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Kirchheimer and Schmitt on "Legality" and "Legitimacy"

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Carl Schmitt remains a famous and an infamous constitutional scholar who is regarded as the crown jurist of the Nazi era. He is slightly less known as a critic of law and a foe of liberalism. During the late 1920s and early 1930s there were a few constitutional scholars who actively defended law and liberalism from Schmitt's attacks. Most of these individuals were professors of law like Hans Kelsen and Richard Thoma. However, there was a young jurist by the name of Otto Kirchheimer who joined these thinkers. Kirchheimer was not just younger than the professors; he had attended Schmitt's lectures at Bonn and did his dissertation under Schmitt's direction. But late in the 1920s, he broke with his mentor over the notions of legality and legitimacy. Kirchheimer's criticisms of his "Doktorvater" reveal not only the problems with Schmitt's views about legitimacy, but also provide a major defense of law and legality.

Keywords: Schmitt, Kirchheimer, legality, legitimacy

Carl Schmitt published *Der Begriff des Politischen* in 1932, which is considered by many to be his most famous book and by many others, to be his most infamous book.[1] The same year he published another book which did not provoke the same amount of debate as *Der Begriff der Politischen,* yet it still generated considerable controversy. As with *Der Begriff des Politischen,* this book carried what seemed to be a rather innocuous title: *Legalität und Legitimität*. Schmitt evidently took considerable pride in choosing his titles and subtitles, but this

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[1] Schmitt, 1932d. This was published by the Berlin firm Duncker & Humblot. But the next year (1933) Schmitt had the book published by the Nazi associated firm Hanseatische Verlagsanstalt Hamburg. To ensure that its radical, right-wing message would not be lost, it was printed in the particular nineteenth-century German font of Fraktur (Schmitt, 1933). While Fraktur is often regarded as a Nazi font, many nineteenth-century German books and magazines were printed in it. But in 1941, the German government decreed that no books should be printed in it and it should no longer be taught in German schools. The thinking was that German propaganda needed to be distributed world-wide and that people outside of Germany were unable to read Fraktur. To this day, most Germans are unable to read it.

title was not Schmitt's own invention. Rather, Schmitt had borrowed the title from an essay that was published in 1932 in the journal *Die Gesellschaft*. Schmitt was well aware of this essay because he not only referenced it in *Legalität und Legitimität,* but he was more than just familiar with the author of the essay: Otto Kirchheimer. Kirchheimer was Schmitt's doctoral student at Bonn and Schmitt was the director of Kirchheimer's 1928 dissertation "Zur Staatslehre des Sozialismus und Bolschewismus." At the time, Kirchheimer regarded Carl Schmitt as his "Doktorvater" and Schmitt considered Kirchheimer his "favorite student." Furthermore, when Schmitt moved to Berlin, Kirchheimer followed and he sat in on some of Schmitt's Berlin seminars in 1931 and 1932. However, Kirchheimer did not share Schmitt's right-wing attitude; rather, he leaned towards social democratic ideas. In fact, Kirchheimer is remembered primarily today as the "founder" of left-wing Schmittianism (Mehring, 1992, pp. 146 and 180, see note 207). This is not the appropriate place to try to refute that assumption; however, it is the place to correct the claim that "Kirchheimer had distanced himself from Schmitt in the mid-thirties" (Hackler and Herrmann, 2016, p. 164) when in fact he had broken with him in 1932, if not earlier (see Neumann, 2015, p. 236). This is evident in Kirchheimer's remarks on Schmitt's *Legalität und Legitimität* which shows that Kirchheimer was already becoming one of Schmitt's intellectual enemies. Schmitt was blurring the line between law and politics and was promoting the idea of legitimacy; Kirchheimer recognized that the line between law and politics was not as firm as many wanted it to be, but he also insisted on the primacy of legality. There are three main works to be considered here regarding this exchange between Kirchheimer and Schmitt: Kirchheimer's 1932 essay "Legalität und Legitimität," Schmitt's 1932 book *Legalität und Legitimität*, and Kirchheimer's 1933 "Bemerkungen zu Carl Schmitts *Legalität und Legitimität*."[2] As Kirchheimer's two essays reveal, he moved from being a relatively reluctant follower of Schmitt to a highly critical opponent of him. A consideration of these three works will help us better understand Otto Kirchheimer's defense of legality as well as Carl Schmitt's ideas about legitimacy. It will also help us appreciate Otto Kirchheimer for his contribution in showing us the problems with Schmitt's political-legal conception.

This exchange between Otto Kirchheimer and Carl Schmitt has mostly been ignored and the purpose of this essay is to rectify this neglect.[3] This essay has

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[2] Kirchheimer has another essay from 1932 that is relevant: "Verfassungsreaktion 1932." However, because it is not directly related to Schmitt's book, it is not included in the list of the three major works. Nonetheless, it is important to understanding Kirchheimer's reaction to the problems of the Weimar constitution and to the notion of the "legal state" ["Rechtsstaat"] (Kirchheimer, 1932). Because both Kirchheimer's article and Schmitt's book have the same title, it is important to avoid confusion by remembering that the article title is in quotation marks while the book title is in italics.

[3] With few exceptions, Schmitt scholars have tended to ignore Kirchheimer. For example, in one of the first books written after the war to have taken Schmitt seriously, there is no mention of Kirchheimer. What makes that omission even more startling is that Hasso Hoffmann's book

five sections. The first section is a brief discussion of Kirchheimer's life and work and his connection to Schmitt. The second section is focused on Kirchheimer's essay "Legalität und Legitimität." The third section is an extended discussion of Schmitt's book *Legalität und Legitimität.* The fourth section is an in-depth examination of Kirchheimer's critique of Schmitt in "Bemerkungen zu Carl Schmitts *Legalität und Legitimität*." The fifth section is an evaluation of the various points that Kirchheimer and Schmitt made about legality and legitimacy and some concluding remarks about that exchange and its continuing relevance for today's tension between legality and legitimacy.

