Introduction

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For nearly twenty-five years now, radical scholars in the American legal academy have subjected the ideal of the rule of law to a scathing critique. Whereas classical liberal democratic jurisprudence has demanded that law take a clear and cogent form in order to render state action as predictable as possible, contemporary authors associated with the Critical Legal Studies movement (CLS) have countered with the thesis that

> it is impossible to imagine any central or local legal institutions advocating a coherent, noncontradictory body of rules. *All* rules will contain within them deeply embedded, structural premises that clearly enable decision makers to resolve particular controversies in opposite ways. . . . [A]ll law seems simultaneously either to demand or at least allow internally contradictory steps.[1]

Allegedly, the traditional quest for determinate legal rules is illusory; a profound and unavoidable indeterminacy necessarily lies at the core of all legal experience. From Jeremy Bentham to John Rawls, a rich tradition of liberal political thought has emphasized the virtues of the rule of law for democratic politics. Some recent scholars instead prefer to highlight its purportedly privatistic and antiegalitarian elements. Roberto Unger goes so far, at least at one juncture, to endorse its dismantlement: since "the experience that supports the rule of law is one of antagonism among private wills," he suggests that a communal, solidaristic, political and social system very well might be able to do without it. If classical law depends on illegitimate forms of inequality, why not just discard the rule of law? A system of indwelling communal values, based on odd moralistic standards (such as "in good faith," "in the public interest") that have taken on ever greater significance in contemporary law, purportedly could make up the core of an alternative to it.[2] Why worry about a panoply of signs that suggest the ongoing decay of the rule of law?

The essays collected in this volume serve to introduce an alternative tradition of "critical legal studies" to an audience that has long been denied access to it. Franz L. Neumann (1900–1954) and Otto Kirchheimer (1905–1965)—the resident legal and political scholars of the pathbreaking and rightly famous neo-Marxist Institute for Social Research—were hardly oblivious to the ways in which liberal legal forms are implicated in the manifest inequalities and injustices of contemporary society.[3] Yet in dramatic contrast to much of contemporary radical American legal scholarship, the Frankfurt School theorists Neumann and Kirchheimer expressed substantial sympathy for a number of traditional components of the ideal of the rule of law. Unlike some currents within contemporary Critical Legal Studies, their analysis and critique of the rule of law ideal never succumbed to the temptations of a one-sided "deconstruction" of the modern legal tradition. Of course, the concerns of Neumann and Kirchheimer are oftentimes analytically and temporally distinct from contemporary Critical Legal Studies; we obviously cannot expect a decisive intellectual response to contemporary CLS from two intellectual offspring of Weimar Germany. By the same token, Neumann and Kirchheimer present an impressive challenge to the knee-jerk hostility to liberal legalism widespread in contemporary critical legal scholarship. Witnesses to the tragic destruction of the Weimar Republic and the rise of Nazism, Neumann and Kirchheimer argued early on that crucial components of the rule of law are threatened in the twentieth century by a series of unprecedented political and social transformations. In the most general terms, the transition from classical liberal parliamentarism to a form of bureaucratized mass democracy and the evolution of traditional competitive capitalism into a increasingly "organized capitalism" dependent on extensive state intervention threaten to undermine the rule of law by destroying many of its original institutional presuppositions. Whereas many contemporary radical legal scholars suggest that we should welcome this trend, Neumann and Kirchheimer powerfully argue that we very much need to acknowledge its ambivalent and in many ways truly worrisome implications.

Like their colleagues at the Institute for Social Research, Neumann and Kirchheimer were often obsessed with the significance of the Nazi experience for understanding contemporary legal development; they, too, at times undoubtedly overstated the centrality of fascism when formulating their dramatic views about the (alleged) ongoing disintegration of the rule of law. In some distinction to Max Horkheimer, Theodor Adorno, and Herbert Marcuse, however, the experience of fascism simultaneously cemented Neumann's and Kirchheimer's appreciation for a series of liberal legal and political institutions. The Frankfurt School's political and legal scholars thus ultimately proved able to integrate the traditional concerns of liberal legal and political theory into their theorizing in a manner that none of

their colleagues was able to rival. This also helps explain the real tensions that existed between Neumann and Kirchheimer and theorists such as Horkheimer and Adorno. Within the Institute for Social Research, Neumann and Kirchheimer were, unquestionably, "outsiders"; their nuanced interpretation of the achievements of the modern legal tradition conflicted with the increasingly apocalyptic theorizing of the Frankfurt School's main representatives during the late 1930s and early '40s. A real divide separates the careful, empirically minded—but nonetheless socially critical—essays collected in this volume from the brilliant but excessively one-sided view of Western modernity articulated, for example, in Horkheimer and Adorno's famous *Dialectic of Enlightenment*.[4]

