

“Political Justice” in the Making: Otto Kirchheimer and His Late Work in Historical Perspective

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Abstract

Since the publication of Otto Kirchheimer’s late study *Political Justice: The Use of Legal Procedure for Political Ends* (1961) scholars have repeatedly debated the assessment of this text. The various readings of *Political Justice* can be explained by the way in which the study’s subject and the author were historically situated. Our article provides insights into the author’s biographical background as well as the intellectual and institutional processes in the USA and in Europe, which influenced the writing of the book. We outline key aspects of his understanding of political justice, which deals with the difference between class justice and political justice and with the possibilities and limits of actual political maneuvering within various forms of legal procedures. Viewed from today’s perspective, Kirchheimer’s analysis remains strikingly pertinent. The findings presented here aim to facilitate a renewed reading of *Political Justice*, inviting researchers to take Kirchheimer’s research into consideration for the study of current ties between law and politics.

Keywords: Arkadius Rudolph Lang Gurland, Carl Schmitt, class justice, Cold War, emigration, Frankfurt School, intellectual habitus, judicial space, Luchterhand Verlag, Otto Kirchheimer, political justice, Princeton University Press, rule of law, third-party effect, Weimar Century

Otto Kirchheimer (1905–1965) is familiar to many as one of the scholars working at the Institute for Social Research directed by Max Horkheimer, which in the 1930s was first exiled in Paris and later in New York. Along with Franz Neumann, Kirchheimer was responsible for legal topics at the institute

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and published articles about legal developments in National Socialist Germany in the *Zeitschrift für Sozialforschung*. Kirchheimer also became known for his revision of Georg Rusche's book *Punishment and Social Structure* (Rusche and Kirchheimer 1939),¹ a work that substantially influenced the formation of critical criminology. Other factors contributing to his renown include his analyses of the catch-all party phenomenon of the 1950s, which led to him becoming a classic author of political science.

Kirchheimer's late study *Political Justice: The Use of Legal Procedure for Political Ends* (1961) is viewed by most scholars as his principal work, but they have also repeatedly debated the assessment of the text. Whereas some strive to elevate *Political Justice* to the status of a classic (Salzborn 2011, 210–211; van Ooyen 2011), others foreground the sober and doubtlessly accurate observation that the term “political justice” has been consigned to a “shadowing existence” (Schale 2006, 271) in current scholarly debates. Compared to the heyday of critical legal studies in the 1960s and 1970s, today's scholars seem less interested in analyzing political justice. But as we want to show, *Political Justice* remains a classic, waiting to be read, interpreted, and applied to actual cases. The shadow metaphor is also employed to mark a second controversial point pertaining primarily to Kirchheimer's style of thought, namely, his relationship with the “terrible jurist” Carl Schmitt. Thus Robert van Ooyen seeks to explain the complicated reception of *Political Justice* by pointing out, among other things, that Kirchheimer, a former student of Schmitt, never properly managed to step out of the “shadow” (van Ooyen 2011, 199) of his doctoral advisor, who had been severely compromised by his involvement in National Socialism.²

A third disagreement, likewise linked to Kirchheimer's style of thought, stems from the extreme difficulty of assigning Kirchheimer to a scholarly discipline. Was he primarily a legal scholar, a view supported by the fact that he earned his doctorate in 1928 with a dissertation on constitutional law and published on legal subjects throughout his life? Or should he be deemed a social scientist because his thought, influenced by the social theory of the Frankfurt School, does not conform to comparatively narrow jurisprudential requirements, as maintained by Donna E. Arzt? (1993)³ Or should he perhaps really be viewed as a political scientist on the basis of his research, which contributed substantially to the formation of political science after 1945? The latter reason is why Frank Schale making reference to an analysis by Kirchheimer's contemporary Max Rheinstein, concludes that *Political Justice* is not a “jurisprudential treatise” (Schale 2006, 272; see also Söllner 1990 and Rheinstein 1962) – a point we will return to in the fifth section.

This paper argues for a historically informed reading of Kirchheimer's *Political Justice*. In order to understand the text's ambiguities, it is crucial to contextualize both the author and his writings and to focus on the intellectual and institutional processes behind the making of the book. Furthermore, we want

to encourage scholarship to investigate current practices of political justice. By addressing the historical reasons for the ambiguities in the book and providing some clarifications we hope to make Kirchheimer's concept of political justice more accessible to social and legal scientists in their analysis of today's practices.

As already recognized by Kirchheimer's contemporaries, the controversies ignited by his writings are closely related to his biography (Herz and Hula 1969, XI). Born to Jewish parents in 1905 in Heilbronn, Kirchheimer studied philosophy, ancient history, law, and sociology, completing his studies with Carl Schmitt at the Faculty of Law at Bonn University with a dissertation entitled "Zur Staatslehre des Sozialismus und Bolschewismus" (The Socialist and Bolshevik Theory of the State) (see Mehring 2010). Already at this time, politics shaped his scholarly interests. Because of his Jewish background and political activities with other legal scholars such as Franz Neumann and Ernst Fraenkel in the Weimar Republic's leftist circles, he had to leave Germany in 1933.

First he went to Paris, where he received an appointment at the Institute for Social Research. At this time he still entertained hopes of being able to support the anti-Fascist resistance from France by denouncing the deterioration under the Hitler regime of constitutional guarantees. Then in 1937 he followed the Institute for Social Research and emigrated to the United States, where one of his first activities included revising Georg Rusche's criminological study *Punishment and Social Structure*. Due to the lack of sources, Kirchheimer's contribution can no longer be precisely determined (see Melossi 1978 and 1980).

Due to the inadequate resources of the Institute for Social Research and unsuccessful applications for third-party funding, Kirchheimer had to endure financially precarious circumstances until he was hired by the Office of Strategic Services (OSS) in 1943, working for a section of the OSS that was later transferred to the State Department. Kirchheimer owed his position above all to the deputy section head Franz Neumann, whom he knew from the Institute for Social Research and who had already made a name for himself in the scientific community of the United States with his study *Behemoth: The Structure and Practice of National Socialism* (Neumann 1942).

Kirchheimer's job was to prepare analyses of National Socialist Germany that could be used for waging war and for democratically restructuring the political system after the establishment of peace (On this the text edition by Laudani 2013). Initially lacking any prospects of permanently returning to Germany and unable to find any university position in the United States that offered sufficient economic security and prestige, Kirchheimer remained with the State Department until 1955. In this year he finally became a full professor at the New School of Social Research in New York before later moving to Co-

lumbia University. His chair at Columbia University, previously held by Franz Neumann, bore the title “Public Law and Government,” a designation that linked his juridical focus with his research in political science, in particular, on the transformation of the Western European party system. Shortly after receiving approval for a professorial chair in Freiburg im Breisgau, Kirchheimer died in 1965 of heart failure while travelling.

