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Carl Schmitt's Revenge—the Context of a Newly Discovered Publication by Schmitt

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ABSTRACT

The recent discovery of yet another (small) publication by Schmitt is more than just an interesting fact by itself for ardent Schmitt scholars. Including previously unknown archival material, the discovery sheds new light on three contexts of Schmitt's relationship to his former favorite student Otto Kirchheimer: First, on the break-up of their personal contact as a consequence of George Schwab's failed attempt to receive a PhD grade at Columbia University for his study on Schmitt in 1961; second, on the hidden connections between Schmitt's and Kirchheimer's concepts of political justice; and third, on Kirchheimer's previously unknown contribution to Hannah Arendt's book *Eichmann in Jerusalem*.

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In March 1963, Otto Kirchheimer reported in a letter to his friend Ernst Friesenhahn about a book review by Carl Schmitt.¹ Friesenhahn and Kirchheimer had both been students of Schmitt in Bonn in the 1920s.² Friesenhahn was among the few former students of Schmitt who had broken with Schmitt's ideas and was serving as member of the German Constitutional Court. Kirchheimer wrote:

By the way, our friend Carl Schmitt has managed again to take revenge on me semi-anonymously for not accepting his young man's doctoral dissertation. Signed 'C.S.,' he made an unfriendly comment in a German journal, I think it was '[Die] politische Meinung', by saying more or less that the whole book [Kirchheimer's *Political Justice*] actually doesn't say anything more than my essay from 1955.³

The derogative review of Kirchheimer's book *Political Justice* was indeed written by Schmitt (see [Schmitt 1962](#)). Following Kirchheimer's hint, I easily found the review in the August 1962 issue of the German journal *Die Politische Meinung* (The political opinion) and already mentioned it briefly in a research article in *Redescriptions* (see [Buchstein 2021, 20](#)). The review was previously not known among Schmitt scholars.

Schmitt had written a number of book reviews during his lifetime; however, nearly all of them had emphasized the quality of the books under his review. In this particular case, he wrote a negative review. Why? The discovery of yet another (even small) publication by Schmitt may be an interesting fact by itself for some ardent Schmitt scholars. However, it is gaining more importance when it is put into three contexts of Schmitt's relationship to one of his former favorite students in Bonn, Otto Kirchheimer: First, the context of the break-up of the personal contact between Schmitt and Kirchheimer as a consequence of George Schwab's failed attempt to get a PhD at Columbia University for his study on Schmitt in 1961; second, the context of indirect theoretical connections between Schmitt's and Kirchheimer's concepts of political justice; and third, the context of the previously unknown contribution to Hannah Arendt's book *Eichmann in Jerusalem*. The following reconstruction of the three contexts are based to some extent on previously unknown archival material.

1. THE CONFLICT OVER GEORGE SCHWAB'S DISSERTATION

The conflict over Schwab's dissertation has already been mentioned a couple of times in the secondary literature. Nearly all descriptions of the conflict, however, are based on the information given by Schwab only (see [Hitschler 2011, 19–21](#); [Mehring 2007](#); [Richter 2001, 222–224](#)). Born in Lithuania, the student, George David Schwab, belonged to an interwar generation of young Jews who had been lucky enough to survive being held in a concentration camp and were able to flee to the United States. In New

1 I am grateful to Sandra H. Lustig for the translation of my original German manuscript (and also for a number of critical comments) and to Linda Turner for copy-editing it. In particular, I want to express my gratitude to Hanna Kirchheimer-Grossman (*1930) and Peter Kirchheimer (*1946) for the many occasions to talk with them about the life and work of their father. In addition, I want to thank the two peer-reviewers for their very helpful suggestions. All original quotations in German have been translated by the author in collaboration with Sandra H. Lustig for this article.

2 For an overview of Kirchheimer's life and work see Schale et al. (2018) and Buchstein (2024).

3 Letter from Otto Kirchheimer to Ernst Friesenhahn dated March 31, 1963. Otto Kirchheimer Papers, Series 2, Box 2, Folder 61. See Kirchheimer (1955a) and (1955b).

York, he met Franz L. Neumann and decided to study political science as a graduate student at Columbia University. After Neumann's death in 1954, Herbert L. Deane, professor of political theory, became Schwab's supervisor. Deane recommended Schwab to write his PhD dissertation about Schmitt's legal and political theory. With Carl Joachim Friedrich acting as liaison, Schwab contacted Schmitt in October 1956. In January 1957, he informed Schmitt of his plan to visit him in Plettenberg next year. He arrived in Schmitt's hometown for a two-month stay and returned for additional visits in the following years.

Schmitt made plenty of time for his guest over the following months and years. He succeeded in giving Schwab what a number of other younger visitors including Ernst-Wolfgang Böckenförde, Reinhart Koselleck, and Christian Meier had raved about all their lives, namely making them feel that he was truly taking them seriously and that he cared about teaching them. Schwab remained enthusiastic about the long and amicable conversations he had with Schmitt, as he wrote in his memoirs in 2021. In his long life, he had never learned as much from any other person and in such a short period of time about legal and political theory and international relations (see [Schwab 2021, 145–158](#)).