Neumann and Kirchheimer also engaged in a life-long intellectual dialogue with Carl Schmitt, twentieth-century Germany's foremost right-wing authoritarian political and legal theorist (and an object of growing interest among scholars today).[5] In light of contemporary debates among jurists and political scientists, their intense exchange with Schmitt takes on renewed significance.[6] In Germany in the 1930s, it was Carl Schmitt who led a chorus of voices that was busily occupied with the task of demonstrating the alleged incoherence of liberal legal and political ideals. In contrast to contemporary theoretical constellations, representatives of the authoritarian right argued that liberal ideals of determinate law were a mere myth: "the sovereignty of law means only the sovereignty of men who draw up and administer law."[7] Fascist antilegalists proceeded to draw at least one possible conclusion from this position and began to emphasize the role of the sovereign, normatively unregulated *will* or *power decision* within law. For them, the emerging Nazi legal order was superior to its liberal democratic rivals in part because fascist Germany's heavy reliance on vague, open-ended *indeterminate* legal provisos alone allegedly gave full expression to the centrality of an arbitrary *willfulness* that was thought to constitute the unavoidable essence of all legal experience. In the 1930s, right-wing authoritarians insisted that liberal legalism's attempt to delineate between law and morality was incoherent; many of them helped make sure that the new legal order of the German "folk community" would build on amorphous, moralistic legal standards in order to subject it to reactionary, antipluralistic moral ideas.[8] Right-wing authors like Schmitt enthusiastically proclaimed the death of the basic tenets of universalistic liberal jurisprudence, and he and his allies then relied on this claim to help justify the situation-oriented, highly arbitrary structure of Nazi law.

The essays collected in this volume should encourage contemporary students of the rule of law to reconsider many of the political and intellectual divisions characteristic of contemporary debates within political and legal theory: an easy "deconstruction" of the rule of law may very well prove to have far more *indeterminate* political implications than many contemporary

scholars are willing to recognize. Neumann's and Kirchheimer's essays also demand that we try to answer a question that remains as crucial today as it was in the 1930s and '40s: if left unchecked, might not the apparent decay of some facets of the rule of law—now widely documented by a diverse group of scholars[9]—leave us with a troubling, highly discretionary system of law very much incompatible with democratic politics?

Although the world of the early Frankfurt School is undoubtedly very different from our own, we surely would do well not to make the mistake of naively assuming that the political catastrophes of the 1930s and '40s are unrelated to the fate of contemporary democracy.

THE DESTRUCTION OF WEIMAR DEMOCRACY AND THE DEBATE ON LEGALITY AND LEGITIMACY

Franz Neumann and Otto Kirchheimer reached intellectual maturity during the Weimar Republic's final, crisis-ridden years, and their Weimar-era experiences decisively shaped the structure of their intellectual interests. Both labor lawyers, activists in the Social Democratic Party, and prolific contributors to a wide variety of legal and political journals, Neumann and Kirchheimer spent much of their time during Weimar's final years doing battle with those trends that culminated in a process in which—as Neumann describes it in "The Decay of German Democracy" (1933)—"German democracy committed suicide and was murdered at one and the same time."[10] Written for the British journal *The Political Quarterly* immediately following the Nazi takeover, this early essay not only anticipates elements of the neo-Marxist account of German fascism provided by Neumann's classic *Behemoth: The Structure and Practice of National Socialism*,[11] but also offers a preliminary analysis of those features of Weimar's demise that he and Kirchheimer came to consider of more general significance for understanding legal and political processes in the twentieth century: the potential fragility of welfare state–type constitutional systems based on uneasy compromises among antagonistic social groups, growing evidence that privileged social blocs are increasingly hostile to traditional liberal democratic institutions, the decline of parliament whereby "the state is no more a liberal one but which interferes with nearly all aspects of human life,"[12] the growth of judicial discretion and its potential perils to democracy, and the blurring of any meaningful distinction between parliamentary law and administrative decree and the concomitant transformation of the bureaucratic apparatus into the central decision-making body of the contemporary state. The essays that appear in this volume deal with one or more aspects of these vital issues.