Even though many studies have already researched Otto Kirchheimer’s work, the historical context of *Political Justice* – without which the book’s argumentative structure and the discussions of recent reception are difficult to understand – has hardly been explored. By drawing upon extensive archival materials, especially in the first chapter, we attempt to fill this gap. Examining the book’s publication history, the first section shows that, in terms of its argumentative form and intellectual habitus, *Political Justice* was in a sense a German-American hybrid. Even though he had already lived in the United States for about twenty years, adapting to life there, Kirchheimer remained rooted in German political thought (Herz and Hula 1969, XI; Söllner 1985). While working on the manuscript, he corresponded with other emigrants from Germany, who particularly because their similar experiential background easily followed his development of the problem, which was strongly shaped by his experiences in Germany. They helped him tailor his way of thinking for an American audience and deal both with his own idiosyncratic language as well as with recurring translation issues. The next two sections address the historicity of key terms and concepts in *Political Justice*: the second section problematizes Kirchheimer’s handling of the distinction between foes and friends; the third examines the historical development of the discussion of political justice.

While the term “political justice” can be traced back as far as the German imperial period, it only became terminologically fixed during the Weimar Republic. Viewed against the background of this history, the distinctive character of Kirchheimer’s understanding of political justice becomes clear. At the same time, we show that his thought continued to be influenced by his intellectual socialization during the Weimar period. Kirchheimer operated on the leftist margin of the group of emigrant intellectuals who, like Ernst Fraenkel and Karl Loewenstein, transferred democratic concepts back and forth between Germany and the United States during the post-war period, thereby ringing in what Udi Greenberg has called the “Weimar Century” (Greenberg 2014; Söllner 1999).⁴ The fourth section examines how Kirchheimer focused his analysis on the compatibility of political justice with the principles of democratically legitimate constitutionality. From his perspective, the “use of legal procedure for political ends” was acceptable as long judges possessed a margin of discretion – “judicial space” – and the judiciary operated within an arena exposed to public criticism. He thereby distanced himself from the

liberal-democratic mainstream of the legal sciences in the Cold War, which viewed the practice of political justice as intrinsically problematic. In the fifth section, we take a look at the reception of *Political Justice* in the 1960s, which differed noticeably between the United States and Germany. Whereas the book's reception in the United States occurred chiefly as part of specialized scholarly debate, in Germany the book was used to publicly criticize the Federal Court of Justice.

Publication History of Political Justice

Otto Kirchheimer worked on a research project entitled "The Problems of Criminal Justice in Contemporary Europe"⁵ as early as spring 1941. However, his application for a Rockefeller Foundation grant, which he wanted to submit with Max Horkheimer's support, was evidently unsuccessful. In 1954, Kirchheimer again approached the Rockefeller Foundation with a project proposal, which no longer centered on "contemporary Europe" but rather on a plan to conduct a system comparison with regard to the subject of "political justice."⁶ Kirchheimer had gathered ample material for his study during his work for American intelligence. With his book project he now sought to establish himself within the academic sphere (Müller 2011). In 1955, he contributed an article entitled "Political Justice" (Kirchheimer 1955) to an anthology dedicated to Max Horkheimer and published by the Institute for Social Research, which since 1950 was once again domiciled in Frankfurt am Main. While this article already contained a few of the fundamental theses of *Political Justice*, a number of years would pass before financing could be secured and the book project realized.

Kirchheimer received his first grant from the Rockefeller Foundation in late 1956, which supported him for a period of 18 months and allowing him to suspend his teaching activity at the New School. Justifying the project in his grant application, Kirchheimer explained: "In recent times both in democratic and totalitarian systems the judicial process has been used as a means for dealing with political as well as criminal deviates. Because of the mounting use of legal and judicial techniques in situations of political conflict, a basic study is badly needed in this field."⁷ While writing the book, Kirchheimer interacted intensively with Arkadius Rudolph Lang Gurland, a Marxist emigrant from Germany. Gurland had already worked with Kirchheimer at the Institute for Social Research in New York; after a failed appointment at the Institute for Political Science in Berlin, Gurland had returned to the United States, where he kept himself afloat with translation and contract work.⁸ The surviving correspondence reveals that, starting in late 1957, Gurland also

contributed heavily to the content of Kirchheimer's project, sending him extensive commentaries on text passages that had already been formulated. To complete the book, Kirchheimer received additional financial support from the Rockefeller Foundation for the spring of 1960. After discussions with Chicago University Press broke down, in spring 1960 Otto Kirchheimer conducted negotiations with Princeton University Press.⁹ In April, provisionally entitled "Politics and the Administration of Justice," the manuscript was evaluated by three anonymous appraisers. One appraiser was the constitutional lawyer Karl Loewenstein, a personal acquaintance of Kirchheimer and likewise a German emigrant, who had already assessed the project on behalf of the Rockefeller Foundation in 1958.¹⁰ Loewenstein issued a rather harsh verdict: "this reviewer cannot recommend publication of the manuscript in its present form." Yet his criticism targeted the book's structural and linguistic deficiencies, not the project as a whole. And thus Loewenstein concluded his assessment by emphasizing that "no responsible publishing house should allow an enterprise of this eminence to slip through its hands. If properly organized and – partly – rewritten the book would adorn the publications list of any University Press."¹¹ Similarly, the other two appraisers objected to what they felt was Kirchheimer's essayistic or "discursive" writing style. But they, too, appraised the book project as a "major contribution to a much neglected field of research." Princeton University Press finally accepted the manuscript in June 1960; in November or December 1961, the book appeared on the market in the United States and Great Britain.

The insufficient intelligibility of Kirchheimer's text featured as a recurring theme not only in the aforementioned appraisals but also in his correspondence with Gurland. Although Kirchheimer wrote the text in English, he still continued to think in his mother tongue.¹² Thus the text was full of German terms, which Gurland criticized as an unacceptable "Teutonization of the language."¹³ The translation of the German title "*politische Justiz*," which Kirchheimer had already chosen for an earlier essay on the subject in 1955, also proved problematic. Gurland rejected the direct translation as "political justice" and in late December 1957 wrote to Kirchheimer: "The weak point of the whole thing is, however, that you use 'Justice' for *Justiz*, which won't do. Justice will always have a connotation of *Gerechtigkeit* [fairness; equity] – unless you want to put it in quotes and use it ironically."¹⁴ Under no circumstances did Kirchheimer want "justice" to be understood ironically and until early 1961 he remained undecided about which title would be most appropriate. Ultimately, he consented to the Princeton lecturer Judy Walton's suggestion of using the original title with an explanatory subtitle. To avoid any potential misunderstandings, the title was also explained "for the American reader" in the book's foreword. It should be noted that none of the English-language reviewers misunderstood the title.