Kirchheimer and Schmitt

Carl Schmitt certainly does not need an introduction but Otto Kirchheimer probably does.[4] Kirchheimer was born in Heilbronn in the southwestern region of Germany on November 11, 1905. He studied at Heilbronn, Heidelberg, and Ettenheim and then attended universities at Munich, Cologne, Berlin, and Bonn. It was at Bonn that he attended Schmitt's seminars beginning in 1926 and it was at Bonn that he wrote his dissertation *Zur Staatslehre des Sozialismus und Bolschewismus* under Carl Schmitt's direction for which he earned the Dr. Juris degree in 1928 (Buchstein, 2017, p. 22). It was during his time at Bonn that Kirchheimer was regarded by others as well as by Carl Schmitt himself as Schmitt's "favorite student" and Kirchheimer regarded Schmitt as his "Doktorvater" (Buchstein, 2020, pp. 70, 88; Mehring, 2014b, p. 34; Neumann, 2015. p. 236). In fact, Kirchheimer continued to participate in Schmitt's seminar on constitutions into 1931. This relationship between Kirchheimer and Schmitt is rather unusual for three reasons: (1) Kirchheimer was inclined towards socialism and Schmitt was against it, (2) Kirchheimer regarded economic issues as important and Schmitt regarded them as a distraction, and (3) Kirchheimer was Jewish, and while Schmitt had broken

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was entitled *Legitimität gegen Legalität,* thus reflecting the titles of Kirchheimer's article and Schmitt's book. For two recent examples, there is no mention of Kirchheimer in the index to *The Weimar Moment.* This is a collection of twenty-two essays on liberalism, political theology, and law, so there are more than thirty listings in the index for Schmitt (Kaplan and Koshar, 2012).

In *Demokratische Staatsrechtslehrer in der Weimarer Republik* Kathrin Groh discussed Hugo Preuß, Gerhard Anschütz, Richard Thoma, Hans Kelsen, and Hermann Heller, but there is no mention of Kirchheimer (Groh, 2010). The references to Kirchheimer are not very many and are rather fleeting in *The Oxford Handbook of Carl Schmitt* (Meierhenrich and Simons, 2019, pp. 111, 112, 113, 135). There are three exceptions: Reinhard Mehring's Schmitt biography, his collection of essays on Schmitt, and Volker Neumann's book on Schmitt as jurist (Mehring, 2009, 2014a; and Neumann, 2015). To my knowledge, only Neumann and Karsten Olsen have discussed the exchange between Kirchheimer and Schmitt on legality and legitimacy. However, Neumann focused on Schmitt and Olsen emphasized economics (Neumann, 2015; Olsen, 2016).

[4] Much of this account is based upon Hubertus Buchstein's lengthy, informative, and impressive introduction to volume five of Kirchheimer's *Gesammelte Schriften* (Buchstein, 2020). Another account is found in Wolfgang Luthardt's remarks on Kirchheimer's work until 1933 (Luthardt, 1976).

with Catholicism, he remained an anti-Semite. From 1930 to 1933, Kirchheimer worked for the social-democratic journal *Die Gesellschaft,* was a Privatdozent at Berlin, and then was an attorney in the German capitol. In 1930, Kirchheimer published a work which drew considerable attention: "Weimar — und was dann? Analyse einer Verfassung." The second part of the title indicated Kirchheimer's interest was focused on how the Weimar constitution was written and his concern about its applicability. In the essay that Carl Schmitt wrote for the *Handbuch des Deutschen Staatsrechts,* Schmitt spent much of his time attacking the two editors, Gerhard Anschütz and Richard Thoma. But Schmitt praised Kirchheimer for "Weimar — und was dann" and he expressed agreement with him regarding the opposition between the capitalistic West and the communistic East as well as Kirchheimer's comment about a "justice state."[5] When the National Socialists gained power in 1933, Kirchheimer was briefly imprisoned in May and upon his release, he left Germany. He moved to Paris where he worked for Horkheimer's "Institut für Sozialforschung." In November of 1937, Kirchheimer, his wife Hilde, and their seven-year-old daughter Hanna emigrated to the United States. They lived in New York City and he taught at both the International Institute for Social Research and at Columbia University. Unfortunately, the marriage ended in divorce in 1941. He married Anne Rosenthal and in 1943 they moved to Washington D.C. where he worked for the Office of Strategic Services (OSS) from 1943 until 1945. He became an American citizen on November 16, 1943. The same year he became a guest lecturer at Wellesley College and then was at the American University during 1951 and 1952. He also taught at Howard University in 1952 through 1954. In 1951, the Kirchheimers bought a house on the outskirts of Silver Spring, Maryland which both Otto and Anne treasured because of the naturalness of the setting. When he began teaching again in New York City in 1955, he would commute and spend two nights in New York before returning to his family. In New York, he taught at the New School for Social Research and then in 1960 at Columbia University. From 1961 to 1962, Kirchheimer held a Fulbright Fellowship at Freiburg and he continued to travel to Germany for the next several years. He died of a heart attack just after boarding a plane at Dulles airport in Washington D.C. on November 22, 1965. He left behind his wife Anne, his daughter Hanna from his first wife, and his son Peter who had been born to Kirchheimer and Anne in 1945. Kirchheimer may be best known for his 1961 book *Political Justice: The Use of Legal Procedures for Political Ends*.

It was at Columbia during the early 1960s that Kirchheimer and Carl Schmitt were indirectly reconnected. George Schwab was a doctoral student at Columbia and was writing a dissertation on Schmitt's thinking prior to 1936. Kirchheimer was a committee member and was totally dissatisfied with it and demanded a

[5] Schmitt, 1932c, p. 572 note 1, pp. 573, 580 note 24. Although Kirchheimer had already earned his degree, he continued to attend Schmitt's 1931 seminar on the constitution.

major revision. He contended that Schwab's dissertation was intended to rehabilitate Schmitt's reputation. Schwab rewrote it but even the revision failed to meet Kirchheimer's standards. Schwab, who had been in contact with Schmitt, informed Schmitt of this and, as a result, Schmitt repudiated his former "favorite student," Otto Kirchheimer. Schwab was finally able to finish the dissertation in 1965, after Kirchheimer's death, but he was unable to get it published by Princeton University Press. Schwab flew to Germany and met with Schmitt and it was because of Schmitt's lengthy relationship with Duncker & Humblot that the firm agreed to publish the dissertation. However, Reinhard Mehring pointed out that publication was delayed several times and the dissertation did not appear until 1970 (Mehring, 2009, pp. 543–545). It is Mehring who has continued to claim that Otto Kirchheimer is the "father of all Marxist reception" of Schmitt's work, yet there is little to substantiate that (Buchstein, 2017, p. 61; Mehring, 2009, p. 546). But it is a claim that continues to be repeated today and it has led scholars such as Karsten Olsen to regard Kirchheimer's writings from the early 1930s to be Leftist oriented and to emphasize economics (Olsen, 2016, pp. 104, 110). As will be shown, while Kirchheimer did write about the workers in "Legalität und Legitimität," his concern was with fairness and representation rather than with Leftist politics. An examination of "Legalität und Legititimät" as well as "Bemerkungen zu '*Legalität und Legitimität*'" reveals that Kirchheimer's overriding concern was with the replacement of the democracy with the dictatorship "authorized" by Article 48 of the Weimar Constitution.[6]