At Columbia University, Kirchheimer became at the request of Deane, a member of the dissertation committee. The defense in February 1962 ended in uproar. Since it was impossible to find any files on the matter in Columbia University's archive, the only sources for this event are Schwab's descriptions (see [Schwab 1988a, 1988b, and 2021](#)). According to his report on the 2 hour dissertation defense in his memoir of 2021, the discussion was initially 'boring' until Kirchheimer weighed in. He 'mercilessly attacked' him ([Schwab 2021, 177](#)) and criticized the dissertation as a whole: Schwab had 'failed to understand Schmitt's true role in Weimar', he had 'turned Schmitt upside down' and had 'written an apology of Schmitt'. Kirchheimer rejected the sharp distinction in Schwab's work 'between racial theory and Catholic anti-Semitism'.⁴ He also accused Schwab of misinterpreting the principle of equal opportunity in the constitution. Finally, he criticized Schwab's fundamentally misguided understanding of Article 48 of the Weimar Constitution, as a result of which his codification of the emergency decrees in his dissertation was flawed. Kirchheimer explained in detail how Schmitt had paved the way for the Nazi regime with his theory of the emergency decrees. Schmitt had been 'among the most prominent gravediggers of Weimar' ([Schwab 1988b, 462](#)). Schwab insisted in his defense that he had 'not encountered any references to anti-Semitism prior to 1933' ([Schwab 2021, 157](#)) in Schmitt's work and that Schmitt had enthusiastically attempted to defend the Weimar Republic against both Communists and the Nazis. Schwab had not even remotely understood Schmitt's role in the destruction of the Weimar Republic and moreover, the work included several factually incorrect and polemical attacks against critics of Schmitt. In addition, Schwab had avoided discussing the new literature on Schmitt in Germany. Since Herbert Deane and the other members of the committee had nothing substantive to contribute to the debate, they followed Kirchheimer's negative assessment.

Schwab immediately reported extensively to Schmitt about the negative result of his defense in letters and during his next visit to Plettenberg. Concerning his own academic standards, Kirchheimer wrote in a letter to Friesenhahn at an early stage of the conflict that he would not necessarily even have objected to a defense of Schmitt 'lock, stock, and barrel', but only if Schwab had emphasized Schmitt's 'real doctrines

⁴ On Kirchheimer's view of catholic anti-Semitism, see Buchstein (2018).

and did not disguise him as a democrat and strict constitutionalist⁵ before and after 1933. Nevertheless, both Schwab and Schmitt viewed Kirchheimer's substantive objections to Schwab's dissertation as a purely politically motivated attack on them. Two months after Schwab's defense, Schmitt wrote to Ernst-Wolfgang Böckenförde: 'I am sure you know that Kirchheimer didn't let poor George pass' (Schmitt & Böckenförde 2022, 321). He held Kirchheimer responsible for Schwab's failure and felt it to be an attack by Kirchheimer *ad hominem* and a stab in the back (see Quaritsch 1995, 72; Schwab 1988a, 81).

2. SCHMITT ON POLITICAL JUSTICE

At the time when the conflict about Schwab's dissertation escalated, Kirchheimer was focused on a book on the political use of the administration of justice as his main intellectual project. The backstory to Kirchheimer's book and its subject goes back to the Weimar Republic and is closely linked to ideas from Schmitt's book *Constitutional Theory*. Schmitt had devoted an entire section to the subject of political justice in his 1928 magnum opus as part of his criticism of the bourgeois *Rechtsstaat*. Schmitt defined 'political justice' as the result of the impossible attempt to settle all political conflicts 'via a formal judicial procedure' (Schmitt 1928, 176). Thus, the term 'political justice' in this context has nothing to do with the normative question of the moral quality of judicial decisions, but is rather focused solely on the procedural administration of justice.

In his book, Schmitt first described the historical conditions for the emergence of the liberal *Rechtsstaat*, then its key substantive components and institutional organizational principles. He asserted that the fully realized ideal of the *Rechtsstaat* 'culminates in the conformity of the entire state life to general judicial forms' (Schmitt 1928, 176). The *Rechtsstaat* must provide for a procedure for every type of disagreement and dispute between citizens and the state as well as between the various state institutions. The main prerequisite for these procedures to succeed was valid general norms. Some of the disagreements and disputes, however, lacked such a norm laid down in advance. Schmitt recognized a systematic gap in the theory of the bourgeois *Rechtsstaat* at this point. Some disagreements and disputes were so strong 'that the political distinctiveness of such cases' (Schmitt 1928, 176) was inevitable, and it was also inevitable that judges' decisions in these cases were political decisions. That, he thought, constituted 'the actual problem of political justice' (Schmitt 1928, 176) as a component of the *Rechtsstaat* that was as necessary as it was contrary to the system.

Schmitt's concept of political justice was not a negative polemical one. He did not consider political justice to be the abuse of judicial procedures out of political calculus or the camouflaging of political purposes by means of a judicial facade. Quite the contrary. The political was already inherent to the matter in dispute. Because of its political character, 'a special procedure or order is provided for special types of genuine legal disputes' (Schmitt 1928, 177). This occurred less in the realms of private law but more often in criminal matters or in disagreements under public law.

Schmitt listed the six most important examples of political justice in his book (see Schmitt 1928, 176–180). His list begins with high treason and treason against a home country. The second example is ministerial and presidential indictments. Next

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

comes genuine constitutional disputes decided by constitutional courts; in other words, Schmitt thought that all decisions made by constitutional courts were a form of political justice. The fourth example is doubts and differences of opinion over the constitutionality of statutes and decrees by special courts. The fifth example is taken from France and the United States and their special treatment of governmental acts in the area of adjudication. Schmitt's last example is judicial reviews of important elections by constitutional courts or special electoral review commissions (see [Schmitt 1928, 180](#)).

