

Otto Kirchheimer: Capitalist State, Political Parties and Political Justice

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BIOGRAPHICAL SKETCH

Otto Kirchheimer worked at the exiled Frankfurt Institute of Social Research in Paris and New York between 1934 and 1943. This was a crucial period of time for Kirchheimer, as well as for the Frankfurt School in general.¹ John H. Herz and Erich Hula have rightly stated that Otto Kirchheimer ‘was no systematic thinker’ (Herz and Hula, 1969: ix). The wide intellectual range of his work does not rest on an overarching theoretical basis. Kirchheimer’s focus was rather on current political problems. Nevertheless, the originality of his Weimar writings, his contributions to the work of the Institute, his analyses of changes in party systems and his reflections on political justice have stimulated a persistent interest in his work and an ever growing body of secondary literature on both sides of the Atlantic.

As is the case for many émigrés, knowledge of Otto Kirchheimer’s biography is fragmentary.² This is particularly true for his

childhood and the first years after the Nazis came to power in 1933. Otto Kirchheimer was born on November 11, 1905 into a German-Jewish family in Heilbronn, a small city in the south-western German state of Württemberg. He was the youngest of six children born to his parents, Julius and Frederike Kirchheimer. Both his mother and his father died during his childhood and teenage years. Thanks to the family money he inherited, he could be sent to excellent private boarding schools. Although he was not religious as a teenager, Kirchheimer enthusiastically joined the socialist German-Jewish youth movement *Die Kameraden* in 1919. The experiences and friends he made there awakened his interest in philosophical questions, as well as in socialism and communism. As for many left-leaning, politically organized youth at the time, renowned Marxist authors such as Rosa Luxemburg and Max Adler proved formative to his political outlook.

Supported by his parents’ inheritance, Kirchheimer studied philosophy, history,

sociology and law from 1924 to 1928. He began his studies with the Neo-Kantian philosopher Karl Vorländer in Münster. During this time he joined the German Social Democratic Party (SPD) and became active in its youth movement (*Jungsozialisten*). In 1925 he moved to Cologne to take classes with the sociologist Max Scheler and then to Berlin to study law and constitutional theory with Rudolf Smend and Hermann Heller. Smend encouraged him to move to Bonn in order to study with Carl Schmitt. Despite their diametrically opposed views, the polemically minded Schmitt relished the discussions with the young Kirchheimer, who quickly became a sort of leftist Wunderkind in Schmitt's Bonn circle (Mehring, 2011; Breuer, 2012: 111–41). Under Schmitt's supervision, Kirchheimer completed his doctoral thesis on constitutional theories in socialist and Bolshevik political thought at the beginning of 1928.

In 1930 Kirchheimer moved to Berlin, where he got a job at the law office of Franz L. Neumann and Ernst Fraenkel. The office worked for the labor unions and the SPD. Kirchheimer was skeptical of Fraenkel and Neumann's defense of social-democratic reformism but built a close personal relationship with Neumann during this time. In Berlin he also reestablished contact with Schmitt, who had also moved there. Schmitt's diaries indicate the intellectual exchange between the two of them as well as the harsh anti-semitic reservations Schmitt personally had about Kirchheimer (Schmitt, 2010: 231).

Shortly after the election in March 1933 that secured Hitler's power, the Gestapo took Kirchheimer into custody. He was rescued by the fortunate coincidence of being in a prison cell with Paul Kecskemeti, a United Press correspondent for the *New York Times*. They had never met, but when Kecskemeti was supposed to be released, due to international protest, he insisted that Kirchheimer also be released. Kirchheimer quickly managed to escape to France. In Paris, he rejoined his wife. Having lost all his inheritance, he

desperately tried to find work as a journalist and translator. He joined a group of young academics including Walter Benjamin and Arkadij Gurland who were supported for various lengths of time through small research contracts from the Société Internationale de Recherches Sociales. In 1934 he was taken on to the payroll of the exiled Institute on a part-time basis to research criminal law and criminology. Given the political situation in Europe, Kirchheimer prepared to emigrate to the United States. Due to his ties to the Institute, his papers were accepted by the US immigration agency and he arrived at Ellis Island in 1937. In New York, he found a home with Kurt Rosenfeld and his group, and Franz Neumann offered him a part-time contract at the Institute, which was now loosely affiliated with Columbia University.

With Neumann's support, he was employed two years later in the Research and Analysis Branch of the newly established Office of Strategic Services (OSS) in Washington, D.C. In collaboration with John H. Herz and Herbert Marcuse, he prepared documents on the legal grounds for bringing the political elite of Nazi Germany to trial after the war.

After the war, the intelligence branch of OSS moved to the Department of State. Whereas Neumann, Marcuse and many others left the administration and found employment at US universities and colleges, Kirchheimer had to stay on for ten more years at the Department of State, hating his job and feeling mistreated by the FBI, who interviewed him a couple of times under the suspicion of being a communist.³ Kirchheimer found his intellectual succor as an adjunct teacher at colleges in nearby Washington and as the author of academic papers and numerous book reviews for the *Washington Post*.

Kirchheimer achieved a temporary professorship in Political Science at the New School for Social Research in New York in 1955 and a full professorship in Political Science at Columbia University in 1960. Professionally, he remained an outsider from academic and

intellectual émigré circles in the United States. His exchanges with Hannah Arendt were among the few exceptions, due to a shared interest in the prosecution of Nazi criminals.

After Kirchheimer's release from the State Department, he became a very productive academic writer. He finished his magnum opus, *Political Justice*, in 1961, wrote numerous reviews for newspapers and journals and published a number of articles about European political systems in general and about structural changes in party systems in particular. His next plan was to write a comprehensive book on the role of political parties in late capitalist societies. Otto Kirchheimer died of a fatal heart attack on November 22, 1965.

THE WEIMAR YEARS: CLASS STRUGGLE AND THE DECLINE OF THE CONSTITUTIONAL STATE

Kirchheimer's political views during the Weimar period ranged from a reformist social democracy to a more militant class-conscious socialism. The theorists of reformist social democracy, like Rudolf Hilferding, Hermann Heller, Franz L. Neumann or Ernst Fraenkel, considered the Weimar Constitution as an opportunity to pave the way to democratic socialism. In contrast, in his early Weimar writings, Kirchheimer was one of the most outspoken young voices critical of the Weimar Republic among the non-communist left. However, he changed his position and defended the Weimar Constitution after 1930 when the democratic system of the Weimar Republic was under attack by the political right and authoritarian politicians.

In *Weimar – and What Then?* (Kirchheimer, 1930b), published in the first months of 1930, and one of his most famous texts, Kirchheimer presented his critical analysis of the Weimar Constitution in systematic form. Following more radical theorists like Max

Adler or Arthur Rosenberg, he viewed the existing Weimar Constitution as the final step in the history of bourgeois rule. According to Kirchheimer's early outlook, democracy is only one political form by which to organize a capitalist society; dictatorship is another (Kirchheimer, 1928). Following Marx's analysis of the 18th Brumaire, Kirchheimer describes the social basis of the Weimar Republic as a compromise between different social groups: the revolution of 1918 forced the old imperial and bourgeois military, industrial, bureaucratic and legal elites to agree to a compromise with the leaders of the working class. However, the political parties that founded the new German republic did not replace the old elites because they feared a revolution like the one in Russia. Right from the start the Weimar Constitution was created with 'birth defects'. This critique was aimed in particular at the second section of the Weimar Constitution ('On Basic Rights and Duties') and its unsystematic list of liberal, Christian, socialist and nationalistic statements.