While conducting his correspondence with Princeton, Kirchheimer simultaneously negotiated with the Luchterhand Verlag in Neuwied regarding a German translation of the book.¹⁵ Luchterhand's editor, Frank Benseler, had already asked Kirchheimer in a letter whether he wanted to publish his book as part of the firm's newly founded series, *Politica*. In the following years *Politica: Abhandlungen und Texte zur politischen Wissenschaft* (Politica: Treatises and Texts on Political Science) became one of West Germany's most prestigious publication series (See Walter 1975, 112–153). Kirchheimer had planned on also publishing the book in German ever since the project began, and he mediated between Princeton and Luchterhand to accelerate collaboration.

For the German translation, he recommended Gurland, who in March 1962 signed a translation contract with Luchterhand. Despite the two publishers' brisk collaboration, *Politische Justiz* appeared not in 1963 as planned but rather in 1965, prompting fears on the part of Kirchheimer that his text could lose its current relevance and that his reputation might be damaged by the publication delay. Benseler later blamed the delay on Gurland and his "very tedious translation" and unnecessary corrections. In turn, Gurland accused the Luchterhand Verlag of imprecise work and inadequate support in editing the manuscript. In retrospect, the accusations of both parties seem accurate. Having become a professor for political science at the Technical University of Darmstadt in 1962, Gurland must have been very busy and for a time even broke off contact with Kirchheimer. At the same time, the publisher's diligence did not extend all that far. Thus the first printings of the German edition appeared with an especially embarrassing typographical error in the subtitle: "Juristische Verfahrensmöglichkeiten zu *juristischen* Zwecken," that is, "juridical procedural opportunities for *juridical* purposes." (Kirchheimer 1965a). Kirchheimer consequently threatened legal action, but this did not eliminate the publisher's interest in his texts.¹⁶ Possibly this was because in 1965 the Luchterhand Verlag launched a series on the topic of "democracy and the constitutional state" whose focus was largely shaped by ideas developed in *Political Justice*. Kirchheimer was supposed to play a role on the expanded editorial board, but was prevented from doing so by his early death.¹⁷

Friend, Foe, or Contrasting Relationships

Kirchheimer felt the purpose of "political justice" lay essentially in weakening the position of one's political foe by means of court proceedings or even just by threatening such proceedings, in order to thereby facilitate the implementation of one's own interests or those of one's allies. By analyzing the judiciary as an instrument of political struggle, he drew attention to a structural problem

of the modern constitutional state that normative theories of jurisprudence could grasp only as either a temporary deviation or a pathology of the entire legal system, but not as a continuously available option, as the judiciary's latent permanent condition. Without reducing law solely to the function of safeguarding power, as was sometimes the case in Marxist theory, he wanted to demonstrate how court cases, due to the considerable maneuvering room in procedural law, could be deployed for political purposes, without this involving even slightest violation of juridical principles.

Kirchheimer's frequent use of the concept of foe – above all in the introduction and conclusion of *Political Justice*, in particular the statement “Every political regime has its foes or in due time creates them” (Kirchheimer 1965a, 3) – tacitly refers to Carl Schmitt and his 1932 treatise *Der Begriff des Politischen*, which because of its sharply polemical form of presentation had further intensified the Weimar Republic's already polarized situation (See Scheuerman 1994, 27–28, 230). Schmitt argued that in order for the concept of the “political” to have a topically realistic significance, it must be defined via the distinction between friend and foe: “The specific political distinction to which political actions and political motives can be reduced is that between friend and enemy.” (Schmitt 1963, 26). Here he meant above all the highly charged confrontation between two nations, which increases the pressure to make decisions and results in the respective population viewing itself for a specific period as an existential unity, even if its individual members otherwise follow diverging objectives. It stood to reason for Kirchheimer to transfer this approach to internal political foes in the manner already laid out in Schmitt's argumentation.¹⁸ As shown by surviving letters, Kirchheimer knew that his recourse to the concept of foe might be disconcerting, at least for readers with the corresponding background knowledge. While dealing with the proofs of *Political Justice*, he wrote to Gurland: “On the other hand, there is one change to be made for reasons of academic politics, the word ‘*Freund-Feind Beziehungen*’ [friend-foe relationships] has been obliterated and ‘*Kontrastbeziehungen*’ [contrasting relationships] has been substituted.”¹⁹ The notorious reputation of Schmitt, his doctoral adviser, explains why Kirchheimer cited not a single one of Schmitt's texts in the German translation of *Political Justice* even though time and again he implicitly referred positively to Schmitt's form of emphatically objectifying thought. This reticence was probably a major reason why the reception of *Political Justice* during the 1960s – both in West Germany and abroad – only rarely addressed the intellectual connection with Schmitt, which in turn made easier the Left's appropriation of Kirchheimer's theses.²⁰

Notwithstanding the foe concept's awkward prehistory, two reasons compelled Kirchheimer to apply it as an analytical schema to judicial practice. First, dealings before the courts are always based on a conflict between two opposing parties. Disputes of greater or lesser intensity are supposed to be resolved by

way of court proceedings to patch the symbolic rift in society. But the situation is not so straightforward, because under certain circumstances the court room assumes the function of a public stage for hostile attitudes, which contributes to conflict escalation and can entail unpredictable consequences for the judiciary. Thus, for example, the trials conducted in droves against Social Democrats or Communists under the German Empire and the Weimar Republic also always concealed risks for those that set them in motion.²¹ Second, prior to the Nazi seizure of power, Kirchheimer had worked intermittently as a union lawyer and therefore probably knew quite well from his own perspective as well as from reading relevant texts that court cases are often motivated by hostility (See his posthumously published commentary, Kirchheimer 1968). The Nuremberg trials, which occupied him during his time with the OSS, offered him further, much more extreme examples of just how conflict-ridden juridical proceedings could be, both for participants and for external viewers, especially when involving explicitly political issues of dispute (Kirchheimer and Herz 2013).²² For a legal expert with his range of experiences, it was obvious to describe court proceedings as an ideal forum for hostile encounters.

