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Carl Schmitt and Ossip Flechtheim at Nuremberg: A Crossroads for International Justice and Intellectual History

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Abstract

Should theoretical discourse supporting state crimes be protected as free speech or prosecuted as atrocity speech? The relationship between Neo-Hobbesian Nazi collaborator Carl Schmitt and progressive Futurology founder Ossip Flechtheim provides a fascinating framework for exploring that question. In 1933, Schmitt rejected Flechtheim as a PhD student, on antisemitic grounds. Meanwhile, becoming Nazism's "Crown Jurist," he helped force Jewish lawyers, including Flechtheim, into exile. Post-war, Flechtheim, now on the US Nuremberg prosecution staff, arrested Schmitt. Through Flechtheim's experience, this article explores how Schmitt's prosecution, within a contemplated "Propaganda and Education Case" (PEC), might have determined how to treat atrocity-complicit academic propagandists. It chronicles how the PEC/Schmitt case collapsed when Flechtheim's investigation was curtailed due to resource constraints, equivocal precedent, and prosecutor Robert Kempner's botched interrogations. Nonetheless, Flechtheim contributed to the *Ministries* Trial conviction of propagandist Otto Dietrich. The article concludes by juxtaposing that case with Schmitt's near-prosecution to contemplate norms for charging theorists laying needed groundwork for atrocity, via sufficiently proximate speech, even absent direct incitement. Such an international justice future would mirror immediate post-Cold War intellectual developments, which vindicated Flechtheim's vision, not Schmitt's. Exploring this topic is timely, as Russian academic discourse has enabled/fueled Ukraine's invasion and related atrocities.

Keywords: Carl Schmitt; Ossip Flechtheim; Nuremberg Trials; atrocity speech; academic freedom; international criminal law; propaganda; crimes against humanity; aggression; Nazi Germany

A. Introduction

Berlin, Germany, March 24, 1947. A red brick detention center loomed over the tree-lined intersection of Friesenstraße and Jüterboger Straße.¹ Inside, the rightist German intellectual Carl Schmitt, once Nazism's greatest legal theoretician,² sat across from the German-Jewish political

¹The arrest was effectuated via a summons, rather than conventional arrest warrant. See Summons (17 March 1947) from Ossip Flechtheim to Carl Schmitt, National Archives and Records Administration (hereinafter Summons), Washington, DC, Berlin Branch Documents, Record Group Number 238, Entry Number NM-70 202.

²Among the most useful reference works on Schmitt's role in intellectual history are GOPAL BALAKRISHNAN, *THE ENEMY: AN INTELLECTUAL PORTRAIT OF CARL SCHMITT* (2000); JAN-WERNER MÜLLER, *A DANGEROUS MIND: CARL SCHMITT IN POST-WAR EUROPEAN THOUGHT* (2003); JOSEPH W. BENDERSKY, *CARL SCHMITT: THEORIST FOR THE REICH*. (2014). The best current biography of Schmitt is REINHARD MEHRING, *CARL SCHMITT: A BIOGRAPHY* (2014).

philosopher Ossip Flechtheim, the founder of “Futurology” and a rising star of left liberalism. Soon after Adolf Hitler’s 1933 accession to power, for apparent antisemitic reasons, the then-Professor Schmitt rejected graduate student Flechtheim’s request to supervise his PhD dissertation at the University of Cologne. From the young man’s perspective, the pro-Nazi jurist caused his later exclusion from the legal profession and eventual expulsion from the Fatherland itself. Now, the tables had turned, for it was Flechtheim who returned to Germany after the fall of the Third Reich, working for American prosecutors, who had Schmitt arrested as a possible defendant in the Nuremberg Trials just the previous day.³

That these major twentieth-century intellectuals, who had earlier crossed paths as teachers and would-be students, became potential adversaries in criminal justice proceedings at Nuremberg is striking enough. Still more intriguing, though, was the nature of Schmitt’s envisioned prosecution – as a defendant in what the lawyers referred to as the “Propaganda and Education Case” (PEC), a trial before one of the American Nuremberg Military Tribunals (NMTs), subsequent to the 1945–46 initial proceeding before the International Military Tribunal (IMT).⁴ Perhaps most significantly, the prosecutors and defendants in this proposed inquest before one of the American Nuremberg Military Tribunals (NMTs) represented a turned-on-its-head pairing of 1930s persecuted Jewish lawyers, which included prosecutor Robert Kempner (who, like Flechtheim, was a victim of the Aryanization of the legal profession that Schmitt had helped to implement),⁵ facing off against Nazis who had been active in the academic and ideological spheres.⁶

But the PEC never made it to court, having been cut due to Nuremberg trial program resource constraints and concerns about the legal implications of the IMT’s acquittal of Nazi Radio Division head, Hans Fritzsche.⁷ Moreover, even though PEC target Otto Dietrich, Hitler’s press chief, would go on to be tried as part of Nuremberg’s *Ministries* Case, Schmitt himself never faced justice beyond his initial arrest and the series of interrogations that followed.⁸ Those questioning sessions, including the Schmitt-Flechtheim confrontation, were deemed inadequate to warrant prosecution. But could a more thorough investigation have yielded a triable case? If it had, how might a trial of one of Nazi Germany’s leading theoreticians have turned out? Would it have resulted in undue infringements on academic freedom or would it have been a useful corrective for the lack of accountability in respect of intellectual contributions to state crimes?

Although a few historical accounts have dealt with the episode – mainly from a Schmittian biographical perspective⁹ – up until now, almost nothing in the legal literature has grappled

³MARIO KEßLER & OSSIP K. FLECHTHEIM: POLITISCHER WISSENSCHAFTLER UND ZUKUNFTSDENKER (1909-1998) 77–79 (2007); Mario Kessler, *Between History and Futurology: Ossip K. Flechtheim*, in GERMAN SCHOLARS IN EXILE: NEW STUDIES IN INTELLECTUAL HISTORY 173–211 (Axel Fair-Schulz and Mario Kessler, eds., 2011). On Flechtheim’s “Futurology,” a political-academic program for future-oriented policy study and progressive social reform, see, e.g., OSSIP K. FLECHTHEIM, FUTUROLOGIE: DER KAMPF UM DIE ZUKUNFT (1971).

⁴KEVIN JON HELLER, THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW 64–67 (2011).

⁵See ROBERT MAX WASILII KEMPNER, DAS DRITTE REICH IM KREUZVERHÖR 293 (1969).

⁶HELLER, *supra* note 4, at 64–67.

⁷*United States v. Goering*, Judgment, Fritzsche (Int’l Mil Trib. Sept. 30, 1946), reprinted in 6 F.R.D. 69, 186–87 (1946) [hereinafter Fritzsche Judgment]. On NMT resource challenges, see Gregory S. Gordon, *The Nuremberg Trials Public Communications Apparatus: Propaganda for WWII Healing and Cold War Positioning at the Dawn of PR in ICL*, 20 J. INT’L CRIM JUSTICE 11, 46–47 (2022).

⁸For a brief summary of Schmitt’s post-war activities, see Mehring, *supra* note 2, at 547–48.

⁹The most complete English-language accounts so far are Joseph W. Bendersky, *Carl Schmitt at Nuremberg*, 72 TELOS 91 (1987); Joseph W. Bendersky, *Carl Schmitt’s Path to Nuremberg: A Sixty-Year Reassessment*, 139 TELOS 2007 6 (2007). Key German-language accounts preserving important historical details and materials, such as Schmitt’s interrogation records and autobiographical recollections, include HELMUT QUARITSCH, ANTWORTEN IN NÜRNBERG (2012); Claus-Dietrich Wieland, *Carl Schmitt in Nürnberg (1947)*, 2 1999: ZEITSCHRIFT FÜR SOZIALGESCHICHTE DES 20. UND 21. JAHRHUNDERTS 108 (1987).

directly with these questions.¹⁰ Nor has any treatment explored in depth the way the case against Carl Schmitt might have been constructed or its potential impact on the trajectory of international criminal law. Moreover, given its fascinating implications for intellectual history, on both a biographical level (that is, celebrated Nazi rightist philosopher versus ascendant leftist Jewish thinker) and on a broader conceptual level (that is, neo-Hobbesianism versus Futurology), it is surprising that existing scholarship has failed to consider the Nuremberg travails of Carl Schmitt from the perspective of Ossip Flechtheim.

This article fills these gaps in the literature by chronicling the historical linkages, divergences, and “re-linkages” of these two lawyers cum philosophers amid their very different experiences of 20th-century Germany and its fate. Those experiences involved encounters with some of the period’s most influential and interesting personages, including Hermann Goering, Heinrich Himmler, Benito Mussolini, Thomas Mann, W.E.B. DuBois, Edmund Husserl, Theodor Adorno, Max Horkheimer, Hans Kelsen, Raphael Lemkin, Robert Jackson, and “Wild Bill” Donovan, among others. At the same time, the article puts the Schmitt-Flechtheim encounter into a legal framework that helps explain why the PEC prosecution was initially contemplated, why it never came to fruition, and why, especially given the propaganda linked to the recent Russian invasion of Ukraine, the policy considerations that animated it may still be relevant.

The Article is divided into five parts. After this Introduction, Part 2 explores the interwar and wartime histories of Schmitt, who, contrary to traditional accounts, revealed deep-seated antisemitism prior to the Nazi period,¹¹ and Flechtheim, whose cosmopolitan upbringing inspired him to initially embrace doctrinaire Marxism and later democratic socialism. It shows how their divergent origins molded polar-opposite political orientations temporarily converging toward a relative center, as both theorized the death of the Weimar state. The section then chronicles Schmitt’s rollercoaster relationship with the Nazi party and Flechtheim’s exile years in Belgium, Switzerland, and the United States, and his eventual return to Germany, via connections in the Office of Strategic Services, the precursor to the Central Intelligence Agency.

Part 3 then examines the Schmitt-Flechtheim postwar encounter, including Flechtheim’s March 1947 arrest and interrogation of Schmitt, followed by Kempner’s interrogations. This part also reveals, for the first time in the Schmitt literature, an “Aggression Propaganda Case,” proposed by Genocide Convention author Raphael Lemkin, which would have placed Schmitt and Lebensraum theorist Karl Haushofer in the dock. The latter’s suicide obviated Lemkin’s prosecution recommendations, but American lawyers were still prepared to try Schmitt as part of the PEC proceeding. In the end, however, as this section will explain, resource constraints, the *Fritzsche* acquittal, and Kempner’s botched handling of Schmitt’s interrogations led to the demise of the PEC as well as the individual case against Schmitt.

So, Part 4 considers what might have been. Could Kempner have conducted the interrogations more effectively? Might additional investigation by Flechtheim’s Berlin team have strengthened the case against Schmitt? This section also looks at the IMT precedents, the subsequent NMT legal

¹⁰The most extended consideration of the case so far is Quaritsch, *supra* note 9. The author, however, was predisposed towards supporting Schmitt’s own arguments and characterizations of the legal issues. But a more balanced approach was presented in MICHAEL SALTER, KIM MCGUIRE & MAGGI EASTWOOD, *THE ACCIDENTAL BIRTH OF HATE CRIME IN TRANSNATIONAL CRIMINAL LAW: “DISCREPANCIES” IN THE PROSECUTION FOR “INCITEMENT TO GENOCIDE” DURING THE NUREMBERG PROCESS INVOLVING THE CASES OF JULIUS STREICHER, HANS FRITZSCHE AND CARL SCHMITT* (2013) (focusing on “hate speech,” not Schmitt’s other conduct). Edwin Bikundo’s analysis concentrates more on philosophical than legal questions. See Edwin Bikundo, *Carl Schmitt as a Subject and Object of International Criminal Law: Ethical Judgment in Extremis*, 16 INT’L CRIM. L. REV. 216 (2016); accord Michael Salter, *Neo-Fascist Legal Theory on Trial: An Interpretation of Carl Schmitt’s Defence at Nuremberg from the Perspective of Franz Neumann’s Critical Theory of Law*, 5 RES PUBLICA 161 (1999).

¹¹See Bendersky, *Carl Schmitt at Nuremberg*, *supra* note 9, at 95 (“What is conclusive is that before the Nazi seizure of power there was not the slightest anti-Semitic note in any of Schmitt’s writings or personal and professional relations.”) By the time Schmitt’s diaries were published, with their plethora of antisemitic passages, this view was no longer tenable. See Joseph W. Bendersky, *Schmitt’s Diaries*, in *THE OXFORD HANDBOOK OF CARL SCHMITT* 143 (Jens Meierhenrich & Oliver Simons, eds., 2016) (describing the diaries as “enlightening regarding Schmitt’s incessant personal antisemitism”).

authorities and jurisprudence to gauge what Schmitt might have been charged with and the likelihood of a potential conviction. As it turns out, prosecutorial pessimism may have been unfounded – had Flechtheim been allowed to probe further, his desire for justice against Carl Schmitt might have been realized.

Finally, a concluding section evaluates how the PEC might have successfully criminalized certain propaganda, including academic discourse. While not directly inciting specific offenses, it lays the needed groundwork for campaigns of persecution/aggression via sufficiently proximate speech. But, debating the merits of such a hypothetical precedent is not strictly academic, as it were. Most recently, for example, Russian theorists who deny Ukrainian statehood have, ironically, labeled Ukrainians as “Nazis” and have catalyzed imperial aggression and atrocities. They sometimes play a role eerily analogous to Schmitt’s on behalf of the NSDAP. In this regard, can Schmitt’s near-miss Nuremberg prosecution help us conceive the next important chapter in developing atrocity speech law?

B. Schmitt and Flechtheim from Weimar through the Fall of the Third Reich

I. *The First Crossing of Paths: Rejection and Persecution*

1. *The Origins and Rise of Carl Schmitt*

Born into a conservative Catholic family of modest circumstances in Westphalia, Schmitt was immersed in the classics as a youth and encouraged by his devout parents, including his French-German bilingual mother, to become a priest.¹² Here, we can perhaps first discern the religious roots of his lifelong antisemitism. In his later private diaries, he blamed the Jews for “killing Christ.”¹³

Schmitt ultimately turned from classics to law, excelling academically. He saw himself as an exceptional intellect, and craved recognition.¹⁴ An inkling of such recognition came in 1916, on the publication of his habilitation thesis, “The Value of the State and the Significance of the Individual,” his first extended work on the theme of the State’s political power in relation to society’s non-political aspects.¹⁵ Even at this relatively formative stage, Schmitt was fascinated by the idea of the State as a dangerous, dominant, almost supernatural force that stood in for the power of God in human affairs. This would be a lifelong preoccupation.

In 1916, Schmitt married his first wife, a Croatian woman who falsely claimed to be a countess. He then divorced her and ultimately married a Serbian woman, Dušanka (who had served as a translator in the divorce proceeding) but he failed to procure an annulment and was excommunicated from the Catholic Church.¹⁶ Over time, he became much more distant from official Catholic doctrine, writing in the late 1920s: “I flee back to Germandom; away from the Jews . . . the Catholics and all those soul snatchers.”¹⁷

In the meantime, World War I had begun in 1914. A year later, Schmitt volunteered for service in the German Army. However, due to a back injury, he was assigned duties as a law clerk in the Independent General Command of the Bavarian First Army. In early publications during the war, Schmitt had already posited that “dictatorship is intrinsically sovereign and unlimited” and that

¹²Mehring, *supra* note 2, at 4–7.

¹³CARL SCHMITT, *TÄGEBUCHER: 1931 BIS 1934*, 417, 420 (Wolfgang Schuller & Gerd Giesler, eds., 2010).

¹⁴Schmitt’s contempt for alleged intellectual inferiors arises frequently in his diaries and memoirs, including those dealing with his notions surrounding his guilt—or rather lack thereof—during the Nazi period. See, e.g., CARL SCHMITT, *EX CAPTIVITATE SALUS: EXPERIENCES, 1945–47* 59 (2017) (“most people are far too primitive to distinguish a diagnostician from a prophet.”)

¹⁵See Mehring, *supra* note 2, at 43–49.

¹⁶Brian Fox, *Carl Schmitt and Political Catholicism: Friend or Foe?* 7 (2015) (City University of New York PhD Thesis) at https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1943&context=gc_etds (last visited February 21, 2024).

¹⁷CARL SCHMITT, *TÄGEBUCHER 1925 BIS 1929* 427 (Martin Tielke und Gerd Giesler, eds., 2018).

“the legitimacy of the legal state is reducible to the situation of concrete danger.”¹⁸ Consistent with this, he was deeply troubled by the extremist uprisings and other chaotic scenes after Germany’s defeat, particularly in Munich, where he witnessed a short-lived communist regime being established and then suppressed with bloody violence.

The reaction against such anarchy and fixation on the role of State power in imposing order was a key driver for his first major work on Weimar intellectual life, his 1921 book *Dictatorship*, in which he argued that Executive authority was needed to stabilize society during emergency conditions. This notion of exceptional sovereign power undergirded his influential 1922 work *Political Theology*, which more clearly spelled out the idea of an Executive-led jurisprudence, another central theme in his work.¹⁹

In what many consider his masterpiece, 1927’s *The Concept of the Political*, he tied the ultimate basis for legitimate political authority to extra-legal, sociological factors based on “Friend-Enemy” relations.²⁰ With his consistent relativizing of legal rules in favor of political and social structures, Schmitt’s intellectual agenda brought him into close conversation with many other antiliberal crosscurrents of early 20th-century European thought. Over the course of the 1920s in particular, he found himself engaging with various kinds of “organic” or “vitalist” conservatism, which viewed the state as a kind of outgrowth of a particular society and, often, as embodying its cultural (or racial) characteristics.²¹

Meanwhile, his antisemitism was intensifying. Despite having a few Jewish acquaintances in his early years, as well as occasional amicable relations with Jewish colleagues/students as a professor, his diaries also indicate obsessive, lifelong Jew-hatred/paranoia.²² Thus, at various points over the years, he would express his: “fear of the Jews,”²³ “disgust at these Vienna Jews,”²⁴ “rage over the Jews,”²⁵ “[contempt for] the awfulness of the Jews,”²⁶ “disgust at the filthy Jew [Hans] Kelsen,”²⁷ “depression over the Jews,”²⁸ and sense of Jews as “controllers.”²⁹

Moreover, as Schmitt became more involved in far-right politics during the late Weimar years, these antisemitic utterances took on a more clearly political tinge. In 1929, he wrote of “the terrible power of the Jews who have nothing to do with us and who rule us.”³⁰ Over the following years, he wrote of his fear of “the power of Jews in Germany,”³¹ “ghastly Jews and socialists,”³² and his “disgust and repugnance at a world in which one has to fall into the hands of such Jews.”³³ Living

¹⁸Michael Dylan Rogers, *The Development of Carl Schmitt’s Political Thought during the First World War*, 12 MODERN INTELLECTUAL HISTORY 123, (2016).