Kirchheimer refused to agree with the leading social democrats who tolerated a conservative non-parliamentary government and its extensive use of the emergency rule of the constitution in the German Reichstag. Whereas Carl Schmitt was supportive of this authoritarian turn to the right, Kirchheimer criticized it and its toleration by the SPD from the very beginning in 1930. He viewed the employment of the emergency measures as not only destroying the achievements of the working class over the last decade but also of parliamentary democracy in general. Owing to the fact that the crucial administrative fields of the state had never been democratized, he stated:

Herein lies the basic and irreparable error of this constitution: it did not come to a decision; it fell prey to the misconception that the principles of democracy alone constitute the principles of a specific social or ideational order; it forgot that democracy cannot do more than articulate already existing conditions. What a democracy can do is

to give external expression to an existing social order and to represent it meaningfully. Because of the confusion between the form of democracy and its content no one undertook to endow this constitution with a political program. (Kirchheimer, 1930b: 72)

This quotation reveals two central tenets of Kirchheimer's critique of the Weimar democracy in the first months of 1930. First, picking up on Carl Schmitt's famous formula of 'a constitution without a decision' (Schmitt, 1928: 32), Kirchheimer interpreted the legal and political system of the Weimar Republic as an unstable compromise between diverse and often antagonistic social groups and classes. Both Schmitt and Kirchheimer shared the conviction that legal norms depend on power and decisions. Yet there is a discrepancy between their understandings of the term 'decision'. For the young socialist, a decision never emanated from nothing but was rather to be founded in class relations. Neither did Kirchheimer adopt Schmitt's cynical concept of the political as an uncompromising distinction between friend and enemy. In Kirchheimer's understanding, the struggle of the classes is not a blind combat in history but rather a competition of principles. Every attempt to improve the situation of the working class was thwarted by the conservative executive or judiciary. The consequence was a crisis of bourgeois rule: first, with respect to its democratic quality, as non-elected forces heavily restricted the power of legislature; and, second, with respect to the rule of law, since the current rules were not applied administratively and judicially in accordance with the rules given by the constitution or the legislature. In such a system, the belief in the rational-legal authority is shaken.

This leads us to the second tenet of Kirchheimer's critique of the Weimar parliamentary system. In order to establish a functioning democracy, society has to decide on a common social order. The implementation of political equality at the beginning of the Weimar Republic was interpreted

as a revolutionary breakthrough by many social democrats. But to Kirchheimer this 'political democracy' did not say anything about economic power relations. Although Kirchheimer's argument was often described as 'left-Schmittian' anti-parliamentarism, he did not argue for an identitarian ideal of democracy as Schmitt did. If we follow Max Adler's distinction between 'political' and 'social democracy', Kirchheimer saw only the latter as a democracy; 'social homogeneity' is the basic premise of any democratic state. Here, homogeneity does not refer to the idea of some transcendent national unity. Rather, homogeneity is a social category and, as such, a necessary condition preventing the establishment of permanent minorities, which would be marginalized and even repressed through majority rule. This argument is also expressed in his dissertation. At the end of *The Socialist and Bolshevik Theory of the State* (1928), Kirchheimer mentioned two alternatives: the policy of social democrats, which he pictured as a weak 'antipolitical refusal to make a decision' (Scheuerman, 1997: 36), and the strong Bolshevik claim for state sovereignty and power politics, which overturned any ethos of constitutionalism. Kirchheimer rejected both options and demanded a more active and militant realization of socialist aims, which had become part of the second section of the Weimar Constitution.

It is, therefore, hardly surprising that Kirchheimer focused on how the Weimar Constitution dealt with private property. According to its wording, the expropriation of private property without full financial compensation was possible as long as it was done for the public welfare and proceeded via parliamentary laws. In a democracy, the legislature is supposed to be omnipotent, and the historical trend points toward growing state intervention: 'The principle of the liberal *Rechtsstaat* is abandoned, insofar as the state, acting on its own conventions, interferes with that which was previously an unquestionable sphere of private domination'

(Kirchheimer, 1930a: 103). However, in the political reality of the Weimar Republic, Kirchheimer's interpretation of the constitution on the issue of property rights had no chance of being implemented. On the contrary, the prevailing legal opinions of the conservative courts expanded the security for private property rights and made it impossible for the state to realize certain infrastructure programs. The political hope of mainstream social democrats that the state would be able to transfer economic enterprises into common property turned out to be illusory.

Kirchheimer diagnosed a deadly crisis of the Weimar parliamentary system and suggested a more militant politics of socialist transformation. Although he had criticized the Weimar Constitution fundamentally and radically, he could draw only a limited practical conclusion from this. Kirchheimer did not change the general picture of his analysis of the Weimar Republic, but the conclusions he drew from it in 1928 were very different from those he drew from the summer of 1930.

The year 1930 ended the era of parliamentary governments in Germany. From that point on, the executive governed without the support of a majority in the Reichstag, based on presidential emergency decrees. This regime change influenced Kirchheimer's position with respect to constitutional politics.⁴ In July 1930 he stated that the Weimar Constitution was 'at least a bit of a democracy' (Kirchheimer, 1930c: 93), which was worth being defended, because up until 1930 it led to substantial compromises between the parties of the bourgeoisie and the social democrats. Schmitt, relying on his antagonistic concept of politics, celebrated the use of emergency rules as a resurrection of the state's sovereignty and the presidential system as a true incarnation of democratic identification. Kirchheimer condemned this process as a decay of democracy and as the first phase of a dictatorship. For Kirchheimer, ruling by emergency decrees could not prove a stepping stone toward the restoration of

public order of a *pouvoir neutre* but rather a partisan tool to regulate economic, labor or social policy in a partisan way. However, instead of calling for mass demonstrations, civil disobedience or even revolutionary acts, he now insisted on compliance with the legal regulations of the constitutional state in order to defend the republican order: 'democracy is the only political system that provides an institutional guarantee that even the most decisive transitions of power need not threaten the continuity of the legal order' (Kirchheimer and Leites, 1933: 82). In his critique of the Prussian coup (*Preußenschlag*) of July 1932 as 'one of the rudest and most evident cases of abuse of form' (Kirchheimer, 1932: 49), Kirchheimer again defended the parliamentary system. In January 1933, a few days before Hitler came to power, he wrote:

The big difference between an autocratic order and a democratic constitutional order is the fact that only the latter secures legal development, though to a limited degree and at the cost of an unavoidable tension between the legal order and the order of power. Therefore, in a democratic state system it can very easily happen that [...] the ideological superstructure of the legal order 'limps ahead of' the actual power relations. (Kirchheimer, 1933b: 183)

Whereas in 1930 Kirchheimer characterized the legal superstructure of the Weimar Republic in a rather orthodox Marxist manner as inferior to power relations (Kirchheimer, 1930b), in 1933 his view turned around.

In the last two years of the Weimar Republic, Kirchheimer defined democracy not merely as a political form for social benefits and emancipation of the working class, but also as the political form that guarantees the interrelation of freedom and equality. He stated: 'the demand for equality is integrated into a demand for the realization of freedom, defined here as an agreement between an unhindered process of will-formation among citizens with the will of the government' (Kirchheimer and Leites, 1933: 65). He no longer defined democracy on the basis of a homogeneous society like Adler and Schmitt did.

Kirchheimer emphasized that democracy neither works by itself nor by the unpolitical power of the state administration; instead it has to be achieved through controversies, conflicts and, sometimes, even civil wars. Ideally, besides leading to maximal political participation, the mutual dependency of freedom and equality in democracy would result in a growing satisfaction of social needs. According to Kirchheimer, the telos of democracy is social democracy. This defense of parliamentarism distinguishes Kirchheimer from communist attitudes as well as his former teacher Carl Schmitt. After 1930, Kirchheimer rejected not only Schmitt's negative view on party politics and his anti-parliamentarianism but also Schmitt's negation of the civilizing function of law.