Schmitt claimed that in all the examples listed, purely judicial decisions following the ideal of the *Rechtsstaat* were not possible. The actions of the courts always took place in a political decision-making arena whose sphere of influence therefore had to be, and was indeed, the subject of political decisions in advance. According to Schmitt, the ideal of the bourgeois *Rechtsstaat* was a chimera, and political justice was a symptom of the fact that the perfect *Rechtsstaat* could never be attained. It is clear that the intent behind this hypothesis from his *Constitutional Theory* was critical: Schmitt considered it to be a devastating blow right to the heart of the liberal theory of the *Rechtsstaat*.

3. THE AMBIVALENCES OF POLITICAL JUSTICE

Kirchheimer had assisted Friesenhahn to copy-edit Schmitt's book *Constitutional Theory* in 1928 and was very familiar with Schmitt's thoughts on the topic of political justice. In addition, he had also addressed political justice in his Weimar writing himself, albeit in a different way to Schmitt. Back in 1929, in one of his earliest comments on judicial policy, Kirchheimer had criticized the decisions of the *Reichsgericht* on the occasion of the 50th anniversary of its establishment in Leipzig as a faithful reflection of the ideas and views of Germany's ruling classes (see [Kirchheimer 1929](#)). He had faulted both a politically one-sided practice of ruling against the left and the court's defense against the law of expropriation codified in the constitution as politically motivated perversion of justice. Kirchheimer's understanding of political justice during the Weimar Republic was synonymous with the accusation of class justice going back to socialist Karl Liebknecht during the German Empire; this was also raised by authors during the Weimar Republic, for instance, his fellow lawyer Ernst Fraenkel ([1927](#)).

Kirchheimer had also used the term 'political justice' in his 1935 article 'State Structure and Law in the Third Reich' in connection with his attacks against Schmitt legitimizing the changes in Nazi criminal law. Kirchheimer saw this as the construction of 'political cases' ([Kirchheimer 1935, 153](#))⁶ of criminal law for the purpose of persecuting political opponents. The procedural guarantees and the independence of the judiciary in Nazi criminal law had already been replaced by executive orders, with Schmitt's blessing, in the fight against political opponents: 'It is thus perfectly legitimate to conclude that political justice in Germany is primarily administered by policemen who punish' ([Kirchheimer 1935, 153](#)). Only if it happened to be opportune for the police or the Gestapo did they bother to hand their cases to the courts.

It is striking against this background that Schmitt and Kirchheimer evaluated political justice in very different ways in the postwar period. Both agreed on the terminological level that political justice was understood as making political use of the opportunities

6 Emphasis by Otto Kirchheimer.

given by judicial proceedings. Unlike the English term, the German term '*Politische Justiz*' does not allow any other meaning. However, Schmitt and Kirchheimer strongly disagreed in their evaluation of the phenomenon of political justice. Schmitt had switched to the mode of complaining about a political justice system he claimed was hostile to him. In contrast, Kirchheimer's usage of the term took two steps in the opposite direction: changing course from the mode of exposing to one of soberly describing, and in the context of his theory of liberal democracy, he even took on a normative, potentially positive understanding of the term. He developed this concept extensively in his 1961 book about political justice.

The book *Political Justice* is subtitled *The Use of Legal Procedures for Political Ends*. The subtitle was suggested by editor Judy Walton of Princeton University Press⁷, who wanted to add it to indicate to American readers what the book really was about. Kirchheimer dedicated his book 'To the Past, Present, and Future Victims of Political Justice' (Kirchheimer 1961, v).

There were more than two decades between his use of the term 'political justice' for criminal justice against political opponents and his understanding of 'political justice' as a broader term for any use of the judicial process for the purpose of gaining (or upholding, or enlarging) or limiting (or destroying) political power. The political justice he referred to now pointed well beyond political criminal justice. His book uses examples dating back to European antiquity and right up to the time of writing to provide a seemingly encyclopedic overview of all kinds of political proceedings. Most of the examples are from the United States, France, the United Kingdom, Russia/the Soviet Union, or from Germany during the Weimar Republic, the Third Reich, the German Democratic Republic, and the Federal Republic of Germany at the time.

The book consists of three main sections with a total of twelve chapters. In the first section, Kirchheimer portrays the emergence of the category of a specifically political offense and devotes a chapter each to the basic forms of political proceedings against individuals and the measures that could be used against political organizations. In the second section, three chapters look at the institutions and actors of political justice: the public prosecutor's office, the courts, the judges, the defense attorneys, and the defendants. The next two chapters examine specific constellations of political justice: justice in the GDR in the 1950s and the problem of proceedings against former political and military elites by successor regimes, such as with the Nuremberg Trials. In the third and final part of the book, Kirchheimer explores two phenomena he considered to be closely linked to political proceedings: first, asylum law, understood as an opportunity to escape from politically motivated criminal prosecution by fleeing and emigrating and second, the institution of mercy, understood as lessening or erasing the punishment for political offenses *ex post*.

Kirchheimer begins his initial clarifications of terms in the first chapter with the words 'Every political regime has its foes or in due time creates them' (3).⁸ He then goes on to define politics as a degree of intensity, as did Schmitt. Something was deemed to be political 'if it [was] thought to relate in a particularly intensive way to the interests of the community' (25). Political justice was just one area among many in the political struggle for power. Consequently, he commented on political events and the

⁷ Letter from Judy Walton to Otto Kirchheimer dated January 17, 1961. Otto Kirchheimer Papers, Series 2, Box 2, Folder 65.