As Neumann notes in "The Decay of Weimar Democracy," the Weimar Constitution represented an unprecedented attempt to synthesize traditional liberal institutions with new forms of direct democracy, socialist conceptions of economic democracy, and ambitious programmatic constitutional rights and standards—some of which, like Article 162's announcement that "the federal government shall endeavour to secure international regulation of the legal status of workers to the end that the entire working class of the world may enjoy a universal minimum of social rights," possessed a distinctly radical character.[13] Undertaking their task in the immediate aftermath of the Soviet Revolution and then Germany's own revolution in 1918, the Constitution's architects—jurists and politicians like Hugo Preuss and Friedrich Naumann—believed that the special conditions of political and social existence in postrevolutionary Germany necessitated undertaking a series of legal innovations if the new republic were to gain a measure of stability. In order to do justice to the breathtaking ideological pluralism of postwar Germany, the Constitution seemed to abolish, as Neumann points out, any transcendental justification of government. In contrast to many previous democratic constitutions, it supplemented a first, rather traditional section that outlined basic organizational and formal decision-making procedures with a second, highly detailed section dedicated to an ambitious set of "basic rights and duties of the German people." Aiming to bring together Germany's heterogeneous social and political groups *and* simultaneously provide meaningful opportunities for substantial political and social evolution by means of constitutionally circumscribed paths, these "basic rights and duties" included provisions for classical liberal democratic rights as well as a rather diverse set of so-called material clauses: Article 119, for example, declared that marriage constituted "the foundation of family life" and hence should enjoy "special protections," Article 151 required that the economy should be organized in conformity with "the principles of justice," and Article 165 anticipated the possibility of restructuring economic production along democratic socialist lines.

Unsurprisingly, Weimar's constitutional agenda proved controversial in the explosive political and social atmosphere of Germany in the 1920s and '30s. Both left- and right-wing radicals belittled its idiosyncratic aspiration to codify a political and social order situated "between capitalism and socialism."[14] Even today, attempts to update traditional liberal constitutionalism by attributing special constitutional status to the welfare state and so-called *social rights* (to a job, health care, or a guaranteed income) remain the object of heated disputes among jurists and political scientists.[15] The Weimar Constitution clearly represents an early example of the ongoing and very much unfinished quest to fashion *posttraditional* constitutions—that is, constitutions combining traditional liberal democratic political mechanisms and rights with new forms of direct democracy and, typically, a constitutional acknowledgment of the emergence of the welfare state.[16] Consequently, the fate of the Weimar Constitution raises a

series of questions of great importance for the evolution of contemporary constitutionalism.

Otto Kirchheimer's "Legality and Legitimacy" (1932) and his "Remarks on Carl Schmitt's *Legality and Legitimacy*" (coauthored with Nathan Leites in 1933) provide an introduction to the fascinating debate that took place in response to the decay of constitutional government during Weimar's final years. Kirchheimer's essays offer a powerful corrective to first, misleading contemporary analyses of the legal roots of Weimar's demise, and second, apologetic interpretations of Carl Schmitt's political and legal theory.[17]

In *Economy and Society*, Max Weber famously argued that "rational legal authority" constitutes a characteristically modern answer to the problem of generating belief in the rightness of the political order. In a morally disenchanted world, the belief in enacted rules provides the most effective means for guaranteeing political obedience. The question of legitimacy in the contemporary world is a problem of legality; modern law guarantees its own legitimacy.[18] In "Legality and Legitimacy," Kirchheimer builds on Weber's claim in order to demonstrate that German legal and administrative practices in the early 1930s constitute a blatant surrender of Weber's rational legality—which Kirchheimer, in some contrast to Weber, interprets in a democratic fashion[19]—in favor of a premodern, morally substantial, and potentially authoritarian concept of *legitimacy*, not unlike that which Weber believed necessarily lacked an adequate normative grounding in modern times. In Kirchheimer's account, administrative elites in post-1930 Germany take advantage of some elements of the Weimar Constitution, especially the emergency clauses of Article 48, in order to establish a system of "supra-legality" that is dependent on suspect, premodern legal standards that allegedly possess eternal validity and indisputable rectitude. Traditional liberal guarantees of formal equality before the law are jettisoned, and bureaucratic elites undertake openly discriminatory action against those (chiefly left-wing) groups whose social and political views are interpreted as constituting a potential threat to the reactionary political agenda of the administrative elite and its allies among the socially privileged. In short, the Weimar Constitution is robbed of its flexible, open-ended character, and an executive-centered conception of rule by administrative decree—justified by reference to the plebiscitary personage of the federal president—results in the effective abandonment of political liberalism, which in Kirchheimer's account represents a practical organizational principle for modern, socially divided Germany.