Political Justice: On the Historical Development of a Concept

Naturally, Schmitt was not Kirchheimer's only source of ideas. In his evaluation for Princeton University Press, Karl Loewenstein chided that Kirchheimer needed to write an introduction that elucidated the context of *Political Justice* in a systematically structured way: "The reader is confronted with several studies all of them of a high caliber without doubt – that have not been integrated into a comprehensible frame of reference."²³ We can no longer reconstruct the actual extent of the manuscript's revision. A conceivably obvious frame of reference could have been established by deriving the concept of political justice historically, thereby giving it an explicit biographical and sociopolitical framework. For even though Kirchheimer was trying to elucidate the interaction of law and politics from a standpoint that highlighted its contemporary relevance, his interest in the subject was due largely to his intellectual socialization in the Weimar Republic, which had already witnessed the development of a standard critique of politically motivated criminal prosecution.²⁴ Kirchheimer himself addressed this historical background of his deliberations in the fifth section of *Political Justice*. Even though the book is not only about the Weimar period, the latter remained the intellectual background for Kirchheimer's thinking about political justice. For a contextualized and enriched understanding of his argumentation, it is useful to trace the concept of political justice back to its presumed origins in the German-speaking world.

The discussion about the phenomenon of political justice already began during the German Empire, initially, namely, under the keyword “class justice.” In 1882, *Der Sozialdemokrat* – the newspaper of the Social Democratic Party – for the first time printed an article featuring the headline “class justice”; the article dealt with a libel suit against a number of Social Democratic Reichstag delegates (*Klassenjustiz* 1882, 1–2; see Haaß 1990). To be sure, continuous critical discussions about court cases against Democrats who had come in conflict with the law already existed. But with the catchy slogan of “class justice,” which branded the entire legal system alternatively as bourgeois or reactionary, the critique of juridical practice reached a new qualitative level.

The period after the turn of the century saw the publication of a number of texts that lent the discourse on class justice a more systematic form. In 1907, the jurist Karl Liebknecht was brought to trial for high treason for campaigning in a comprehensive brochure against the militarization of German society. In direct connection with the proceedings, Liebknecht published two texts that can be described as classic works in the body of literature critical of the state: *Rechtsstaat und Klassenjustiz* (Constitutional State and Class Justice), which was based on a lecture; and *Antimilitarismus und Hochverrat: Das Hochverratsurteil gegen Karl Liebknecht nebst einem kritischen Beitrag zur Naturgeschichte der politischen Justiz* (Antimilitarism and High Treason: The Sentence of High Treason Against Karl Liebknecht, with a Critical Contribution on the Natural History of Political Justice) (Liebknecht 1985, 17–42, respectively 163–220). The two texts were published as monographs that same year.

As the titles already suggest, Liebknecht saw no need to make a terminological distinction between class justice and political justice. In his portrayal, the judiciary operated chiefly as an instrument of the ruling class, not only in trials for high treason with their obvious political dimensions but also in criminal law and civil law actions that still possessed a veneer of impartiality. Viewed from such a perspective, the judiciary was almost inevitably political.

Rechtsstaat und Klassenjustiz was a key text for the criticism of judicial practice, for Liebknecht formulated an insight – in terms of the sociology of knowledge – into the formation of class justice that would be revived by many later publications, such as Ernst Fraenkel’s much discussed treatise about the sociology of class justice (Fraenkel 1927). To explain the functioning of class justice, Liebknecht referred to the idea of false consciousness. Thus he stated:

I am not of the opinion that the judges, for example, consciously or maliciously bend the law. Certainly, there are such judges, too. These do not concern us, for

socially significant is not the exception of criminal individuals but rather the rule, the class character of the judge. ... The judges act generally with best intentions, but with best intentions they can do nothing other than exercise class justice. They cannot accurately grasp the state of affairs (Liebknecht 1985; cf. also Kuttner 1913, 10–11).

Although Liebknecht outlined a sociological framework for the critique of class justice, he did not develop a theory of the general relations between law and politics. A terminologically stable distinction between class justice and political justice first became established in the Weimar Republic. For this period, one can also trace an important semantic shift: although the discussion about class justice continued serving as a reference point for leftist attitudes toward the state, the concept of political justice was increasingly used to criticize the juridical practice. The decisive cause for this linguistic change was the old judiciary's openly hostile stance against the Weimar constitution. A publication by the *League for Human Rights* clearly expressed this new situation:

After the conclusion of the World War and after the revolution of 1918, political justice is structured significantly differently than the so-called class justice of the ancien régime. ... The old political justice in the new republic is also directed against classes, in particular against certain parties, the left parties, but in the first place against attitudes ... (Deutsche Liga für Menschenrechte 1927, 217)

The concept of "attitude" (*Gesinnung*) in this quote was understood in the widest possible terms. It allowed for the description of the use of the judiciary by a wide range of different political actors, not only the conservative forces of the Weimar Republic. The cited publication marked a conceptual opening, which overcame the narrow discourse of class justice. Although we cannot ascertain whether Kirchheimer knew this text in particular, in *Political Justice* he referred to another publication, *Die Justiz* (The Judiciary), founded in 1925 as the journal of the Republican Judges League. Its publishers made it their mission to criticize the negative stance of judges toward the new constitution as an impermissible politicization of their entrusted official powers (cf. Bleckwenn 1926). As a result, from the perspective of state theory, the Left's struggle *against* the state and the judiciary gave way to the immanent conflict about the judiciary's proper configuration.

Political Justice is situated at precisely this junction; the book can be read as an attempt to further develop the Weimar period's critique of political justice, transfer it to the scholarly community in the United States, and make it productive for the present. A significant theoretical achievement of Kirchheimer – and a late contribution to the discussion of the 1920s – was that he

abandoned the Marxist topic of false consciousness, which was fundamental to the left wing understanding of class justice, and replaced it with an institutional analysis of the various ways in which politics can interfere with the realm of law.

As already pointed out, Kirchheimer did not make the historical development of the concept of political justice explicit. It was not even clear for the reader that his scientific engagement with political justice went back in 1930s, when the right attitude toward the state became a question of life and death.²⁵ Kirchheimer's first text that assigned a central role to political justice was the monograph *Staatsgefüge und Recht des dritten Reiches* (State Structure and Law in the Third Reich), published during Kirchheimer's exile in France under the pseudonym Hermann Seitz (Kirchheimer 1935). The text's immediate historical background is well known: the book's design feigned the appearance of a volume in the series "Der deutsche Staat der Gegenwart" (The German State of the Present) published by Carl Schmitt, in order to inform the conservative-bourgeois camp about the National Socialist's anti-liberal understanding of law and the massive dismantling of constitutional guarantees since the Hitler regime took power (Luthardt 1976). The construction through violent methods of a "folkish leader state" (Kirchheimer 1935, 7; cf. Pauer-Studer 2014) had rendered the concept of class justice more or less obsolete, which is why the discussion referred continuously to "political justice" or "partisan criminal justice."