¹⁹CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY xvii, 43 (George Schwab, trans., 2005) (expressing the view that “life [and the action of the state] can never be reduced or adequately understood by a set of rules, no matter how complex.”)

²⁰CARL SCHMITT, DER BEGRIFF DES POLITISCHEN, 58 ARCHIV FÜR SOZIALWISSENSCHAFT UND SOZIALPOLITIK I (1927); CARL SCHMITT, THE CONCEPT OF THE POLITICAL: EXPANDED EDITION 26 (George Schwab, trans., 2008) (“The specific political distinction to which political actions and motives can be reduced is that between friend and enemy.”)

²¹See, e.g. MICHAEL STOLLEIS, A HISTORY OF PUBLIC LAW IN GERMANY, 1914-1945, 100-102 (2004) (“The field [of state theory] as a whole was, like none other, called to comment on politics”); see also *id.* at 161 (discussing “the entire tradition of the Historical School, which had sought to connect history and prevailing law into an ‘organic development.’”)

²²Mehring, *supra* note 2, at 55-67; 287-90; 528.

²³CARL SCHMITT DER SCHATTEN GOTTES: INTROSPEKTIONEN, TAGEBÜCHER UND BRIEFE 1921 BIS 1924 196, 198, 201 (Martin Tielke und Gerd Giesler, eds., 2014).

²⁴*Id.* at 198.

²⁵Schmitt, *supra* note 13, at 185.

²⁶*Id.* at 172, 184.

²⁷*Id.* at 73.

²⁸Schmitt, *supra* note 17 at 203.

²⁹*Id.* at 420.

³⁰*Id.* at 291.

³¹Schmitt, *supra* note 13, at 59.

³²*Id.* at 130.

³³*Id.* at 147.

in Berlin, he saw it as “utterly shameful, that I should be here in this Jew city, injured and humiliated by Jews.”³⁴

During these same years, Schmitt served as a constitutional advisor to Chancellor Heinrich Brüning’s Centre Party cabinet and then joined the circle of the authoritarian general-turned-politician Kurt von Schleicher, both of whom sought to suppress or, worse, co-opt the Nazi movement. While originally supporting this goal, acquaintances reported that as early as 1932, Schmitt had “reconciled himself” to the Nazis. Indeed, he would later say that he viewed it as “Hitler’s historical mission” to “overturn the diktat of Versailles.”³⁵

II. Ossip Flechtheim and His Path to Hans Kelsen and Carl Schmitt

1. A Bilingual and Multicultural Upbringing

While Schmitt was studying law and seeking fame in the years leading up to the Great War, one of his future avid readers was beginning life in Ukraine. In 1909, Ossip K. Flechtheim was born in Mykolaiv, near Odesa, to bookseller Hermann Flechtheim, a German migrant, and his Russian-speaking wife Olga. The paternal side of the family was best known for Ossip’s uncle Alfred, a leading art dealer and Berlin gallery owner. In addition to gifting him with bilingualism (as Schmitt’s parents had done for him), Flechtheim’s split-nationality household inculcated him with a multicultural perspective; indeed, he later remarked that, as he had kin on both sides of World War I, there had been “no place for patriotism” in his family.³⁶

Following the Flechtheim brood’s move to Düsseldorf in 1920, Ossip completed his schooling at the conservative Hindenburg-Gymnasium while growing up in a cultured, humanistic, secular milieu. At the age of 18, he graduated with honors and then began college studies that would take him to universities in Freiburg (where he earned a law degree and studied under the great philosopher Edmund Husserl), Heidelberg and Paris (where he perfected his French), and Berlin. He passed the state law examination in Düsseldorf in 1931 and was employed by the German civil service (a role from which the Nazi regime would later exclude him), before pursuing PhD studies at the University of Cologne.

During his early student days, he also decided to join the German Communist Party (KPD).³⁷ A close lifelong friend, the international relations theorist John H. Herz, recalled Flechtheim’s deep interest in Marxism since adolescence. Over his life, this interest would open him up to a broader set of ideas of utopian potential, social progress, and human agency, which were ultimately embodied in his writings on “Futurology.”³⁸

2. Disillusionment with Stalinism and Consideration of Schmitt

In time, Flechtheim became disillusioned with Soviet communism. As Joseph Stalin was consolidating his power, the violent suppression of political rivals and “untrustworthy” groups in society was becoming harder for foreign admirers such as Flechtheim to ignore.³⁹ When travelling to Russia in early 1931 to study communist praxis, he initially saw some hope for the USSR. However, his months-long stay there confirmed for him a sense of incompatibility between progressive politics and Stalinism.⁴⁰ He also grew deeply disillusioned with the KPD and its Moscow-based handlers during its miscalculated handling of late Weimar electoral politics.

³⁴*Id.* at 160.

³⁵NICHOLAUS SOMBART, *JUGEND IN BERLIN, 1933-1943* 266 (1984).

³⁶Keßler & OSSIP K. Flechtheim, *supra* note 3, at 13–16.

³⁷*Id.* at 27–30, 46, 85–86.

³⁸See, e.g. Ossip K. Flechtheim, *In unserer Familie war kein Platz für Patriotismus*, in HAJO FUNKE (ED.), *DIE ANDERE ERINNERUNG. GESPRÄCHE MIT JÜDISCHEN WISSENSCHAFTLERN IM EXIL* 422–39 (1989).

³⁹See, e.g. STEPHEN KOTKIN, *STALIN: WAITING FOR HITLER, 1929–1941* 64 (2017).

⁴⁰*Id.*; see also OSSIP KURT FLECHTHEIM AND HERMANN WEBER, *DIE KPD IN DER WEIMARER REPUBLIK* (1969).

Back in Germany, while still technically a KPD member, Flechtheim joined the clandestine socialist group *Neu Beginnen* (New Beginning), which sought to work inside both the Communist and the Social Democratic Parties to prevent internecine warfare between them. However, he eventually left the KPD in 1933 after Hitler's rise to power and amid the persecution of communists in Germany. Around the same time, he began his studies at the University of Cologne where a number of prominent jurists, in particular the celebrated positivist Hans Kelsen, were members of the faculty. Despite his misgivings about what he perceived as Kelsen's too idealistic approach to law, Flechtheim began working under his supervision for a doctoral thesis that would ultimately turn into a Hegelian theory of criminal punishment, engaging with the thought of both Kelsen and Schmitt.⁴¹

Although it might have seemed paradoxical for a radical Jewish leftist intellectual like Flechtheim to be attracted by the views of an arch-conservative Catholic thinker like Schmitt, who was closely associated with Weimar's rightist and monarchist political forces, the Ukrainian-born doctoral candidate was in fact far from alone in this respect. Indeed, among Schmitt's readers, and even his students, many leftists appreciated how his liberal doctrine critiques enabled more radical approaches to law and politics.⁴² Crucially for them, Schmitt's late Weimar thought presented itself as an ideologically neutral analysis of the state's relationship with society. Those on the left could share part of the critical project while pursuing different agendas. In the late 1920s, for example, Schmitt had supervised some leftist doctoral students, most notably Otto Kirchheimer, who graduated in 1928 with a dissertation on "The State Theory of Socialism and Bolshevism."⁴³ Flechtheim perhaps aimed for a similar trajectory but his hopes were soon to be dashed as Schmitt threw his lot in with the Nazi cause.

3. Schmitt vs. Kelsen and Prussen contra Reich

To put this period of Flechtheim's career into context, it is well to consider the relationship between Kelsen and Schmitt. Future generations of legal scholars would often juxtapose these two as representing "opposite" positions on the relation between legal norms and political realities.⁴⁴ And, by the last years of Weimar, they were in a clear state of theoretical and professional rivalry. In 1930, for example, Schmitt had written to prominent constitutional scholar Gerhard Anschütz, praising him for rejecting Hans Kelsen's latest work thus "put[ting] an end to the murky flood of Talmudistics, the need for validity, and the delusions of priority [among norms]."⁴⁵

In this revealing comment, Schmitt combined a crucial point of theoretical disagreement with Kelsen; that is, finding a hierarchy among all legal norms [flowing from Kelsen's famous *grundnorm*-based Pure Theory of Law] with a barely-concealed appeal to antisemitism. This aspect of the rivalry was even clearer in Schmitt's diaries, where he associated Kelsen's approach to legality with a "Jewish" ideology or even with "the power of the Jews."⁴⁶ By the time of these scribbles during the late Weimar period, Schmitt was already actively hoping for – and was ready to contribute to – a "national community" in which Jews would be severely marginalized, if not excluded altogether.

⁴¹OSSIP KURT FLECHTHEIM, *HEGELS STRAFRECHTSTHEORIE* (1936); for a discussion of Flechtheim's Ph.D. experience see Kefler & Ossip K. Flechtheim, *supra* note 3 at 44–45 (N.B., Kelsen as Flechtheim's supervisor finds no other support in the historical record).

⁴²*Id.*

⁴³Reinhard Mehring, *Otto Kirchheimer und der Links-Schmittismus*, in RÜDIGER VOIGT, ed., *DER STAAT DES DEZISIONISMUS* (2007); Hubertus Buchstein, *The Godfather of Left-Schmittianism? Otto Kirchheimer and Carl Schmitt after 1945*, 24 *REDESCRIPTIONS: POLITICAL THOUGHT, CONCEPTUAL HISTORY, AND FEMINIST THEORY* 4, 7 (2021).

⁴⁴See, e.g., Stanley L. Paulson, *Hans Kelsen and Carl Schmitt: Growing Discord, Culminating in the "Guardian" Controversy of 1931*, in *THE OXFORD HANDBOOK OF CARL SCHMITT* (Jens Meierhenrich & Oliver Simons, eds., 2016).

⁴⁵CARL SCHMITT, *TÄGEBUCHER: 1931 BIS 1934* 44 (2010).

⁴⁶See, e.g., *id.* at 59.

This sentiment figured prominently in Schmitt's interactions with the Jewish community at the University of Cologne during his employment there in 1933. The previous year, the law faculty offered Schmitt a position following the death of Fritz Stier-Somlo, an esteemed German-Jewish professor of public law, who himself recommended Schmitt. Although Schmitt had heard a rumor that Kelsen had opposed this decision, the latter, as Faculty Dean, was also its main representative in lobbying him to accept, expressing hope that, as colleagues, they would "get along well personally, despite their academic disagreements." Schmitt tactfully agreed despite his concealed religious hatred of Kelsen.⁴⁷

But, as Schmitt was being recruited to Cologne, his reputation was not only rising in academic circles, he was being recognized as a major constitutional law practitioner as well. This was due to his representing the Weimar national government in the 1931–32 *Preussen contra Reich* case, which involved a dispute regarding the Weimar President's power to replace Prussia's elected authorities for allegedly failing to carry out their constitutional duties.⁴⁸ Schmitt's support for the central government of President Paul Von Hindenburg and Chancellor Franz Von Papen against Prussia's Social Democrats was closely tied to his broader agenda, which by then sought to transform the German state into more of a traditional authoritarian entity; that is, fomenting a "conservative revolution."⁴⁹ Although skeptical of insurgent radical movements like the Nazis and potentially (though this point is debatable) hoping to continue Weimar's constitutional system, Schmitt sought a kind of rightist coup.

In the wake of his successful performance in the Prussian case, Schmitt agreed to Cologne's job offer.⁵⁰ Although he still viewed the Nazi Party as a threat to be contained, he was one of many statist conservatives who would quickly reconcile themselves to Hitler's movement, though he ended up being far more enthusiastic than most.

4. Schmitt, as Nazi Collaborator, Rejects Flechtheim

By March 1933, Hitler had been appointed Chancellor and, in the wake of the Nazi-engineered Reichstag fire, the NSDAP legislative majority had passed the Enabling Act, effectively vesting Hitler with dictatorial powers. By April, legislation banning most Jews from civil roles, including those at universities, meant Hans Kelsen had been put on indefinite leave. Although Kelsen's colleagues put together a petition calling for an exception to the policy on his behalf, Schmitt declined to join in this "absurd" initiative, once again seeing it in terms of his own antisemitism.⁵¹

Still, Flechtheim appreciated Schmitt's presence at the University of Cologne. In need of a new advisor following Kelsen's removal, he hoped the similarly influential Schmitt might supervise his dissertation.⁵² Flechtheim's effort to reach out to Schmitt as a potential advisor went so far as to moot a potential switch of topic to the legal thoughts of Juan Donoso Cortés, an early 19th-century Spanish counterrevolutionary political theorist and theologian, whose work was a key influence on the development of Schmitt's own philosophy.⁵³ But Schmitt flatly rebuffed him, noting that he could not work with Flechtheim given current "conditions," which Flechtheim understood as a rejection on antisemitic grounds (noting this could "only refer to my so-called racial descent.")⁵⁴ Later, Flechtheim would recall that he "knew Schmitt from his time at the University of

⁴⁷Mehring, *supra* note 2, at 181, 258; Schmitt, *supra* note 35, at 73.

⁴⁸See summary in Bendersky, *supra* note 2, at 161–62 (2014).

⁴⁹*Id.*; see also Jens Meierhenrich and Oliver Simons, "A Fanatic of Order in an Epoch of Confusing Turmoil": The Political, Legal, and Cultural Thought of Carl Schmitt, in *THE OXFORD HANDBOOK OF CARL SCHMITT* 3–70 (2014).

⁵⁰See Bendersky, *Carl Schmitt's Path to Nuremberg*, *supra* note 9, at 189–91.

⁵¹Schmitt, *supra* note 13, at 283.

⁵²Keßler & OSSIP K. Flechtheim, *supra* note 3, at 44.

⁵³See especially Schmitt, *POLITICAL THEOLOGY*, *supra* note 18, at 54–65.

⁵⁴Wieland, *supra* note 9, at 108–09. *But see Ad Notam Genommen*, Carl-Schmitt Gesellschaft e.V. Available at: <https://www.carl-schmitt.de/en/about-us/?hilitte=Flechtheim> (seeing Spanish-language competence as a factor) (last visited February 21, 2024).

Cologne . . . when he had unsuccessfully tried to obtain his doctorate under him,” adding in the same breath that he “had witnessed how Schmitt had seen to it that a Jewish assistant professor was fired.”⁵⁵ Indeed, Schmitt was in the process of becoming one of the Third Reich’s most illustrious legal counsellors.

II. Schmitt’s Role in Sanctifying Nazi Laws, Purging Jews, and Justifying Aggression

1. Entering Nazi Circles

Schmitt’s rise to the upper echelon of the Nazi bar, during which time he became known as the “Crown Jurist of National Socialism,”⁵⁶ was enabled by four prominent members of the new government: Herman Goering (Minister-President of Prussia and, in practice, Hitler’s top lieutenant), Hans Frank (Hitler’s personal lawyer), Franz Von Papen (Vice Chancellor), and Johannes Popitz (a friend and Prussia’s finance minister under Goering). The latter two, who had admired Schmitt’s work in connection with *Preussen contra Reich*, were the first to open the door to the new regime. Von Papen invited Schmitt to join a high-level commission tasked with drafting “*Gleichschaltung*” legislation, which would Nazify every level of government via strict hierarchical coordination from Berlin down through the bottom tiers of local administration.⁵⁷ In joining this key drafting effort, in addition to Von Papen, Schmitt worked with and impressed Goering as well as Reichsminister of the Interior, Wilhelm Frick.

2. Becoming Nazi Germany’s “Crown Jurist”

2.1 Advocating the Purge of Jews from the Legal Profession

Soon after that, in May 1933, Schmitt joined the Nazi party. Now one of its most prominent and prestigious jurists, he finally gave vent to his strong private feelings of antisemitism. These public attacks included calls for the expulsion of the Jews. In a veiled reference to them, his May 31, 1933, Article in the *Westdeutscher Beobachter* declaimed that the “intellectual class” had “never belonged to the German people [or] to the German spirit.”⁵⁸ Meanwhile, justifying Nazi persecutory measures that had already effectively marginalized the Jews, he explained that “Germany has [now] spat them out for all time.” For those Jews who had by then slipped through the cracks, he explicitly called for their removal from positions of authority as well as forced expulsion from Germany (*Strafexpatriation*), withdrawal of citizenship, and/or destruction of their “anti-German” books.⁵⁹

2.2 Joining the Government and Glorifying Hitler

Schmitt also penned a series of pieces defending the *Gleichschaltung* process and was rewarded by Goering in July with an appointment to the Prussian State Council. Having thus been officially installed in the government, Schmitt gained further powers over the Third Reich’s judicial/educational spheres through Hans Frank’s “Academy for German Law” (AGL), which was declared to be a Reich Corporation of Public Law by a July 1934 Statute signed by Hitler. According to Nazi expert Raphael Lemkin, this “law gave it an official status, making it practically an arm of the government.”⁶⁰ Lemkin quoted a Nazi publication as explaining that the “Academy is not an academy in the usual sense of the word, i.e., an institution of mere learning and science . . . but [an organization for] the creation of a body of law [and thus it] will have to supplant to a

⁵⁵Buchstein, *supra* infra note 43.

⁵⁶Loewenstein; cf. “Carl Schmitt,” Stanford Encyclopedia of Philosophy, August 29, 2019, <https://plato.stanford.edu/entries/schmitt/> (last visited February 21, 2024).

⁵⁷Bendersky, *supra* note 2, at 199–206.

⁵⁸Mehring, *supra* note 2, at 296.