⁸ See Kirchheimer (1961) for this and the following quotes.

impacts of political justice using categories such as victory and defeat. At the same time, his understanding of politics included an appeal to the public—whose support was essential for victory in political competitions. Kirchheimer understood political proceedings conducted in the public eye to be events with a theatrical dimension and used vocabulary from the sphere of the theater: stage, audience, director, drama, and script. Political proceedings conducted in public, he asserted, had the primary function of legitimation but also to restrict the scope for political action. They could serve as a resource for the production of political legitimacy—or not, as the case may be. Thus, political trials were ‘marked by a creative element of risk and unpredictability, which distinguishes[d] them from an administrative command performance’ (Kirchheimer 1968, 98).

Viewed against the background of Kirchheimer’s political biography and his lifelong debate with Schmitt, two topics in the book stand out: first, Kirchheimer’s integration of political justice into a theory of the democratic *Rechtsstaat* and second, his assessment of the Nuremberg Trials in retrospect.

With respect to the first topic, Kirchheimer like Schmitt—but without mentioning his name—contradicted how Western democracies officially presented themselves, namely that political justice could not exist there. He argued that political justice was unavoidable even in well-functioning *Rechtsstaaten*—and that this was not necessarily all the negative. He had formulated this hypothesis in his first project proposal to the Rockefeller Foundation back in 1954. He understood political justice as one of multiple modalities for dealing with the real or imagined principal opponents of a political regime. In *Rechtsstaaten*, an internal contradiction resulted from this, namely between the legal means and the political goal to be achieved. This fusion of politics and opposition is reminiscent of Schmitt at first glance. As described above, Schmitt had in fact devoted an entire section to political justice in the *Rechtsstaat* in his *Constitutional Theory*. However, Kirchheimer only addressed two of Schmitt’s six main examples of political justice: high treason and indictments of ministers or other high officials and, unlike Schmitt, he wrote about asylum law and amnesty law.

Kirchheimer viewed politics and justice as placed along a continuum. Political actors made use of the opportunities afforded by judicial proceedings—be it at the initiative of state agencies or of members of the opposition who wanted to publicly put the state in a bad light. Yet in liberal *Rechtsstaaten*, those in power could not prevent members of the opposition from gaining control over the justice apparatus, too. They could contrive suits concerning libel or perjury. Groups excluded from political power could thus influence their fellow citizens’ political views. Political proceedings were fraught with risk for both sides. If those in power took control of the justice apparatus, this created uncertainties in liberal democracies. Since the development of policies had to take a ‘detour’ (421)⁹ via legal procedures and their inflexible rules, it was impossible for political intentions to prevail unchanged. That meant wasting time and limiting the methods that could be used, which implied risks for both sides. This was the specific judicial space, the uncertainty of the outcomes of political trials, in liberal democracies. Consequently, political justice in democratic *Rechtsstaaten* might even have ‘benefits’ (429) by taking on a positive function civilizing the conflict. Then, following Smend’s theory of dynamic integration (see Smend 1928), it performed the function of integrating society via conflicts.

⁹ See Kirchheimer (1961) for this and the following quotes.

Kirchheimer supported his deliberations with the historical hypothesis that using legal procedures politically only made sense with the emergence of the bourgeois *Rechtsstaat*. Limiting state action in procedural terms, or juridification, did not mean to end political justice but was, rather, its prerequisite. He identified the Federal Republic of Germany and the United States as being at opposite ends of the spectrum, Germany as a militant democracy able to repress principal political opposition by banning political parties or depriving citizens of fundamental rights and the United States as a country with virtually no legal restrictions to principal political opposition. Kirchheimer's ideal was a liberal practice like what he saw in the United Kingdom. There, the government strictly limited itself to repressing unlawful acts while granting generous freedom to propaganda and political organization. He placed France and Italy in between, too, with their administrative discrimination against the communists. Seeking to depoliticize political justice, Kirchheimer believed, was in the best case an optical illusion, in the worst self-deception. In a democratic *Rechtsstaat*, what mattered was not to abolish political justice, but to reduce it to a tolerable level. The alternative to political justice could be worse, for example, if a regime acted more arbitrarily and perhaps violently if it had no recourse to the courts. Like Schmitt, Kirchheimer held the view that political justice could not be overcome. Unlike Schmitt, however, he did not think that this fact was an absolute breach with the system of the principles of the *Rechtsstaat* but an opportunity for its recognition by society.

Nonetheless, the tone of Kirchheimer's book is melancholy in many places. He was of the opinion that political justice united both a repressive and a civilizing element within itself, and the two were inextricably linked to one another. This tension could not be unmade; at best it could be recognized in its ambiguity. Political justice could never bring about complete justice.

4. RE-EVALUATING THE NUREMBERG TRIALS

A second main topic of Kirchheimer's *Political Justice* is the Nuremberg War Crimes Trials addressed in Chapter VIII, titled 'Trial by Fiat of the Successor Regime'. Looking back 20 years later, Kirchheimer considered these trials to be proceedings without any prior models or precedents. Whatever pressure there was did not come from external organized groups but from the situation itself: It was the pressure of 'the charnel houses, the millions who had lost their families, husbands, or homes' (340). Kirchheimer was analytically correct in calling these proceedings 'successor trial[s]' (324) in hindsight. But he did not conclude from this that they had been illegitimate. On the contrary. He praised them as an achievement of civilization and an example of how transitional justice could succeed. The paradigmatic significance and accomplishment of the trials had been undermined by the dissensions among the wartime partners. The wartime coalition had broken apart 'before the ink on the Nuremberg judgement had time to dry' (324) and the opportunity to lay a firm foundation for a new world order was wasted.