A substantial difference between this text and *Political Justice* was that Kirchheimer in the mid-1930s still clearly appealed to the liberal idea of a neutral judiciary, presumably for strategic reasons, in order to turn German moderates against the National Socialist regime. In the 1950s, when he began comparing democratic and totalitarian systems, this appeal completely fell away, replaced by a realistic view of the judiciary that no longer possessed the same beseeching character. As a result of the comparative perspective, Kirchheimer appeared less in the role of the socially engaged critic than in that of the academically trained observer.

The absence in *Political Justice* of any specific discussion of the historical background of the concepts in Kirchheimer's argumentation can probably be explained from the aspirations he pursued with the book with respect to practical use of academic knowledge, but which he would not formulate more clearly until the German translation. In the foreword to *Politische Justiz*, Kirchheimer wrote that he did not want to fixedly specify any abstract, trans-temporally valid criteria for justice but rather simply depict a phenomenon, for "could not the mirror that is held up to all participants by an analysis of political justice be a more unassuming but also less contradictory inducement for self-examination?" (Kirchheimer 1965a, 14). Such a "mirror" might indeed have become very clouded by extensive references to the older debates about "class justice" or to the writings of Carl Schmitt.

The Openness of Political Processes: "Judicial Space" and "Third-party Effect"

The existence of court cases in which political battles are waged was for Kirchheimer an indisputable fact. Hence in *Political Justice* he also mocked those jurists who, disregarding the recent past, assumed quite simply that where the rule of law prevailed, the only persons that would be convicted were ones who had committed a criminal offense. To explain this "naive" point of view, he referred to the fear that the judiciary might lose influence and prestige: "to say that the thing exists and often entails consequences of importance is, in the eyes of such men of Law Immaculate, equivalent to questioning the integrity of the courts, the morals of the legal profession." (Kirchheimer 1965a, 47). From these jurists' perspective, politics and justice must remain strictly separated spheres in order to preserve the integrity of judicature.

In his book Kirchheimer, too, describes politics and justice as two separate spheres, each with its own actors and procedures. However, he argues that there are always overlaps, junctures where the actors from one sphere influence the other. Yet his sober perspective on judicature does not immediately lead him to view the constitutional state under the rule of law as endangered. One of the core messages in *Political Justice* is that the use of the judiciary for political purposes can be successful only if the judiciary possesses at least a minimum degree of independence, for otherwise judicature turns into a farce. According to Kirchheimer, political justice correspondingly describes, admittedly, the "use" of legal proceedings for political purposes, but not their complete instrumentalization.

The institution of the judicial office – or, respectively, the jury, as known from the United States – plays a decisive role in guaranteeing the judiciary's independence. As Kirchheimer had learned from Weimar texts, judges are not autonomously acting agents but instead are integrated into social and political structures and therefore ultimately part of the political system. Nonetheless, in their capacity they represent the entire society and must do so in credible and somewhat independent manner. The judge therefore stands in a conflict of interest, which necessitates a margin of discretion, a so-called judicial space (Kirchheimer 1965a, 423–429). According to Kirchheimer, this margin of discretion forms a fundamental part of the judicial office; it can be temporarily restricted, but not completely abolished without degrading judicature to an extended arm of government. Even though judges themselves can never be completely detached from their own situatedness and the constraints of their worldview, "judicial space" guarantees the openness of political processes, which are subject to the constant negotiation of the participating parties. In Kirchheimer's argumentation, politics and justice are therefore neither radi-

cally separate from each other, nor does judicature allow itself to be completely controlled by government. Kirchheimer stressed that in contrast to the practices implemented by the Nazi state and by the “totalitarian judicial functionary” of the Soviet Union or the GDR, political justice in “constitutional regimes” always entailed a certain “risk” (Kirchheimer 1965a, 425–426).

In this connection, the most important factor was what Kirchheimer called the “desired third-party effect” of political justice (Kirchheimer 1965a, 426). Juridical procedures used for political purposes are aimed at the public. The knowledge of the openness of juridical proceedings creates a moment of tension that, without the public’s observatory function, can easily dissipate. The judiciary’s credibility is critical for the effect of political justice. Those who want to fight political battles through the judiciary therefore cannot undermine the judiciary’s authority and all too obviously politicize the law. Kirchheimer nonetheless points out that there is an entire range of “possible occasions for court action in connection with repressive programs in contemporary non-totalitarian society.” As an example, he identified the West German government’s “fully repressive policy” in the 1950s, which impacted the Communist Party of Germany (Kommunistische Partei Deutschlands, KPD) (Kirchheimer 1965a, 17).

With his definition of political justice as an integral part of “constitutional regimes,” Kirchheimer set himself apart from the contemporary western debates about the so-called rule of law. Thus, for example, starting in the late 1950s, the International Commission of Jurists, referred to by Kirchheimer at a number of points in his book, strove to develop generally valid principles for “a society living under the rule of law” (Lalive 1960, 1). The formulated objective of these efforts was to strengthen the independent judiciary in constitutional states and guarantee fair proceedings for all accused persons (On the history of the International Commission of Jurists Tolley 1994). In this context, the rule of law was also always understood in opposition to the conformist judiciary of communist states, featuring in propaganda as a Western achievement that had to be held up as something quite distinct compared to the justice practiced by “judicial functionaries” behind the Iron Curtain.

Very much aware of the importance of constitutionality and the rule of law, Kirchheimer did not adopt this ideologically tinted Cold War rhetoric. His concern in *Political Justice* was not about reforming the constitutional state or depoliticizing justice in terms of the idea of neutrality. To him this seemed futile. Instead he came up with a sociological diagnosis of the times, maintaining in the expanded final section of the 1965 edition of *Politische Justiz* that the “thorough politicization” of the judiciary was a “consequence of our present age with its all-encompassing ideological wars.” (Kirchheimer 1965a, 653–654). In light of the ideological fronts, Kirchheimer noted, there was something contradictory about the demand for the uniform ideological ori-

entation of the population and all state organs, since it was either unnecessary or, as would be the case for a society split into irreconcilable factions, simply impossible to implement.

Notwithstanding the undertones of cultural criticism in Kirchheimer's analysis, viewed in the scholarship as a departure from his radical social criticism during the Weimar Republic (cf. Scheuerman 1994, 233–234; Schale 2006, 289), he saw here a "chance" not to negate political justice but rather to use it for one's own interests or at least "reduce to a tolerable degree the burden that every act of political justice entails." (Kirchheimer 1965a, 654). In this sense, Kirchheimer did more than simply describe an academic problem that occupied him repeatedly throughout his life. Rather, by investigating political justice as specific political strategy, he also pointed out the specific weaknesses and opportunities for action that emerged as a result. This was a pragmatic approach to the problem of political justice, which in the legal policy debates of the Weimar Republic did not yet stand at the fore; and it meant a progressive reevaluation of a judicial practice that in other contexts held exclusively negative connotations.