⁵⁹*Id.*

⁶⁰Raphael Lemkin, Memorandum to Brigadier General John W. Weir, August 18, 1945, 15, Taube Archive of the International Military Tribunal (IMT) at Nuremberg, 1945–46 (hereinafter Lemkin Report).

great extent the function of parliamentary bodies in legislation since parliament has ‘stepped into the background.’”⁶¹

In effect, the Academy sought to operationalize *Gleichschaltung* within the legal profession and to infuse lawyer culture in the Reich with the “*Führerprinzip*” (or “leader principle.”)⁶² The latter put Hitler’s orders above the rule of law which, in the context of the legal profession/academy, entailed the purging of Jews. This was brought about through AGL draft legislation, publications, conferences, and speeches, to which Schmitt contributed greatly. Next to Frank, Schmitt was perhaps the leading voice in the AGL, having been placed by Frank on the organization’s *Führerrat* (Leadership Council) while also being appointed its Chair for the Committee on State and Administrative Law.⁶³

At the first annual AGL meeting in Berlin, Schmitt had the chance to see what he called a “wonderful speech by Hitler about the total state,” which left him “much consoled.”⁶⁴ In his own public remarks that day, Schmitt referred to Germany’s “great leaders,” more specifically pointing to “Adolf Hitler, the leader of the German people, whose will today is the *nomos* of the German people, and Hans Frank, the leader of our German legal front and pioneering fighter for our proper German right, the model of a National Socialist jurist.” The message for the judges and others in the audience was clear: obeying Nazi orders and doctrine should trump legal procedure.⁶⁵

In addition to giving speeches on these topics, Schmitt was actively publishing articles that furthered the AGL agenda. For example, a 1933 AGL pamphlet authored by Schmitt developed his new description of a constitutional order of the Nazi state based on a “tripartite structure” of “State, Movement, and People.”⁶⁶ Drawing on and adapting themes from broader fascist thought, Schmitt developed a theoretical justification of the Nazi Party’s power, the subservience of judges regarding political decisions, and the people’s subjugation.

2.3 Justifying the Night of the Long Knives and the Nuremberg Laws

The following year, Schmitt published important written justifications for the June 30, 1934 “Night of the Long Knives,” the political mass murder of Hitler’s perceived enemies (including Schmitt’s own former ally Kurt von Schleicher). The piece was titled “The Führer Protects the Law,” and Detlev Vagts describes it as “a paean to Adolf Hitler’s [bloody purge].”⁶⁷ Vagts adds that it “represents the lengths to which Schmitt was willing to go” in legally justifying Hitler’s crimes.⁶⁸

In 1935, Schmitt authored various full-throated defenses of the Nuremberg Laws, which stripped Jews of citizenship, civil and political rights, and the legal capacity to marry non-Jews. He referred to these anti-Jewish apartheid measures as “the constitution of freedom,”⁶⁹ and as a transformation away from earlier German constitutions that did not “originate in German blood and German honor.”⁷⁰

In Berlin, to ensure the Laws were properly implemented, Schmitt provided “specialist training for civil servants in the judicial system,” including sessions on “Law as the Plan and Will of the Führer.” Later, at an AGL annual meeting, portions of which Hitler personally attended and

⁶¹*Id.*

⁶²Mehring, *supra* note 2, at 303–04.

⁶³*Id.*

⁶⁴*Id.*, at 305.

⁶⁵*Id.*

⁶⁶CARL SCHMITT, *STATE, MOVEMENT, PEOPLE: THE TRIADIC STRUCTURE OF THE POLITICAL UNITY* (Simona Draghici, ed. and trans., 2001).

⁶⁷Detlev Vagts, *Carl Schmitt’s Ultimate Emergency: The Night of the Long Knives*, 87 *THE GERMAN REVIEW: LITERATURE, CULTURE, THEORY* 203, 203 (2012).

⁶⁸*Id.*

⁶⁹Carl Schmitt, *Die Verfassung der Freiheit*, 40 *DEUTSCHE JURISTEN-ZEITUNG* 1133 (1935).

⁷⁰Salter, MacGuire & Eastwood, *supra* note 10, at 73–74 (citing DIRK BLASIUS, CARL SCHMITT: PREUSSISCHER STAATSRAT IN HITLERS REICH, 10–14, 105–7 (2001)).

approved of, he gave an address on “Jurisprudence in the Führer State.”⁷¹ Among his other teachings, Schmitt called for the concept of “human being” to be removed from jurisprudence and replaced with “specific” notions such as “*Volksgenosse*” (folk comrade), foreigner, and Jew.⁷²

A year later, In 1936, German émigré professor Karl Lowenstein described the overall effect of the Nazi Crown Jurist’s imprimatur on this persecutory legal system:

Law is no longer an objective norm but a spontaneous emanation of the “Führer’s” will. Positive law is valid only so far as it corresponds with the political intentions of one man. [This] is tantamount to a blunt denial of the separation of powers and the rule of law. Both are submerged in political power . . .⁷³

Also in 1936, reflecting his status as one of Nazi Germany’s most influential jurists, Schmitt traveled to Italy (with Hans Frank) for a meeting with Benito Mussolini. In his later recounting, Schmitt discussed issues of political theory with *il Duce*, particularly the differences between National Socialist and Italian Fascist ideology, the latter placing a far higher value on the state than race. He would also claim that Mussolini had asked him to “pass on a warning to Hitler” regarding this topic, which he did.⁷⁴

That same year, Schmitt’s hostility towards Judaism and “the intensity of his preoccupation with what he took to be ‘Jewish law’” seemed to escalate.⁷⁵ According to Raphael Gross, Schmitt’s “intention to ground his antisemitism scientifically now also emerged sharply[.]” This was embodied in his 1936 conference on “Judaism in German Jurisprudence,” wherein Schmitt spoke of the historical “invasion” of Germany by Jews and Jewish thought,⁷⁶ sought to marginalize even legal texts that happened to be written by Jews, and defended the rabidly antisemitic Nazi publisher Julius Streicher and his “great struggle”:

We need to repeatedly impress on ourselves and our students what the Führer has said about Jewish dialectics in order to escape the danger of ever-new camouflage and talking a theme to death. A merely emotional antisemitism does not do the job; we need certainty grounded in knowledge [*Erkenntnis*] . . . We have to liberate the German spirit [*Geist*] from all falsifications, falsifications of the concept of spirit that made it possible for Jewish emigrants to label Gauleiter Julius Streicher’s great struggle [*Kampf*] as something non-spiritual [*etwas Ungeistiges*].⁷⁷

2.4 Schmitt’s Power within the Legal Academy

But Schmitt’s pernicious influence on the legal profession in Nazi Germany was not limited to the government and the bar – it also adversely impacted the legal academy. In late 1933, for example, Schmitt was appointed to the prestigious position of Chair of Public Law at the University of Berlin, and appointed a member of the *Kaiser-Wilhelm-Institut für ausländisches Recht und Völkerrecht*. By the following year, owing to Frank’s influence, he was made editor-in-chief of the *Deutsche Juristen-Zeitung* and director for the university instructors’ section of the Association of National Socialist German Jurists.

⁷¹Carl Schmitt, *Die Rechtswissenschaft im Führerstaat*, ZEITSCHRIFT DER AKADEMIE FÜR DEUTSCHES RECHT 435 (1935).

⁷²Mehring, *supra* note 2, at 336.

⁷³Karl Lowenstein, *Law in the Third Reich*, 45 YALE L.J. 779, 811 (1936).

⁷⁴This apparently refers, however, not to any direct communication with Hitler, but rather to subsequent academic publications in which Schmitt noted the differences between Nazi and Italian views on the state. Mehring, *supra* note 2, at 339.

⁷⁵Raphael Gross, *The “True Enemy”: Antisemitism in Carl Schmitt’s Life and Work*, in THE OXFORD HANDBOOK OF CARL SCHMITT 96–97 (Jens Meierhenrich & Oliver Simons, eds., 2014).

⁷⁶Mehring, *supra* note 2, at 343–44.

⁷⁷Carl Schmitt, DAS JUDENTUM IN DER DEUTSCHEN RECHTSWISSENSCHAFT: ANSPRACHE VORTRÄGE UND ERGEBNISSE DER TATUNG DER TEICHSGRUPPE HOCHSCHULLERER, im NSRB AM 3. UND 4. OKTOBER 29–30 (1936) (translated by Raphael Gross), in *id.*

Deputy Führer Rudolf Hess also supervised him as a member of the *Hochschulkommission*, responsible for university appointments. Each of these positions conferred significant influence over the nature and content of judicial discourse and principles of legal interpretation, as well as a major platform for articulating arguments for Nazi legitimacy and the purging of Jews.⁷⁸

Schmitt's activities directed towards the antisemitic transformation of the German legal profession reached a zenith in 1936 when he launched a series of anti-Jewish conferences and initiatives, including the conference on "Judaism in Jurisprudence" as well as related programs for the National Socialist University Teachers Group, at whose conference, in October, he demanded a complete purging of the "Jewish spirit" in German law.⁷⁹ Of note, Schmitt also organized a "vow" to oppose the "Jewish spirit" in law for participants in his conference, which was submitted to Reich Science Minister Bernhard Rust.⁸⁰ On December 2 of that year, he also wrote to SS Chief Heinrich Himmler, describing the fruitful work of his Teachers Group and offering full cooperation in the "struggle against Judaism."⁸¹

By then, and synchronous with Schmitt's virulently antisemitic speech over the previous four years, Himmler had already established the nucleus of his concentration camp archipelago in Germany, with Dachau (near Munich), Sachsenhausen (near Berlin), Buchenwald (near Weimar), and Lichtenburg (near Merseberg in Saxony, meant for women). These camps were already holding thousands of Jews and political prisoners, many of whom were being (or would eventually be) tortured and murdered.⁸²

2.5 Schmitt's Support of the Nazi Conquest

Despite his celebrated status in the early years of the regime, by 1937, Schmitt's major influence on domestic matters had come to an end owing to Nazi Party infighting (especially from certain fanatical critics within the SS who doubted his ideological purity).⁸³ Nevertheless, he still held his academic posts and (under the protection of Goering) continued to exert a strong influence in defending National Socialism's foreign policy of conquest. He had previously lectured on "National Socialism and International Law" and also wrote a booklet which, like many of his works during the early years, was distributed within the Party.

Starting in 1937 through to the end of the war, his defense of the Nazi state centered on his theory of "*Grossraum*" (great space), which he promoted through articles, lectures, and appearances overseas, including fascist allied states such as Spain and Romania. Per this theory, Schmitt saw Germany exercising hegemony over a European *Grossraum* between the "Western powers, with their liberal-democratic principles, and the Bolshevik East, with its idea of world revolution."⁸⁴ The theory generated much media coverage overseas, where the British press credited Schmitt as being the "key man" behind Hitler's expansionist policy.⁸⁵ As Joseph Bendersky writes, it thereafter "acquired currency in Germany" with the Kiel Institute

⁷⁸Mehring, *supra* note 2, at 338–40.

⁷⁹*Id.* at 342–45.

⁸⁰*Id.* at 344.

⁸¹Joseph W. Bendersky, *The Expendable Kronjurist: Carl Schmitt and National Socialism, 1933–36*, 14 JOURNAL OF CONTEMPORARY HISTORY 309 (1979).

⁸²*Concentration Camps: 1933–1939*, Holocaust Encyclopedia, June 27, 2019, <https://encyclopedia.ushmm.org/content/en/article/concentration-camps-1933-39> (last visited February 21, 2024).

⁸³Mehring, *supra* note 2, at 342–48. Nonetheless, Schmitt remained highly active in public discourse after 1937. In that year, for example, he gave "repeated" lectures on the topic of "Volk and State," as well as writing pro-Nazi interpretations of international law refuting the notion of "illegal war." In 1938, this was followed up by extensive speaking and publishing related to Thomas Hobbes, which he used as a chance to continue "attacking the Jewish spirit." That year, he also attended AGL events on Nazi approaches to international law and on the relationship of "Dictatorship and Democracy." By early 1939, he had clearly formulated his *Grossraum* doctrine. See *id.* at 350–60.

⁸⁴Bendersky, "Carl Schmitt at Nuremberg," *supra* note 9, at 93.

⁸⁵*Id.*

publishing Schmitt's early 1939 lecture (two weeks after the Nazi invasion of the remains of the Czech state) as a book, which again managed to reach a wide variety of high-level Nazi readers.⁸⁶

Certain experts have discerned a direct connection between Schmitt's thoughts and Nazi aggression. For example, historian Matthew Specter points to passages where Schmitt specifically associates *Grossraum* with *Lebensraum*, the comparable term used in the writings of Hitler and other regime mouthpieces.⁸⁷ Among Schmitt's frequent attacks on the "spaceless" British doctrine of universal control over the seas, he portrays Germany and its allies as righteous overlords of land-based, territorial empires. Thus, he writes that "The Mediterranean for England is only one path (*Strasse*) among many . . . while for Italy it represents *Lebensraum*."⁸⁸ Similarly, an antisemitic component emerges in *Grossraum* discourse, including Schmitt's explicitly distinguishing the notion from the "peculiar incongruity [*Missverhältnis*] of the Jewish people with everything that concerns land, country, and region."⁸⁹ Even after the war, Schmitt was still committed to the idea that "the assimilated Jew is the true enemy," which strongly suggests that Jews would have had no place or safety in his ideal of a German-dominated *Grossraum* empire over Europe.⁹⁰

Mark Mazower argues that despite Schmitt's awkward relationship with the SS in the late 1930s, he "articulated more clearly than anyone else in the Third Reich the way the regime saw its place in the world at this time."⁹¹ Indeed, "Hitler himself started using what sounded very much like Schmittian language" when articulating his policies.⁹² In particular, Hitler's public invocation of the Monroe Doctrine from 1939 to defend German continental expansion was arguably influenced by Schmitt's recent lectures on the subject before influential academic audiences, or by his earlier critiques of the Doctrine. More broadly, Schmitt's 1930–1940s theorizing supported and justified Germany's imperial expansion, including the annexations of the Sudetenland and Austria and the subsequent wars against and occupation of Poland and France.

Tellingly, Schmitt took care to ensure that his writings and lectures on the subject reached far and wide. For instance, his talks abroad often concerned related themes, such as his 1941 lecture in Paris in which he defended the assertion of German hegemony over Europe as part of its role as leader of Europe's land powers. His essay on this subject was published soon after in *Das Reich*, considered to be the "favourite propaganda vehicle" of Joseph Goebbels.⁹³ Close contacts during the war also recalled him complaining about Hitler's decision to invade the Soviet Union and take on the full might of Western sea and air power as *strategic* mistakes, in contrast to the "land wars" against German neighbors, which he saw as successful and justified initiatives.⁹⁴ The question for Schmitt seems to have been how best the Nazi regime could occupy and rule Europe, not whether it ought to do so.

⁸⁶*Id.*

⁸⁷Matthew Specter, *Grossraum and Geopolitics: Resituating Schmitt in an Atlantic Context*, 56 *HISTORY AND THEORY* 398 (2018). Specter's view thus challenges that of Joseph Bendersky, who argued, in perhaps too sweeping and categorical terms, that Schmitt's *Grossraum* concept "had nothing to do with either biological racism or *Lebensraum*" – although even he also admitted that Schmitt did not explicitly challenge either notion.

⁸⁸CARL SCHMITT, *VOLKERRECHTLICHE GROSSRAUMORDNUNG MIT INTERVENTIONSVERBOT FÜR RAUMFREMDE MÄCHTE. EIN BEITRAG ZUM REICHSBEGRIFF IM VOLKERRECHT* 34–35 (1991), quoted in Specter, *supra* note 87, at 404.

⁸⁹*Id.* at 79.

⁹⁰CARL SCHMITT, *GLOSSARIUM: AUFZEICHNUNGEN AUS DEN JAHREN 1947 BIS 1958* 255 (Gerd Giesler and Martin Tielke trans., 2015).

⁹¹MARK MAZOWER, *HITLER'S EMPIRE: HOW THE NAZIS RULED EUROPE* 577–78 (2000).

⁹²*Id.*

⁹³Samuel Garret Zeitlin, *Propaganda and Critique: An Introduction to Land and Sea*, in CARL SCHMITT, *LAND AND SEA: A WORLD HISTORICAL MEDITATION* xxxiv (Samuel Garrett Zeitlin, trans., 2015) (1942).

⁹⁴Sombart, *supra* note 35, at 266.

III. Flechtheim's Experience of Exile

1. Arrest by the Gestapo

As Schmitt was helping engineer the complete purge of Jews from Nazi Germany's legal profession, Ossip Flechtheim was desperately trying to avoid being one of its victims (having already been excluded from his civil service post in 1933). After Schmitt rejected him for doctoral supervision, he managed to find two advisors, Professors Albert Coenders and Gotthold Bohne, who were willing to see his project on *Hegel's Theory of Criminal Law* through to the award of a PhD in 1934.⁹⁵ But he was running out of time in Hitler's Germany. The following year, while Schmitt was prominently supporting the promulgation and enforcement of the Nuremberg Laws, Flechtheim had come to the end of the line in the Nazi state. Unable to work as a lawyer, he had been earning a very modest living via part-time paralegal work in Düsseldorf. In September of 1935, the Gestapo arrested him there for anti-Nazi activities but released him after three weeks.⁹⁶ He realized it was time to leave Germany.

2. Seeking Refuge in Brussels, Geneva, and the United States

Flechtheim briefly found refuge in Brussels. Initially underestimating the dangers he faced, he wanted to return to Germany as soon as possible. If not for the sage advice of his *Neu Beginn* friends in Belgium, he may not have gone on to Switzerland. As he later admitted, those friends "saved me."⁹⁷ Once in Geneva, his old mentor Hans Kelsen, who had also taken refuge there, helped him secure a fellowship from the *Institut universitaire des hautes études internationales*, the graduate school of the League of Nations, joining several other friends and acquaintances.⁹⁸ Meanwhile, his dissertation was finally published in 1936 as *Hegel's Theory of Criminal Law (Hegels Strafrechtstheorie)*. It had to be released by a Czech publisher because none in Germany would, by that point, publish texts by a Jewish academic.

In Geneva, Flechtheim improved his French and worked under Kelsen's direction on the study of Soviet legal and political thought, thereby making use of his Russian language skills. In his works during this period, he expressed his clear views on the flawed Soviet model of communism for the first time in writing. These could be summed up as devolving from the overly optimistic Millenarian vision of human liberation to a smokescreen for parochial Soviet state interests.⁹⁹ Flechtheim left Geneva in February 1939 to seek greater safety in the United States, where his first engagement would be at the relocated Institute for Social Research (*Institut für Sozialforschung*, aka the original institutional home of the Frankfurt School), which Max Horkheimer had transplanted to New York City.¹⁰⁰

Flechtheim's connection to Horkheimer was through the latter's old Frankfurt School colleague Theodor Adorno, who met Flechtheim via *Neu Beginn* connections.¹⁰¹ Grants from the Oberlander Trust and the Emergency Committee in Aid of Displaced Foreign Scholars largely financed his relocation to the United States. (This funding also helped Flechtheim support his

⁹⁵Keßler & OSSIP K. Flechtheim, *supra* note 3, at 45. n

⁹⁶*Id.* at 46–47.