Kirchheimer reviewed four main objections of the defense attorneys against the Nuremberg prosecution, rejecting one after the other. Incidentally, Schmitt, too, had independently put forward these four objections, using identical or similar wording, in his letters, anonymous articles, or diary notes, most of which Kirchheimer could not have been aware of. The first objection was that the defendants could plead that they had simply followed the law. Using a line of argument following the philosophers of natural law, Gustav Radbruch and Lon L. Fuller, Kirchheimer countered that the

defendants 'in those patently exceptional cases' (328) such as the mass murder of Jews and Poles were not permitted to plead that they had implemented existing laws or that their behavior had been legal. He argued that the value of legal certainty 'is not strong enough' against the principle that 'intentional violation of minimum standards deprives an enactment of the claim to legal validity' (328).

A second objection was following superior orders: the perpetrators had been bound to specific and binding orders. Kirchheimer responded that there had indeed often been superior orders at the lower levels of the military, and that refusing to follow orders had cost soldiers their lives. In every case there will be some point when one has to make a personal decision: 'At this moment arises the conflict of open resistance or silent withdrawal' (331). Kirchheimer explains that 'active resistance will always remain a highly personal decision' (331) and concludes that 'active resistance to the oppressor is [...] an illusory yardstick' (331). According to him, the 'legitimate yardstick' is 'withdrawing' from 'significant participation' (331) in the regime. Kirchheimer explains that this kind of behavior was possible in Nazi Germany. He mentions as an example on the lower level of the regime that some judges avoided appointments to *Sondergerichte* without facing reprisals. On the higher level of military command, the relations were in fact 'more like relations within what might be abbreviated a power elite, and should be judged in these terms' (330). The defendants in Nuremberg belonged to this power elite who had decided not to withdraw from their positions.

The third objection of the defense concerned the alleged bias of the court because it had been appointed by the victorious powers. Kirchheimer did not consider this a special feature. In all political trials conducted by the judges of the successor's regime, 'the judges are in a certain sense the victor's judges.' (352). He forcefully contradicted the assertion that a German court would have arrived at different rulings in the first postwar years. German judges—provided they had not been Nazis—may have emphasized different points and selected different procedures, yet they would by no means have arrived at rulings more beneficial to the defendants.

A fourth objection concerned the accusation of *tu quoque*: judgment was passed on acts that the Allies had also committed themselves. Kirchheimer stated that this accusation made clear that political proceedings like these concerned not only the past but that they always also concerned the future: 'In laying bare the roots of iniquity in the previous regime's conduct, it simultaneously seizes the opportunity to convert the trial into a cornerstone of the new order' (336). In the case of the Nuremberg Trials, the accusation of *tu quoque* was absurd and merely showed to what small degree those who propounded it had understood the Nazi regime's crimes: 'Of those misdeeds which we call offenses against the human condition, no comparable practices of any state of the world, whether represented on the bench or not, could serve in exculpation or mitigation' (338).

This last question marked the point at which Kirchheimer again clearly acknowledges his commitment to universal norms. Elsewhere in his oeuvre, he usually refers to the historical variability of norms or to the political instrumentalization of moral norms. But confronted with the evidence of mass annihilation and mass enslavement presented in the Nuremberg Trials, he reverts to a position akin to natural law:

And in wading through the evidence on mass annihilation and mass enslavement, those fact situations which we have since come to describe as genocide have established signs, imprecise as they might be, that the

most atrocious offenses against the human condition lie beyond the pale of what may be considered contingent and fortuitous political action, judgement on which may change from regime to regime (341).

The ‘lasting contribution’ of the Nuremberg Trials was their transformation into ‘the concerns of the human condition, the survival of mankind in both its universality and diversity’ (341).

5. IN EXCHANGE WITH HANNAH ARENDT

Kirchheimer raises in his book the difficult question of how to deal with the principle of ‘individual responsibility’ (319) if the entire state had become an *état criminel*. It is precisely these questions about the link between social norms, the law, and personal responsibility that Hannah Arendt poses in her coverage of the trial against Adolf Eichmann published in her articles in *The New Yorker* in 1961. Arendt had read *Political Justice* immediately after its publication and had included her thoughts in the later version of her reporting, which was published as a book in 1963. Arendt and Kirchheimer were acquainted from their time in exile in Paris but had never developed a closer personal relationship. This remained the case even though they met privately a few times in New York.¹⁰ Arendt, too, was particularly interested in the eighth chapter, as evidenced by what she underlined in her copy of Kirchheimer’s book.¹¹

In her own book, *Eichmann in Jerusalem*, Arendt built on Kirchheimer’s deliberations on the theatrical dimension of political justice and the ‘irreducible risk’ (Arendt 1963, 208) of political trials. Moreover, she referred explicitly to his analyses of the political context of the Nuremberg Trials (see Arendt 1963, 127, 256, 257, and 266). She also quoted a key idea from his work for her book about distinguishing between guilt and innocence. She followed Kirchheimer both in her argument that active resistance to a totalitarian regime was an illusory and wrongful normative standard and in her definition of the appropriate yardstick:

[T]he only possible way to live in the Third Reich and not act as a Nazi was not to appear at all; ‘Withdrawal from significant participation in public life’ was indeed the only criterion by which one might have measured individual guilt, as Otto Kirchheimer recently remarked in his *Political Justice*. (Arendt 1963, 127)

Kirchheimer had added the following in his book to the parts Arendt had quoted:

A large body of experience teaches us that many men show a fatal proclivity toward pushing themselves, or allowing themselves to be pushed, into positions where they know in advance the honors and rewards will entail corresponding entanglement and responsibility. (Kirchheimer 1961, 331)

Although he did not mention Schmitt by name in this passage, readers in the know were certainly aware that he was referring not only to jurists in general but to *Preußischer Staatsrat* Carl Schmitt too.