Kirchheimer seems to make a turnaround: despite all its weaknesses, the Weimar Constitution is no longer to be seen as a misconstruction. However, the practical political question is still unanswered: what is to be done when the legal, administrative and military elites turn their backs on democracy? The answer Kirchheimer gave in January 1933 was the following:

A socialist appreciation of democracy does not primarily concentrate on the legal norms of a democratic constitution but has to make its evaluation of democracy dependent on the question of whether it can count on the overall legal behaviour of the other political agencies of power; whether the other parties and social power groups are prepared to accept the basic democratic institutions, even if they are intent upon limiting their aspirations of power and conceding free play to their political enemies. (Kirchheimer and Leites, 1933: 180-2)

If this is not the case, even violence becomes a legitimate tool for the restoration of democracy. The social democrats should not be afraid, he repeated in an article published in March 1933, 'that the working class can conquer executive political power'. Such a 'civil war has only been forced upon it' (Kirchheimer, 1933a: 27). German history, however, took a different turn.

THE LEGAL ORDER OF NATIONAL SOCIALISM

The biographical details of Kirchheimer's early time in Paris are still not known. Only four articles written by Kirchheimer during his first two years in exile have been discovered so far: *Remarks on Carl Schmitt's 'Legality and Legitimacy'* (Kirchheimer and Leites, 1933), *The Growth and the Decay of the Weimar Constitution* (1933c), *Zur Geschichte des Obersten Gerichtshofes der Vereinigten Staaten von Amerika* (1934) and *State Structure and Law in the Third Reich* (1935), which was published as an indictment against the Nazi regime under the pseudonym Dr Hermann Seitz. It was smuggled into Germany and published in disguise as part of the series *Der deutsche Staat der Gegenwart* edited by Carl Schmitt (Schmitt, 1933). The article was printed in Amsterdam and illegally distributed in Germany by the anti-Nazi resistance. The series *Der deutsche Staat der Gegenwart* was a main source of legal justification for the Nazi state. Important writings from Schmitt were published in this series as well as writings by leading Nazi jurists like Ernst Rudolf Huber, Reinhard Hoehn, Theodor Maunz, Paul Ritterbusch and Werner Weber. In *State Structure and Law in the Third Reich* Kirchheimer attacked the very heart of their justifications for the Nazi system by claiming that the dissolution of constitutional guarantees by National Socialism destroyed the bases for any legal order.

In retrospect, Kirchheimer described the fall of the democratic Weimar Republic as not just due to the successful agitation of the National Socialist party but on a more fundamental level as a consequence of the shift from competitive capitalism toward monopoly capitalism in modern society, a general trend he identified in other Western capitalist societies. Similar to his conclusion in *Weimar – and What Then?*, he blamed the lack of a distinct decision about the social order in the Weimar Constitution for the fall of the republic.

The idea of the ‘social state’ had not been compatible with the parliamentary and bureaucratic interests of the middle classes. Those groups had no interest in regulating conditions of ownership in big industrial and agricultural enterprises (Kirchheimer, 1933c: 562–4). Monopolization was not solely a product of the Nazi regime but had already developed during the Weimar Republic. He wrote in 1941:

This process of absorption of individual rights by monopolistic groups, although noticeable throughout the whole world, was especially apparent under the Weimar Constitution, where the mixture of traditional liberties and status quo guarantees under the misleading title of fundamental rights offered an excellent legal starting point for such developments. Property rights became a protective screen for the process of monopolization, freedom of religion was used to strengthen the existing religious corporations, and freedom of speech and association had to be supplemented by strong protecting organizations in order to obtain recognition. (Kirchheimer, 1941a: 142)

In his first paid work in the United States at the Institute, from winter 1937 to summer 1938, he was to revise, edit and finish a book manuscript by Georg Rusche on the labor market and penal system. The book was published in 1939 with the title *Punishment and Social Structure* and became the Institute’s very first publication in English (Kirchheimer and Rusche, 1939). Kirchheimer wrote the final chapters of the book, in which he argued that punishment policies had no direct influence on the crime rate. Neither a mild policy with the goal of character reform nor a severe policy with the goal of deterrence determine the crime rate. Instead he identified the economic condition of society as the main determinant.

After completing this book, Kirchheimer was offered new contracts as a part-time assistant for the Institute. Since the beginning of the Second World War, the general research agenda of the Institute had focused on conferences and research projects on Nazi Germany. In this context Kirchheimer published his best-known work on the economic

and legal order of National Socialism during 1939 and 1943: *Criminal Law in National Socialist Germany* (1939/40), *Changes in the Structure of Political Compromise* (1941a), *The Legal Order of National Socialism* (1941b) and a book he wrote together with Arkadij Gurland and Neumann, *The Fate of Small Business in Nazi Germany* (Kirchheimer et al., 1943). Together with Gurland, he also provided the economic statistics for Neumann’s book *Behemoth* (Neumann, 1942).⁵

Kirchheimer’s position at the Institute was difficult. The historian Thomas Wheatland describes the atmosphere and Kirchheimer’s status under Max Horkheimer’s hierarchical regime during the years in New York in the following words:

Horkheimer, as paternal authority figure, occupied the table’s center seat and never smiled. To his left sat Theodor W. Adorno, who – unable to contain his intellect or excitement – flitted about the room like a hummingbird constantly conversing with people. On Horkheimer’s right sat Friedrich Pollock in a state of perpetual solemnity. Herbert Marcuse and Franz L. Neumann, two of the wittiest and most personable members of the group, were assigned the next pair of seats beside Adorno and Pollock. Leo Löwenthal and Henryk Grossmann occupied the last two interior spaces at the table, and Otto Kirchheimer and Arkadij Gurland sat at the ends of the table, occupying the most hazardous position at the seminars. After each paper, Institute members would address it in turn. Horkheimer would speak first, followed by Pollock, then Adorno, and so it would proceed until the floor was turned over to Kirchheimer and Gurland. Because both were always the last to speak, their comments often seemed unoriginal or wildly speculative, formulated in a desperate attempt to say something new. As [Daniel] Bell recalls, both received the frequent derision of their colleagues. (Wheatland, 2009: 80)

Anne Kirchheimer-Rosenthal, Kirchheimer’s second wife, remembered his years at the Institute with little sympathy for its leading figures: ‘They gave him a pittance and they did treat him like dirt. Only after he got a job and a position [in the American academia] they treated him like a human being’ (Schale, 2006: 96). Nevertheless, Kirchheimer closely

collaborated at the Institute with Neumann, Gurland and Marcuse, and intellectually the years with the Institute were a very productive period of his life.

As Max Horkheimer explained to Neumann in a letter on February 1, 1942, profound theoretical and political differences concerning the nature and structure of National Socialism led to harsh disputes between the members of the Institute (quoted in Laudani, 2013: 3–4). Horkheimer and Adorno's theory on National Socialism was grounded on Friedrich Pollock's concept of 'state capitalism', which understood the Nazi regime as one among other cases of an emerging new economic and social order, which had transformed monopoly capitalism into a 'command economy' (Pollock, 1941: 454). They were inclined to the view that the Nazi regime was like the Soviet regime. In contrast to these members of the inner core of the Frankfurt School, Kirchheimer agreed with Franz L. Neumann, Arkadij Gurland and partly with Herbert Marcuse (Jay, 1973: 143–72; Wiggershaus, 1995: 223–36, 280–91) that National Socialism was a monopoly capitalistic system built on the social order of private ownership. The economic imperatives of monopoly capitalism were intact and the compromises among the elites of economy, party, military and administration were based on an economic system of private capitalism. This turned out to be the last intensive and truly interdisciplinary debate at the Institute.