⁹⁷TERENCE RAY RENAUD, RESTARTING SOCIALISM: THE NEW BEGINNING GROUP AND THE PROBLEM OF RENEWAL ON THE GERMAN LEFT, 1930-1970, UC BERKELEY ELECTRONIC THESES AND DISSERTATIONS 66 n 48 (2015). Available at: <https://escholarship.org/content/qt3v8721k4/qt3v8721k4.pdf> (last visited February 21, 2024).

⁹⁸*Id.* at 49–50.

⁹⁹See OSSIP K. FLECHTHEIM, WELTKOMMUNISMUS IM WANDEL (1977).

¹⁰⁰Keßler & OSSIP K. Flechtheim, *supra* note 3 at 51, 61; on the Frankfurt School and its wartime activities see, e.g. MARTIN JAY, THE DIALECTICAL IMAGINATION: A HISTORY OF THE FRANKFURT SCHOOL AND THE INSTITUTE OF SOCIAL RESEARCH, 1923-1950 (1996); Martin Jay, *Adorno in America*, 31 NEW GERMAN CRITIQUE 157–82 (1984).

¹⁰¹Renaud, *supra* note 97, at 67.

parents, who had escaped Germany and found refuge in Guatemala.)¹⁰² While at the Institute for Social Research, Flechtheim assisted Franz Neumann in writing his important 1942 work on Nazi ideology and the state, *Behemoth: The Structure and Practice of National Socialism*, which took frequent aim at Schmitt's work and its influence in Germany.¹⁰³ During this time, Flechtheim further developed the burgeoning concept that would occupy his intellectual agenda for the balance of his career, a "brand of critical utopian studies" called Futurology.¹⁰⁴

His notion of a "real science of 'Futurology,'" inspired by his lifelong leftism, his recent Frankfurt School collaborators, and his commitment to optimism and progress, called for human actors to take responsibility for the future while avoiding an unattainable chiliastic political agenda.¹⁰⁵ Flechtheim sought to push back against deeply pessimistic theorists such as Schmitt and Oswald Spengler, the latter of whom had predicted an extended period of dictatorship amid Western civilization's collapse. Flechtheim objected to their error of "theodicy," that is, justifying various forms of human suffering and iniquity as inevitable by-products of historical processes or the flaws of human nature.¹⁰⁶ Thus, Futurology's goal was to save "the future from the present geopolitical and socioeconomic configuration: namely, through the critical investigation of alternative futures not determined by current power constellations."¹⁰⁷

3. Thomas Mann, W.E.B. Du Bois, and Atlanta University

While his fellowship at the Institute for Social Research had been productive, like other exiled scholars, Flechtheim needed a full-time academic position. Thomas Mann, the great German novelist whom Flechtheim had gotten to know in the US through his Theodor Adorno connection, now came to the rescue. Via Mann's recommendation, in 1940, Flechtheim was offered a position at Atlanta University (AU) in Georgia.¹⁰⁸ His brief at AU was to teach "the whole program of the newly established discipline of political science."¹⁰⁹ His friend John Herz and several other German-Jewish refugee scholars also found desperately-needed teaching positions at historically Black colleges and universities in the South.¹¹⁰ In Atlanta, Flechtheim became acutely aware of the oppression of African Americans in his place of refuge and realized that "the process of the United States becoming a full-fledged democracy would only be completed when African American citizens had been granted equal rights."¹¹¹

He was helped to this conclusion by the great Black historian and sociologist William E. Burghardt Du Bois, his colleague and neighbor at Atlanta University. W.E.B. Du Bois spoke fluent German, which he had learned during his student days in Berlin in the 1890s, and he had visited the Third Reich in 1936 as an Oberlander Trust Fellow. While there, he had been "shocked by the Nuremberg Laws" that had been promoted by Schmitt and helped facilitate Flechtheim's expulsion from Germany.¹¹² The latter still had Schmitt on his mind, monitoring the Nazi Crown

¹⁰²Mario Kefler & Ossip K. Flechtheim (1909–1998): *Political Scientist and Futurologist between Europe and North America*, in *TRANSATLANTIC RADICALISM: SOCIALIST AND ANARCHIST EXCHANGES IN THE 19TH AND 20TH CENTURIES* 226 (Frank Jacob & Mario Kefler, eds., 2021).

¹⁰³FRANZ LEOPOLD NEUMANN, *BEHEMOTH: THE STRUCTURE AND PRACTICE OF NATIONAL SOCIALISM, 1933-1944* (2009 edition). Flechtheim's 1940s CVs note that his contributions to *Behemoth* specifically included research on Schmittian theory. Nachlass Ossip K. Flechtheim, Deutsches Exilarchiv 1933–1945, Deutsche Nationalbibliothek.

¹⁰⁴Renaud, *supra* note 97, at 187.

¹⁰⁵Ossip K. Flechtheim, *Teaching the Future*, 16 *THE JOURNAL OF HIGHER EDUCATION* 9, 460–65 (1945).

¹⁰⁶Ossip K. Flechtheim, *Toynbee and the Webers*, 4 *PHYLON* 3, 248–64 (1943).

¹⁰⁷Renaud, *supra* note 97, at 187.

¹⁰⁸Kefler & OSSIP K. Flechtheim, *supra* note 3, at 226 (Flechtheim was later promoted to Assistant Professor of Government at AU, now "Clark Atlanta University").

¹⁰⁹*Id.*

¹¹⁰See GABRIELLE SIMON EDGCOMB, *FROM SWASTIKA TO JIM CROW: REFUGEE SCHOLARS AT BLACK COLLEGES* 77–80 (1991).

¹¹¹Kefler & OSSIP K. Flechtheim, *supra* note 3, at 228.

¹¹²*Id.* at 227.

Jurist's activities as evidenced by his Article with his associate John Herz, *Bolshevist and National Socialist Doctrines of International Law: A Case Study of the Function of Social Science in the Totalitarian Dictatorships*. Published in 1940, it offered, *inter alia*, a sharply critical assessment of Schmitt's *Grossraum* theory, tying it to Nazi expansionism.¹¹³

Aware of Flechtheim's persecution in Germany and appreciative of his support for Black civil rights aspirations in America, a sympathetic Du Bois supported his new colleague's strong stance against totalitarianism and helped Flechtheim integrate into the AU community. He asked him to write for the newly established journal *Phylon: The Atlanta University Review of Race and Culture*¹¹⁴ and served as a reference. This then helped Flechtheim secure an instructor job at Bates College in Maine after his non-tenured position at AU ended in 1943.¹¹⁵

4. Bates College, the OSS, and a Return to Germany

Flechtheim taught in Maine until 1946, when a very interesting offer presented itself. Ultimately, the new opportunity had its origins in Flechtheim's association with the Office of Strategic Services (OSS), the precursor to the CIA. As noted by Kim Priemel, OSS's Research and Analysis Branch (R&A) "became a major hub of Europe's exiled intelligentsia."¹¹⁶ The R&A's director, Harvard historian William Langer, on leave from academia during the war, "not only enlisted a number of his Ivy League peers" but also "liberal or left-wing historians [including] lawyers and political scientists Franz Neumann, Otto Kirchheimer, and Ossip Flechtheim, along with philosopher Herbert Marcuse, all from the Institute of Social Research."¹¹⁷ These lawyer-scholars provided the R&A with wartime intelligence and insights regarding the National Socialist regime.

The OSS would become connected to the Nuremberg Trials soon after the Nazi defeat when the spy agency's founder, William "Wild Bill" Donovan, joined the staff of the US chief prosecutor at Nuremberg, Robert Jackson. Donovan, a former prosecutor and decorated war hero, helped with preparations for the trial of the major Nazi war criminals at Nuremberg before the International Military Tribunal (IMT). The defendants in that case included two Nazi propagandists – Julius Streicher, editor-in-chief of the viciously antisemitic tabloid *Der Stürmer*, and Hans Fritzsche, head of the Radio Division in Goebbels's Propaganda Ministry. As the American prosecutors were gearing up for trial, Donovan played an instrumental role, bringing with him dozens of OSS officers and other staff (including General Counsel James B. Donovan (no relation)). Two of Flechtheim's closest wartime associates, Franz Neumann and his old friend John Herz, also worked on Jackson's staff in 1945.¹¹⁸

As the US was preparing for the so-called Subsequent Nuremberg Trials of Nazi defendants at the American-run "Nuremberg Military Tribunals" (NMTs), Flechtheim's OSS connection opened the door for a return to Germany.¹¹⁹ In the summer of 1946, taking a leave of absence from Bates, he joined the staff of General Telford Taylor, Jackson's successor as US chief prosecutor for

¹¹³Joseph Florin and John H. Herz, *Bolshevist and National Socialist Doctrines of International Law: A Case Study of the Function of Social Science in the Totalitarian Dictatorships*, 7 SOCIAL RESEARCH 1 (1940) ("Joseph Florin" was a pseudonym for Ossip Flechtheim – as the piece was critical of the Nazi regime and members of Flechtheim's family were still in Germany, this nom de plume was apparently used to protect them).

¹¹⁴Kefler & OSSIP K. Flechtheim, *supra* note 3. at 228.

¹¹⁵*Id.*

¹¹⁶KIM PRIEMEL, THE BETRAYAL: THE NUREMBERG TRIALS AND GERMAN DIVERGENCE 42 (2016).

¹¹⁷*Id.*

¹¹⁸*Id.* at 369.

¹¹⁹The archival record suggests that Flechtheim's path to Nuremberg may have been through Franz Neumann. Indeed, by 1943, Neumann had already recommended Flechtheim for a position with the OSS. Letter of Franz Neumann, 18 May 1943, Nachlass Ossip K. Flechtheim, Deutsches Exilarchiv, Deutsches Nationalbibliothek.

the Subsequent Trials.¹²⁰ Taylor's operation would ultimately be referred to as the Office of Chief of Counsel for War Crimes (OCCWC) and would be placed under the aegis of the Office of Military Government, United States (OMGUS), located in Berlin.

C. The Schmitt-Flechtheim Reunion in Post-War Germany

I. Flechtheim Returns to Germany

1. Establishment of the Berlin Branch and Flechtheim's Posting There

The connection between Berlin and Taylor's operation in Nuremberg was vital. In the summer of 1946, the Chief of Counsel decided to open a special investigative unit in the former Nazi capital. Of the OCCWC's offsite branches, the one in Berlin would be the "primary satellite," given its location as Hitler's seat of power and its breadth and variety of captured documents. The branch would also serve to liaise with OMGUS. Attorney Benjamin Ferencz was made its chief and moved from Nuremberg to Berlin in August of 1946.¹²¹

At the outset, the bulk of the Berlin Branch personnel consisted of investigators (approximately thirty-four), each of whom was placed within a "thematic" subsection: (1) SS Division; (2) *Economics* Division; and (3) *Ministries* Division (these divisions corresponded with the trial team divisions in Nuremberg). Many of the investigators in these divisions were native German speakers, who were also proficient in English. As explained by Telford Taylor, "Most of the documentary evidence was German, so that [many of the American] attorneys . . . were helpless unless assisted by analysts and research workers who were qualified, both linguistically and by general education and intelligence, to screen extensive files and other large collections of documents and select such as were or might be relevant evidence."¹²² Thus, "Most of the [OCCWC's] research analysts were highly qualified; the Ministries Division, for example, required not only fluency in German and knowledge of French, but also knowledge of Nazi history, 'legal experience' plus a knowledge of 'international law,' and 'acquaintance with criminal investigation techniques.'"¹²³

2. Flechtheim and Kempner Assigned to Ministries

Former attorney Flechtheim's skill set (which included French and, potentially, helpful Russian language fluency) meant that he was a perfect match for the *Ministries* Division in the Berlin Branch. Not surprisingly, upon his arrival in the summer of 1946, he was placed within Ferencz's unit and assigned as the *Ministries* Division Chief.¹²⁴ By the spring of 1947, Flechtheim had several investigators working under his supervision.¹²⁵ Ferencz noted in a letter of August that year that Flechtheim "was responsible for the administration of the section and for conducting all interrogations and investigations."¹²⁶ In addition, Flechtheim had been "acting Chief of the Berlin Branch for several months," supervising "more than 75 people" at the time.¹²⁷

¹²⁰Letter of Benjamin Ferencz, 28 August 1947, Nachlass Ossip K. Flechtheim, Deutsches Exilarchiv 1933-1945, Deutsches Nationalbibliothek.

¹²¹Benjamin Ferencz, Letter to Gertrude Ferencz, August 14, 1946, Keri Ferencz Letter Collection (on file with the authors).

¹²²TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10, 14-15 (1949).

¹²³Heller, *supra* note 4, at 45, quoting JOHN MENDELSON, TRIAL BY DOCUMENT: THE USE OF SEIZED RECORDS IN THE UNITED STATES PROCEEDINGS NURNBERG 58 (1988).

¹²⁴Berlin Branch Organization Chart, RG No. 238-202, Correspondence-Memoranda.

¹²⁵Berlin Branch Organization Chart, RG No. 238-202 Correspondence-Memoranda, December 10, 1946. This document shows that Flechtheim had eight investigators working under him. By March 1947, with OCCWC trial activities ramping up, that number would have likely been larger.

¹²⁶Letter of Benjamin Ferencz, 28 August 1947, Nachlass Ossip K. Flechtheim, Deutsches Exilarchiv 1933-1945, Deutsches Nationalbibliothek.

¹²⁷*Id.*

In Nuremberg, meanwhile, the chief of the corresponding *Ministries* trial section was an attorney named Robert M. Kempner who had been one of Jackson's prosecutors for the IMT trial. The Jewish-German Kempner had been a successful lawyer in Berlin in the 1920s, ultimately becoming chief legal advisor to the Prussian Police. He was well known as an opponent of the Nazi movement and an advocate of its suppression.¹²⁸ After Hitler took power in 1933, Goering promptly fired Kempner and held him for two months in a concentration camp. In 1935, after promulgation of the Nuremberg Laws, Wilhelm Frick, then the Nazi Interior Minister, used Kempner's Jewish background to revoke his German citizenship.¹²⁹

Kempner was then expelled from Germany in 1936. He directed a boarding school for three years in Florence, Italy, before fleeing to the United States (via transit through France) in 1939. While working as a lecturer at the University of Pennsylvania, he began serving as an expert advisor to the US Department of Justice and the FBI on Nazi spy cases. Eventually, he came to the attention of Jackson, who put him on his staff and had him work on the IMT cases against Goering and Flick. With his German language skills and first-hand knowledge of the Third Reich, Kempner's work was praised, and he agreed to stay on with Taylor's staff to lead the prosecution of the *Ministries* Case before the NMTs.¹³⁰ One of Nazism's most prominent lawyers, its "Crown Jurist" would eventually appear on the Flechtheim-Kempner target list. But, in the post-war ruins of Berlin, Schmitt would be incarcerated twice before that happened.

II. The Arrests and Detentions of Carl Schmitt

1. The Initial Arrest by the Soviets

In the midst and in the wake of the Nazi defeat, Carl Schmitt was arrested on three separate occasions. The first of these was on April 30, 1945, the very date Hitler committed suicide in his Berlin bunker. Soviet forces sweeping the Nazi capital took Schmitt in and interrogated and released him within twenty-four hours.¹³¹ There was no known follow-up to this detention in the form of any prosecution attempt or investigation, although Soviet legal theorists had criticized Schmitt and assigned him partial blame for the theories underlying Nazi expansion.¹³² For his part, somewhat remarkably, and in his characteristically arrogant way, Schmitt later expressed surprise – not over the Soviet decision against prosecuting him but, rather, by the fact that they had not "taken him on as an advisor."¹³³

2. The First Arrest by the Americans

His second arrest, this time at the hands of the Americans, came on September 26, 1945 and resulted in a much lengthier period of confinement. It would seem that Schmitt was taken in primarily at the urging of two individuals. One was the man who fathered the concept of "genocide," Raphael Lemkin, whose widely-circulated memorandum of August 18, 1945 urged that Schmitt be "seized," and strongly suggested a potential case against him for further investigation.¹³⁴ However, this memorandum was not primarily concerned with Schmitt's own possible criminal liability but rather that of another major Nazi intellectual, the leading geopolitics scholar and one-time Hitler

¹²⁸See generally Kempner, *supra* note 5.

¹²⁹*Id.*

¹³⁰Heller, *supra* note 4, at 28.

¹³¹JAN-WERNER MULLER, A DANGEROUS MIND: CARL SCHMITT IN POST-WAR EUROPEAN THOUGHT 47 (2003).

¹³²See Mikhail Kiselev, *Karl Shmitt v SSSR*, 19 RUSSIAN SOCIOLOGICAL REVIEW 276 (2020).

¹³³Wieland, *supra* note 9.

¹³⁴Lemkin, *supra* note 60.

confidant, Karl Haushofer.¹³⁵ Still, it is likely this suggestion played less of a direct role than the influence of another refugee lawyer, Karl Loewenstein.

Loewenstein was a Jewish-German lawyer, legal academic, and theorist of “militant democracy” (that is, restricting democratic freedoms to prevent democracies from being overthrown, later developed in Karl Popper’s *The Open Society and Its Enemies*).¹³⁶ Like Flechtheim and Kempner, Loewenstein fled Nazi persecution and found a safe haven in the United States. And, like Flechtheim and Kempner (and many other intellectual Jewish lawyer émigrés in their circle), Loewenstein made his living as a lecturer at institutions of higher learning (Yale University (1934–1936) and then Amherst College (1936–1942, 1946–1961)). In 1942, he took partial leave from Amherst to become a Special Assistant to the U.S. Attorney General in Washington, D.C., where he advised on fascist political organization and activity in the Americas. After the war, the Justice Department asked him to serve in the Legal Division of OMGUS. This was when he advised the American authorities to arrest Schmitt.¹³⁷

As noted above, Loewenstein had already published an Article in the *Yale Law Journal* in 1936, sharply critical of Schmitt’s key role in Nazifying the German legal profession. In accordance with his earlier views, when recommending Schmitt’s arrest, Loewenstein explained that Schmitt, as “one of the most eminent political writers of our time” and “the leading authority on authoritarian government and totalitarianism” had “abused his gifts for evil purposes” to the “German people’s misfortune.”¹³⁸ After summarizing Schmitt’s contributions to solidifying Nazi control and persecuting Jews, Lowenthal concluded:

In the opinion of this writer Schmitt qualifies as a war criminal. He is one of the intellectual instigators of Hitler’s acts of aggression and aided and abetted them by his intellectual authorship. I hardly know of any individual person who has contributed more for the defense of the Nazi regime than Carl Schmitt. I suggest that the case be submitted to the War Criminals Commission for further action.¹³⁹

After his arrest, Schmitt was held in a series of internment camps and the extensive library in his Berlin apartment was impounded (both as a useful source of information for occupation authorities and as a possible source of evidence).¹⁴⁰ Army counterintelligence officials then interrogated him and concluded in an October 18, 1945 report that, although his influence had diminished after the 1936 SS attacks against him, he “continued to publish works advocating totalitarianism and a European control system dominated by Nazi Germany and that he had lectured abroad in 1943–44.”¹⁴¹ Schmitt remained in detention.