¹⁰ As reported by Peter Kirchheimer in a conversation with the author on April 30, 2024.

¹¹ See Arendt’s copy of Otto Kirchheimer, *Political Justice*. Bard College, Hannah Arendt Collection, Call #: KF310.P65 K56.

Kirchheimer, for his part, was just as keen to read Arendt's book. Referring also to his wife Anne and his son Peter, he wrote to her after reading the first edition of 1963: 'my family of non-professionals is reading it also with great interest and seem to share my enthusiasm.' He told her he agreed with her analysis on the whole: 'I agreed with about two thirds of what you said and my disagreements are minor and on the legal rather than a political or moral level.'¹² His affirmative statement is remarkable considering the vehement criticism Arendt's book received after its publication in the United States, in particular with regard to her discussion of the role of the *Judenräte* (Jewish Councils) in the concentration camps. Kirchheimer's former superior at the Office of Strategic Services (OSS), Robert M. W. Kempner, was among the first harsh critics in *Aufbau* (see [Kempner 1963](#)), followed by the vast majority of Jewish readers (see [Renz 2021, 50–131](#)). Along with Arendt's friend sociologist Joseph Maier (see [Maier 1963](#)), who had shared an office with Kirchheimer at the Institute of Social Research in New York, Kirchheimer was among the few Jewish authors who mostly agreed with her view of the Eichmann trial. In his letter to her, he added a list with a number of corrections concerning technical legal aspects of her book. Arendt took them on board in the revised second edition of her book in 1964. Later, in the German edition of his book *Political Justice*, Kirchheimer shared the main point of her criticism of the Israeli government, that it had turned the trial into a 'courtroom drama' to instrumentalize it 'as a pivotal point of demonstrative affirmation of the national state idea in the face of the ongoing external threat to the state's existence' ([Kirchheimer 1965, 44](#)).

Carl Schmitt's readings of Hannah Arendt are worth mentioning in this context, too. He basically read her as a Jewish enemy (see [Suuronen 2022](#)) and commented extensively on her books from the 1950s to the 1970s. After the publication of Arendt's *Origins of Totalitarianism* (see [Arendt 1951](#)), he enthusiastically called it an interesting and important book (see [Herberg-Rothe 2004; Suuronen 2022](#)). He cited it in private letters and in his *Glossarium* in support of his own retrospective theory concerning the difference between a total state and a totalitarian movement like the Nazis. In particular, her distinction between 'real Nazis' and 'outstanding intellectuals' fitted into his retrospective self-description. He liked her account of the limited role intellectuals could play within totalitarian Nazi Germany. He read her book as an indirect justification for his retrospective pose as a victim of the Nazi system. Moreover, he read it as an explanation as to why his career was interrupted in 1936: the more totalitarian a political system becomes, the less space it leaves open for truly original and independent intellectuals like himself.

Shortly after the publication of Arendt's report *Eichmann in Jerusalem* Schmitt also got hold of her new book. This time he reacted quite differently. He wrote to legal scholars Roman Schnur and Ernst Forsthoff in October and November 1963, respectively, that reading her book had been an 'upsetting' experience that had left him 'sick for several weeks' ([Schmitt & Forsthoff 2007, 198; Schmitt & Schnur 2023, 542](#)). He explained his emotional reaction to Forsthoff as follows: 'because once again my legal opinion from August 1945 came to my mind, especially its conclusion' ([Schmitt & Forsthoff 2007, 199](#)). The legal opinion he was referring to was the one Schmitt had written for the defense of war criminal Friedrich Flick. In this, he had argued that Flick could not be held responsible in Nuremberg for any significant crime. In Schmitt's view, the same applied to those who served as legal scholars for the Nazi system. Only a very small number of elite Nazis were to be held responsible. Arendt

¹² Letter from Otto Kirchheimer to Hannah Arendt dated May 15, 1963. Otto Kirchheimer Papers, Series 2, Box 1, Folder 11.

argued from a diametrically opposing point of view when she explained that those who lacked specific influence, such as the Nazi intellectuals, had a ‘greater realm of freedom’ (Suuronen 2022, 19) in their decision whether or not to support the regime. Instead of choosing silence or emigration, all Nazi intellectuals had willingly chosen to support the regime with their writing: ‘For politics is not like the nursery; in politics obedience and support are the same’ (Arendt 1963, 279). Her argument was an echo of her reception of Kirchheimer’s criteria to distinguish between guilt and innocence mentioned above. After having read Arendt’s book on Eichmann, Schmitt finally realized that Arendt’s work could not be utilized in the apologetic manner as he had previously thought.¹³

In his letter to Roman Schnur, Schmitt also mentioned Kirchheimer. He told Schnur: ‘It is interesting that she gets advice from O. Kirchheimer, who is actually anything but a lawyer’ (Schmitt & Schnur 2023, 542). He went as far as suspecting Kirchheimer to be the source of a ‘smear tactic’ against him, namely Arendt’s note that Dieter Wechtersheim, the assistant of Robert Servatius, Eichmann’s lawyer in the Jerusalem trial, was ‘a disciple of Carl Schmitt’ (Arendt 1963, 145), which Schmitt denied. Arendt did not indicate in any of her publications that she got advice from Kirchheimer for her book about the Eichmann trial and, to this day, there is no mention of his supportive role in the secondary literature on Arendt. Nevertheless, Schmitt knew about it. The source of his information is unknown to me. His knowledge about this is a remarkable example of Schmitt’s interest in Kirchheimer’s activities.