[6] Books have been written about Article 48 of the Weimar constitution because that was the pretext that the German Reich used to wrest control from the Prussian "Land" government. There were five paragraphs in Article 48 but the first two were the ones used to justify taking over the Prussian government. Both paragraphs govern situations when a Land government fails to fulfill its obligations. In such instances, the Reich president can use any means he thinks necessary, including force, to see that the duties are fulfilled. The Reich claimed that Prussia had not done its duty to ensure peace and order and the Reich pointed to the street battles in Berlin (and in Altona, near Hamburg) on July 17 and 18, 1932 between communists and Nazis as an indication of the failure by the Prussian government. Schmitt applauded this move and later defended the Reich in court; Kirchheimer was already appalled by what he regarded as the misuse of Article 48. In "Artikel 48 — der falsche Weg" from 1930, Kirchheimer attacked Reichskanzler Brüning for his reactionary regime and for misusing Article 48. And, he disputes Schmitt's claim that the dictator must not only act but must react in order to safeguard the order and security of the state (Kirchheimer, 1930/2017c, pp. 202–204). For a good but brief discussion of the 1930 legal coup see chapter eight in Dietrich Orlow's *Weimar Prussia 1925–1933* (Orlow, 1991, pp. 225–246). In his still informative commentary on the Weimar constitution, Gerhard Anschütz insisted that Artikel 48 governed two different things: (1) the execution by the Reich regarding duties that a Land government did not fulfill and (2) the Reich can intervene in cases where a Land has allowed a situation in which public order and security is either threatened or destroyed. Anschütz regarded paragraph one to be the "Reich execution" ["Reichsexekution"] because of the Land's failure and paragraph two to be the "dictatorial force" ["Diktaturgewalt"] because of the need for "extraordinary" ["außerordentliche"] measures (Anschütz, 1933, pp. 269 and 275). For an earlier account see Fritz Poetzsch's commentary from 1919 (Poetzsch, 1919, pp. 69–70). There he described paragraph one as the "Reichsexekution" but paragraph two as the reestablishing of "public security and order" ["öffentliche Sicherheit und Ordnung"]. Between 1919 and 1933 there were numerous times in which Article 48 was invoked, but those occasions were short-lived and less drastic — unlike the complete and permanent replacement of the Prussian government by the Reich.

Kirchheimer's Article "Legalität und Legitimität"

There were only four years between Kirchheimer's dissertation and "Legalität und Legitimität" but there is an enormous difference in Kirchheimer's approach to Carl Schmitt and his ideas. In his brief (under twenty pages) dissertation Kirchheimer cites Schmitt four times but his spirit is found throughout this work (Kirchheimer, 1928/2017a, p. 135 note 8, p. 139 note 17, p. 144 note 27, p. 148, note 36). Kirchheimer refers to four of Schmitt's writings: *Die Diktatur, Politische Theologie, Die geistesgeschichtliche Lage des Parlamentarismus,* and *Kernfragen des Völkerbundes.* The fact that Kirchheimer referenced Schmitt's books does not indicate his reliance on his mentor as much as his use of Schmitt's concepts: exception, dictator, fiend, sovereignty, legitimacy, stability, and myth. In 1929 Kirchheimer published a short essay on the fifty years of the German courts and again some of the terminology is drawn from Schmitt: enemy and especially "guardian of the constitution" ["Hüter der Verfassung"] (Kirchheimer, 1929/2017b, pp. 187, 188, and 190). The last reference is particularly "Schmittian": "The 'guardian of the constitution' guards according to his own standards" ["Der 'Hüter der Verfassung' hütet nach eigenen Maßstäben…"] "Weimar — und was dann?" appeared in 1930 and while there are similarities to Schmitt's works, there is now a more left-winged approach. Like Schmitt, Kirchheimer is concerned with the genesis and the history of the Weimar Constitution, but now he is invoking Rosa Luxemburg and Karl Liebknecht (Kirchheimer, 1930/2017d, pp. 211, 213). That is because Kirchheimer contends that the nineteenth century fight for democracy was successful and it has now been transformed into the fight for social democracy (Kirchheimer, 1930/2017d, p. 215). However, Schmitt's thinking is still present — Kirchheimer's notion of "social homogeneity" is very much a Schmittian demand for a "community of values" ["Wertegemeinschaft"] (Kirchheimer, 1930/2017d, p. 217). Kirchheimer also appears to follow Schmitt's insistence on the necessity of invoking Article 48 of the Weimar constitution to suspend democracy in favor of a dictator who will restore order and security (Kirchheimer, 1930/2017d, p. 218 and note 10, p. 230 note 18). However, Kirchheimer was always concerned with fairness and he pointed to the Reich President's partiality in dealing with problematic situations in Thüringen and in Bayern. In the former, Reich troops were sent in to occupy, the leaders were evicted, and a new election was ordered. In Bayern, there were no troops, nor removal of officials, and no demand for new elections. Instead, there was a "Gentlemen's Agreement" between the Bavarian government and the Reich (Kirchheimer, 1930/2017d, pp. 244–245). The difference was political and economical — Thüringen was a socialist-leaning "Land" whereas Bayern was a conservative stronghold. Kirchheimer concluded with a non-Schmittian sentiment: that it was the tragic destiny that at the time of the Weimar Constitution's birth, the workers had no political or economic power to further their own interests. The question was "and what then?"