But he was never brought to justice. He might have been considered for the IMT trial but the defendants for that proceeding had already been identified and would be indicted within less than a month of his first American arrest. Even if he had been considered a proper defendant for that case, there would not have been enough time to include him as part of a successful prosecution. Moreover, during the summer of 1945, on behalf of industrialist Friedrich Flick (and in

¹³⁵On Haushofer’s thought and its genealogical relationship with earlier trans-Atlantic studies of geopolitics, as well as Schmitt’s simultaneous and subsequent work on related themes, see MATTHEW SPECTER, *THE ATLANTIC REALISTS: EMPIRE AND INTERNATIONAL THOUGHT BETWEEN GERMANY AND THE UNITED STATES* (2021).

¹³⁶Carlo Invernizzi Accetti & Ian Zuckerman, *What’s Wrong with Militant Democracy*, 65 *POLITICAL STUDIES* 182, 183 (2017) (citing Karl Popper, *THE OPEN SOCIETY AND ITS ENEMIES* (1945)).

¹³⁷Bendersky, *Carl Schmitt’s Path to Nuremberg*, *supra* note 9, at 13–16.

¹³⁸*Id.*

¹³⁹*Id.*

¹⁴⁰*Id.*, at 14, citing Loewenstein to Colonel McLendon, Library of Professor Carl Schmitt, October 10, 1945, Loewenstein Papers, Box 28/1.

¹⁴¹*Id.*, at 15, citing Preliminary Interrogation Report of Carl Schmitt, Berlin, October 18, 1945, US National Archives, College Park, MD, RG 238.

anticipation of the trials at Nuremberg), Schmitt had written a legal memorandum on the crime of aggressive wars in the context of international law and the principle “Nullum crimen, nulla poena sine lege” (no crime without prior law).¹⁴² He sought to draw a line between “acceptable” punishment for those responsible for egregious Nazi crimes and what he saw as the desirable immunity of those who had only “indirectly” contributed to war.¹⁴³

Still, heading into the fall of 1945, Schmitt remained detained but uncharged and there were no apparent specific plans to raise a case against him. On October 10, 1945, during a caesura of the proceedings at Nuremberg after the IMT delivered its verdict (convicting nineteen, including Goering, Frick, and Streicher, and acquitting three, including Von Papen and Fritzsche), and two months before the start of the NMT trials, American authorities released Schmitt. That left him free but under a cloud of suspicion and in something of a legal limbo. At the time, Loewenstein was leaving his OMGUS advisory post, Flechtheim had recently arrived to work at the Berlin Branch, Kempner had started his NMT preparations, and Schmitt would soon be back in prison.

3. The Second Arrest by the Americans

3.1 Flechtheim's Responsibility for the Arrest?

By March 1947, with NMT proceedings under way and Flechtheim and Kempner up to speed on the OCCWC matters within their respective bailiwicks, Carl Schmitt returned to the list of possible Nazi defendants. While the record is not completely clear on this point, historian Joseph Bendersky plausibly suggests that the decision to arrest Schmitt for possible prosecution before the NMTs was initiated by Flechtheim. He writes of the Berlin Branch *Ministries* Section chief having been well acquainted with Schmitt from their time in Nazi Germany (noting he recalled Professor Schmitt's rejection of him as a PhD candidate on “racial” grounds and his responsibility for terminating a Jewish professor at Cologne). He added that authorities in OMGUS asked the Berlin Branch *Ministries* Section Chief “why the *Kronjurist* of National Socialism had not been arrested and convicted.”¹⁴⁴ Finally, per Bendersky, Kempner implied in his writings that it was Flechtheim who first detained Schmitt, and then “sent” him to Kempner in Nuremberg.¹⁴⁵

This version of events is certainly credible. Thanks to new documentation unearthed through original archival research, we can now verify that it was Flechtheim who effectuated Schmitt's arrest through a summons ordering his presence at the red brick police detention center on Friesenstraße.¹⁴⁶ In this regard, the existing literature has ignored the fact that Flechtheim was in a management position at the Berlin Branch, with several investigators working under his supervision. Thus, Bendersky was technically wrong when he described Flechtheim as “working on Kempner's staff”;¹⁴⁷ he was actually working for the Berlin Branch Chief, Benjamin Ferencz. As an investigative manager, coordinating with Kempner in Nuremberg and keeping Ferencz apprised in Berlin, while also receiving his own information from OMGUS, Flechtheim arguably had enough knowledge and latitude to initiate the idea of arresting Schmitt for possible prosecution in the PEC proceeding and following through on it. Per Flechtheim's contemporaneous description, “basic policy on who is to be indicted is determined in Nuremberg,” but

¹⁴²Carl Schmitt, *The International Crime of the War of Aggression and the Principle “Nullum crimen, nulla poena sine lege,”* in *WRITINGS ON WAR* 125 (Timothy Nunan, ed. and trans., 2011).

¹⁴³*Id.* at 180.

¹⁴⁴“VON DER HOFFNUNG ALLER DEUTSCHEN”: WIE DIE BRD ENTSTAND, 1945 BIS 1949 105–07 (Jörg Wollenberg, ed., 1991).

¹⁴⁵Bendersky, *Carl Schmitt's Path to Nuremberg*, *supra* note 9, at 7. Bendersky also suggests that Kempner himself may have initiated the idea of arresting Schmitt.

¹⁴⁶Summons, *supra* note 1. When translated from German, the document might be more read as a “request.” However, in the context of the American occupation mandate, it required Schmitt's presence at the detention center.

¹⁴⁷Bendersky, *Carl Schmitt's Path to Nuremberg*, *supra* note 9, at 23.

“frequently couched in very general terms, so the . . . interpretation is left to me.”¹⁴⁸ He added, “I had much leeway in the preparation of the cases.”¹⁴⁹

In light of the above, Oona Hathaway and Scott Shapiro aptly summarize the case for Flechtheim initiating the idea of arresting Schmitt on March 23, 1947:¹⁵⁰

Flechtheim had been a doctoral student at Cologne in 1933. He asked Schmitt to be his doctoral supervisor but Schmitt turned him down. Flechtheim assumed that he was rejected because he was a Jew . . . [He] had been traumatized by this man . . . and . . . likely bore him a grudge. But this was no mere vendetta. [He] sincerely believed that Schmitt should be prosecuted as a war criminal.¹⁵¹

3.2 Potential Schmitt Prosecution Frameworks

The prosecution in question might have been via two possible Nuremberg proceedings: (1) an “Aggression Propaganda Case,” as had been proposed by Lemkin in his memorandum; and (2) a “Propaganda and Education Case” that would have more generally targeted Nazi polemicists, academics, journalists, and educators.

Lemkin’s Aggression Propaganda Case (our term), formulated while he was working for the US War Department, was laid out in an August 18, 1945 memorandum titled “The Case against Karl Haushofer,” addressed to his superior, Brigadier General John M. Weir (Assistant Judge Advocate General and Chief of the War Crimes Commission in Europe).¹⁵² Proposed lead defendant Haushofer, a former German Army officer and political geographer was “widely considered to have been the father of German geopolitics [and] the men whom he counseled famously included Rudolf Hess and Adolf Hitler.”¹⁵³ The discipline of “geopolitics” attained huge influence during the interwar era and was enthusiastically adopted by Nazi officials.¹⁵⁴ Haushofer also popularized and fleshed out the Nazi concept of *Lebensraum* (that is, the idea of the German nation as a living organism that must conquer and displace others to sustain its growth and to survive) which, as previously explained, was a close conceptual cousin of Schmitt’s *Grossraum* theory.¹⁵⁵

In the memorandum, Lemkin suggested prosecuting six others, including Schmitt.¹⁵⁶ In particular, as previously noted, Lemkin urged US authorities to “seize” Schmitt, who was placed first on that list and described as “a friend of Haushofer, who has instigated in his writings to

¹⁴⁸Letter of Ossip K. Flechtheim, 20 April 1947, Nachlass Ossip K. Flechtheim, Deutsches Exilarchiv, Deutsches Nationalbibliothek.

¹⁴⁹*Id.*

¹⁵⁰Index cards to the War Crimes Case Files (“Cases Not Tried”), 1944–1948, and Witnesses and Defendants in War Crimes Cases, 1946–1948, Record Group 549, Records of United States Army, Europe 549.2; Records of U.S. Army, Europe (USAEUR) 1933–1964; Records of the War Crimes Branch of the Judge Advocate General Section, U.S. National Archives and Records Administration (College Park, MD) [hereinafter Index Card].

¹⁵¹OONA HATHAWAY AND SCOTT SHAPIRO, *THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD* 295 (2017). The authors rely on an index card that appears to be written at a later date, which indicates that Schmitt was arrested on March 19, 1947. See Index Cards, *supra* note 150. Hathaway and Shapiro also note that Loewenstein, Kempner, and Neumann would have shared such feelings about Schmitt. Any one of them could have been the originator of the idea to have him re-arrested. *Id.*

¹⁵²Lemkin, *supra* note 60.

¹⁵³HOLGER H. HERWIG, *THE DEMON OF GEOPOLITICS: HOW KARL HAUSHOFER “EDUCATED” HITLER AND HESS* XI (2016).

¹⁵⁴See, e.g. Specter, *supra* note 135.

¹⁵⁵*Id.* The case was based on five grounds: (1) devising for Hitler/Hess a plan for global illegal war; (2) justifying National Socialism as a “world movement”; (3) recruiting and training “fifth columnists” for German overseas conquest; (4) inciting ethnic Germans in foreign countries to collaborate with the proposed Nazi annexations; and (5) through the Academy of German Law (of which Schmitt was a prominent member), drafting laws to effectuate mass deportation and spoliation of conquered peoples.

¹⁵⁶Lemkin, *supra* note 60. Lemkin’s memorandum has previously attracted some scholarly attention in terms of the prospect that Haushofer might have been a defendant before the IMT. See, e.g., Priemel, *supra* note 105, at 243 and John Q. Barrett, *Raphael Lemkin and “Genocide” at Nuremberg, 1945-1946*, in *THE GENOCIDE CONVENTION SIXTY YEARS AFTER ITS*

illegal war and annexation of foreign territories.”¹⁵⁷ That Lemkin would envision Schmitt next to Haushofer in the dock is not surprising, given that the former’s “wartime reflections on *Großräume* . . . were widely regarded as the theoretical underpinning to the Third Reich’s territorial expansion and made him . . . the ‘foremost proponent of *Geojurisprudenz*.”¹⁵⁸

How might this memorandum have impacted Nuremberg Trials prosecution strategy? While still in the employ of the War Department, in late August 1945 (soon after completing this Haushofer/Schmitt memorandum) Lemkin also began serving as an advisor to Robert Jackson’s staff in London (not long before the group decamped for Nuremberg to begin the IMT trial). Lemkin shared his memorandum with Jackson’s team, and it made a very positive impression. According to Jackson biographer John Barrett:

It seems that Lemkin arrived in London from Washington in late August 1945. In Washington, he had been working to complete an extensive report on General Karl Haushofer, a German former geopolitical theorist and teacher who the US then was considering for addition to the list of prospective Nazi war crimes defendants. Lemkin’s report, which reached Jackson’s London office in late August or early September 1945, impressed Shea and Alderman; in the second week of September, they arranged for a copy to be delivered in Washington to Justice Jackson, who was back in the US for consultations with President Truman and others.¹⁵⁹

The subjects of Lemkin’s memorandum, which included Haushofer and Schmitt, were, ultimately, not included as defendants at the IMT. But given how much the American prosecutors appreciated the memorandum, it is possible that Haushofer and Schmitt, along with the other suspects identified by Lemkin, might have been targets for the Subsequent Trials. That said, even had Lemkin’s suggestion of an “Aggression Propaganda Case” tempted Taylor’s staff as a possible NMT proceeding, it was largely made moot by Haushofer’s March 1946 suicide.

Thus, by March 1947, when the Americans arrested Schmitt for the second time, he was being considered as a defendant in a more broadly themed NMT propaganda case, referred to by Taylor’s staff as the “Propaganda and Education Case” (PEC). In a trial programs memorandum submitted to OMGUS on March 14, 1947, just before Schmitt’s arrest, the OCCWC included the PEC as one of its projected proceedings. Schmitt was among the list of contemplated defendants along with: (1) Otto Dietrich, Chief of the Press Division in the Nazi Propaganda Ministry; (2) Max Amann, President of the Reich Press Chamber (which strictly regulated newspaper personnel and content and adjudicated disputes related thereto); (3) Arthur Axmann, Baldur von Schirach’s successor as Hitler Youth Leader; (4) Bernhard Rust, Minister of Education; (5) Herman Muhs, Minister of Church Affairs; (6) Gustav Scheel, Reich Leader of Students and Lecturers; (7) Helmut Sündermann, Press Chief and Chief of Staff in the Press Chamber; (8) Werner Naumann, of the Science, Education, and Popular Culture Division of the Propaganda Ministry; and (9) Hartmann Lauterbacher, a District Commander in the Hitler Youth.¹⁶⁰

ADOPTION 43 (2010). But this would seem to be the first time in the literature that Lemkin’s report has been discussed in connection with its suggested prosecution of Schmitt.

¹⁵⁷Lemkin, *supra* note 60. The others suggested for prosecution include three professors, Konrad Meyer, Josef Folkers, and R. Wagner, who helped Haushofer in promoting the doctrines of geopolitics and *Lebensraum*. Also included were Kurt Wovinkel and Wolfgang Schwarz, journal editors/propagandists for the same doctrines. *Id.* The memorandum does not explicitly use the word “arrest” but its juxtaposition of Schmitt as someone to be “seized,” along with his alleged crimes, strongly suggests prosecution along with Haushofer.

¹⁵⁸Priemel, *supra* note 116, at 260.

¹⁵⁹John Q. Barrett, *Raphael Lemkin and “Genocide” at Nuremberg, 1945-1946*, in *THE GENOCIDE CONVENTION SIXTY YEARS AFTER ITS ADOPTION 43* (Christoph J. M. Safferling & Eckart-A. Conze, eds., 2010).

¹⁶⁰Memorandum from Telford Taylor to Lucius Clay, March 14, 1947, NA-153-1018-13-87-0-1 (hereinafter First Trial Program). See also Kevin Jon Heller, *Carl Schmitt’s Nuremberg Near-Miss*, *Opinio Juris*, January 10, 2010, <http://opiniojuris.org/2010/01/10/carl-schmitts-nuremberg-near-miss/> (last visited February 21, 2024) (hereinafter *Near Miss*) (It should be noted that a few of the names of the projected defendants appear to be mistranscribed in Heller’s account [or possibly in the

It was in the context of possibly being included in this proceeding that Schmitt was arrested and interrogated during the spring of 1947. An analysis of the interrogations and their significance now follows.

III. The Interrogations of Schmitt

1. Flechtheim's Interrogation: Confronting a "Latter-Day Hobbes" about abetting a "Murderous Regime"

Flechtheim had not seen Schmitt since the latter rejected him as his PhD supervisor, after which Schmitt actively worked with the NSDAP to help purge Jews, including Flechtheim, from the legal profession. This must not have been lost on the OCCWC investigator as he was preparing the arrest warrant.

The following day, his showdown with the former Nazi *Kronjurist* took place. In the end, it was noteworthy, less for its confrontation regarding evidence, issues, and legal arguments and more for its clash of personal histories, ideologies, and reversed roles – the rejected PhD student versus the responsible racist professor; the persecuted versus the persecutor; the founder of Futurology versus the philosopher of Fascism; the returned Jewish refugee versus the disgraced Nazi suspect; the exponent of the Nuremberg Trials versus the exponent of the Nuremberg Laws; the defeated man of 1935 versus the defeated man of 1945; Rule of Law versus Freedom of Thought; ardent progressive versus arch conservative; and left versus right.

From a strictly legal perspective, the session seemed to be mostly a preliminary encounter to get Schmitt processed before being sent to Nuremberg for further interrogation.¹⁶¹ Flechtheim did engage in preparatory questioning that asked Schmitt about his contribution to the crimes of the Third Reich. But he recorded that Schmitt “tried to cover up his involvement in the murderous regime” by describing himself as merely a “devout Catholic” and suggesting his role was that of a latter-day Hobbes.¹⁶² At some point, an edgy Schmitt tried to turn the tables and confrontationally asked Flechtheim if, during the French Revolution’s Reign of Terror, he “would have arrested Rousseau.”¹⁶³ Despite Schmitt’s anxieties, Flechtheim was apparently not optimistic about the prospects for justice, expressing concern that, in the end, “nothing would be done about him.”¹⁶⁴

Still, the Futurologist managed to score some of his own personal points during the face-off. He finally had the opportunity to confront Schmitt about his rejection of him as a PhD student on antisemitic grounds. But the latter showed no contrition, with Flechtheim noting that Schmitt “didn’t want to hear anything more about [it].” Flechtheim then found himself in the position of fielding a request from Schmitt related to his lodgings. He was pleased at the chance to deny the

original documentation that he consulted]; e.g. Gustav Scheel is rendered as Gustav “School,” and Werner Naumann has been rendered as Werner “Zachintisch.”)

¹⁶¹Wieland, *supra* note 9, at 108. Consistent with the preliminary nature of the encounter, Schmitt brought his CV with him.