Soon after its publication, Kirchheimer sent Schmitt a copy of the book. He added a brief formal dedication ‘With compliments, your OK.’¹⁴ This correspondence of November 1961 became the last direct personal contact between the two of them. Schmitt is known to add handwritten comments in the books he read, and they are very few and far between in this one. He apparently did not read the sections on the legal proceedings relating to the Nazi crimes at all. But he did read the two-page appendix on the Roman Empire and the Christians, underlining some parts. Schmitt left his few marks in the parts of the book that he believed pointed to his own concept of politics as the friend-enemy distinction. Most of his markings are in the three-page section headed ‘The Informer: Enemy from Within’ in Chapter VI ‘The Defendant, His Lawyer, and the Court.’ Moreover, Schmitt could not suppress his urge to add a comment underneath Kirchheimer’s dedication ‘To the Past, Present, and Future Victims of Political Justice’: he added a handwritten note: ‘I do not compare the victims (to whom I—past, present and future—belong), I only compare the judges, C.S.’¹⁵ Schmitt did not respond directly to Kirchheimer. His reaction to the book the following year was overshadowed by the conflict between them about Schwab’s dissertation.

6. SECOND-ORDER OBSERVATIONS: SCHMITT’S REVIEW

No personal contact between Kirchheimer and Schmitt is documented after Schwab’s failed dissertation. Whether it was Schmitt who broke off contact or whether both

¹³ On Schmitt’s reading of *Eichmann in Jerusalem*, see Graf (2021), Suuronen (2022), and Plaetzer (2022).

¹⁴ Schmitt’s copy of Otto Kirchheimer, *Political Justice* (page1). Carl Schmitt Papers, RW 0265–25665.

¹⁵ Schmitt’s copy of Otto Kirchheimer, *Political Justice* (page 5). Carl Schmitt Papers, RW 0265–25665.

sides had concluded that they no longer wanted anything to do with one another can no longer be determined today. Both, however, still followed the work and activities of the other. Although Kirchheimer refrained from contacting Schmitt again, he closely monitored the steps Schmitt took after he had rejected Schwab's dissertation. One year after the incident, Kirchheimer wrote the letter, already quoted in the first section beginning of this article, to Friesenhahn, that 'our friend Carl Schmitt has managed again to take revenge on me semi-anonymously for not accepting his young man's doctoral dissertation.'¹⁶

One of the editors of *Die Politische Meinung* (The political opinion), in which Schmitt's review had appeared, was conservative publicist Rüdiger Altmann, who had studied under Schmitt in Berlin as a wounded veteran in the final semesters during World War II and had been in touch with him again from the mid-1950s onward (see [van Laak 1993, 262–265](#)). It was presumably via this connection that the article got published in the journal. Signed with Schmitt's already famous 'C. S.', this text has nevertheless not been listed in the bibliographies of Schmitt's works to date (see [Benoist 2010](#)). Not only Kirchheimer's statement (presumably informed about the authorship by Werner Weber and/or Rudolf Smend), but equally the review's substance, language, and style support Schmitt's authorship. For example, it was characteristic of Schmitt to approach the reviewed book via the index and to refer to the dedication. The choice of wording is quite typical of Schmitt in multiple places as well.¹⁷

Schmitt began the review¹⁸ by pointing out that Kirchheimer had dedicated the book to the victims of political justice. Schmitt added that to him 'any and all political administration of justice is somehow suspect, in most cases an annoyance and a piece of folly' (94)—which was only partly an accurate description of the intention of Kirchheimer's book, however. Schmitt chafed at Kirchheimer's assessment of the case of Paul Jorns during the Weimar Republic. Prosecutor Jorns had been assigned to investigate the murders of Rosa Luxemburg and Karl Liebknecht. Kirchheimer agreed with the opinion liberal journalist Berthold Jacobs had expressed in 1928 that through his way of investigating the case, Jorns had aided and abetted the murderers and had helped them escape from jail. Jorns responded by filing a libel suit against Jacobs. Yet Jorns lost this case in multiple instances because of the facts presented. According to Kirchheimer, the Reichsgericht applied a legal trick to avoid having to acquit the journalist once again. Schmitt contradicted this point, rejecting Kirchheimer's 'attack' (94) on the court as 'unjustified' (94).

Schmitt nitpicked about two minor errors in the index of names and one piece of incorrect information about a judge at the Nazi *Volksgerechtshof*. He caricatured Kirchheimer's argument in the book as an arbitrary concatenation of examples and names: 'On page 26, he quotes the *Bundesgerichtshof*, presents Count Harry von Arnim, only to flash back to Henry VIII and then shift his attention to Hermann Göring' (94). Kirchheimer had 'processed a downright improbably copious amount of material with unending diligence' (94). Yet this supposed praise was poisoned inasmuch as he judged him a few lines further down: 'Incidentally, in his essay "*Political Justice*" ... the author stated his concerns in a considerably more concise and concentrated way'

¹⁶ Letter from Otto Kirchheimer to Ernst Friesenhahn dated March 31, 1963. Otto Kirchheimer Papers, Series 2, Box 2, Folder 61.

¹⁷ Schmitt experts Reinhard Mehring (e-mail dated 7 December 2021) and Gerd Giesler (e-mail dated December 8, 2021) also support my claim of Schmitt's authorship.

¹⁸ See Schmitt (1962) for this and the following quotes.

