had been among those driven out of Germany with Schmitt’s applause in 1933, had managed to survive.

Even though no friendship or any kind of more intimate professional relationship resulted from this visit, they stayed in contact afterwards and even met again once more in Cologne in June 1953. After Kirchheimer’s birthday letter to Schmitt shortly after their meeting in Cologne, they stopped writing each other letters for the next five years; their contact was reduced to sending each other reprints, and even that only rarely.

Their correspondence—which was sparse overall compared with Schmitt’s communications with others—does not show indications of a close personal bond but was characterized by distant politeness and occasionally a critical comment of Kirchheimer’s toward Schmitt or his followers. The original initiative to resume personal contact in 1947 had been Schmitt’s, when he asked Ossip K. Flechtheim about Kirchheimer and also asked him to pass on his best regards to him. Kirchheimer was already aware of Schmitt’s detention at this time via Flechtheim and presumably also due to his contacts with Karl Loewenstein, Rudolf Smend, Carlo Schmid, and Richard Schmid. The next documented contact is dated 22 November 1949 when Schmitt sent Kirchheimer a copy of his essay on Francisco de Vitoria (or, more likely, *Ex captivitate salus*). Schmitt was eager to provide Kirchheimer with his writing that linked up with subjects they had both worked on during the Weimar Republic. Kirchheimer did not take up Schmitt’s offers to conduct a debate with one another. Whereas Schmitt proposed discussing subjects like property rights, expropriation, or constitutional courts, Kirchheimer stuck to pleasantries and did not allow himself to be drawn into any in-depth discussions. The fact that there are no handwritten comments or the like in his copies of these works, which are among his papers, also raises doubts as to whether he even found Schmitt’s *Nomos of the Earth* or his interpretations of Hamlet interesting enough to read them attentively.

In most of his letters, Kirchheimer responded only briefly to Schmitt—with one exception: his letter of November 1952, in which he addressed their methodological differences once again. He reminded Schmitt of the essay he had co-authored with Nathan Leites in 1932/1933 and in which he had confronted Schmitt’s conceptual realism with empirical evidence regarding actual tendencies of institutional developments in Western democracies. Schmitt had not responded to this criticism twenty years earlier. And he did not respond to Kirchheimer this time, either. Only in his *Glossarium* are some notes to be found on this matter, and he considered the label “conceptual realism,” which Kirchheimer had intended to be an accusation, to be an honorary title. He proudly noted “conceptual realism—as a prerequisite of jurisprudence,”<sup>108</sup> followed a few lines later by vi-

108 *Glossarium* entry of 24 April 1947 (Schmitt 2015, 14).

cious antisemitic invective.<sup>109</sup> A year later, he countered “positivist illusionism” by stating that it meant “doing without any conceptual realism, which, however, [constituted] the essence of legal thinking.”<sup>110</sup> At the root of this notion of Schmitt’s was apparently the idea that it was only the use of concepts itself that created reality. He considered conceptual realism to be a creative practice because he noted at one point in his *Glossarium*: “merely mentioning a word determines the atmosphere.”<sup>111</sup> Schmitt positioned non-creative, positivist, and “Jewish” thinking as the opposing view to creative conceptual realism.

Kirchheimer increasingly became convinced that his efforts to achieve targeted denazification in the Western zones had failed. Nevertheless, he did not see the newly established Federal Republic of Germany as having any problems of legitimacy; he considered only the GDR, which had been founded using dictatorial means, to be illegitimate. He became all the more interested in empirical questions of the new German democracy: election campaigns, election laws, election results, government formations, party formation, parliamentary politics, and government policy. Reading Kirchheimer’s analyses from Schmitt’s perspective, we can interpret them as attempts to explore future opportunities for politically stabilizing the Federal Republic of Germany. Kirchheimer identified certain continuities from the Weimar Republic, for example in the top politicians and the election results. Yet the discontinuities—and the Basic Law played a key role here—seemed more prominent to him. These discontinuities were the empirical basis for his hope that the conflictual Weimar times, which in Schmitt’s imagination would rapidly develop into a civil war scenario, could be avoided this time. Here, Kirchheimer was convinced of a policy of social and political integration that was legitimized in the theory of integration put forward by Smend and his students.