There was a two-year interval between "Weimar — und was dann?" and "Legalität und Legitimität." Kirchheimer was now in Berlin and working as an attorney. He was married and had a child. So, his personal situation had fundamentally altered and his approach to politics had changed as well. Although Carl Schmitt looms large throughout "Legalität und Legitimität," so does the spirit of Max Weber. This is shown throughout much of the first of the seven sections beginning with the opening sentence. Kirchheimer cites Weber's claim in *Wirtschaft und Gesellschaft* that every social system seeks a certain degree of legitimacy; thus, transforming from a matter of sheer power to a matter of legal order.[7] Kirchheimer does not minimize the importance of this transformation but he does indicate that it is not the matter under consideration. What is a matter of consideration is how traditional "Herrschaft" has been replaced by modern bureaucratic "Herrschaft" and traditional favoritism has been replaced by impartial expertise; Kirchheimer again cites Weber's comments about bureaucratic "Herrschaft" — decisions are rendered "without regard to the person" ["ohne Ansehen der Person"] (Kirchheimer, 2017j, p. 376).[8] In addition, there was the notion of equality under the law and this was guaranteed by the separation of the law givers and the executioners of those laws. Thus, legitimacy had been replaced by legality in modern democracies. Unfortunately, Germany was moving away from such a legal order and back towards one based not upon legality but on legitimacy. Furthermore, it was not one based upon equality but one founded on the "bureaucratic aristocracy" ["bureaukratisch Aristokratie"]. Kirchheimer suggested that this was a result of the tension between the bourgeoise and the proletariat with political and legal power going to the former and leaving the latter with little recourse (Kirchheimer, 2017j, pp. 377–378).

In feudal times, political thinkers insisted that there was a "right of resistance" ["Widerstandsrecht"] that was the right of the populace to resist the monarchy's absolutism. However, modern democracy has insisted that there is no difference between the governor and the governed, so there is no longer any need for any "right of resistance." As result, the "right of resistance" has been replaced by the

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[7] Kirchheimer cited the second edition of *Wirtschaft und Gesellschaft*. The 1925 edition differs from the first edition of 1922 only that the second edition is divided into two volumes instead of the original's single volume. The page that Kirchheimer cited is the same. Although Weber was writing about charisma, his point is applicable to charismatic "Herrschaft" as well as legal "Herrschaft." The relevant part concerns the need for all privileged classes to legitimatize their political, social, and economic order: "that is, out of the base of pure factual conditions of power to transform into a cosmos of conveyed law and be regarded as being legitimate" ["d.h.: aus einem Bestande von rein faktischen Machtverhältnissen in einen Kosmos erworbener Rechte verwandelte und geheiligt zu sehen."] (Kirchheimer, 1929/2017b, p. 376; Weber, 1922, p. 648).

[8] Weber used the phrase "ohne Ansehen der Person" in *Wirtschaft und Gesellschaft* (Weber, 1922, p. 661). In "Politik als Beruf" Weber emphasized the impartiality of the "true official" ["echte Beamte"] who would make decisions "Sine ira et studio" which he rendered "ohne Zorn oder Eingenommenheit" ["without anger or partiality"] (Weber, 1992, p. 189).

"rationalizing concept of law" ["rationalisierte Gesetzesbegriff"], that is, the "rule of law." Kirchheimer used the English "rule of law" to describe the situation in England. But he pointed to France as the place where the concept of legality gained more prominence throughout much of the nineteenth century. He did insist that the French rights were primarily formal rights and he suggested that the second half of the Weimar Constitution contained numerous material rights. However, Kirchheimer noted that the Weimar constitution endorsed pluralism but that this complexity of values contributed to tension. Kirchheimer quoted Carl Schmitt's claim in *Der Hüter der Verfassung* that this complexity gave rise to the "Pluralism der Legalitätsbegriffe."[9] The problem is that the bureaucrats have taken on the role of determining the legality of laws and to determine how long any departure from the laws can be allowed. Kirchheimer points specifically to the application of Article 48 and that it is the administrative branch that has determined how long the emergency degree is allowed to remain in effect. Yet, it was the framers of the constitution who had written that article and they did not specify how long it should be in effect: there is a huge difference between "indeterminate time" ["unbestimmte Zeit"] and "foreseeable longer duration" ["voraussichtlich längerer Dauer"] (Kirchheimer, 2017j, p. 380). He questioned how the Reich president has such power that he and he alone can determine the duration of the emergency measures under Article 48 and how its authority overrules the law and is dismissive of both the people and their representatives in parliament (Kirchheimer, 1929/2017b, p. 381). Kirchheimer made a further point that this was nothing less than a dictatorship and that it is contrary to democracy. In fact, legality is the mark of democracy but in Germany there is the shift from democracy to dictatorship and the corresponding shift from legality to legitimacy and the use of power. Kirchheimer added that nothing expresses this shift from legality to legitimacy as much as the Reichskanzler Brüning's statement: "If one declares that when one came to power by legal means in which legal barriers were broken, then that is not legality" ["Wenn man erklärt, daß man, auf legalem Wege zur Macht gekommen, die legalen Schranken durchbrechen werde, so ist das keine Legalität"] (Kirchheimer, 2017j, p. 382). For Kirchheimer, Brüning did not care about any "legal barriers" and all that he did was to ensure that legality was replaced by legitimacy. Thus, there is no longer any role for parliament and no need for law; now it becomes a matter of "legitimate" power. And, any determination of legitimacy is done solely by those who possess power and with that the legal basis for action no longer exists (Kirchheimer, 2018, pp. 382–383, 385).

The lack of a legal basis presented a particular problem for political parties in Weimar Germany. Previously, when there was the separation between the executive and the legislative branches, all political parties had some sort of legal basis

[9] Kirchheimer did not emphasize this phrase as Schmitt had. Furthermore, Kirchheimer apparently gave the page number as 91 whereas it is page 90 (Kirchheimer, 2017j, p. 90).

for their existence. But with the domination of the executive and the reintroduction of the issue of sovereignty, the legal basis disappeared. Now the issue was whether specific political parties should be regarded as a threat — and be declared "traitors to the fatherland and enemies of the People" ["Verrätern des Vaterland und Feinden des Volkes"] (Kirchheimer, 2017j, p. 385). This led Kirchheimer to the crux of the matter: that the dictator determines who is friend and who is enemy. For the government, it was clear that the National Socialists were friends and the Communists were enemies. Unfortunately for the Communists, there was no legal order to appeal to and no one to offer them a neutral tribunal. They were portrayed as a danger to national unity and to property rights. They were branded as anarchists who wished to destroy the state; therefore, the state had legitimate grounds to seek to destroy them (Kirchheimer, 2017j, pp. 386–387). The Communists were prohibited from assembling and their placards were removed — not because of violating a specific police order but because of the suspected goal. Thus, legal rules were replaced by legitimate goals. Although the NSDAP (Nationalsozialistische Deutsche Arbeiterpartei) and the KPD (Kommunistische Partei Deutschlands) were supposedly treated equally, in reality members of the former were treated with tolerance by some and even treated as compatriots by others. In contrast, the members of the KPD were not only not tolerated, but were actively opposed. This discrepancy was based upon the supposed goals — "conservative" for the Nazis and "revolutionary" for the Communists. Kirchheimer noted that the various courts ruled against the Communists and for the Nazis (Kirchheimer, 2017j, pp. 389–391).