(94). The purpose of the book ‘might be for its author to gain influence on the law clerks in the American Supreme Court and thus on its decisions’ (94). In other words, Schmitt insinuated that the German discussion would not benefit at all from the book. But he did recommend two publications about state security and the constitution by other authors to the readers of *Die Politische Meinung*. Schmitt concluded his review with lukewarm praise: ‘In any case, Kirchheimer’s book is interesting and instructive. Even if one does not agree with everything he says’ (94).

Schmitt was known for his own particular way of approaching the subjects of the books he reviewed. That is why it is not surprising that he cherry-picked just a few points to comment on. But it is surprising how little he engaged with the concept of political justice and also the wider context of Kirchheimer’s argument in his review. This raises the question how deeply Schmitt had even read the book. He is known to have made handwritten comments in the books he read, and as mentioned in the previous chapter, there are only very few comments of his in his copy of this book.¹⁹ Apparently, he had read it superficially at best, and he did not reveal to his readers at which points—potentially including the Nuremberg Trials, asylum law, and Nazi criminal law, for example, none of which he even mentioned—he disagreed with its author. Nor did he devote a single word to Kirchheimer’s critical analysis of the legal system of the GDR either.

Three years earlier, he had responded quite differently when Kirchheimer had sent him an offprint of his essay on the concept of legality in East Germany. Kirchheimer later included this essay with only a few changes in his book *Political Justice*. In May 1959, Schmitt had written in a letter to Ernst-Wolfgang Böckenförde that Kirchheimer’s essay was ‘exciting’ and had urged him to read it (see [Schmitt & Böckenförde 2022, 199](#)). Nothing about this recommendation is to be found in his review of Kirchheimer’s book.

The (revised) German edition of *Political Justice* was published in March 1965. Kirchheimer took the conceptual introductory passages of this edition as an opportunity to refer to Rudolf Smend’s idea about the potentially integrative functions of judicial procedures (see [Kirchheimer 1965, 22–24](#)). By contrast, Schmitt was not mentioned explicitly even once in the German edition.

Once again, however, a few passages read like silent dialogues with Schmitt, for instance, where Kirchheimer contradicted Schmitt’s student Roman Schnur’s interpretation of the history of French parliamentarism in the late sixteenth century as ‘large-scale neutralization’ or attested that the parliament in Paris had successfully adapted to rapidly changing situations (see [Kirchheimer 1965, 660–661](#)). In some passages of his defense of the Nuremberg Trials, to which he added multiple pages for the German edition, he had German critics of the trials speak, at times using Schmitt’s vocabulary (see [Kirchheimer 1965, 473–510](#)). Exercising less restraint than previously in his essays on political justice published in German, Kirchheimer now used the word *Feind* (enemy), a signal word of Schmitt’s. The word appeared right at the beginning, in the first two sentences of the book, as well as in many other places (see [Kirchheimer 1965, 21, 206, 207, and 237](#)). However, Kirchheimer never used the word *Feind* to signify enmity between persons or groups of persons but, rather in the sense of a group’s fundamental opposition to a political system. The term Kirchheimer used as

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

a synonym for *Feindschaft* (enmity) was *systemfeindlich*, inimical to the system (see [Kirchheimer 1965, 243](#)), thereby diverging from Schmitt's usage of the word *Feind* in a personalizing and existential way.

Schmitt continued to observe from afar Kirchheimer's activities and publications. In the following years, Schmitt wrote a number of disrespectful comments about Kirchheimer in his letters to his friends and young admirers. In 1965 he wrote to Armin Mohler about the publication of the German edition of *Politische Justiz*: '[Kirchheimer's] book about political justice does not address the actual problem' ([Schmitt & Mohler 1995, 354](#)). Yet, as in his review for the journal *Die Politische Meinung*, he failed to reveal to Mohler what he thought the actual problem of political justice was.

On November 22, 1965, in the midst of this turbulent life as an internationally renowned professor of political science, Otto Kirchheimer suffered a heart attack on an airplane just before it took off from Washington, DC, to New York. He died a few days after his 60th birthday. He was not an observant Jew, but he was committed to his Jewish identity.²⁰ His ashes were buried alongside those of his parents in the Jewish cemetery of his former hometown of Heilbronn, as he had wished. His German PhD, which was taken away from him during the Nazi era, has been restituted after more than 85 years by Boon university in November 2023 (see [Horstkotte 2023](#)).

7. CONCLUSIONS

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

With the exception of Schmitt's derogatory book review, Kirchheimer and Schmitt did not exchange views or debate Kirchheimer's book *Political Justice*—nor did Kirchheimer take the opportunity to discuss Schmitt's *Theory of the Partisan*, although

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

he was interested in the American warfare against the Vietcong. Schmitt's preface to the new German edition of *The Concept of the Political* would have provided another potential starting point for a new dialogue between the two. He wrote that it would be important to explore to what extent the judicial process itself as a procedure changes its substance and object and transfers them to a different aggregate state. It is striking how his wording corresponded to Kirchheimer's research program in *Political Justice*. However, Schmitt left this connection unmentioned. He presented the subject as still in its infancy and thus missed another opportunity to enter into a critical dialogue with Kirchheimer. The latter, on the other hand, gave no indication in his book about the real extent to which it was inspired by Schmitt's considerations on political justice in his *Constitutional Theory*. He too refrained from openly discussing his old partner's theory in controversial dialogues with him. The fact that Schmitt published his book review semi-anonymously, is symbolic for the distorted communication between the two legal scholars.

COMPETING INTERESTS

The author has no competing interests to declare.

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