Already in 1935, Kirchheimer had argued that in order to secure full state integration and monopolization the Nazis prevented free movements of goods by suppressing freedom of contract while maintaining the social order of private capital. This was also achieved by toughening criminal law and changing the meaning of basic legal terms, like 'substantive justice', or legal compliance (Kirchheimer, 1935: 145–6). Those terms were no longer based on legal rationality – referring to the independence of courts in reaching a sentence – but were used as an instrument to

ascertain political reliability to secure the *deutsche Volksgemeinschaft* (ethnic German community). In 1941 Kirchheimer called this form of rationality 'technical rationality' to exemplify how the administration of justice functioned (Kirchheimer, 1941b: 99). Whereas Marcuse applied the concept of technical rationality to the ideologically instrumentalized mass culture (Marcuse, 1941) and Pollock to the economic structure, and thus concluded that National Socialism is based on a 'command economy' (Pollock, 1941: 447–8),⁶ Kirchheimer applied the concept exclusively to the legal order of National Socialism. Courts were transformed into executive organs to secure political reliability and economic monopolization enhanced by a plurality of organizations having their own jurisdiction over their members (Kirchheimer, 1941b: 108). Not only the army but also industrial and agricultural enterprises were judging working and production conditions autonomously. There was no possibility for workers to call the courts on their own. In this way the Nazis were able to secure the support of all interest groups in power. Thus, criminal law was primarily a source of instructions for political suppression, which ignored possible social circumstances as the origin of criminal behavior (Kirchheimer, 1935: 148).

Since Kirchheimer did not apply the concept of technical rationality to the economy (like Pollock did), he could interpret German National Socialism as a political compromise between certain social groups. The political compromise of National Socialism was constituted by the NSDAP and members of the SA and SS, big industrial companies, agriculture, the *Reichswehr* (the German army) and the state bureaucracy. Hitler's role as Führer was to integrate these different groups with their different social interests. Similarly to Neumann, Kirchheimer argued that the Nazi government was not in full control of the capitalist economy. The Nazi compromise was achieved by new economic and political guarantees for certain interest groups: first, the assurance of institutional

security by enforcing a 'strong government' and abolishing democratic fluctuations in the instructional structure to lower investment risks for big industries; second, opening new investment markets to benefit the few economic power holders; and, third, enhancing monopolization and cartelization by, for example, granting self-jurisdiction to the big industries (Kirchheimer, 1941a: 143–7). Therefore, the Nazi regime was by no means anti-capitalistic or post-capitalistic; it concentrated the possibility of ownership and economic power among a few people holding power over large trusts, while the middle class and small businesses were destroyed (Kirchheimer, 1941a: 155–9).

Kirchheimer insisted on the view that the self-preservation strategy of National Socialism was not sustainable. The reason for the instability of Nazi Germany was that it relied on a state that had to be able to secure simultaneously successful external expansion by war and by internal suppression of any opposition. Such a constellation was problematic for the stability of the system because in the case of external shocks 'it is rather doubtful whether suppression can be maintained when the system that insured it has been substantially shaken' (Kirchheimer, 1944: 193).

In a way similar to Neumann and Gurland, Kirchheimer occupies a distinct place within the group of the first generation of the Frankfurt School in exile. He did not follow the negative philosophy of history in Adorno's and Horkheimer's *Dialectic of Enlightenment* (1944), nor did he share the revolutionary optimism of his close personal friend Herbert Marcuse. In the debates within the Institute about the best way to describe German Nazism, he insisted, against Horkheimer, Pollock and Adorno, on the priority of structural changes in modern capitalism for any analysis of Nazi Germany. In retrospect, this constellation was paradoxical. Horkheimer and his followers created a theory of 'state capitalism', a system of society in which politics dominate the economic

sphere; but they did not carry out any analysis in political science to get a closer look at the political processes of this new system. Kirchheimer on the other hand was hired to fill the gap in Horkheimer's ambitious 'interdisciplinary materialism' in the fields of politics and law. However, his empirical research led him to conclude that any serious analysis of politics and law in Nazi Germany has to have as its analytical starting point the capitalist character of the economy.

But it is not only detailed empirical knowledge that makes Kirchheimer's analysis of fascism, in retrospect, more convincing than the state-capitalism theory of Horkheimer and his inner circle at the Institute. Axel Honneth is correct when he attributes the superiority of the interpretation by Kirchheimer, Gurland and Neumann to a 'social-theoretical approach, which is more implicitly than explicitly' (Honneth, 1995: 79) to be found in their work. Whereas for Horkheimer and his inner circle, social integration represented a process which comes about by means of the unconscious compliance with the functional imperatives of society, Kirchheimer and his two co-authors understood social integration 'also by way of communication between social groups' (Honneth, 1995: 78). Such an approach sets up a barrier against a Marxist functionalism that finally led Horkheimer and his close associates to draw a monolithic picture of a totally administered society. Against such a functionalism, Kirchheimer's analyses of both the Weimar Republic and of Nazi Germany started from an analysis of the interests and orientations that the main social groups themselves had brought into the political games.

WESTERN POSTWAR SOCIETIES: THE VANISHING OPPOSITION

Kirchheimer's view on the prospects for democracy after the war changed over the years. But whereas his writings in the Weimar

period and, to a lesser degree, in the early years of his exile, were underpinned by an optimistic vision of a better and just social and political order, in his very late work he changed his fundamental perspective: instead of hoping for a better political world he hoped to avert the worst. In his last essay in the *Festschrift* for Herbert Marcuse, Kirchheimer concluded his reflections with the following diagnosis of the times:

It may well be, however, that the historian of the twentieth century will be less impressed by diverse propagandistic claims of various regimes as to the reign of law under their dominion than with the close cohabitation between wide stretches of certainty for mass man's daily living conditions with unheard-of areas of oppression, lawlessness, and rewards for maximum aggressiveness. A generation that has lived through Auschwitz and Hiroshima and was indifferent or powerless to prevent them, and which is prepared to see bigger Hiroshimas, has no cause for complacency about its preservation or even enlargement of some orderly forms of living. It may have forgotten the essential: there must be life for life to be worth living. (Kirchheimer, 1967: 261)

Kirchheimer's first studies on Germany at the OSS were guided by his fear of a forthcoming Nazi resurgence. However, such a scenario soon played a minor role in his evaluations of German society. According to Kirchheimer, the majority of Germans and the key political parties seemed to focus on industrial and economic reconstruction; political conflicts, ideological controversies and accounting for the past mattered next to nothing. West Germany was more than another bastion of the postwar affluent society, with its orientation on non-political pragmatism. The so-called economic miracle, the position in foreign policy and even the taboo of its Nazi past fostered its defining feature: the welfare state with its all-embracing universe of claims. The once feared revanchism and nationalism were replaced by the satisfaction of private consumer dreams, an increasing national income and the maintenance of social normality. West Germany was, in Kirchheimer's eyes, a stable political system but not a democratic

community with a culture of civic discussion. His criticism was now directed toward the political parties – not exclusively toward the government – and no longer toward the judicial system. Kirchheimer praised the Federal Constitutional Court for its decision in the 1950s on civil service law after Nazism and its cautious activity in the communist party-ban proceedings. His critique of political power, however, revolved around the replacement of the normative ideal of a 'good life' with the satisfaction of consumer needs. 'Part of the stupendous absorptive capacity of the West German regime [...] rests on its collective lack of memory; there is little demand for self-criticism in a successful going concern' (Kirchheimer, 1961a: 254–66).

Kirchheimer stated that anyone who disturbed this universe of claims by questioning the German emphasis on economic developments and consumerism, suggesting an alternative foreign policy toward the Soviet bloc or remembering the Nazi past was regarded as a troublemaker. His prime example became the so-called 'Spiegel case'. In October 1962, leading journalists of the German weekly news magazine *Der Spiegel* were taken into custody and prosecuted for treason by the Federal government. Kirchheimer drew a parallel between some of the government activities and the methods of the Gestapo. He called the government activities against the journalists 'cheese cover' (Kirchheimer, 1964: 85) and criticized the rise of a 'surveillance state' (Kirchheimer, 1966a: 282–6) in West Germany. Although Kirchheimer perceived the widespread public protest in the Spiegel case as an indicator for positive political change, he remained skeptical with respect to the political culture in West Germany.