¹⁶²*Id.*

¹⁶³ERNST NIEKISCH, *ERRINERUNGEN EINES DEUTSCHEN REVOLUTIONÄRS, VOL. 1: GEWAGTES LEBEN, 1885-1945, 241-45* (1974). The translation of Niekisch’s text from German to English is “Schmitt asked whether Flechtheim would have arrested Rousseau, the theorist of the French Revolution, under similar circumstances.” However, this was an inapt analogy not least because Rousseau, who died in 1778, could not have been arrested during or after the Revolution. Other than Wieland’s account, Niekisch’s is the only description of Flechtheim’s interrogation of Schmitt in the literature of which we are aware. Niekisch, an antisemitic communist with a healthy appreciation for authoritarianism, had been an acquaintance of Schmitt during the late Weimar period. The vignette describing the interrogation is only a fragment disconnectedly embedded in Niekisch’s personal memoirs. According to Niekisch, Flechtheim was so impressed with the Rousseau analogy that he decided to have Schmitt released. *Id.* However, while Schmitt frequently compared himself to Rousseau, Flechtheim clearly did not release him, rather he sent him to Nuremberg. So, the accuracy of Niekisch’s account must be called into question.

¹⁶⁴Wieland, *supra* note 9, at 108.

Crown Jurist's demand to change his place of confinement, where he objected to being held with "the terrible SS men."¹⁶⁵

2. *Kempner's Interrogations: Grappling with the Role of Intellectuals in State Crimes*

While Flechtheim may have initiated the justice process against Schmitt in Berlin, he was not responsible for how it ended. That would be decided in Nuremberg, to which Flechtheim dispatched him on March 30, 1947. And the prosecutorial strategy appeared to center on Kempner trying to extract confessions from Schmitt during a series of ill-conceived and poorly executed interrogations.

2.1 *The April 3rd Interrogation*

The first of these took place on April 3, 1947. On the surface, it seemed as if Kempner was well prepared. In addition to a summary of Schmitt's offices and duties, publications, and travels abroad during the Hitlerian period, he was armed with several incriminating documents, including Schmitt's book on *Grossraum* (likely the one Loewenstein seized from his library); his 1933 piece "Five Principles of Legal Practice"; and a 1936 *Jüdische Rundschau* Article on the conference Schmitt had held on "Jews in Jurisprudence." These documents:

Clearly [implicated] Schmitt as influential player in the Third Reich, complicit in its crimes. *Grossraum* could supposedly implicate him in wars of aggression. And not only had the three-page "Five Principles" argued that the administration of justice should be National Socialist, but its visual impact was equally damaging. The imposing cover (with a swastika symbol of Nazi justice) identified Professor Dr. Carl Schmitt as *Staatsrat* and Director of the University Teachers Group of the National Socialist League of German Jurists. And the three paragraph summaries of the article on Jews and German law had Schmitt supporting Reich Justice Minister Hans Frank's condemnation of Jewish influences and referring to Jews in German law as parasitic and unproductive.¹⁶⁶

Kempner began the first interrogation, evincing a clear idea of his prosecutorial focus in responding to Schmitt's question about the nature of the charges against him as involving "your participation, direct or indirect, in the planning of wars of aggression, of war crimes and of crimes against humanity."¹⁶⁷ But his strategy (in conducting the interrogation) did not serve him well. It essentially consisted of asking open ended questions meant to elicit incriminating responses but with nothing to incentivize candor or concession. And while follow-up questions might have helped correct this problem, they were not forthcoming. Thus, the transcript is replete with the following sorts of exchanges:

Kempner: Did you not provide the ideological foundation for [the launching of aggressive wars]?

¹⁶⁵*Id.* The brief description of the interrogation in Wieland, it should be noted, seems incomplete and may be partially inaccurate. It is based on a letter Flechtheim sent to Wieland decades after the fact (in 1983). The language does not flow and/or seems telegraphic at points. For example: "He claimed that he had always been a devout Catholic and that the things of this world had never mattered to him. I had hardly ever asked him about Rousseau." Clearly, the line about being Catholic followed by Flechtheim referring to questions about Rousseau does not flow coherently. Not surprisingly, Bendersky notes that Flechtheim's "later recollections are suggestive but unreliable. They appear to be a collage of information and stories about Schmitt circulating over the decades and affected by problems of memory." Bendersky, *Carl Schmitt's Path to Nuremberg*, *supra* note 9, at 23–24.

¹⁶⁶*Id.*, at 24–25.

¹⁶⁷*Interrogation of Carl Schmitt by Robert Kempner (I)*, 72 TELOS 97, 98 (Joseph W. Bendersky, trans., 1987) Note that, because the chronologically second interrogation of Schmitt by Kempner was only discovered and published by Bendersky subsequent to the first, third, and fourth interrogations, the original numbering of the third and fourth sessions in the titles of their published versions, i.e. as "second" and "third," is incorrect.

- Schmitt:** No.
- Kempner:** Could your writings be so interpreted?
- Schmitt:** I do not think so – not by anyone who has read them.
- Kempner:** Did you seek to achieve a new international legal order in accordance with Hitlerian ideas?
- Schmitt:** Not in accordance with Hitlerian ideas and not sought to achieve but diagnosed.
- Kempner:** What is your attitude toward the Jewish Question, in general, and how it was handled in the Third Reich?
- Schmitt:** It was a great misfortune and, indeed, from the very beginning.
- Kempner:** Did you consider the influence of your Jewish colleagues, who were teachers of international law, a misfortune?
- Schmitt:** With the exception of Erich Kaufmann [who was harried into exile in 1939], there were no Jewish legal scholars there [in Nazi Germany]. He was a belligerent militarist. He originally coined the phrase “The social ideal is the victorious war,” in “*Die Clausula rebus sic stantibus*” [a 1911 publication].
- Kempner:** Now, however, Erich Kaufmann is not here, but you are.
- Schmitt:** I do not want to incriminate him. I also would not like to create the impression of incriminating this man.

Clearly, asking Schmitt, in the context of his being a possible prosecution target, whether his own writings could be interpreted as criminal in nature produced the kind of self-serving answer that it did. That was immediately followed up by a question as to whether Schmitt sought to achieve a new international legal order “in accordance with Hitlerian ideas.” When Schmitt answered in the negative, Kempner had no follow up. When he then asked about the persecution of Jews, Schmitt’s reply that the “handling” of the Jews was a “great misfortune,” drew no related lines of inquiry as to what the “misfortune” meant. Instead, rather inexplicably, Kempner asked whether the “influence” of Jewish international law teachers was a misfortune. This bizarre question seemed to be a non-sequitur and wholly irrelevant. Schmitt took advantage of the lapse and deftly steered the dialogue into a discussion of Erich Kaufmann’s work, and no further questions about Nazi persecution of Jews or Schmitt’s role therein followed. Thus began a pattern, repeated across the four sessions, of failing to ask helpful and/or cogent follow-up questions.

Kempner did get some other small concessions from Schmitt – for example, that Jewish theorists had no understanding of his “territorial theory” (that is, *Grossraum*) and that Hitler and other Nazis “were probably for it.”¹⁶⁸ Schmitt implicitly admitted that he wrote in “in the Hitlerian style” or in “Goebbels’s style,” but added that he had not done so since 1936 – to which Kempner offered no push-back.¹⁶⁹ Kempner did confront Schmitt with some of his writings but not the most damning ones (for example, his infamous defense of the Night of the Long Knives). Salter et al. note that it is “doubtful whether Kempner had adequately researched this topic.”¹⁷⁰ The session soon ended.

2.2. The April 11th Interrogation

A follow-up interrogation on April 11 was similarly feckless. This key passage demonstrates Kempner’s ineffective line of questioning:

- Kempner:** You can assume that everything you have written is well known and that these demonstrate that you have theoretically established the foundations for war crimes, wars of aggression.
- Schmitt:** No, that is not correct.

¹⁶⁸*Id.* at 100.

¹⁶⁹*Id.*

¹⁷⁰Salter, MacGuire, and Eastwood, *supra* note 10, at 101.

- Kempner:** Would you not admit that your influence in this area is much more significant and much more dangerous than when, on the basis of your work, some members of the SS ultimately invade foreign countries and shoot people en masse?
- Schmitt:** That is taking things too far. I would very much like to address that matter. That is a complicated subject.
- Kempner:** From a criminal perspective it is straightforward. Aren't you engaging in metaphysical somersaults?
- Schmitt:** I'm not denying anything. The problem of the responsibility for ideologies doesn't require any metaphysical somersaults.
- Kempner:** Did you sermonize for 30 years in order to bring about the ideal of democracy? You sermonized 30 years in order to bring about "*Grossraum*."
- Schmitt:** That doesn't necessarily follow from my writings either.
- Kempner:** Of course it does. Without men like you Nuremberg would not be laying in ruins.
- Schmitt:** That's another topic.
- Kempner:** In comparison to you isn't Streicher a harmless sermonizer?
- Schmitt:** On an entirely different level. I am an advocate of free scholarship.
- Kempner:** On another occasion you have said that you compare yourself to someone who diagnoses a plague. But didn't you yourself spread a plague?
- Schmitt:** That was not my intention.
- Kempner:** Did you submit a legal opinion before the Supreme Court in 1932?¹⁷¹

These inquiries may have been even less effective than those from the first session. Interspersing them with extra-legal terminology such as "metaphysical somersaults" and "spreading plagues," while later asking Schmitt whether his words were more dangerous than the SS "invading foreign countries" and "shooting people en masse" was not likely to yield usable material for any future prosecution. Again, the dialogue was riddled with non-sequiturs that allowed Schmitt to divert attention to his brilliance in the Weimar legal proceedings and away from his guilt in lending legal legitimacy to the Third Reich.

2.3 The April 21st Interrogation

The third interrogation, on April 21, followed the same pattern. Again, a small excerpt is quite revealing:

- Kempner:** Have you now been able to reconcile yourself in any way to the role you played in the Third Reich and in the preparation of criminal offenses, as I interpret them?
- Schmitt:** Here we are not really disputing facts. I accept them. It is a question of interpretation and legal evaluation. As a long-standing professor of jurisprudence, I cannot stop thinking.
- Kempner:** Nor should you. To clarify again what the theory of the public prosecutor is: Did you participate in the preparation, etc. of wars of aggression and in other punishable offenses related to these at the point of decision-making? What is your answer to that? Could you state it concisely in a single sentence?
- Schmitt:** I neither served in a decision-making capacity, nor did I participate in the preparation of wars of aggression.¹⁷²

Kempner essentially invited Schmitt to exculpate himself and then let his self-serving answer stand. He then allowed Schmitt to deflect the discussion into a disquisition on the works of

¹⁷¹Joseph W. Bendersky, *The "Fourth" (Second) Interrogation of Carl Schmitt at Nuremberg*, 139 TELOS 35 (Joseph W. Bendersky, trans., 2007).

¹⁷²*Interrogation of Carl Schmitt by Robert Kempner (II)*, 72 TELOS 101, 102 (Joseph W. Bendersky, trans., 1987).

Hobbes and Rosseau. At one point, Schmitt admitted he was an “intellectual adventurer” and Kempner responded, in a very non-legal way: “You have the blood of an intellectual adventurer?” This then yielded another golden opportunity that Kempner squandered:

- Schmitt:** Yes, that is how thoughts and knowledge develop. I assume the risk. I have always accepted the consequences of my actions. I have never tried to avoid paying my bills.
- Kempner:** If, however, what you call the pursuit of knowledge results in the murder of millions of people?
- Schmitt:** Christianity also resulted in the murder of millions of people. One does not know unless one has experienced it oneself. I by no means feel, as do many others, an innocent victim to whom something horrible has happened.
- Kempner:** But this is no comparison. And is it not, simply stated, a criminal investigation of your personal make-up?
- Schmitt:** I can tell you a great deal about that. If I were asked, I would be glad to express my honest opinion.¹⁷³

Unaccountably, however, Kempner never asked. Instead, he began posing questions about an entirely unrelated topic – the role played by Hans Lammers, Chief of the Reich Chancellery (here it would seem that Kempner was helping himself prepare for the *Ministries* Trial) in Nazi Germany. The interrogation then remained on the topic of other key players in the Third Reich, and soon petered out.

2.4 The April 29th Interrogation

A little over a week later, the last interrogation took place. From a prosecutorial standpoint, it was no better in quality. For example, Kempner asked Schmitt whether he had belonged to the SS.¹⁷⁴ But he had to know that the answer was no, and this only allowed Schmitt to bring up a very helpful fact – that certain radical elements in the SS began denouncing him in late 1936. Then, toward the end, this exchange took place:

- Kempner:** Are you not ashamed that you wrote these kinds of things at that time?
- Schmitt:** Today, of course. I do not consider it appropriate to continue to rummage around in the disgrace we suffered at that time.
- Kempner:** I do not want to rummage around.¹⁷⁵

Given that the whole point of the interrogation was to “rummage around” Schmitt’s pro-Nazi conduct and writings, it is astonishing that Kempner would so readily accede to Schmitt’s request. The interrogation ended soon after that.

During these sessions, at various points, Kempner had asked Schmitt to write about his own potential culpability (that is, his contributions to Hitler’s *Grossraum* policy and his assistance in the preparations for wars of aggression) and the roles played by certain important functionaries in Hitler’s government. Schmitt did so, once again providing Kempner with self-serving written responses that were calculated to minimize the possible role of an intellectual, like himself, in defining, justifying, or assisting state policy.¹⁷⁶ One week after his last interrogation, Schmitt was

¹⁷³*Id.* at 104.

¹⁷⁴*Interrogation of Carl Schmitt by Robert Kempner (III)*, 72 *TELOS* 105, 106 (Joseph W. Bendersky, trans., 1987).

¹⁷⁵*Id.* at 107.

¹⁷⁶But certain Schmitt chroniclers, such as Bendersky and Mehring, treat his memoranda for Kempner as objective. See, e.g., Mehring, *supra* note 2, at 419 (“Schmitt’s statements are detailed and trustworthy”). Kempner himself was clearly impressed by them. However, a close reading reveals numerous questionable characterizations of the sort that one would expect from a man essentially writing an affidavit to assert his own innocence. For example, Schmitt claimed “that for which I am being held responsible is essentially only that which I have written — scholarly treatises, which have resulted in many fruitful scholarly

transferred from the Palace of Justice detention facility to a residence for witnesses in upcoming trials. Soon after submitting his last written piece to Kempner, Schmitt left Nuremberg on May 6, 1947 and met his wife in Plettenberg, where they moved in with his sisters. His time in Nuremberg had come to an end.

By May of 1947, the same month Schmitt was released, the OCCWC decided to scupper the PEC. It would seem that Taylor's trepidations about the potential impact of the *Fritzsche* case, along with limited resources, sealed the fate of that proposed proceeding.¹⁷⁷ By May 20, 1947, when the OCCWC submitted a new trial program, only Dietrich, Amann, Axmann, and Scheel remained as potential defendants under the aegis of *Ministries*. Archival research within the Berlin Branch files at the National Archives and Records Administration reveals that they were considered part of a newly styled "Press and Propaganda Case."¹⁷⁸ By September of 1947, only Dietrich and Amann remained in the Press and Propaganda Case.

By the time the *Ministries* Trial began on January 6, 1948, Dietrich was the only former PEC defendant seen in the dock. Several of the other PEC targets were tried and convicted by denazification courts that sentenced them to various terms of hard labor (somehow, Lauterbacher managed to escape detention and lived underground supporting Nazi and right wing causes in various parts of the world until his death in 1988). Schmitt, whose level of Nazi classification meant he had a choice, decided not to submit himself to the denazification procedures.

D. Evaluating the Case against Schmitt: Strategy, Speech, and International Crimes

I. Investigative Strategy and Construction of the Case

So how are we to evaluate the case against Schmitt? To answer this question, it is submitted that the best approach is to look at the matter from both an investigative/evidentiary perspective and a legal perspective. With regard to the former, there is no question that Kempner botched his handling of the case. Even assuming that the results of questioning Schmitt should have been determinative regarding a decision to prosecute, the interrogations were disastrous. Helmut Quaritsch correctly describes them as "amateurish and ill-prepared" while another expert dismisses them as "more moral reproaches than preparations for a justiciable indictment."¹⁷⁹

Apart from engaging in more extensive preparation, Kempner would have fared much better had he proceeded in chronological order and not asked Schmitt, among the shrewdest of lawyers, a series of broad, open-ended questions meant to elicit ultimate confessions of guilt. Not surprisingly, the wily *Kronjurist* never took the bait. To deal with this, like a good cross-examiner

debates." But this is hardly an apt or "trustworthy" description of his defense of Hitler's murder of political opponents, histrionics against the "Jewish spirit" (and other virulently antisemitic utterances), or exaltation of the Nuremberg Laws. Similarly, he mischaracterized his role in the memoranda by again comparing himself to Rousseau, with his relation to Nazi crimes supposedly resembling the Genevan philosopher's relationship to "Jacobin terror" during the French Revolution. He did this despite the fact that, unlike Rousseau, Schmitt was alive during the commission of such crimes, aware of the policies behind them, and deliberately defended them. *Interrogation of Carl Schmitt by Robert Kempner (III)*, *supra* note 174 at 129.

¹⁷⁷See Heller, *supra* note 4, at 64–65. Heller explicitly references concerns about the *Fritzsche* acquittal but in other portions of his book he alludes to trials being eliminated because of resource constraints. See, e.g., *id.* at 74 (referring to not taking on another trial given the OCCWC's "limited resources.") See also Gordon, *supra* note 7, at 49 (noting that "resources for the NMT programme started evaporating.")

¹⁷⁸Alexander Hardy, Memorandum to *Ministries* Division Personnel, September 23, 1947, RG No. 238-202, Correspondence-Memoranda. Heller notes that, upon the demise of the PEC, Dietrich, Amann, Axmann, and Scheel were folded into the "Government Administration Case" (whose key defendant was Hans Lammers, President of the Reichschancery). Hardy's memorandum suggests the more likely scenario that a "Press and Propaganda Case" was the successor to the PEC.

¹⁷⁹Bendersky, *Carl Schmitt's Path to Nuremberg*, *supra* note 9 at 8, citing Quaritsch, *supra* note 10, at 11–47; Carl Schmitt Gesellschaft e.V., *Schmitt Chronicles*, CARL-SCHMITT.DE (2023), <https://www.carl-schmitt.de/en/carl-schmitt/schmitt-chronik/> (last visited February 21, 2024).

in court, Kempner could have orally focused on small details, backed up by existing documentation, which would have supported a stronger case at trial.