Kirchheimer's "Legality and Legitimacy" never denies that deep divisions within the German Parliament after 1930 impaired the functioning of traditional parliamentary democracy. In contrast to many accounts of this period, however, he is reluctant to conclude the story there. As Hans Boldt has similarly argued, the Weimar executive after 1930 "did not try to find a

majority in Parliament at all, and the inability of Parliament to pass resolutions had been largely brought about by the government itself, which dissolved the *Reichstag* again and again."[20] Weimar's profound political and social splits contributed to the political system's ills. But a complete analysis of Weimar's demise also needs to focus on the conscious attempt by traditional elites within the governmental apparatus—in particular, in the judiciary and state bureaucracy—to destroy Germany's first experiment in democratic government. As Kirchheimer argues, they appealed to some components of the Weimar Constitution while distorting its underlying spirit; as we will see, this was precisely the strategy pursued by Carl Schmitt.

Kirchheimer's essay thus challenges a widely held interpretation of the sources of Weimar's ills. For decades, jurists have argued that Weimar's instability stemmed in part from the (alleged) pervasiveness of legal positivism among German jurists in the Weimar period. Because legal positivism insisted on a clear distinction between the spheres of morality and legality, its followers—so the argument goes—refused to concern themselves adequately with the moral character of the legal order. In turn, this rendered them impotent in the face of Nazism: unable to confront the moral ills of fascist legal and political trends, German jurists marched in line with fascist legal commands during the 1930s and '40s just as they allegedly had done during the democratic Weimar period.[21] As Kirchheimer argues here, however, administrative and judicial elites were happy to abandon formalistic characteristics of the Weimar constitutional agenda—for example, its emphasis on the need for equal treatment of different political groups—in favor of a concept of legitimacy based on a set of traditional, antipluralistic moral standards. Weimar did not collapse because its jurists were afraid to distinguish between "friends and foes," as Schmitt and his compatriots have argued, but because administrative and judicial actors hostile to democracy were all too willing to instrumentalize legal institutions in order to squelch their political opponents. Positivism was hardly an unchallenged, hegemonic theoretical orientation among German jurists during the early '30s. Instead, the belief that law should immediately serve nationalistic and belligerently bourgeois ends inspired many jurists and then led them to condone and ultimately embrace the rise of fascism.

Although "Legality and Legitimacy" emphasizes the role of Article 48 in Weimar's disintegration, Kirchheimer simultaneously hints in the essay that the amorphous material-legal standards of the second part of the Weimar Constitution might also provide a constitutional starting point for attempts within the administration and judiciary to undermine the lawmaking authority of the democratic Parliament. In Kirchheimer's analysis, such clauses permit political interests to appeal to open-ended constitutional standards (for example, Article 119's emphasis on the sanctity of the family) in juxtaposition to parliamentary legislation, and this accordingly might generate a

system of "dual legality" in which judicial and administrative decision makers are outfitted with special authority that the Constitution never intended them to possess.[22] Carl Schmitt's extremely influential *Legality and Legitimacy*, which appeared in 1932 shortly after Kirchheimer's essay, seizes upon this insight but radicalizes it in order to serve altogether different political purposes. Whereas Kirchheimer points to the potential dangers of such clauses in order to warn his fellow citizens of the spectre of authoritarianism, Schmitt focuses on them with the aim of demonstrating the inherent incoherence of the Weimar Constitution—and, by implication, *any* post-traditional democratic constitution that tries to undertake a synthesis of divergent political and social ideals.

In *Legality and Legitimacy*, Schmitt depreciatively dubs the provisions in the Weimar Constitution for parliamentary lawmaking "functionalistic" and "value-free."[23] By promising to provide an "equal chance" to every political party to make up a political majority, such procedures appear to presuppose some minimal standard of justice. According to Schmitt, however, mere equal chance remains an inadequate and ineffective normative standard. Especially in crisis situations, it is unlikely that governments will assure an equal chance to their opponents. At the same time, certain material components of the Constitution's second section on "basic rights and duties" point to the outlines of a political system based on an appeal to a substantial, value-laden concept of legitimacy. Precisely this feature of the Weimar Constitution had worried Kirchheimer; in Schmitt's alternative gloss, it offers a starting point for an improved "second constitution" and thus "deserves to be freed from all internal contradictions and bad compromises and developed in a consistent manner."[24] In other words, the multifaceted democratic Weimar constitutional order should be jettisoned for a new system based on *select* elements of "the basic duties and rights" described in the latter portion of the Weimar Constitution.