Kirchheimer's research on the change of party structures can be best understood as part of his broader analysis of modern mass society (Schale and Buchstein, 2014). Due to their non-ideological behavior, the rising catch-all parties are the key political actors in modern society. They are exclusively focused

on electoral success, which leads to a mini-mization of ideological conflicts. Moreover, the orientation toward voters instead of party members strengthens the managerial dimension of political leadership and weakens deliberation within the party. These managerial trends strengthen the cooperation of business, administration, media and parties to a large extent and lead to a loss of critical supervision of the administration and other institutions of government. Political opposition becomes even more difficult. Kirchheimer discusses two ideal types: an opposition loyal to the government and an 'opposition by principle'. Both types of opposition lack programmatic ideas within the constitutional framework. Repeatedly, Kirchheimer wrote about the postwar setup in terms of absurdity: 'Activity becoming another form of passivity' (Kirchheimer, 1959: 499). Kirchheimer replicates such disillusioning results in many analyses, e.g., of the labor unions or the decline of intra-state federalism. However, as long as the economic miracle and the welfare state are able to maintain a 'universe of claims' (Kirchheimer, 1954: 312), this type of political integration by marketing works perfectly well.

Kirchheimer's last and more explicit sociological studies illustrate the extent to which his analyses are connected to Herbert Marcuse's writings of the early 1960s. Modern society is described as 'one-dimensional'. Kirchheimer tries to demonstrate how non-ideological political attitudes arise from social changes in modern mass production, bureaucratization and consumerism. Conspicuous private consumption substitutes the attainment of socio-political aims. Sometimes the labor unions sense the limits of such a view on society but 'an awareness of another and better order and a need to dissociate their claims from those of other groups by way of an elaborate theory [...] simply does not exist' (Kirchheimer, 1956: 508). Alienation without any proper political form entails false consciousness, the distinguishing characteristics of which are irrational

escapism, growing self-understanding as a pariah and confining oneself to pure instrumental reason. As in Marx's early writings, individualism does not mean liberation but isolation. Such an interpretation follows Marcuse's terms 'surplus repression' and 'repressive desublimation' as features of modern society, but Kirchheimer does not see any demand for non-repressive sublimation. The only remaining insight is that all the agencies organizing the universe of claims 'are insufficiently related to the major problem of his [man's] existence: his purpose in life' (Kirchheimer, 1966b: 24). Based on such a view, an analysis of Kirchheimer's magnum opus, *Political Justice* (1961b), sheds light on the extent to which his early normative ideal of a just humane society was transformed into hopeful skepticism for the reduction of injustices.

POLITICAL JUSTICE AND LIBERAL DEMOCRACY

The first edition of Kirchheimer's book *Political Justice. The Use of Legal Procedures for Political Ends* came out in 1961. The much extended German edition appeared in 1965. Kirchheimer had worked on this book right after he had left the OSS in 1955. However, as John Herz and Eric Hula rightly emphasize, *Political Justice* is more a product of his lifelong experiences with the administration of law and politics in liberal democracies since the Weimar Republic than of his observations during the years of the Nazi regime (Herz and Hula, 1969: xxxii). While it is common to assume that the phenomenon of political justice is mainly a practice used by authoritarian regimes for purposes of propaganda, Kirchheimer focused his interest on liberal constitutional states. He was inspired by his former teacher Rudolf Smend and his 'theory of integration', which states that the courts in liberal democracies should not

only integrate the legal community but also support the general political goals of the regime and thus enhance state integration (Kirchheimer, 1965: 23).⁷ This is where Kirchheimer's reflections on political justice begin.

The title of the book is ambiguous to English readers, as Kirchheimer explains in the preface:

The term Political Justice is usually taken to reflect the search for an ideal order in which all members will communicate and interact with the body politic to assure its highest perfection. Is it, then, gross linguistic abuse and utter cynicism to apply this term, as European writers have traditionally done, to the most dubious segment of the administration of justice, that segment which uses the devices of justice to bolster or create new power positions? (Kirchheimer, 1961b: vii)

It was to avoid confusion that Kirchheimer added the subtitle 'The Use of Legal Procedures for Political Ends' (Hackler and Herrmann, 2015: 183). Most American scholars when referring to *Political Justice* use the term 'political trials' instead.

Political justice in Kirchheimer's sense is a necessary but paradoxical component of the judicial process in any democratic state. Courts are supposed to be neutral institutions that decide on the limits of political thought and action (Kirchheimer, 1961b: 6–7). Kirchheimer claims that political trials have been a useful tool throughout history to legitimize persecution in states based on liberal principles. He illustrates this claim by presenting numerous examples up to the Nuremberg trials and those against suspected communists in the United States and West Germany. In one chapter he takes a closer and critical look at the administration of justice in the GDR; this investigation had a personal component as well, because his first wife – remarried as Hilde Neumann – took a leading position in the East German judicial apparatus until her early death in 1959. The final chapters of the book deal with the adjustments of political justice, asylum and clemency.

For Kirchheimer, 'authentication' had been one of the two major functions of political trials in liberal constitutional systems since the French Revolution. By referring to *a priori* rules, judicial authentication simultaneously legitimizes and constrains government actions. Therefore, political justice has a positive aspect: in order to gain legitimacy, a judicial process has to follow procedural law. This is the reason for Kirchheimer's exclusion of regimes like Nazi Germany from his analysis. In such systems, law is always politically controlled and implemented like an order or a directive. As Ulrich Scheuner put it in a letter: 'The counterpart [of political trials] is even worse: It is the administrative annihilation of foes, from concentration camps through to administrative forced exile'.⁸

The mobilization of public opinion is the second function of political justice. The courtroom becomes a stage not only for the regime but also for the accused. It gives the accused a chance to promote his or her political beliefs and goals:

The aim of political justice is to enlarge the area of political action by enlisting the services of courts on behalf of political goals. It is characterized by the submission to court scrutiny of group and individual action. Those instrumental in such submission seek to strengthen their own position and weaken that of their political foes. (Kirchheimer, 1961b: 419)

For Kirchheimer political justice is not bound to political criminal law but characterized by the intention of the actors to use courts for political purposes. It is important to emphasize that for Kirchheimer political justice does not necessarily result in the misuse of law. The functions of authentication and producing public images are also the reasons why political justice in some cases seems more attractive to power holders than administrative action (Kirchheimer, 1961b: 95–7).

Kirchheimer's definition of political justice reveals his complex intellectual relationship with Carl Schmitt and his terminology

of friend and foe. Even though Kirchheimer manages to mention Schmitt's name not once, close readers of the book realize that he defines politics as a battlefield for power in ways similar to Schmitt. But even though he uses the term 'politics' as Schmitt does, the meaning for Kirchheimer is different. According to Schmitt, politics and law are antagonistic entities and therefore any constitutional jurisdiction is self-contradictory; whenever the medium of law is used to settle political disputes, the logic of friend and foe automatically transfers law into politics. Kirchheimer, in contrast, assumes that political justice is a suitable and essential instrument to settle fights over political power. Thus, political justice should be understood in a positive way as a cultural achievement of the modern *Rechtsstaat* to constrain political arbitrariness. This insight leads Kirchheimer to agree with legal positivists like Hans Kelsen and Max Weber and their formula of 'the juridification of politics' (van Ooyen, 2011). In order to give readers of the German edition of the book who were familiar with Carl Schmitt's vocabulary no reason for possible misunderstanding, Kirchheimer instructed Gurland to avoid the term 'Feind' (enemy) and to use 'Gegner' (opponent) in the translation instead.⁹