For example, instead of asking “Did you seek to achieve a new international legal order in accordance with Hitlerian ideas?” he could have taken small excerpts from Schmitt’s *Grossraum* works and juxtaposed those with similar excerpts from texts supporting the idea of *Lebensraum*, specifically asking Schmitt to acknowledge the similarities. Along the same lines, Kempner could have gone through the most troubling provisions of the Nuremberg Laws and placed them next to excerpts from Schmitt’s writings that promoted/defended this apartheid legal regime (as well as strictly factual questions about the training sessions Schmitt conducted to instruct lawyers/civil servants on how the new strictures worked – assuming, as is likely, such sessions were in the public record or otherwise documented).¹⁸⁰

Kempner might have posed straightforward queries regarding Frank’s position as the regime’s top lawyer as well as a breakdown of Schmitt’s extensive contacts and those who worked with him (for example, asking him about their state visit when they met with Mussolini). Similarly, from 1933 through 1936, he could have “baby-stepped” Schmitt through his various positions of power in the German legal profession, with his antisemitic tracts leading up to his 1936 anti-Jewish programme for the National Socialist University Teachers Group, at whose conference he demanded a complete purging of the “Jewish spirit” in German law.¹⁸¹ Kempner could have concluded with questions about Schmitt writing to Himmler about his efforts and offering the SS leader full cooperation in the “struggle against Judaism.”¹⁸²

After reaching the end of 1936, in his questions, Kempner could have pivoted from Schmitt’s involvement in Nazi internal affairs to external affairs. That is when it would have been especially appropriate to juxtapose writings on *Grossraum* with *Lebensraum*. And Kempner could have asked very tailored questions covering Schmitt’s trips overseas for the regime during the war. For example, he could have elicited precise details about how the trips were organized and the method of payment. Instead, this is how Kempner actually proceeded during the second interrogation:

Kempner: There are several things I would like to know about your trip to Paris.

Schmitt: That trip was very interesting; I can tell you key things about that.

Kempner: What kinds of things?

Schmitt: In what regard is my trip to Paris related?

Kempner: Please write down everything.¹⁸³

This ended yet another futile line of inquiry. But Kempner could also have probed about Himmler’s communications to the effect that regime spokespersons, such as Schmitt, were needed to incentivize German allies (such as the fascist governments in Hungary, Romania, Spain and Portugal, where Schmitt spoke) to support Nazi policies. In one of his written offerings to Kempner, Schmitt acknowledged, “I obtained the possibility of lecturing abroad again . . . when Himmler and those around him began to feel unsure about foreign countries and thought it better not to simply ignore, as they had been doing, the pressing invitations from foreign jurists and law

¹⁸⁰For a description of such standard practices in relation to assessing the credibility of witness statements (let alone accepting as fact the self-interested arguments of defendants), see, e.g. Appeal Judgement, January 30, 2015, *Popović et al.*, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (hereinafter ICTY) (IT-05-88-A) (“when exercising its broad discretion, a trial chamber has to consider relevant factors on a case-by-case basis, including the witness’s demeanour in court; his role in the events in question; the plausibility and clarity of his testimony; whether there are contradictions or inconsistencies in his successive statements or between his testimony and other evidence; any prior examples of false testimony; any motivation to lie; and the witness’s responses during cross-examination.”)

¹⁸¹See *supra* notes 68–70 and accompanying text.

¹⁸²*Id.*

¹⁸³Bendersky, *supra* note 171 at 42.

schools wanting me to lecture.”¹⁸⁴ Kempner never asked Schmitt about this, nor about the presence of other Nazi officials on such trips or the need for the entourage to present a unified communications front towing Hitler’s party line.

Overall, the interrogation sessions could have shored up the factual record on small details that would have painted a damning large picture. And the sum total of these details would have reconstructed a bridge between Schmitt’s pre- and post-1936 efforts on behalf of the Reich.

Still, relying on an interrogation of Schmitt alone might not have been the optimal strategy. Instead, or in addition, Flechtheim and his *Ministries* investigators could have questioned other witnesses to collaborate Schmitt’s conduct in support of Nazi Germany. This might have led to other relevant documents and new leads. These are standard prosecutorial pre-trial case preparation practices and protocols.

II. The Legal Merits of the Case

1. Existing Assessments of How a Schmitt Prosecution Might Have Turned Out

Regardless of pre-trial strategy, and assuming it had been handled optimally, how might the case have turned out if tried? Certain experts have weighed in. On one end of the spectrum, Helmut Quaritsch, a committed Schmitt defender, concludes that “Kempner’s case against Schmitt was legally so untenable . . . that Kempner must have had other motives [in particular, Quaritsch believed Kempner viewed Schmitt as only a material witness].”¹⁸⁵ Bendersky disagrees, finding that “Kempner and others held deep convictions that Schmitt must be and could be prosecuted as a war criminal.”¹⁸⁶ Still, on balance, Bendersky considers it “highly improbable” that Schmitt could have been successfully prosecuted.¹⁸⁷

At the other end of the spectrum, Wieland emphasizes that Schmitt was a well-known and effective propagandist and that a legitimate prosecution case alleging crimes against humanity could have concentrated “on the content, style and quantity of [his] numerous writings.”¹⁸⁸ Other scholars, such as Salter himself, seem to stake a middle-ground position. Had Schmitt been tried, Salter suggests, he may well have been acquitted. But there would have been “the possibility of a successful prosecution for incitement and/or persecution” if Telford Taylor’s team had focused on the documents where Schmitt “sought to render considerable service to the ideological transformation and subordination of the judiciary into a subservient branch of Nazi government,” and the way that “Schmitt was materially rewarded for such endorsements of Hitler and collaboration more generally.”¹⁸⁹

2. Examining a Potential Schmitt Prosecution from an ICL Perspective

Importantly, these previous analyses on either side of the debate have not been from the perspective of international criminal law. We thus believe that the literature would benefit from such an analysis and we offer our version of it here.¹⁹⁰ Of course, it is impossible to know with any degree of certainty how the prosecution of Schmitt might have played out had it gone to trial. But prognostications of failure seem to center on three key points: (1) Schmitt’s marginalization after

¹⁸⁴Interrogation of Carl Schmitt by Robert Kempner (III), *supra* note 174 at 109.

¹⁸⁵Bendersky, *Carl Schmitt’s Path to Nuremberg*, *supra* note 9, at 8, describing Quaritsch’s analysis.

¹⁸⁶*Id.*, at 9. International criminal law expert Kevin Jon Heller agrees, finding that “Kempner genuinely believed Schmitt could be prosecuted for crimes against peace in his role as the ‘theorist’ of the Nazis’ aggression.” See HELLER *supra* note 4, at 68.

¹⁸⁷Bendersky, *Carl Schmitt’s Path to Nuremberg*, *supra* note 9, at 32–33.

¹⁸⁸Salter, MacGuire & Eastwood, *supra* note 10, at 73, citing Wieland, *supra* note 9, at 101–02.

¹⁸⁹*Id.* at 74.

¹⁹⁰For an overview of the most important existing analyses, see sources cited, *supra* notes 9–10.

the 1936 SS attacks against him; (2) Kempner's ineffective interrogations; and (3) the IMT acquittal of Nazi Radio Division head Hans Fritzsche.

We do not believe these reasons compel a no doubt conclusion that trying Schmitt would have yielded an acquittal. Moreover, we suspect that there are other factors, including the language of Control Council Law No. 10, which governed NMT proceedings, and jurisprudence later generated by the NMTs, which indicate that the prosecution might have had better conviction prospects than the extant literature has supposed. We now explore these points.

2.1 Re-examining Kempner's Interrogations, Schmitt's History and Fritzsche's Acquittal

a) Kempner's interrogations and the chronological approach to Schmitt's conduct

Regarding the existing literature's pessimism as to the prospects for a Schmitt conviction, some of that has already been dealt with indirectly when considering Kempner's handling of the case. One obvious retort is that Kempner's incompetence should not be factored into an evaluation of the case's merits. A more competent investigation (including, better conducted interrogations) would have likely yielded a more viable prosecution.

In that regard, we again emphasize the chronological approach Kempner could have taken, which might have served as the prosecution's case template at trial. This would have entailed demonstrating that Schmitt's conduct provided substantial support for the regime's *domestic persecutory* policies from 1933 through 1936 and for the regime's *aggressive foreign* policies from 1937 through 1945. In both time periods, between which there was no serious chronological break,¹⁹¹ Schmitt lent his expertise and prestige so as to both legitimize and advance Nazi goals of destroying the rule of law for an absolute dictatorship focused on persecuting minorities (especially Jews) internally and engaging in wars of aggression externally. As Wieland emphasizes, there was ample documentation of this.¹⁹²

b) Putting the Fritzsche judgment in perspective

Another sticking point experts have cited is the IMT's *Fritzsche* decision, which found the Nazi Radio Division head had not sufficiently incited persecution or had not been in enough of a leadership role to merit conviction. Indeed, Taylor noted in a memorandum to OMGUS his concern, regarding a possible PEC trial, that the IMT had acquitted Fritzsche because the prosecution had failed to prove that he had intended "to incite the German peoples to commit atrocities on conquered peoples." Despite Streicher's conviction, Taylor believed that Fritzsche's acquittal "somewhat obstructed" the prospects for PEC trial success.¹⁹³

In reality, *Fritzsche* might not have been such an imposing obstacle. First, the IMT's finding that "his position and official duties were not sufficiently important . . . to infer that he took part in originating or *formulating* propaganda campaigns"¹⁹⁴ should have been seen for what it was, "out of step with the important international criminal law principles established by the IMT at Nuremberg."¹⁹⁵ In particular, pursuant to Article 8 of the Nuremberg Charter, "[t]he fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility . . ."¹⁹⁶ Hence, the fact that he may have complied with Goebbels's overall propaganda

¹⁹¹Although Schmitt and his defenders portrayed his condemnation by SS members in 1936 as a "caesura," his continued writing, teaching, and other cooperation with the regime suggests that this moment may not have been quite the watershed it was portrayed as. For Schmitt's continued activities, see, e.g. Mehring, *supra* note 2, at 358–65. At the very least, this matter could have been more fully investigated by prosecutors.

¹⁹²Wieland, *supra* note 9, at 105–06.

¹⁹³*Id.*

¹⁹⁴Fritzsche Judgment, *supra* note 7 at 186–87 (emphasis added).

¹⁹⁵Gregory S. Gordon, *From Incitement to Indictment? Prosecuting Iran's President for Advocating Israel's Destruction and Piecing Together Incitement Law's Emerging Analytical Framework*, 98 J. CRIM. L. & CRIMINOLOGY 853, 885–86 n.238 (2008).

¹⁹⁶Charter of the International Military Tribunal at Nuremberg art. 6, Aug. 8, 1945, 82 U.N.T.S. 279.

strategy, rather than formulate it himself, should not have been germane to his legal liability.¹⁹⁷ The IMT unequivocally reaffirmed this principle by convicting German Field Marshal Wilhelm Keitel, thereby rejecting his defense of having merely obeyed Hitler's directives.¹⁹⁸ Publicly advocating for the violent acquisition of non-Reich territory as justified by *Grossraum*, while knowing that such acquisition was propagandistically being validated by the comparable doctrine of *Lebensraum*, might very well have been adjudged as materially no different from the latter.

And concern about needing to demonstrate a tight proximate relationship between the utterances and specific acts might have also been misplaced. While it was true that a portion of the IMT's judgment against Streicher was predicated on his "incitement to murder and extermination at the time when Jews in the East were being killed,"¹⁹⁹ another important part of the decision emphasized the long-term effects of Streicher's years of racist rhetoric as laying the groundwork for a persecution campaign against Jews. In the words of the IMT: "In his speeches and articles, week after week, month after month, he infected the German mind with the virus of anti-Semitism and incited the German people to active persecution."²⁰⁰

Thus, despite *Fritzsche*, *Streicher* could have been read as furnishing an NMT bench with grounds for finding liability in the case of NDSAP propagandists like Schmitt and the other would-be PEC defendants. Their work over time, even if not consisting of direct incitement, helped support a campaign of persecution (and, in the case of Schmitt, arguably aggression as well). Thus, the OCCWC's trepidations regarding *Fritzsche*, like those of later commentator's assessing Schmitt's potential liability at Nuremberg, might have been misplaced.

2.2 Control Council Law No. 10 and NMT jurisprudence: The benefit of hindsight

a) The case against Schmitt for crimes against humanity (persecution)

This conclusion is borne out by the provisions of Control Council Law No. 10, which governed NMT proceedings, and the eventual NMT written decisions themselves. As to the latter, the key case is *United States vs. Otto Dietrich*. As we have seen, Hitler's Press Chief was among the targeted defendants for the potential PEC trial. Eventually, after the PEC's demise, he was slotted into *Ministries*, where he was found guilty of crimes against humanity (persecution) based on his years-long newspaper propaganda campaign against the Jews. This was notwithstanding his hierarchical subordination to Goebbels (that is, one of the erroneous determining factors for the IMT in *Fritzsche*). In the words of the *Ministries* panel:

¹⁹⁷In fact, as Salter et al. suggest, *Fritzsche's* acquittal was premised more on "institutional" than legal factors. See Salter, MacGuire & Eastwood, *supra* note 10, at 53–54. In particular, *Fritzsche* was put in the IMT dock at the insistence of the USSR, which had in its custody far fewer IMT defendants than the other Allies, especially the Americans. See *How Did Hans Fritzsche Avoid the Noose? THE PROPAGANDER*, <http://grwa.tripod.com/050.html> (last visited May 9, 2023). In fact, *Fritzsche* was one of only two high-ranking Nazis captured by the Soviets (the other being former Navy Admiral Erich Raeder). *Id.* Still, in comparison to the others in the IMT dock, he was not considered a "major" Nazi war criminal. However, the Soviets believed that *Fritzsche's* inclusion would help even out the balance sheet regarding IMT defendants among the Allies. *Id.* So, his prosecution before the IMT, as opposed to a subsequent trial in the Russian zone, "was motivated largely by incipient Cold War political considerations." Gregory S. Gordon, *The Propaganda Prosecutions at Nuremberg: The Origin of Atrocity Speech Law and the Touchstone for Normative Evolution*, 39 LOY. L.A. INT'L & COMP. L. REV. 209, 231–Co32 (2017). Seen from another perspective, had he been prosecuted along with *Dietrich* as part of the *Ministries* Case (assuming, hypothetically, he had been in American custody), he would likely have been convicted. According to OCCWC prosecutor Alexander Hardy, evidence not yet available at the time of the IMT proceeding but available by 1947 (*viz.* press directives issued by *Fritzsche*) would have certainly meant a guilty verdict for *Fritzsche* at a subsequent Nuremberg trial. *Id.* at 230.

¹⁹⁸See Mark S. Martins, "War Crimes" During Operations Other Than War: Military Doctrine and Law Fifty Years After Nuremberg – and Beyond, 149 MIL. L. REV. 145, 155 (1995) ("The judgment against Keitel was a clear rejection of the defense of superior orders.")

¹⁹⁹*United States v. Goering*, Judgment, *Streicher* (Int'l Mil. Trib. Sept. 30, 1946), reprinted in 6 F.R.D. 69, 161–63 (1946) [hereinafter *Streicher Judgment*].

²⁰⁰*Id.* at 161.

It is thus clear that a well thought-out, oft-repeated, persistent campaign to arouse the hatred of the German people against Jews was fostered and directed by the press department and its press chief, Dietrich. That part or much of this may have been inspired by Goebbels is undoubtedly true, but Dietrich approved and authorized every release . . . The only reason for this campaign was to blunt the sensibilities of the people regarding the campaign of persecution and murder which was being carried out . . . These press and periodical directives were not mere political polemics, they were not aimless expression of anti-Semitism . . . Their clear and expressed purpose was to enrage the German people against the Jews, to justify the measures taken and to be taken against them, and to subdue any doubts which might arise as to the justice of measures of racial persecution to which Jews were to be subjected. By them Dietrich consciously implemented, and by furnishing the excuses and justifications, participated in, the crimes against humanity regarding Jews . . .²⁰¹

Significantly, the Tribunal did not reference calls for action here. Instead, the speech was criminally actionable for the “furnishing” of “excuses and justifications” to “subdue any doubts which might arise as to the justice of measures of racial persecution to which Jews were to be subjected.”²⁰² Thus, as atrocity speech expert Gregory S. Gordon has noted elsewhere:

[The] subsequent decision of the NMT with respect to Reich Press Chief Otto Dietrich has the effect of cutting through this doctrinal morass [of *Fritzsche* versus *Streicher* on direct versus non-direct calls for action]. The tribunal found Dietrich guilty of crimes against humanity (persecution) for his steady stream of media invective against the Jewish people that helped lay the groundwork for the Holocaust. Dietrich’s toxic rhetoric did not directly urge Germans to commit acts of violence against Jews. But liability for the crime of persecution attached nonetheless.²⁰³

Had the OCCWC gone forward with a Schmitt prosecution, his virulently antisemitic writings from 1933 through 1936 would likely have been seen as similarly “furnishing excuses and justifications” to subdue doubts regarding persecution of Jews in the German legal profession, academia, and in broader society. As offered below, his *Grossraum* exhortations might have been comparably adjudicated vis-à-vis crimes against peace.

It might be argued that, as it turned out, the NMTs ultimately “held that [Control Council] Law No. 10 did not criminalize pre-war crimes against humanity (CAH) that were not connected to war crimes or crimes against peace.”²⁰⁴ But the OCCWC could not have known that in early 1947, and had every reason to believe such conduct, properly proved, *would* be subject to CAH liability. This is true because, unlike the IMT, which precluded charging pre-war CAH given a lack of “nexus” between the CAH and crimes against peace/war crimes, Control Council Law No. 10 eliminated the so-called “war nexus” requirement and encouraged prosecutors to charge pre-war Nazi CAH.²⁰⁵

In fact, the OCCWC did charge such conduct. It did so in *Ministries*, where Schmitt, like Dietrich, might have been prosecuted had his case survived the demise of the PEC. The *Ministries* indictment accused thirteen defendants of having participated in atrocities and persecutions committed “during the period from January 1933 to September 1939.”²⁰⁶ Thus, from the vantage

²⁰¹*United States v. van Weizsaecker* Judgment, in 14 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL NO. 10: “THE MINISTRIES CASE,” 565–76 (1950) (hereinafter called TWC).

²⁰²See Gregory S. Gordon, *The Forgotten Nuremberg Hate Speech Case: Otto Dietrich and the Future of Persecution Law*, 75 OHIO ST. L. J. 571 (2014)

²⁰³*Id.* at 606.

²⁰⁴Heller, *supra* note 4, at 93.

²⁰⁵GREGORY S. GORDON, ATROCITY SPEECH LAW: FOUNDATION, FRAGMENTATION, FRUITION 106, 113 (2017).