Kirchheimer argued that the replacement of the legal order by the supposition of legitimate parties has far reaching negative impacts. He pointed specifically to one and that was regarding the labor conflict. In other words, since the workers were striving for better pay and safer working conditions, they were seeking to disturb the economic order. The results were that legal decisions were based upon economic issues and goals — if it was economics, it was legitimate; but if it was politics, it was illegitimate (Kirchheimer, 2017j, p. 393). To Kirchheimer, this was class struggle but it was a lopsided one. That was because the bureaucrats were the ones who made the decisions and they were the ones who replaced the legal order of the parliamentarian democracy with the new order of legitimacy. But that was only one problem — the other one was that the legitimate power legitimatized itself. Rather than being an ethical order, what was evolving was the politization of the bureaucracy and with it misuse, corruption, and the lack of responsibility. Instead of the prewar belief in the "common meaning and sense of duty" ["Gemeinsinn und Pflichtgefühl"] there is an attempt to instill an idealized sense of the past. Kirchheimer expressed the hope that this would be rejected before it would become fully realized (Kirchheimer, 2017j, pp. 394–395).

Later in 1930 Kirchheimer published "Die Verfassungslehre des Preußen-Konflikts" in which he complained again about the Reichskanzler's usurping the power of the

Prussian parliament and he again condemned Schmitt for his attempt to provide legal cover for an executive take-over. If Kirchheimer had tried to be somewhat diplomatic in "Legalität und Legitimität," this essay shows that he had largely given up on making the attempt. Now, Kirchheimer was complaining that the Reichskanzler had misused the Weimar Constitution and had abused the authority given under Article 48 (Kirchheimer, 1932/2017f, pp. 409, 410, 412, and 415, note 13).

Schmitt's Book *Legalität und Legitimität*

Carl Schmitt had an inclination toward being provocative, but he was relatively cautious in his book *Legalität und Legitimität.* At least that is one possible reason for his prefatory statement that "This essay was finished on 10 July 1932" ["Diese Abhandlung lag am 10. Juli 1932 abgeschlossen vor"]. It should be recalled that the street fights that occurred in Berlin and in Altona occurred on July 17 and 18 and had brought about Chancellor von Papen's decision to invoke Article 48. This was supposedly to take over the duties to maintain "security and public order" according to Paragraph 1: the so-called "Reichsexekution" part, and to use dictatorial power as set out in Paragraph 2, the so-called "Diktaturgewalt" part, in order to achieve that. Support for this contention is found in Hubertus Buchstein's comments on Kirchheim's reply to Schmitt. Buchstein noted that Schmitt insisted on pointing out that it was completed in early July — and Buchstein adds that Schmitt's pamphlet appeared in the middle of August. Kirchheimer and Schmitt met shortly after that and they got into a heated discussion. According to Buchstein, Kirchheimer was no longer Schmitt's favorite but was now a "dreadful guy" ["scheußlicher Kerl"] (Buchstein, 2017, p. 89). Evidently, the falling out between Kirchheimer and Schmitt revolved around Schmitt's theories in *Legalität und Legitimität.*

At first glance, *Legalität und Legitimität* does not appear to be a provocative work. The title of the book is innocuous and the sources Schmitt cites were among the most esteemed constitutional scholars and thinkers, including Gerhard Anschütz, Richard Thoma, and Walter Jellinek. Schmitt even cites Kirchheimer's article "Legalität und Legitimität." The opening paragraphs suggest this work is a dry judicial discussion about legality and legitimacy. Similarly, the three sections which make up the work seem to indicate a constitutional discussion: the "Einleitung" sets the stage with a discussion of the legal system of a law-producing state in relation to three other types of states. The first major section is devoted to the particular legal system of the law-producing state with the first subsection devoted to the legal concepts while the second subsection focuses on legality and the notion of "equal chance." The second major section has three subsections revolving around the "extra-ordinary law giver." The "Schluss" is what appears to be a straight-forward conclusion in which Schmitt pulls together his thoughts which he had set out in the two major sections. However, *Legalität und*

Legitimität is neither a dry constitutional work nor a straightforward comparison between legality and legitimacy. A full analysis of this work is beyond the scope of this essay; the focus here is on those ideas which are primarily relevant to Kirchheimer's published reaction.

Carl Schmitt distinguished between four different types of states: the "jurisdictions state," the "ruling state," and the "administrative state," but his main focus in this book is the "law-producing state" ["Gesetzgebungsstaat"], that is, the "legislative state" (Schmitt, 1932a, pp. 7–8). Unlike the other three states, the "legislative state" is impersonal; what has legitimacy is the law, not individuals or groups of individuals. Rather than being predicated on humans, authority, or authorities, the legislative state is predicated upon the law — as "in the name of the law" ["im Namen des Gesetzes"] (Schmitt, 1932a, p. 8). However, Schmitt insisted that every state did more than give orders and command; they also legalized norms and administered commercially intended measures. Schmitt cited Anschütz and Thoma, but he was more concerned about relying on Max Weber. Weber answered the question of how much was administration a core part of any state? Schmitt insisted that administration was part of Plato's *Republic* and Aristotle's *Politics,* but it is also found in Lorenz von Stein's writings. But it was Weber who insisted that an "administrative staff" ["Verwaltungsstab"] was an essential mark of political groups in general (Schmitt, 1932a, pp. 10–11). It appears that Schmitt was contrasting the "endless discussions of the parliamentarian legislative state" ["endlosen Diskussionen des parlamentarischen Gesetzgebungsstaates"] with the "decisionism" of the administrative state: "Here counts: 'The best in the world is a command'" ["Hier gilt: 'Das Beste in der Welt ist ein Befehl.'"] (Schmitt, 1932a, p. 13). Schmitt invokes Rudolf Smend's comment that parliament has no claim to legitimacy, only legality. It is also here that Schmitt again relies on Weber's claim that legality is one of the three types of legitimate authority — thus a connection between legality and legitimacy. But he insists that legality leads back to legitimacy while legality signifies an opposition to legitimacy. It is also here that Schmitt cites Kirchheimer's article "Legalität und Legitimität" and indicates that his former student is correct in maintaining that the parliamentarian democracy "stands only in its legality" ["nur noch in ihrer Legalität besteht"] (Kirchheimer, 1932/2017e, p. 382; Schmitt, 1932a, p. 14). However, as Buchstein explained, Schmitt altered the meaning of Kirchheimer's words to further Schmitt's own argumentative purposes. Where Kirchheimer had restricted his remarks to a particular law, Schmitt generalized it to fit his own legal theory (Buchstein, 2017, pp. 89–90). Schmitt did not just misuse Kirchheimer's comments; he also misused Weber's observation that the German bureaucracy was comprised of apolitical technocrats was wrong because they as political officials were entrusted with maintaining "public order and security" ["öffentliche Sicherheit und Ordnung"]. Hence, they possessed legitimate authority, which, by Schmitt's definition, is political (Schmitt, 1932a, pp. 16, 18). Schmitt's objection is not just with the empty and impersonal