Kirchheimer drew attention to two essential aspects. First, in democratic states, due to the basic openness of the outcome of proceedings and the public's involvement, the consequences of political justice cannot be wholly planned. For example, public protests can occur at any time, increasing pressure on the court and therefore shifting the course of the proceedings in an unpredicted direction. Second, the "detour" of fighting political battles via the judiciary can be used not only by government but also, under certain circumstances, by government critics as a means of resistance. As seen by Kirchheimer, political justice was not always a one-way street.

This kind of nuanced understanding that also recognized how juridical proceedings could be used politically by the persons they targeted points toward Kirchheimer's faith in the protective function of the constitutional state, expressed already in the book's dedication "to the past, present, and future victims of political justice." For him, it was important to move beyond the academic legal discussion about protecting victims of the judiciary. He was firmly convinced that the mere paper existence of laws, institutions, and proceedings could not guarantee protective functions. Kirchheimer would later concretize the argument in a posthumously published essay from 1965 (see Kirchheimer 1969). Rather, in order to use court cases for the benefit of concerns critical of government or, defensively, to minimize the negative consequences of political justice, one needed to understand political justice as a complex conglomerate of actors with specific interests within a given institutional framework. In *Political Justice*, Kirchheimer discusses the distinctive roles of judges, members of the jury, prosecutors, defense lawyers, defendants, foreign observers, media, and the public in order to explain where and when there can be actual room

for political maneuvering in law. Cases from various geographical and historical contexts serve to illustrate Kirchheimer's argument that political justice, under special circumstances, could be temporarily used a shield against state persecution.

A prominent theme in this regard is the legal prosecution of communists, especially in Western Germany and the United States. Kirchheimer makes recurring reference to the "Dennis vs. United States" case in 1949. The case against the American communist Eugene Dennis in New York showed, on the one hand, how judges could rule in favor of vague legal norms (the Smith Act), which were directed against political groups perceived as threats by those in power. In such cases, the judge became a "legal technician shuffling formulas to fit the purpose of the day" (Kirchheimer 1965a, 233). On the other hand, Kirchheimer pointed to how the defendants tried to use their speeches to challenge the court and express their political ideas: "Thus the organization may succeed in presenting a show of militancy, casting discredit on regime for prosecuting a group merely for holding and seeking to spread their opinions ..." (Kirchheimer 1965a, 233). But as he also explains, such counterstrategies are vulnerable and could easily suffer a setback. In the Dennis case, the judges undermined the communist defense strategy by presenting themselves successfully as "victims" of a political campaign. This reminds the reader that the inversion of political justice against the administration and its allies in court is always possible, at least in democracies, but risky.

Reception and Evaluation

Despite the critical attitude toward the judiciary that underlies Kirchheimer's argumentation, the scholarly reception of his book in the 1960s was mostly positive. Donna E. Arzt has assessed various English-language reviews, showing that they widely praised *Political Justice* (Arzt 1993). It is a conclusion we can only affirm. We have been able to find a total of 22 English-language reviews, along with two further reviews in French specialized journals (see the list under Kirchheimer 1961). The vigorous discussion about the book can be explained with reference not only to the topic's general relevance but also to the advertising strategy of Princeton University Press. The publisher sent 6500 notices to selected persons and institutions to announce the book's publication. In addition, it also sent advertisements and review copies to widely read newspapers like *The New York Times Book Review* and *The Washington Post*, an array of relevant specialized journals, and researchers working in similar fields.²⁶ The publisher held up the fact that Kirchheimer engaged in a comparison of "totalitarian, communist and democratic states" as a strength.²⁷ This is evidence that

Kirchheimer not only chose a productive approach to research, as highlighted by the reviews, but was also working on a problem that in the context of the Cold War promised to interest many researchers.

Most of the reviews in the English-language context (all of them American except for one in the United Kingdom) appeared in law journals and political science journals. Since these were scholarly reviews, many of these texts primarily summarized the book's content, engaging in political commentary – negative or positive – mostly only between the lines.²⁸ When inspecting these reviews, two aspects stand out: first, a frequent point of criticism, especially for reviewers in the field of jurisprudence, was the insufficiently systematic nature of Kirchheimer's argumentation. Writing in *The Yale Law Journal*, the jurist Vincent E. Starzinger, who was less interested in a politically engaged critique of legal practice than in the conceptual clarity and systematic rigor of the topic's representation, formulated the clearest critique:

The book is rich in analytical insights, but, to borrow from the title of one of Isaiah Berlin's books, they are the insights of the "fox," not of the "hedgehog." They do not build toward any overreaching thesis or *Gestalt*. At the end of the book, one is immensely better informed than at the beginning, but also curiously uncertain about the conclusions to which the argument has led and whether the outlines of the category of political justice have been sharpened or blurred. (Starzinger 1962, 1365.)

In other words, the book did not meet the prevalent requirements in the United States for a jurisprudential treatise. This is also reflected by Frank Schale's determination cited at the outset, namely, that *Political Justice* is not a "jurisprudential treatise" (Schale 2006, 272; see also Söllner 1990). To be sure, Kirchheimer dealt with a jurisprudential subject, with great expertise to boot, as attested by the reviews, but he did not write like a jurist.²⁹ A few reviewers even had difficulties simply reading the book at first science (Emerson 1962, 269; Cole 1963, 155; Hyman 1962, 680). However, this circumstance cannot be explained solely by Kirchheimer's aforementioned confining attachment to the German language, for, as shown by the correspondence with the publisher, the manuscript had undergone intense editing. Rather, the criticism of Kirchheimer's text targeted his style of thought. Instead of moving within the narrow confines of specialized debates, Kirchheimer went to great lengths to link historical examples to deliberations in the areas of jurisprudence and political. This form of writing was rather unusual, making it – from the perspective of a few reviewers – difficult to understand.³⁰