KIRCHHEIMER'S LEGACY

Kirchheimer's early articles on the Weimar years were widely recognized in Germany from the mid 1960s on, when predominantly left scholars rediscovered the *Weimar Staatsrechtslehre*. Since then, Kirchheimer's early work has stood out as a foresighted critique of the Weimar Republic. In addition, some of his concepts and categories in his Weimar writings have been picked up independently by authors of a later generation of the Frankfurt School – for example, his use of the term 'juridification' by Jürgen Habermas (Habermas, 1995: 356–73), his

analytical distinction between a 'directive' and a 'distributive' sphere in modern capitalism by Claus Offe (Offe, 1984: 89) or his discussion about the relationship between legality and legitimacy by Ulrich K. Preuss (Preuss, 1984). The Anglo-American reception of Kirchheimer's Weimar writings came more slowly and by different paths. Frank Burin and Kurt Shell had already called attention to Kirchheimer's work in 1969 with their edition *Politics, Law and Social Change. Selected Essays of Otto Kirchheimer* (Burin and Shell, 1969), but it was only in the 1980s that Anglo-American scholars took greater interest in Kirchheimer's Weimar writings. Keith Tribe's edition of essays by Kirchheimer and Neumann, *Social Democracy and the Rule of Law*, introduced Kirchheimer and Neumann in 1987 as witnesses of the fall of Weimar and advocates from the left of the 'rule of law' (Tribe, 1987). Tribe correctly contrasted Kirchheimer's and Carl Schmitt's positions. William Scheuerman picked up on this interpretation in his book *Rule and Law under Siege. Selected Essays of Franz L. Neumann and Otto Kirchheimer* (Scheuerman, 1996), in which he referred to Kirchheimer in order to argue against the emerging reception of Schmitt in Critical Legal Studies.

However, in the Anglo-American academy, Kirchheimer was for a long time mainly associated with his contributions to the body of literature by the Frankfurt School on Nazi Germany (Held, 1980; Arato and Gebhardt, 1982) and in particular with Franz Neumann's book *Behemoth*, to which he had contributed intellectually (Jay, 1973: 160–7). Only later did Thorsten Sellin and Edwin H. Sutherland discover *Punishment and Social Structure* as an important starting point for critical criminology (Taylor et al., 1975; Platt and Takagi, 1981; Melossi and Pavarini, 1981; Garland, 1990; Michalowski and Carlson, 1999: 217–49). An enthusiastic reference by Michel Foucault to *Punishment and Social Structure* in the first chapter of his *Discipline and Punish: The Birth of the*

Prison (Foucault, 1976: 35) helped to raise a broader interest in Kirchheimer's work on criminology.

The next wave of interest began with a crucial misunderstanding: the work of Kirchheimer, Marcuse and Benjamin was interpreted by some Anglo-American academics to be deeply influenced by right-wing conservative thinkers like Carl Schmitt, Martin Heidegger and Ernst Jünger. Kirchheimer was declared by some authors in this debate (Kennedy, 1987a, 1987b; Scheuerman, 1997) to be a 'left-Schmittian'. The critics accused Kirchheimer of following Schmitt in his concept of the political, in his anti-parliamentarism and in his critique of liberalism. It took a closer look at Kirchheimer's intellectual roots and the ways he made creative and critical use of Schmittian categories to correct this simplistic impression (Jay, 1987; Söllner, 1987; Preuss, 1987; Bavaj, 2007; Schale, 2011).

Among the wide range of topics in his late work, two issues stand out: his reflections on political justice and his analysis of the rise of catch-all parties. The English-speaking reception of *Political Justice* was sometimes characterized by misunderstandings, when his analysis was understood by some readers to contribute to the discussion of 'What makes a trial political?'. Judith Shklar's book *Legalism. Law, Morals, and Political Trials* (1964) in which she applied Kirchheimer's concept of political trials in a creative way to the Nuremberg and Tokyo trials (Shklar, 1964: 237), was the most productive reception of Kirchheimer's thoughts on this issue. She reaches, however, a different conclusion from Kirchheimer with respect to the function of political trials. Whereas he saw the Nuremberg Trials (again contra Schmitt) as a crucial contribution to the development of international law (Kirchheimer, 1961b: 341), Shklar evaluated political trials as an illegitimate or indecent practice. According to her, the Nuremberg Trials were legitimate only in a political sense, not in a legal one. The recent attempt to define political

trials in the tradition of Kirchheimer by Jens Meierhenrich and Devin Pendas leads to an even more critical conclusion: Kirchheimer's use of the Schmittian term 'politics' narrows his concept to politically intended battles in the courtroom and leaves out possible non-political trials, which may still have a major political impact (Meierhenrich and Pendas, 2016: 27).

Kirchheimer's writings about the structural changes of party systems draw wide attention from political scientists until today. Kirchheimer has become *the* classic author on the emergence of the catch-all party. Within the tradition of the Frankfurt School, Jürgen Habermas in his early work on the transformation of the public sphere, and Claus Offe in his writings about the legitimacy crisis in late capitalism, relied on Kirchheimer's reflections about the changing party systems and the vanishing of opposition in modern democracies (Habermas, 1992: 196–222; Offe, 1985). Meanwhile, there exists a rich body of literature about the empirical validity of his thesis (Wolinetz, 1979; Dittrich, 1983; Krouwel, 2003; Williams, 2009). In addition, it serves as a conceptual tool to model recent developments in party systems facing the rise of right-wing popular parties. Peter Mair and Richard S. Katz and their concept of the 'cartel party' could be read as an update of Kirchheimer's theory which corresponds to recent publications by Colin Crouch and others on 'post-democracy' (Mair and Katz, 1992, 1994, 2002; Mair, 2013).

Kirchheimer's late articles and papers are characterized by a sense of critical distance from, and even grim coolness toward, industrial societies and modern Western democracies. He sympathized with the American student protest movement, which started in Berkeley in 1964, while not sharing Marcuse's enthusiasm for it. Like Horkheimer, Adorno or Löwenthal, he did not trust that the institutions of modern democracy and the public sphere would have a powerful curing effect on the power elites in the long run. Nevertheless, Alfons Söllner

has made an important point when he identifies Kirchheimer's intellectual development as a process of internationalization, acculturation and normative Westernization in the context of his political experiences as an émigré (Söllner, 2003). Kirchheimer's personal experience during the Weimar Republic and its collapse, his precarious existence in Paris and New York and the willingness of the United States to accept him at the OSS, the State Department and in the university system turned him into an intellectually open political scientist who had learned to value and to insist on the minimal normative standards of a liberal democracy. Kirchheimer in his late work did not hope for a better political world but simply wanted to avert the worst.

Notes

- 1 The authors would like to thank Eno Trimcev, Kerstin Pohl, Werner Bonefeld and Beverley Best for their helpful comments.
- 2 The following biographical sketch is based on John H. Herz and Erich Hula (1969) and Frank Schale (2006). Additional biographical information is based on Otto Kirchheimer's Papers (at the University at Albany, M.E. Grenander Department of Special Collections & Archives) and on conversations and interviews (Frank Schale with Anne Rosenthal-Kirchheimer on October 6, 2006; Hubertus Buchstein with John H. Herz on November 15, 1985, with Leo Löwenthal on October 10, 1990, with Wilhelm Hennis on September 26, 2009, with Peter Kirchheimer on March 12, 2015 and with Hanna Kirchheimer-Grossman on March 11, 2016).
- 3 First investigations by the FBI are documented in 1940. During his time at the OSS Kirchheimer had been the subject of loyalty reports several times. While working at the State Department in 1952 he was classified as an employee who is 'eligible on loyalty' (see FBI Headquarters file 121-HQ-13351, Section 1, Report from Hiram Bringham to Honorable J. Edgar Hoover, May 21, 1952).
- 4 *Artikel 48 und die Wandlungen des Verfassungssystems. Auch ein Beitrag zum Verfassungstag* (1930c) was the first article that showed Kirchheimer's radically changed position toward the Weimar parliamentary system after the recently announced *Reichskanzler* Heinrich Brüning passed laws in July 1930 to implement a new fiscal policy by using the emergency rule. Before-

hand, the Social Democratic party had blocked Brüning's policy. *Weimar – and What Then?* was published only a few months earlier.