functionalism of the supposedly apolitical bureaucracy of Max Weber; it is also with the normative legality of Hans Kelsen's "legal state" ["Rechtsstaat"] (Schmitt, 1932a, pp. 18–19).

After discussing this empty legal functionalism, Schmitt turns in the second main section to an issue that both he and Kirchheimer agree is fundamentally important; namely, the idea of "Legality and Equal Chance in the Winning of Political Power" ["Legalität und gleiche Chance politischer Machtgewinnung"]. Schmitt places extra emphasis on the word "chance" first, by indicating that he is leaving it in its original English and second, by pointing out that Weber frequently used the term "Chance" (Schmitt, 1932a, p. 30). What he did not mention is that Weber used the term "Chance" in two ways: first, as "risk" and second as "opportunity." Schmitt and Kirchheimer use the notion of "Chance" as opportunity. Before delving into what that means and why it is important, Schmitt takes issue with Kelsen's view of the state. Kelsen believed that the state functioned best during times of relative peace, but Schmitt was convinced from his time in the war that times were never relatively peaceful and that the state was always in a state of emergency. But Kelsen's democratic ideal presupposes the identity of the ruled with the rulers, thus dispensing with one of the oldest rights in history — the right to resist tyranny. Since the ones who are to obey the laws are the same as those who promulgate them, there is no authority to rebel against. Instead, the majority rules and the minority obey, even if the majority is only 51 out of 100. Thus, those in the majority have the "right to rule" because of a "mathematical functionalism." But Schmitt is concerned that despite the notion of equality, it appears that there is no "equal chance" at gaining political power for the minority of 49. And, Schmitt insists, that during relatively peaceful times, it is easy to calculate the probability of whether one group or the other will achieve the larger number and thereby will gain power. However, in abnormal times, it is less predictable. He provides three grounds for this: (1) that such terms as "emergency situation" ["Notstand"] are difficult to define, (2) that such undefinable terms lead to questioning, and (3) this questioning leads to doubts about the legality of such measures. This results in a situation in which the state still has more power than its opponents, and no more equal opponent means no more "equal chance" (Schmitt, 1932a, pp. 35–37, 40). This ends Schmitt's second major section and leads to Kirchheimer's criticism of *Legalität und Legitimität.*

Kirchheimer's Remarks on Schmitt's *Legalität und Legitimität*

The essay "Bemerkungen zu Carl Schmitts *Legalität und Legitimität*" was published in the fourth issue of volume 68 of the *Archiv für Sozialwissenschaften und Sozialpolitik.* Kirchheimer was not the sole author; Nathan Leites was listed as co-author. Born in St. Petersburg in 1912, Leites studied in Germany where he earned his doctorate at the university in Freiberg in 1935. Shortly after that he

emigrated to the United States where he gained a reputation as an expert on the Soviet Union. He was a professor at the University of Chicago and then became a long-time researcher at the Rand Corporation. He retired to France sometime in the 1960s and died there in 1987. But in 1933 he was a student at Berlin and it is unclear why Kirchheimer chose Leites to be his co-author and how much Leites actually contributed to the essay. But it is clear that the style and the tone is predominantly Kirchheimer's and it is also evident that he had definitely broken with Carl Schmitt. Because of these factors, only Kirchheimer will be regarded here as author.

Kirchheimer recognized what Schmitt was attempting to do in *Legalität und Legitimität*. He believed that instead of producing a general assessment of the "principle of construction" — ["Konstruktionsprinzipien"] of the Weimar Constitution for the present and for the future, Schmitt intended to prove that there was a contradiction in liberal political thinking. This is the contradiction between the possibility for a theoretical justification of democracy and the application of the existing elements. To put it differently, Kirchheimer insists that Schmitt was trying to prove that there is a real gap between democratic norms and political reality. Kirchheimer intends to deal with what Schmitt actually wrote. He not only indicates that Schmitt argued that democracy can be justified only within a homogeneous society, but he quotes Schmitt: "The method of forming wills through the establishment of the simple majority is sensible and tolerable, if a substantial equality of the entire people can be presupposed."[10] This passage points to the crucial democratic notions of freedom and equality. Kirchheimer draws attention to the twin meanings of the term freedom: there is the notion of "freedom *in* the state" ["Freiheit *im* Staat"] and "freedom *from* the state" ["Freiheit *vom* Staat"]. The former is a political freedom in contrast to the latter which is an individual freedom. The former is a freedom within a group where the latter is a freedom without a group. Kirchheimer argues that the former actually has two groups: the political and citizen ["staatsbürgerlich"] and then a third which is the private. The first two include freedom of the press, freedom of opinion, freedom of association. The third includes freedom to own property and religious freedom. He adds that historically these three have not always co-existed (Kirchheimer, 1933/2017g, p. 460). He also clarifies that democracy has a special bond with full political and citizen freedom and it has as a fundamental presupposition that people can have an unhindered "formation of the will" ["Willensbildung"]. Thus, Kirchheimer takes issue with Schmitt's notion of political freedom because of his insistence that it presupposes a homogeneous group. In addition, he sides with

[10] "Die Methode der Willensbildung durch einfache Mehrheitsfestellung ist sinnvoll und erträglich, wenn eine substantielle Gleichartigkeit des ganzen Volkes vorausgesetzt werden kann" (Kirchheimer, 1933/2017g, pp. 458–459; Schmitt, 1932a, p. 31). "Willensbildung" is difficult to render mostly because of the term "Bildung." It is a formation or development of a person's character and it is often translated as "education." However, "education" is far more narrowly focused than "Bildung."