A second striking aspect of the English-language reception is the frequent mention of the concept of enemy (without referencing Carl Schmitt with even a single word), which evidently fascinated the reviewers. Another reason for this was probably that it enabled a brief and pithy rendering of Kirch-

heimer's understanding of political justice. This concentration on the concept of foe encouraged an abbreviated and purely instrumentalist interpretation of Kirchheimer's basic idea, one that he actually wanted to avoid. The reviews explained the phenomenon of political justice as if it were a means of governmental repression, always available and never missing its mark. The reviewers hardly addressed Kirchheimer's thesis that political justice was also a contested practice that – at least in democratic constitutional states – could also be directed against the ruling powers if the opposition pulled out all the stops and the judges knew how to use their “judicial space.” This is an indication that in the early 1960s it was still unusual to apply the critical concept of political justice to Western countries that were identified with the principle of the “rule of law.” Arguing along these lines was Supreme Court Justice William O. Douglas, who resisted applying Kirchheimer's theory to the United States: “But the record of American courts is far more honorable – judged by due process standards – than I think the book makes out.”³¹

The reception in West Germany focused on a different aspect, due primarily to the fact that reviewers pursued less narrowly academic interests. Overall, the book garnered less attention in specialized journals;³² however, it was discussed by prominent Social Democratic jurists: the Hessian General State Attorney Fritz Bauer; the president of the Stuttgart Higher Regional Court, Richard Schmid; and Gustav Heinemann, who in 1966 was appointed the Federal Minister of Justice. The left-wing lawyer Heinrich Hannover, who defended numerous members of the Extra-Parliamentary Opposition (Außerparlamentarische Opposition), likewise referred to Kirchheimer's criticism of political justice (Hannover and Hannover-Druck 1966). Richard Schmid stood out the most among this group of reviewers, especially given that he ran a veritable campaign for the book. In the weekly newspaper *Die Zeit*, he touted that Kirchheimer had “masterfully tackled the problem of political justice with an international perspective” (Schmid 1961). In the same newspaper article, he blatantly accused the Federal Court of Justice of political justice, adopting Kirchheimer's concept of “judicial space” to refer to the unused maneuvering room of the competent judges. When the German edition appeared in 1965, Schmid also promptly wrote a number of laudatory reviews recommending *Politische Justiz* as a handbook and textbook for jurists (Schmid 1965; 1966). Despite the criticism they sometimes expressed about Kirchheimer's argumentation, the four aforementioned authors had no doubt that the books constituted a legal treatise.

Regarding the question raised at the beginning of this article of how to assign Kirchheimer's approach to political justice to a specific scientific discipline, it is obvious that his book addressed not only one but multiple academic discourses. As a trained lawyer, Kirchheimer was able to provide extensive descriptions of political justice, but, instead of restricting himself to a normative

legal point of view, he also included historical comparisons and sociological insights into the permanent overlapping of law and politics and the role of power in judicature. That made his research highly interesting for political science, which studied the various manifestations of power in modern institutions. Due to his exceptional style of thought and deep skepticism of the idea that the sphere of law could be completely secured against external influence, *Political Justice* provided a major contribution and, at the same time, posed a genuine challenge to all the mentioned disciplines.

Conclusion

The various readings of *Political Justice* we have elucidated here can be explained by the historical situatedness of the study's subject and author. Kirchheimer developed a strong academic interest in political developments and structures during his career, exiled in France and later in the United States. In his book, Kirchheimer described court proceedings as a forum for hostile encounters, referring repeatedly to the confrontation between "friend" and "foe." This should not be understood as a reference to his doctoral adviser Carl Schmitt. On the contrary, Kirchheimer had distanced himself from Schmitt in the mid-1930s and did not quote any of Schmitt's works in the book, carefully changing the wording in the German edition to "contrasting relationships." In the Cold War context, Kirchheimer's critical discussion about political justice formed a political issue because it not only challenged the self-assurance of the legal profession but also questioned the widespread belief that the West was the guarantor of constitutionality and the rule of law. It comes as no surprise that Kirchheimer blatantly argued against the mainstream of the legal sciences, because, as a result of his political views, intellectual socialization in the Weimar Republic, and personal emigration history, he already had a broken relationship with the liberal-democratic discourses of the postwar period (Söllner 2009). Therefore he was also more excited about viewing judicature from a practical/political observation post than about writing systematic treatises that would receive no attention beyond their specialized field (Herz and Hula 1969, XI). In a November 1962 letter to Karl Loewenstein, he admittedly mentioned that he had already often asked himself whether it was possible to develop a coherent theory on the basis of their entire material. But he then quickly rejected this idea: "The trouble with you and me is that we would want this theory to have meaningful content rather than to stick to vacuous *Selbstverstaendlichkeiten* [self-evident givens] and terminological generalities ..."³³ Kirchheimer wanted desperately to be "meaningful," and this meant: writing about the practices of political justice in a way that was socio-

politically relevant. This led to a differentiated concept based on broad empirical research, combined with a narrative style of writing, which both irritated and intrigued Kirchheimer's contemporary colleagues in the legal and social disciplines. Viewed from today's perspective, the book's main theses remain strikingly pertinent. The insights presented here into the historical context of Kirchheimer's late work aim to facilitate a new reading of *Political Justice*, inviting researchers to take his theses into consideration for the study of current ties between law and politics.

Endnotes

- 1 The following persons and institutions have assisted us by providing information and archival material: Markus Bürgi, Dieter Emig, Claus-Dieter Krohn, Fabian Link, the M.E. Grenander Department of Special Collections and Archives, University at Albany, the Literaturarchiv Marbach and the Archivzentrum of Goethe University, Frankfurt am Main. We would especially like to mention Tim B. Müller, who provided us with an excerpt of his archival research at the Rockefeller Foundation Archives. In addition, we would also like to thank the Center "History of Knowledge" (Zurich), which financed the procurement of documents, Hubertus Buchstein and the anonymous reviewer for their exacting reading of our article, and Bernard Heise for translating the piece, including the quotations. A different and substantially shorter version of this text has been published in "Wissen, was Recht ist," special issue, *Nach Feierabend. Zürcher Jahrbuch für Wissensgeschichte* 11 (2015): 181–193.
- 2 The debate about the relationship between Kirchheimer and Schmitt is summarized in Bavaj 2007. For a much more impartial interpretation of Kirchheimer's relationship with Schmitt see Scheuerman 1994.
- 3 Arzt bases her view on an extensive review by the jurist Max Rheinstein, who like Kirchheimer was forced to flee the National Socialists and emigrated to the United States. But it remains unclear why Rheinstein described Kirchheimer as "a political scientist and a sociologist" but left his legal training unmentioned, even though this would have surely been helpful for the review of Kirchheimer's book in the context of legal science. Cf. Rheinstein 1962, 202.
- 4 On Neumann see Erd 1985, 157, 190, 195. On Fraenkel see Söllner 2002.
- 5 See the Max Horkheimer's letter of recommendation to the Rockefeller Foundation dated 28 February 1941. Goethe University Frankfurt am Main, Archivzentrum der Universitätsbibliothek, Na 1 Nachlass Max Horkheimer, 325 - Korrespondenzen u.a. mit Frances Bartlett Kinne und Otto Kirchheimer (p. V 101, 1-197).
- 6 For a detailed account of Kirchheimer's institutional contexts, see Müller 2011; on the cross-linkage between the State Department and Rockefeller Foundation, which for Neumann played a significant role, see Müller, 2010.
- 7 The Rockefeller Foundation Archives, Sleepy Hollow, New York, RG 1.2 Series 200, b. 539 f. 4614.