Schmitt was of the opinion that the newly established Federal Republic of Germany was not worthy of recognition at all. To him, it was a badly updated version of a weak Weimar Republic. In his *Glossarium*, he formulated slogans of German resistance against the victorious Allied powers and the founding figures of the Federal Republic of Germany; such resistance, he asserted, would first of all have to focus on Germany’s spiritual self-assertion. He relished commenting sarcastically on rumors that some deliberations from his *Constitutional Theory* had indirectly been taken up in the Basic Law. Moreover, he thought that the Federal Republic of Germany was doomed to failure and would soon go to ruin because of the potential for political conflict. To Schmitt, the struggle for German self-assertion included the refusal to even begin to deal with the Germans’ war crimes. He demanded that the victims refrain from mentioning their personal suffering in public life and even went one step further: remembrance of those murdered by the Nazi regime had to be obliterated, too; only then could there be peace. What Schmitt meant as he called for amnesty was complete amnesia concerning the past.

<sup>109</sup> “Juden bleiben immer Juden. Während der Kommunist sich bessern und ändern kann.” (Jews will always be Jews. Whereas the communist can better himself and change). “Der assimilierte Jude ist der wahre Feind.” (The assimilated Jew is the real enemy). *Glossarium* entries of 25 April 1947 (Schmitt 2015, 14).

<sup>110</sup> *Glossarium* entry of 2 March 1948 (Schmitt 2015, 14).

<sup>111</sup> *Glossarium* entry of 7 October 1947 (Schmitt 2015, 21).

A rift had developed among Schmitt's students from his days in Bonn concerning his dedicated work for the Nazi regime, and this rift left its mark on the atmosphere among West German scholars of public law. On one side was the larger group of his students with the prominent figures Ernst-Rudolf Huber, Werner Weber, and Ernst Forsthoff. All three continued to correspond intensely with Schmitt and had a major influence on public law in the early stages of the Federal Republic of Germany—and Schmitt made frequent and lively positive comments in this regard. On the other side were Ernst Friesenhahn and Gerhard Schiedermair, who distanced themselves from Schmitt clearly and in public, not just in private. A second rift among the West German public law scholars of the day was related to the existence of two competing schools around Schmitt and Smend. Vehement and complex struggles for positions took place between these two schools in the first two decades of the Federal Republic of Germany.<sup>112</sup> Kirchheimer took a clear and public position with respect to both fronts. He was in close personal contact with Friesenhahn, not least about the activities of Schmitt and his circle, and also with Smend, and supported the latter's younger generation of students. By contrast, he was not in direct contact with Weber, Huber, or Forsthoff. At the same time, he openly attacked Schmittianism in German public law in multiple publications and did not mince words. The four leading Schmittians were the targets of his criticism: Werner Weber, Ernst Forsthoff, Ernst-Rudolf Huber, and Joseph Kaiser. Kirchheimer criticized the lack of any empirical basis for their claims and accused them of continuing to promote a false theory of the strong state. He portrayed them as uncritical epigones of Schmitt's who were unable to receive Schmitt's oeuvre critically, selectively, and independently.

Not only their different roles during the years 1933 to 1945, but also the differences in how they dealt with the Nazi past created a deep rift between Kirchheimer and Schmitt which could not be papered over by friendly pleasantries in the forms of address in their letters. After Kirchheimer's visit, Schmitt had written his wife Duška that Kirchheimer was not satisfied with *Ex captivitate salus* because there was no explanation of what Schmitt had done in 1933. Wilhelm Hennis later used stronger words in his conversation with the author: Kirchheimer had been outraged by Schmitt's unwillingness to grapple self-critically with his own responsibility for the Nazi regime's policies.<sup>113</sup> Nevertheless, Kirchheimer did not decide to cut off contact to him completely. None of the surviving sources explain why he continued to respond to him and to keep in contact—and it is important to bear in mind that their postwar contact was by no means close. Perhaps it was another manifestation of what Hennis considered to be Kirchheimer's motive to visit Schmitt at his home in the first place: his way of expressing "proud self-affirmation" ("stolze *Selbstbehauptung*") vis-à-vis Schmitt.

<sup>112</sup> On the competition between these two schools in the 1950s and 1960s, see Günther (2004).

<sup>113</sup> Wilhelm Hennis recounted this in a conversation with the author on 26 September 2009.