Kelsen because of his claim that the "majority decides" ["Mehrheit entscheidet"] is the institutional guarantee for the greatest measure of freedom (Kirchheimer, 1933/2017g, p. 461). Kirchheimer also cites a minister who cannot be described by anyone as a radical who had insisted that the German Reich was the freest and the most equal — not because it was homogeneous, but, rather because it was the most tolerant of differences of opinion (Kirchheimer, 1933/2017g, p, 462). This reference, and the ones to Rousseau and to Kelsen, make it clear that Kirchheimer is a staunch defender of democracy. He faults Schmitt for his repudiation of democracy and for his insistence on using the 51 percent issue as a basis for disparaging the majority. Furthermore, he argues that under Schmitt's absolutism, it is not just the minority which must submit; it is also the majority who must follow the ruler's commands. This leads to his question "who will guard the guards?" ["Quis custodiet ispos custodes?"] (Kirchheimer, 1933/2017g, p. 463). More than that, Kirchheimer maintains that Schmitt's preference for an authoritarian and plebiscite government is something between a communist regime and a National Socialist one. Schmitt's response would likely be that a democratic government cannot be justified; not only because it lacks the capacity to function, but because it even lacks legal justification (Kirchheimer, 1933/2017g, p. 464). Kirchheimer adds that Schmitt's claim of the lack of function means that democracies cannot respond to crises. But Kirchheimer's reply is that many democracies have proven capable of dealing with crises, including Germany between 1925–1929 (Kirchheimer, 1933/2017g, p. 468). Before addressing Schmitt's claim that democracy lacks the capacity to function, Kirchheimer suggests that it is prudent to offer an overview of some of the articles in the second half of the Weimar Constitution and he utilizes Schmitt's own contribution to Anschütz and Thoma's *Handbuch der deutschen Staatsrechts.* Kirchheimer believes that the "Inhalt und Bedeutung des zweiten Hauptteils der Reichsverfassung" is relevant because in it, Schmitt argued that these fundamental rights are unconditional and they cannot be altered or denied (Schmitt, 1932c, p. 575). Schmitt argued that Article 114 guaranteed the freedom of the individual, Article 115 guaranteed the right to privacy in one's own home, Article 117 guaranteed the right to privacy in correspondence, and Article 118 guaranteed the right to one's opinion and the right to express it in speech or in print. Schmitt's point is that these rights and many others in the second part of the Reichsverfassung cannot be changed or modified — unlike Article 48 (Schmitt, 1932c, p. 576). Schmitt's chapter is also relevant because he approvingly cites Kirchheimer's "Weimar — und was dann?" and especially looks to the final chapter in which Kirchheimer discussed the importance of the French Constitution (Kirchheimer, 1930/2017c, p. 248; Schmitt, 1932c, p. 582 and note 30). What Schmitt did not comment on was Kirchheimer's concluding sentences in which he insisted that at the birth of the Weimar Constitution the German proletariat lacked sufficient political power and that he hoped that it would soon have enough courage and sense of responsibility to finally ensure that the Constitution would

no longer be the servant of the powerful (Kirchheimer, 1930/2017c, pp. 249–250). Schmitt had concluded his chapter with some comments about function and that is what Kirchheimer addresses. However, he insists that his notion is larger than the concept that Schmitt had used in that chapter and so Kirchheimer's focus is on how democracy functions as a whole (Kirchheimer, 1933/2017g, p. 469). In so doing, he considers two articles which deal with workers and their rights: Article 156 governs to what extent the government can intrude upon the economy to ensure that it functions for the well-being of society and Article 165 regulates how the worker can count on the government to foster appropriate wages, again for the betterment of the community (Kirchheimer, 1933/2017g, p. 470). Kirchheimer mentions these two Articles because they show that the Weimar Constitution and, by extension, democracy, is concerned with functioning properly and it does so by ensuring the sharing of power.

Kirchheimer returns to his discussion regarding Schmitt's criticism of democracy. Schmitt contended that democracy is based upon a series of contradictions on one side and a number of constitutional elements on the other side. But Schmitt's more basic objection is that a heterogeneous democracy cannot function. Again, Kirchheimer considers the second part of the Weimar Constitution and he spends several pages discussing Article 76. This Article is particularly important because it covers how the Constitution can be altered. But rather than Schmitt's preference for the 51 percent, Article 76 stipulates two thirds of the members of parliament must approve of this legal change (Kirchheimer, 1933/2017g, pp. 475–478). In several footnotes, Kirchheimer contends that Schmitt misrepresents comments that Richard Thoma, Walter Jellinek, and Gerhard Anschütz made about changing the constitution. It is another one of Kirchheimer's complaints that Schmitt misuses quotations about legal matters if that misuse furthers his political agenda (Kirchheimer, 1933/2017g, p. 478, notes 44 and 45).

Schmitt had contended that equality cannot justify democracy and that is because there is not the "equal chance" that the 51 percent can be reached as a matter of a "justice principle of this type of legality" ["Gerechtigkeitsprinzip dieser Art Legalität"] (Kirchheimer, 1933/2017g, p. 478; Schmitt, 1932a, p. 36]. It is just after that comment that Schmitt mentioned "equal chance" again, which leads to Kirchheimer's examination of what Schmitt meant by that. Kirchheimer complained that Schmitt did not define accurately enough what he intended to mean by "equal chance." As a result, it seems that "equal chance" refers to two uses. One use means that each and every voter has an "equal opportunity" to vote for his or her preferred candidate. The second use of "equal chance" appears to be the likelihood of reaching a majority, yet it is unclear that there is actually an "equal chance." That is because this is a matter of politics and not merely a matter of equal voting rights. Kirchheimer's point is that the minority parties may not agree and therefore their votes cannot overcome the unity of the majority party (Kirchheimer, 1933/2017g, pp. 479–480). Kirchheimer objects to Schmitt's

slide between a formal notion of "equal chance" and a material notion of "equal chance," and he insists that it is not the fault of a democracy that it cannot legally guarantee this political "equal chance." However, democracy does not formally hinder the "forming of opinion" ["Meinungsbildung"] (Kirchheimer, 1933/2017g, pp. 480–482). What Kirchheimer does allow is that owning property affects the possibility of "equal chance." Whether that is because of his leftist inclination of those years or whether it is his thinking about the privileged Junker class having a larger share of votes before 1918 is unclear (Kirchheimer, 1933/2017g, p. 483).