- 8 University at Albany, M. E. Grenander Department of Special Collections & Archives, Otto Kirchheimer papers, Series 2, Professional Correspondence, 1927–1965, Box 1, Folder 68, Gurland, Arkadij R. L., 1952–1965; regarding Gurlands academic career, see Buchstein 2014.
- 9 University at Albany, M. E. Grenander Department of Special Collections & Archives, Otto Kirchheimer papers, Series 3, Correspondence with Publishers, Folder 64, Princeton University Press, 1960, Folder 65, Princeton University Press, 1961–1964.
- 10 The identity of the two other appraisers could not be determined from the sources.
- 11 University at Albany, M. E. Grenander Department of Special Collections & Archives, Otto Kirchheimer papers, Series 2, Professional Correspondence, 1927–1965, Box 1, Folder 104, Karl Loewenstein, Reader B, review, p. 3, 9.
- 12 This was a constant in Kirchheimer's writing practice in the United States; he was never properly at home in the English language. Earlier when revising Rusche's *Punishment and Social Structure*, he wrote his parts of the text in German and arranged to have them translated, see Melossi 1980, 56.
- 13 Albany, Otto Kirchheimer Papers, Professional Correspondence, Series 2, Box 1, Folder 68, letter from A.R.L. Gurland to Otto Kirchheimer dated 1 January 1958.
- 14 Albany, Otto Kirchheimer Papers, Professional Correspondence, Series 2, Box 1, Folder 68, letter from A.R.L. Gurland to Otto Kirchheimer dated 31 December 1957.
- 15 University at Albany, M. E. Grenander Department of Special Collections & Archives, Otto Kirchheimer papers, Series 3, Correspondence with Publishers, 1952–1965, Box 2, Folder 57, Luchterhand Verlag (Frank Benseler), 1957–1965.
- 16 The Luchterhand Verlag planned a volume of posthumous texts, but this could not be realized because Surhrkamp had already secured the rights.
- 17 Albany, Otto Kirchheimer Papers, Series 3, Box 2, Folder 57, Luchterhand Verlag (Frank Benseler), 1957–1965, Letter dated 28 January 1964.
- 18 However, the analogy has very clear limits. Whereas in Schmitt's construction, political enmity against foreign nations was supposed to achieve a unifying effect; but in Kirchheimer's analysis political justice tended to intensify hostile attitudes. Cf. Scheuerman, 1994, 23, 232.
- 19 Goethe University Frankfurt am Main, Archivzentrum der Universitätsbibliothek, Na 5 – Nachlass Arkadius Rudolf Lang, Letter dated 30 August 1961.
- 20 This applied for the reviews in the English, German, and French languages as well as for the works-focused biography published at the end of the 1960s by Herz and Hula (1969). Kirchheimer's links with Schmitt were first systematically researched in the early 1980s, starting, namely, with Volker Neumann, (1981). Since the debate following from Volker Neumann's criticism focused in the first place on Kirchheimer's texts from the Weimar Republic, his later work was not taken into account.
- 21 On this see Henning Grunwald (2012, 4): "The courtroom was a privileged site of ideological combat. Carefully stage-managed by party lawyers, political trials allowed Weimar parties to present riveting spectacles of idealism, implacable conviction and heroic sacrifice – always playing off the staid and legalistic state au-

- thority embodied by the judges.”
- 22 The authorship of this text cannot be unequivocally attributed to Kirchheimer, but given the division of labor at the OSS, we can be certain that he was aware of the content.
 - 23 Albany, Otto Kirchheimer papers, Professional Correspondence, Series 3, Box 1, Folder 104, Karl Loewenstein, Reader B, review, p. 3.
 - 24 Ooyen (2011) has already dealt with this set of themes, but limited to a comparison *Political Justice* and Ernst Fraenkel's *Zur Soziologie der Klassenjustiz* (Berlin, 1927). It is noteworthy that Fraenkel rarely speaks about “politics” and the “political, which is why we are drawing upon additional sources.
 - 25 During the Weimar period Kirchheimer had little to do with publishing anything on the subject of judicature. The only known exception appeared in a local newspaper article during his internship, in which he criticized the class-sustaining function of judicature and thereby endangered his law degree. Cf. Grossman 2011, 59–60. Thus far, the text has not been found.
 - 26 University at Albany, M. E. Grenander Department of Special Collections & Archives, Otto Kirchheimer papers, Series 3, Correspondence with Publishers, Folder 65, Princeton University Press, 1961–1964, letter from Keith E. Davis to Otto Kirchheimer dated 11 December 1961.
 - 27 University at Albany, M. E. Grenander Department of Special Collections & Archives, Otto Kirchheimer papers, Series 3, Correspondence with Publishers, Folder 65, Princeton University Press, 1961–1964, publication advertisement (undated, presumably in the winter of 1961).
 - 28 An exception, for example, Pachter 1962; Pachter knew Kirchheimer from his time at the OSS and accused him of undermining political efforts to achieve a more equitable administration of justice by rejecting every positive concept of justice.
 - 29 “He [Kirchheimer] looks at the phenomenon of political justice from this outside point of view rather than from the inside position of the lawyer.” (Rheinstein 1962, 202).
 - 30 Hence in his review Starzinger also suggested a greater concentration on historical examples: “For example, the author might have worked more explicitly within the configuration of history, as he did in his earlier co-authored book, *Punishment and Social Structure*.” (Starzinger 1962, 1366).
 - 31 Douglas 1961, 6. The critique is noteworthy, since *Political Justice* described Douglas as someone who, within the limits of his office, campaigned for a “better society”. Evidently, Douglas did not want to let himself be appropriated for Kirchheimer's purposes.
 - 32 The correspondence with the editor of the Lucherhand Verlag reveals no information about how the publisher promoted the book in West Germany.
 - 33 Albany, Otto Kirchheimer papers, Professional Correspondence, Series 3, Box 1, Folder 104, letter from Otto Kirchheimer to Karl Loewenstein dated 30 November 1962.

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