- 5 On Kirchheimer's close collaboration with Gurland see Buchstein (2010).
- 6 Pollock explicitly refers to Otto Kirchheimer's essay 'The Legal Order of National Socialism' (Pollock, 1941: 447–8).
- 7 Kirchheimer only mentions his former professor Rudolf Smend in the German translation. The enlarged German edition of the book from 1965 is around 250 pages longer and was translated by his old friend from the Young Socialists Arkadij Gurland.
- 8 Letter from Ulrich Scheuner to Kirchheimer, October 10, 1955. In: University at Albany, M.E. Grenander Department of Special Collections & Archives, Otto Kirchheimer papers, Series 2, Professional Correspondence, 1927–65, Box 2, Folder 7 (our translation).
- 9 See letter from Otto Kirchheimer to Arkadij Gurland, August 30, 1961. In: University Archive, Goethe-Universität Frankfurt am Main, Folder: Gurland Papers, Na5/675(5).

REFERENCES

- Arato, Andrew/Gebhardt, Eike (eds.) (1982): *The Essential Frankfurt School Reader*. New York: Continuum.
- Bavaj, Riccardo (2007): Otto Kirchheimers Parlamentarismuskritik in der Weimarer Republik. Ein Fall von "Linksschmittianismus"? In: Vierteljahreshefte für Zeitgeschichte, 55, pp. 33–51.
- Buchstein, Hubertus (2010): From Critical Theory to Political Science: A.R.L. Gurland's Project of Critical Political Science in Postwar Germany. In: *Redescriptions*, 14, pp. 55–82.
- Breuer, Stefan (2012): *Carl Schmitt im Kontext: Intellektuellenpolitik in der Weimarer Republik*. Berlin: Akademie Verlag.
- Burin, Frederic S./Shell, Kurt (eds.) (1969): *Politics, Law, and Social Change: Selected Essays of Otto Kirchheimer*. New York: Columbia Univ. Press.
- Dittrich, Karl (1983): Testing the Catch-all Thesis. Some Difficulties and Problems. In: Daalder, Hans/Mair, Peter (eds.): *Western European Party Systems. Continuity and Change*. London/Beverly Hills: Sage, pp. 257–66.

- Foucault, Michel (1976): *Discipline and Punish: The Birth of the Prison*. New York: Random House.
- Garland, David (1990): *Punishment and Modern Society: A Study in Social Theory*. Chicago: Univ. of Chicago Press.
- Habermas, Jürgen (1992): *The Structural Transformation of the Public Sphere. An Inquiry into a Category of Bourgeois Society*. Cambridge: MIT Press.
- Habermas, Jürgen (1995): *Theory of Communicative Action. Volume Two. Lifeworld and System: A Critique of Functionalist Reason*. Boston: Beacon Press.
- Hackler, Ruben/Herrmann, Lucia (2015): Otto Kirchheimer. Political Justice: The Use of Legal Procedures for Political Ends. In: Dommann, Monika/Esapahangizi, Kijan/Goltermann, Svenja (eds.): *Nach Feierabend*. Züricher Jahrbuch für Wissensgeschichte, 11, pp. 175–80.
- Held, David (1980): *Introduction to Critical Theory*. Berkeley: University of California Press.
- Herz, John H./Hula, Erich (1969): Otto Kirchheimer. An Introduction to His Life and Work. In: Burin, Frederic S./Shell, Kurt (eds.): *Politics, Law, and Social Change: Selected Essays of Otto Kirchheimer, 1969*, ix–xxxviii.
- Honneth, Axel (1995): *The Fragmented World of the Social: Essays in Social and Political Philosophy*. New York: State Univ. of NY Press.
- Horkheimer, Max/Adorno, Theodor W. (1944): *Dialectic of Enlightenment*. New York: Continuum 1972.
- Jay, Martin (1973): *The Dialectical Imagination. A History of the Frankfurt School and the Institute of Social Research, 1923–1950*. Berkeley: Univ. of California Press.
- Jay, Martin (1987): Reconciling the Irreconcilable: A Rejoinder to Kennedy. In: *Telos*, 71, pp. 67–80.
- Kennedy, Ellen (1987a): Carl Schmitt and the Frankfurt School. In: *Telos*, 71, pp. 37–66.
- Kennedy, Ellen (1987b): Carl Schmitt and the Frankfurt School: A Rejoinder. In: *Telos*, 73, pp. 101–116.
- Kirchheimer, Otto (1928): The Socialist and Bolshevik Theory of the State. In: Burin, Frederic S./Shell, Kurt (eds.): *Politics, Law, and Social Change: Selected Essays of Otto Kirchheimer, 1969*, pp. 3–21.
- Kirchheimer, Otto (1930a): The Limits of Expropriation. In: Tribe, Keith (ed.): *Social Democracy and the Rule of Law. Otto Kirchheimer and Franz Neumann, 1987*, pp. 85–129.
- Kirchheimer, Otto (1930b): Weimar – and What Then? An Analysis of a Constitution. In: Burin, Frederic S./Shell, Kurt (eds.): *Politics, Law, and Social Change: Selected Essays of Otto Kirchheimer, 1969*, pp. 33–74.
- Kirchheimer, Otto (1930c): Artikel 48 und die Wandlungen des Verfassungssystems. In: id.: *Von der Weimarer Republik zum Faschismus*. Frankfurt a. M.: Suhrkamp, pp. 91–5.
- Kirchheimer, Otto (1932): Die Verfassungslehre des Preußen-Konflikts. In: id.: *Funktionen des Staates und der Verfassung*. Frankfurt a. M.: Suhrkamp, pp. 42–61.
- Kirchheimer, Otto (1933a): Marxism, Dictatorship and the Organization of the Proletariat. In: Burin, Frederic S./Shell, Kurt (eds.) *Politics, Law, and Social Change: Selected Essays of Otto Kirchheimer, 1969*, pp. 22–32.
- Kirchheimer, Otto (1933b): Constitutional Reform and Social Democracy. In: Tribe, Keith (ed.): *Social Democracy and the Rule of Law. Otto Kirchheimer and Franz Neumann, 1987*, pp. 179–93.
- Kirchheimer, Otto (1933c): The Growth and the Decay of the Weimar Constitution. In: *The Contemporary Review*, 144 (815), pp. 562–4.
- Kirchheimer, Otto (1934): Zur Geschichte des Obersten Gerichtshofes der Vereinigten Staaten von Amerika. In: *Zeitschrift für Öffentliches Recht*, 14, pp. 445–58.
- Kirchheimer, Otto (1935): State Structure and Law in the Third Reich. In: Scheuerman, William E. (ed.), 1996, pp. 142–71.
- Kirchheimer, Otto (1939/40): Criminal Law in National Socialist Germany. In: *Studies in Philosophy and Social Science*, 8, pp. 444–63.
- Kirchheimer, Otto (1941a): Changes in the Structure of Political Compromise. In: Burin, Frederic S./Shell, Kurt (eds.), 1969, pp. 131–59.
- Kirchheimer, Otto (1941b): The Legal Order of National Socialism. In: Burin, Frederic S./Shell, Kurt (eds.), 1969, pp. 88–109.
- Kirchheimer, Otto (1944): In Quest of Sovereignty. In: Burin, Frederic S./Shell, Kurt (eds.), 1969, pp. 160–93.