What is clear, is that Kirchheimer wants to investigate Schmitt's denial that democracy provides for an "equal chance." Kirchheimer allows that there is a difference of gaining power for the 51 percent majority in contrast to the 49 per cent minority but he insists that the "*full* realization of the 'equal chance'" ["*völligen* Realisierung der 'gleiche Chance'"] is utopian (Kirchheimer, 1933/2017g, p. 485). He also maintains that the struggle for "equal chance" is as much a political struggle as it is a legal issue.

Schmitt had insisted that there was a duality or contradiction between the two different types of legal entities. On the one hand, there is the "parliamentarian–legislative–state legal system" ["parlamentarisch–gesetzgebundsstaatlichen Legalitätssystem"] and on the other hand, there is the "plebiscitarian–democratic legitimacy" ["plebiszitär–demokratischen Legitimität"] (Kirchheimer 1933/2017g, p. 486; Schmitt, 1932b, p. 269). Schmitt insisted that this competition was not merely a competition between two instances, but was a struggle between two forms to decide what constitutes "law."

Schmitt had argued that the German parliament did not represent the will of the people and he contended that the legislature lacked justification. Kirchheimer responds that these complaints themselves lack legitimacy because they are nothing more than ideological expressions (Kirchheimer, 1933/2017g, pp. 487–488). He then turns to the issue of changing the Weimar Constitution and Schmitt's complaint about a mere majority. Kirchheimer draws attention again to the requirement in Article 76 where there needs to be at least two-thirds of the members of parliament to be in favor of it in order for any change to be passed (Kirchheimer, 1933/2017g, pp. 489–490). If anything, the large number of votes needed to change the constitution not only reinforces the notion of the constitution's stability but it also indicates its legitimacy and well as its legality. It is this last point that prompts Kirchheimer to direct his attention to Schmitt's claim regarding the "decisive difference" between legality and legitimacy.

The first problem that Kirchheimer notes is that Schmitt is careless in his definitions of legality and legitimacy. For Kirchheimer, there is no fundamental difference between the two. He points in particular to the vote for the Reich president—that the large number needed to elect someone not only provides a legal justification but also gives a legitimacy for it. Thus, the Reichsverfassung is a stable constitution that is both legal and legitimate. Carl Schmitt is in error not

only in his (failed) attempt to differentiate between legality and legitimacy, but in his (equally failed) attempt to argue that the Weimar Constitution was inherently unstable (Kirchheimer, 1933/2017g, pp. 492–493).

Kirchheimer concludes his "diagnostic thesis" ["diagnotischen These"] with a prognosis. It is a question of how stable can a democracy be? In France the Dreyfus affair revealed an anti-democratic army leadership which insisted on its type of justice. Similarly, how can an agrarian revolution which occurred in Russia lead to Bolshevik domination? Kirchheimer does not offer answers to these questions, but he does insist that the changes in a constitution come not just because of legal issues, but are informed by extra-legal ones as well. It will be a matter of dealing with both legal and extra-legal issues that will provide a long-term answer to the debate regarding constitutional stability and constitutional change (Kirchheimer, 1933/2017g, pp. 493–494).

Kirchheimer's remarks on Schmitt's *Legalität und Legitimität* are interesting for at least four reasons. First, Kirchheimer's comments are carefully written ideas about a major and influential book by a noted constitutional scholar. Second, Kirchheimer himself was a well-trained constitutional expert and an authority on legality and legitimacy. Unlike Schmitt, Kirchheimer's comments reflect a judicious and careful reading of Schmitt's texts. And, he highlights Schmitt's rhetorical flourishes and his conceptual confusion so as to get to the heart of Schmitt's problematic reasoning. Fourth, and perhaps most important, Kirchheimer was trained by Schmitt himself so that placed Kirchheimer in the advantageous position to critique his "Doktorvater."

Carl Schmitt apparently did not respond to Kirchheimer's critique, but he was undoubtedly angered by it. Not only was it an aggressive attack, but it was apparently a personal one. Moreover, the fact that Kirchheimer had published it in the *Archiv für Sozialwissenschaft und Sozialpolitik* must have troubled Schmitt. Although Max Weber had been dead for more than a decade, his name was still associated with the journal that Weber had co-edited with Edgar Jaffé and Werner Sombart. After all, Schmitt had attended Weber's seminar in Munich, he had contributed to Palyi's "Festschrift," and he had published the essay "Begriff des Politischen" in the *Archiv.* Yet, Carl Schmitt probably believed that he had more important things to do than to think about his former student. In contrast, Kirchheimer's "Doktorvater" continued to be on Kirchheimer's mind and surfaced in his writings.

Concluding Comments: Kirchheimer's "Legality" or Schmitt's "Legitimacy"

The same year that Kirchheimer published "Bemerkungen zu Carl Schmitts *Legalität und Legitimität,*" he was imprisoned by the Nazis. After being released, he fled to Paris and published a work in English: "The Growth and Decay of the Weimar Constitution." This is a remarkable little essay and deserves to be

examined in detail. But what needs to be emphasized here is Kirchheimer's assessment of his former "Doktorvater": "Professor Carl Schmitt" is "the theorist of the Nazi Constitution just as Hugo Preuß was the theorist of the Weimar Constitution" and that Schmitt reduced politics to "giving obedience and receiving protection all in the name of blood and race" (Kirchheimer, 1933/2017h, pp. 533–534). Whereas Schmitt never renounced his approach to law and politics, Kirchheimer spent the rest of his life fighting against that Schmittian attitude both in the United States and in Germany. In a posthumously published essay in a German collection edited by Ernst Fraenkel and Hugo Sinzheimer, Kirchheimer insisted that the difference between the Weimar Republic and the Third Reich was that the former was a "constitutional state" ["Verfassungsstaat"] and the latter was not — the Republic divided the powers of force whereas they were unified in the latter. In Weimar, there was a line of separation between justice and politics; a line which disappeared under the Nazis (Kirchheimer, 1968/2017i, pp. 551, 553). Kirchheimer's point was that the Weimar Republic was a genuine legal entity, whereas as much as Schmitt claimed, the Third Reich was never even legitimate. In light of all of these comments, it is useful to go back to Kirchheimer's exchange with his former "Doktorvater" over the meaning and importance of democratic legality versus dictatorial legitimacy. Today there is an ongoing debate over the rule of law and in the United States there is a continuing and troubling "debate" over a "legitimate" president versus a "legal" one. The Kirchheimer–Schmitt exchange concerning "legality" and "legitimacy" continues to resonate.

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