²⁰⁶*Ministries*, Indictment, para. 30, TWC 38.

point of early 1947, the specific years during which Schmitt called for the persecution of Jews in the legal field should not have been a straightforward deterrent to prosecution for this conduct.

b) The case against Schmitt for principal/secondary liability for crimes against peace

Moreover, combining charges of the 1933–1936 persecutory conduct with that related to Schmitt’s post-1936 support of the Nazi policy of aggressive war would have made the case even more compelling. That said, the IMT precedent suggested that Schmitt’s *Grossraum* writings and speeches on behalf of the regime in themselves might have factored prominently in a finding of guilt. At the 1945 negotiations in London for the IMT Charter, Robert Jackson had prominently alluded to incitement to aggression in the following colloquy with British representative Sir David Maxwell Fyfe:

Sir David Maxwell Fyfe: Mr. Justice Jackson, just to clarify the discussion, could your point be fairly put this way: that you want the entering into the plan [to commit aggressive war] to be made a substantive crime?

Mr. Justice Jackson: Yes. The knowing incitement and planning is as criminal as the execution.²⁰⁷

The IMT indictment specified the kind of incitement to which Jackson referred. It “ascribed . . . criminal responsibility to the defendants with regard to . . . propaganda intended to directly incite to specific wars of aggression.” And responsibility for such propaganda factored into the convictions of crimes against peace for IMT defendants Rudolf Hess, Wilhelm Keitel, and Alfred Rosenberg.²⁰⁸ An NMT case against Schmitt, combining his 1933–1936 conduct with that in 1937–1945, might have focused on the *Kronjurist’s* aggression propaganda for the second period. And that might have been charged pursuant to Control Council Law No. 10’s Article II(1)(a) for “participation in a common plan or conspiracy” to commit crimes against peace.

Although Schmitt was not an official part of the Nazi central government, at Himmler’s urging, the Berlin bureaucracy organized and paid for Schmitt’s trips abroad to spread his aggression propaganda. Schmitt actually admitted as such in one of Kempner’s all-too-rare effective moments during the interrogations:

Kempner: After 1936, you delivered lectures financed by the Nazi Reich in Budapest, Bucharest, Salamanca and Barcelona; in the notorious espionage and propaganda institute, “The German Institute in Paris,” and other places. Did you deliver lectures? Yes or no?

Schmitt: Yes, I did deliver lectures . . .

Kempner: Who paid for the trip?

Schmitt: Part [was paid] by German agencies.²⁰⁹

Pursuant to Article II(2)(b), liability could attach if a defendant “was an accessory to the commission of any such crime or . . . abetted the same.”²¹⁰ Based on this language, Schmitt might have been found liable as an accomplice to Nazi aggression.

²⁰⁷Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials 376 (Dept. of State 1945).

²⁰⁸Gregory S. Gordon, *Of War-Councils and War-Mongering: Considering the Viability of Incitement to Aggression, in FOR THE SAKE OF PRESENT AND FUTURE GENERATIONS: ESSAYS ON INTERNATIONAL LAW, CRIME AND JUSTICE IN HONOUR OF ROGER S. CLARK* 423 (Suzannah Linton, Gerry Simpson & William A. Schabas, eds., 2015).

²⁰⁹*Interrogation of Carl Schmitt by Robert Kempner (I)*, *supra* note 167, at 100–01.

²¹⁰Control Council Law No. 10, Article II(2)(b).

Again, however, once the NMT cases were actually tried, satisfying the elements of the crimes became knottier than the naked verbiage of Control Council Law No. 10 suggested. For example, the NMTs ultimately ended up imposing a “leadership requirement” with respect to assessing liability for crimes against peace (which was not mandated by the IMT). This new standard required the prosecution to prove that the defendant had the power to “shape or influence” the policy of the aggressor state.²¹¹ It is hard to know whether Schmitt, as a high prestige/high profile figure advocating his *Grossraum* theory on regime-organized trips to persuade allies to get in line with Nazi aggression policies, would have qualified.

This may well have been considered as part of “waging” an aggressive war (which included “actions taken after a war or invasion had been initiated that furthered the aggressive purposes of the attack”),²¹² thus satisfying the crime’s actus reus requirement. And its mens rea – knowing there was an intent to wage aggressive war while knowingly aiding that effort – would very likely have been satisfied as well. Almost no one knew better than Schmitt that the Nazi regime was oriented towards policies of conquest and violent intervention.²¹³ At the very least, in light of preceding IMT jurisprudence and later developments, it would not have been unreasonable for the OCCWC to pursue a trial.

E. Conclusion

1. Putting the Propaganda and the Education Case into Perspective

1. Revisiting the Prosecution Against Schmitt

Given the above, one can easily imagine a different fate for Carl Schmitt at Nuremberg. From an early 1947 perspective, considering the ample documentary records and the encouraging IMT precedents (despite *Fritzsche* and some of the later imposed NMT rigors), a properly handled investigation might have given the OCCWC sufficient grounds for going forward against the Nazi Crown Jurist.

In this regard, perhaps it would have been advisable to leave the case in the Berlin Branch for longer, allowing Fleckheim and his team to conduct a more thorough preliminary investigation, digging around the Berlin archives for additional relevant documents and well-informed witnesses. With better written evidence (for instance, paperwork proving Nazi finance and support of Schmitt’s trips abroad) and testimonial support, the case against Schmitt might have survived.

2. Implications for the Future of Atrocity Speech Law

In the end, an ultimate conviction may very well have been out of reach. Still, the prosecution might have had independent value for establishing the historical record, exposing the role of intellectual collaborators in Nazi crimes, and providing at least some form of expressive justice for those who had been persecuted at its hands, including lawyers and academics.²¹⁴ Kempner seemed to grasp this. As he articulated himself during the first Schmitt interrogation, the OCCWC was poised to establish liability for propagandists who, over time, had laid the ideological and psychological groundwork for the execution of an overall campaign of international crimes. In particular, Kempner was interested in exploring criminal liability for Schmitt and others like him, for providing:

²¹¹Heller, *supra* note 4, at 127, 186.

²¹²*Id.* at 192.

²¹³Regarding Schmitt’s extensive scholarly focus on problems of war, see generally Schmitt, *supra* note 127.

²¹⁴Cf. Barrie Sander, *The Expressive Turn of International Criminal Justice: A Field in Search of Meaning*, 32 LEIDEN J. INT’L L. 32, 851 (2019) (discussing “a nascent strand of expressivism – strategic expressivism – which concerns whether and how different actors in the field may harness the expressive power of international criminal justice in line with their strategic social and political agendas.”).

[The] scholarly foundation for war crimes [and] crimes against humanity. We are of the opinion that the executing agencies in the administration, the economy and the military are not more important than the men who conceived theory...²¹⁵

The fact that the OCCWC shrunk from this task in the end was, we believe, an historically important missed opportunity. In the long run, Taylor's cautious approach could mean that the intellectual architects of atrocity campaigns might never face justice if they could hide behind the veil of "academic freedom." And that could be troubling for the long-term development of the law as it grapples with intellectuals providing cover for ideological contributions to criminal state policies.

Should scholars like Carl Schmitt be allowed to provide the theoretical foundations for, and legitimize, hatreds and attacks against outgroups and foreign peoples that eventually result in orgies of domestic and international violence? Should an advocated model of European continental rule, premised on naked aggression and systemic (if not eliminationist) antisemitism, be seen as mere theory? Looking at more recent analogues, would Professor Ferdinand Nahimana, who helped theorize and actualize anti-Tutsi hatred via academic histories of Rwanda that encoded messages of mass violence, have been absolved of responsibility for genocide in Rwanda absent his work in founding Radio Television des Milles Collines (RTLM), a broadcast mouthpiece for incitement against the genocidally targeted Tutsis?²¹⁶ Is there a clear dividing line between formation of a genocidal or imperialist theory and its instrumentalized spread?

In this regard, Carl Schmitt might have been the ideal test case, given his persecutory/aggressive discourse combined with his impliedly official relationship within the National Socialist regime. Certainly, for the law to strike the right balance, the speech of philosopher propagandists like Schmitt, who cannot be tied directly to particular offenses but who slowly and steadily prime minds for violence, should have a sufficiently proximate relationship with the perpetration of international crimes. What the scope/contours of such a relationship should be remains to be fleshed out by experts. But, in his treatment of the Schmitt case, Michael Salter has called for "an entire book to be written concerning the propaganda by academics..." to resolve the tension between regulating atrocity speech and protecting "countervailing doctrines of 'academic freedom.'"²¹⁷

And the need for such a book is becoming increasingly urgent. Most notably, Russia's international crimes as part of its invasion of Ukraine are intimately tied to "academic" theories close to those espoused by Schmitt on behalf of the Nazi regime. In particular, exponents of the idea of a "Russian world" (*Russkiy mir*), evocative of Schmitt's *Grossraum*, in which Moscow exerts a hegemonic role over its neighbors, have influenced and justified its acts of aggression.²¹⁸ The prominent scholar Aleksandr Dugin, in particular, has, over the course of his career, engaged in a tireless effort to promote the reassertion of Russian imperial rule and a resistance to both "Western civilization" and established norms of international law and global governance.²¹⁹ Sometimes called "Putin's Brain," Dugin, along with likeminded scholars, has denied the existence

²¹⁵Interrogation of Carl Schmitt by Robert Kempner (I), *supra* note 167, at 101.

²¹⁶Appeals Judgment, November 28, 2007, *Nahimana et al.* ("Media case") (ICTR-99-52B-R).

²¹⁷Salter, MacGuire & Eastwood, *supra* note 10, at 16 n. 45.

²¹⁸See, for example, UKRAINE-RUSSIA: Over 400 Orthodox priests in Ukraine condemn Patriarch Kirill, HUMAN RIGHTS WITHOUT FRONTIERS INTERNATIONAL, APRIL 15, 2022, <https://hrwf.eu/ukraine-russia-hundreds-of-priests-of-the-moscow-patriarchate-in-ukraine-condemn-the-role-of-russian-patriarch-kirill-in-the-war/> (last visited February 21, 2024) ("the doctrine of the 'Russian World,' which for many years has been promoted by Patriarch Kirill and which has become one of the ideological justifications for the war of the Russian Federation against Ukraine.")

²¹⁹For assessments supporting Dugin's role in Russian policymaking, see Anton Barbashin & Hannah Thoburn, *Putin's Brain: Alexander Dugin and the Philosophy Behind Putin's Invasion of Crimea*, 31 FOREIGN AFFAIRS (2014); Anton Shekhovtsov, *Putin's Brain?*, 4 NEW EASTERN EUROPE 72 (2014). For a contradictory assessment, see, Alex Hu, *Alexander Dugin Is Not That Important*, THE NATIONAL INTEREST, February 8, 2023, <https://nationalinterest.org/feature/alexander-dugin-not-important-206186> (claiming that Dugin is "just one of many pawns in Putin's curated media ecosystem") (last visited February 21, 2024); but see Ivan Makridin, *The Making and Unmaking of Putin's Rasputin*, CODA MEDIA, August 25,

of Ukrainians “as a nation,” dehumanized them by accusing them (ironically) of being “Nazis” and called for their statehood to be disregarded.²²⁰ Explicitly inspired by, and citing Schmitt’s theories,²²¹ Dugin and these other scholars arguably have played an important role in translating such notions into state violence. If international criminal liability is eventually imposed on the architects of Russia’s war in Ukraine, should the figures who represent their “intellectual blood bank” escape from the reach of prosecutors, simply by virtue of academic immunity and free speech?

II. Final Reflections on International Justice and Intellectual History

In the end, Carl Schmitt refused to be “denazified.”²²² After 1947, he was excluded from holding teaching positions or other significant roles in academia or civil society. Although he made repeated attempts to reintegrate his thoughts into West German society, he was never able to occupy a prominent position in open public discourse as he had during both the Weimar and Nazi periods. Indeed, in an attempt to renew his relevance, he even began to reach out to his former leftist and Jewish contacts, hoping to exert influence through them, despite the obvious betrayal that he had committed by assisting genocidal Nazi rule. Even Flechtheim was brought into these efforts. First, Schmitt tried to use his good offices to restore his relationship with Otto Kirchheimer, but to no avail.²²³ Later, Schmitt sought to claim Flechtheim himself as a follower during comments in a 1970 press interview, though this claim was soon angrily rebuffed by the latter, ironically reversing their dynamic of rejection in 1933.²²⁴

Despite his marginalized position, Schmitt still manages to attract new readers. Some of his early ideas on emergency powers and pre-legal foundations of constitutions, for example, continue to play a role in German law, and even have a global reach.²²⁵ Nonetheless, when he died at the age of ninety-six in 1985, he remained *persona non grata* in academia, and the propriety of citing his work (at least without heavy caveats) is still vigorously debated.²²⁶ It is a mark of dubious distinction that the term “Schmittian” is in general use, not in a neutral sense but usually as a term of condemnation for unjustified exaltation of executive power. Meanwhile, as has been noted, some of the most important current subsets of Schmitt readers are advocates and emulators of his imperialist Nazi-era theories. If the ICL field eventually comes to grapple with today’s *Grossraum* propagandists, as it came close to doing in 1947, Schmitt’s theoretical prescriptions on such matters may well fall into further disrepute.

By contrast, Ossip Flechtheim’s thoughts have remained a beacon of inspiration for progressive scholars and activists. He devoted decades of effort to promoting his notion of a science of Futurology as an alternative to pessimistic state theory. During the Cold War, he even sought to establish it as a peaceful, liberal-socialist, and European-oriented “Third Force” against Western capitalism and Soviet communism.²²⁷ Moreover, he remained actively engaged in political debate

2022, <https://www.codastory.com/newsletters/russia-dugin-disinformation/> (last visited February 21, 2024) (“Putin himself . . . echoes almost to the word Dugin’s thoughts on a revitalized Russosphere.”)

²²⁰See, e.g. ALEKSANDR DUGIN, UKRAINA: MOYA VOINA: GEOPOLITICHESKIY DNEVNIK [UKRAINE: MY WAR: A GEOPOLITICAL DIARY] (2015).

²²¹Aleksandr Dugin - *Karl Schmitt: 5 Urokov Dlya Rossii* [Carl Schmitt: 5 Lessons for Russia], 7 Nash Sovremennik (1991), http://read.virmk.ru/d/Dugin_Shmitt.htm (last visited February 21, 2024) (citing Schmitt for the claim that “Russia is a Great Space and its Great Thought is carried by its people in their gigantic continental Eurasian soul,” and calling for Russia’s leaders to “arm the state with ideology” reflecting these beliefs.)

²²²See Salter, *supra* note 10, at 184 (“Schmitt refused ‘resolutely to submit to even a token procedure of de-Nazification.’”)

²²³Buchstein, *supra* note 55.

²²⁴KARLHEINZ WEISSMANN, ARMIN MOHLER. EINE POLITISCHE BIOGRAPHIE 268 n 38 (2011).

²²⁵Müller, *supra* note 2.

²²⁶See Joseph Weiler, *Cancelling Carl Schmitt?*, EJIL: TALK, AUGUST 13, 2021, <https://www.ejiltalk.org/cancelling-carl-schmitt/> (last visited February 21, 2024).

²²⁷See OSSIP K. FLECHTHEIM, FUTUROLOGIE ALS “DRITTE KRAFT” (1973).

within Germany, taking merciless aim from his position at the Freie Universität Berlin (not far, ironically, from Schmitt's Nazi-era residence) at the center-right of the West German establishment while calling for peace and the birth of a "new left" politics.²²⁸ In keeping with his onetime role in Schmitt's near-prosecution, Flechtheim kept arguing for greater social and historical accountability and a continuation of the antifascist project.

It was not until the 1980s that German society as a whole caught up with Flechtheim, as the process of *Vergangenheitsbewältigung* or "coming to terms with the past" became a central topic of public discourse.²²⁹ After Schmitt's passing in 1985, Flechtheim lived another thirteen years, a period during which he saw other aspects of his lifelong intellectual agenda come to fruition. These included German reunification amid the end of the Cold War, the peaceful integration of Europe, and the widespread demise of autocratic governments at both ends of the political spectrum. Fittingly, in 1998, the year of his death, the International Criminal Court was created, seemingly vindicating both his sanguine forecasts for world peace and his important early contributions to international justice.²³⁰

Unlike Carl Schmitt, the man against whom he faced off in that Berlin interrogation room in March 1947, Ossip Flechtheim's personal arc, while he lived, was one of redemption. He may well have been disappointed that the professor who rejected him as a Jewish PhD student in 1933, and then became the "Crown Jurist" for a regime that murdered 6 million of his co-religionists, ultimately escaped justice.

But he might have taken solace knowing that the work performed by his Berlin Branch investigative team contributed to the 1949 convictions of nineteen out of twenty-one defendants at the corresponding *Ministries* Trial in Nuremberg. This included Otto Dietrich, whose NMT condemnation represented an important symbolic and jurisprudential expression of justice in reference to Nazi propaganda in the Subsequent Trials. Ultimately, it could lay the foundations for an important new chapter in atrocity speech law. Were he still around to see it, Flechtheim would have likely appreciated such an auspicious normative development as further proof that adherence to his philosophy, not Schmitt's, will ultimately lead to humanity's greatest flourishing.

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²²⁸Kefler & OSSIP K. FLECHTHEIM, *supra* note 3, at 198; TERENCE RENAUD, NEW LEFTS: THE MAKING OF A RADICAL TRADITION 231–33 (2021) ("The mid-to late 1960s also saw a renaissance of futurology . . . Futurology appealed to West German students not only because their appetite for theory was insatiable. It also expanded their horizon of possibility by making alternative futures an object of scholarly analysis.")

²²⁹See, e.g., PETER REICHEL, VERGANGENHEITSBEWÄLTIGUNG IN DEUTSCHLAND: DIE AUSEINANDERSETZUNG MIT DER NS-DIKTATUR VON 1945 BIS HEUTE (2001); cf. MATTHEW G. SPECTER, HABERMAS: AN INTELLECTUAL BIOGRAPHY 29–30, 207 (2010) (describing how a young Jürgen Habermas "joined the minority within the constitutional law profession who were struggling toward . . . a process of coming to terms with the past . . . critical to reconstructing German political culture," and his influence in mainstreaming these efforts).

²³⁰See OSSIP K. FLECHTHEIM, IST DER ZUKUNFT NOCH ZU RETTEN? WELTFÖDERATION – DER DRITTE WEG INS 21. JAHRHUNDERT 293 (1995) (expressing his view of a "functioning international criminal court" as an important step forward for humanity).