- Kirchheimer, Otto (1954): Notes on the Political Scene in Western Germany. In: *World Politics*, 6 (3), pp. 306–21.
- Kirchheimer, Otto (1956): West German Trade Unions. In: *World Politics*, 8 (4), pp. 484–514.
- Kirchheimer, Otto (1959): Majorities and Minorities in Western European Governments. In: *The Western Political Quarterly*, 12 (2), pp. 492–510.
- Kirchheimer, Otto (1961a): German Democracy in the 1950s. In: *World Politics*, 13 (2), pp. 254–66.
- Kirchheimer, Otto (1961b): Political Justice. The Use of Legal Procedures for Political Ends. New Jersey: Princeton Univ. Press.
- Kirchheimer, Otto (1964): Brief an Hermann Kesten. In: Hermann Kesten: Ich lebe nicht in der Bundesrepublik. München: List Verlag, pp. 85–91.
- Kirchheimer, Otto (1965): Politische Justiz: Verwendung juristische Verfahrensmöglichkeiten zu politischen Zwecken. Neuwied: Luchterhand.
- Kirchheimer, Otto (1966a): Nachwort. In: Lehmann, Lutz: Legal & Opportun. Politische Justiz in der Bundesrepublik. Berlin: Voltaire Verlag, pp. 282–6.
- Kirchheimer, Otto (1966b): Private Man and Society. In: *Political Science Quarterly*, 81 (1), pp. 1–24.
- Kirchheimer, Otto (1967): The *Rechtsstaat* as Magic Wall. In: Scheuerman, William E. (ed.), 1996, pp. 243–63.
- Kirchheimer, Otto/Leites, Nathan (1933): Remarks on Carl Schmitt's *Legality and Legitimacy*. In: Scheuerman, William E. (ed.), 1996, pp. 46–98.
- Kirchheimer, Otto/Rusche, George (1939): *Punishment and Social Structure*. New York: Columbia Univ. Press.
- Kirchheimer, Otto/Gurland, Arkadius R.L./Neumann, Franz L. (1943): *The Fate of Small Business in Nazi Germany, U.S. Senate Special Committee on Small Business*. Washington D.C.: U.S. Government Printing Office.
- Krouwel, Andrew (2003): Otto Kirchheimer and the Catch-All Party. In: *West European Politics*, 26, pp. 23–40.
- Laudani, Raffaele (ed.) (2013): *Secret Reports on Nazi Germany: The Frankfurt School Contribution to the War Effort*. Princeton, NJ: Princeton Univ. Press.
- Mair, Peter (2013): *Ruling the Void: The Hollowing of Western Democracy*. London: Verso.
- Mair, Peter/Katz, Richard S. (1992): The Membership of Political Parties in European Democracies 1960–1990. In: *European Journal of Political Research*, 22, pp. 329–45.
- Mair, Peter/Katz, Richard S. (1994): *How Parties Organize. Change and Adaptation in Party Organizations in Western Democracies*. London/Beverly Hills: Sage.
- Mair, Peter/Katz, Richard S. (2002): The Ascendancy of the Party in Public Office: Party Organizational Change in Twentieth-Century Democracies. In: Richard, Gunther/Montero, José Ramón/Linz, Juan J. (eds.): *Political Parties. Old Concepts and New Challenges*. Oxford: Oxford Univ. Press, pp. 113–35.
- Marcuse, Herbert (1941): Some Social Implications of Modern Technology. In: *Studies on Philosophy and Social Science*, 9, pp. 414–39.
- Mehring, Reinhard (2011): Ein typischer Fall jugendlicher Produktivität. Otto Kirchheimers Bonner Promotionsakte. In: van Ooyen, Robert/Schale, Frank (eds.), 2011, pp. 17–35.
- Meierhenrich, Jens/Pendas, Devin (eds.) (2016): *Political Trials in Theory and Practice*. Cambridge: Cambridge Univ. Press.
- Melossi, Dario/Pavarini, Massimo (1981): *The Prison and the Factory. The Origins of the Penitentiary System*. London: Palgrave MacMillian.
- Michalowski, Raymond J./Carlson, Susan M. (1999): Unemployment, Imprisonment, and Social Structures of Accumulation. Historical Contingency in the Rusche–Kirchheimer Hypothesis. In: *Criminology. An Interdisciplinary Journal*, 37 (2), pp. 217–49.
- Neumann, Franz L. (1942): *Behemoth: The Structure and Practice of National Socialism*. New York, London: Oxford University Press.
- Offe, Claus (1984): *Contradictions of the Welfare State*. Cambridge: MIT Press.
- Offe, Claus (1985): *Disorganized Capitalism: Contemporary Transformations of Work and Politics. Studies in Contemporary German Social Thought*. Cambridge: MIT Press.
- Platt, Tony/Takagi, Paul (eds.) (1981): *Crime and Social Justice*. London: Palgrave Macmillian.

- Pollock, Friedrich (1941): Is National Socialism a New Order? In: *Studies in Philosophy and Social Science*, 9, pp. 440–55.
- Preuss, Ulrich K. (1984): *Politische Verantwortung und Bürgerloyalität*. Frankfurt am Main: Fischer.
- Preuss, Ulrich K. (1987): The Critique of German Liberalism: A Reply to Kennedy. In: *Telos*, 71, pp. 97–109.
- Schale, Frank (2006): *Zwischen Engagement und Skepsis. Eine Studie zu den Schriften von Otto Kirchheimer*. Baden-Baden: Nomos.
- Schale, Frank (2011): Parlamentarismus und Demokratie beim frühen Otto Kirchheimer. In: van Ooyen, Robert/Schale, Frank (eds.), 2011, pp. 141–75.
- Schale, Frank/Buchstein, Hubertus (2014): Introduction to Kirchheimer 'Elite – Consent – Control in Western Political Systems'. In: *Redescriptions*, 17, pp. 140–48.
- Scheuerman, William E. (1996): *The Rule and Law Under Siege: Selected Essays of Franz L. Neumann and Otto Kirchheimer*. Berkeley: Univ. of California Press.
- Scheuerman, William E. (1997): *Between the Norm and the Exception. The Frankfurt School and the Rule of Law*. Cambridge: MIT Press.
- Schmitt, Carl (1928): *Verfassungslehre*. Berlin: Duncker & Humboldt.
- Schmitt, Carl (1933): *Staat, Bewegung, Volk. Die Dreigliederung der politischen Einheit*. Hamburg: Hanseatische Verlagsgesellschaft.
- Schmitt, Carl (2010): *Tagebücher 1930–34*. Berlin: Akademie Verlag.
- Shklar, Judith (1964): *Legalism: Law, Morals, and Political Trials*, 3. Ed. (1986). Cambridge MA: Harvard Univ. Press.
- Söllner, Alfons (1987): Beyond Carl Schmitt: Political Theory in the Frankfurt School. In: *Telos*, 71, pp. 81–96.
- Söllner, Alfons (2003): Normative Westernization? The Impact of Remigres on the Foundation of Political Thought in Post-War Germany. In: Müller, Jan-Werner (ed.): *German Ideologies since 1945. Studies in the Political Thought and Culture of the Bonn Republic*. New York: Palgrave Macmillan, pp. 40–60.
- Taylor, Ian/Walton, Paul/Young, Jock (eds.) (1975): *Critical Criminology*. London: Routledge Revivals.
- Tribe, Keith (1987): *Social Democracy and the Rule of Law. Otto Kirchheimer and Franz Neumann*. London: Allen & Unwin.
- van Ooyen, Robert (2011): Die dunkle Seite des Rechtsstaats: Otto Kirchheimers 'Politische Justiz' zwischen Freund-Feind, Klassenjustiz und Zivilisierung. In: van Ooyen, Robert/Schale, Frank (eds.), 2011, pp. 199–224.
- van Ooyen, Robert/Schale, Frank (eds.) (2011): *Kritische Verfassungspolitologie. Das Staatsverständnis von Otto Kirchheimer*. Baden-Baden: Nomos.
- Wheatland, Thomas (2009): *The Frankfurt School in Exile*. Minneapolis: Univ. at Minnesota Press.
- Wiggershaus, Rolf (1995): *The Frankfurt School: Its History, Theories, and Political Significance*. Cambridge: MIT Press.
- Williams, Michelle H. (2009): Catch-All in the Twenty-First Century? Revisiting Kirchheimer's Thesis 40 Years Later. In: *Party Politics*, 15 (5), pp. 539–41.
- Wolinetz, Steven B. (1979): The Transformation of Western European Party System Revisited. In: *West European Politics*, 2 (1), pp. 4–28.