Which elements did Schmitt have in mind? For the most part, his answer to this question remains vague. Nonetheless, he clearly does not aspire to salvage the Weimar Constitution's liberal democratic core, let alone its provocative social democratic elements. Much of the central argument of *Legality and Legitimacy* is devoted to trying to demonstrate the anachronistic and incoherent character of (traditional, parliamentary-based lawmaking or) *legality* and the virtues of an alternative system of political *legitimacy*. In Schmitt's view, although parliamentarism and the rule of law matches the imperatives of an early bourgeois state/society constellation, an authoritarian plebiscitary system proves better suited to the tasks of government in an era requiring extensive state intervention in social and economic affairs. As he openly announces, "the administrative state which manifests itself in the praxis of 'measures'"—in other words, a system of case-oriented, situational law like that supposedly required by the complexities of the contemporary

interventionist state—"is more likely appropriate to a 'dictatorship' than the classical parliamentary state."[25] A plebiscitary dictatorship, based on an appeal either to charisma or "the authoritarian residues of a predemocratic era,"[26] accords more closely with contemporary political and social needs.

The existence of a value-laden constitutional basis for this alternative "second constitution" generates a series of immediate political difficulties for Weimar. How can a constitution be both formal and material, value-free and value-laden? Such underlying contradictions not only inevitably manifest themselves in a series of irrationalities that plague the decision-making procedures outlined in the Constitution, but a series of concrete, *empirical* dysfunctionalities result as well. Without risking a host of concrete problems, how could any constitutional order possibly institutionalize material protective clauses (for religion, for example, or marriage) that function to hinder the legislative regulation of some spheres of political existence while simultaneously endorsing a formalistic concept of parliamentary legality, according to which any conceivable political group should have an equal chance to gain majority status? For Schmitt, the fragility of Weimar democracy is preprogrammed into the Republic's own founding document.

Kirchheimer's "Remarks on Carl Schmitt's *Legality and Legitimacy*" offers an impressive critical discussion of Schmitt's most important work from the early 1930s. Here I can point only to its most provocative features.

Kirchheimer begins by criticizing both Schmitt's *normative* argument for the necessity of homogeneity in democracy and Schmitt's related *empirical* claim that democracy ultimately cannot survive without homogeneity. Relying on Hans Kelsen, Kirchheimer accomplishes this by resisting Schmitt's reductive interpretation of the ideal of democracy to the ideal of a far-reaching, substantial form of equality or "sameness." As Kirchheimer rightly points out, the struggle for democracy has always involved the attempt to realize *both* equality *and* autonomy. Only a democratic theory that acknowledges both principles can even begin to make sense of classical democratic decision-making devices such as majority rule; in contradistinction to Schmitt's attempt to ground majority rule in an illiberal interpretation of the concept of equality, Kirchheimer insists that majority rule has to be seen as aspiring to guarantee autonomy "for as many people as possible," that substantial empirical evidence suggests that heterogeneity is compatible with democratic stability, and that new sources of democratic stability, ignored by Schmitt's dramatic account of inevitable liberal democratic disintegration, may be emerging. Kirchheimer offers a tentative assessment of both the merits and demerits of an "instrumental" relationship to the political system that he considers increasingly widespread among political actors and movements in the twentieth century. But if heterogeneity is inevitable in contemporary democracy, this also implies the problematic character of Schmitt's insistence on the incoherent nature of any attempt to

synthesize formal democratic rule-making procedures with special material constitutional clauses. For Kirchheimer, the Weimar Constitution does not demand that we opt *either* for its (purportedly) value-free *or* value-laden elements. Instead, it represents a sensible attempt at a compromise between decision-making procedures whose neutral character is *unimpeded* and those whose neutrality is relatively *impeded*. There is no a priori reason why "compromises between the value of democratic forms and the value of definite objective values" necessarily imperil democracy. Furthermore, "heterogeneity always implies the necessity of protection" like that provided by material constitutional clauses. In some situations, special constitutional protective clauses in fact may *reduce* political friction and thus contribute to democratic stability. Particular groups (labor unions supportive of a constitution's endorsement of economic democracy, for example, or religious dignitaries attracted by its acknowledgment of religious freedom) thus may be brought into a positive relationship to democracy. In short, the overall story—readers interested in the ongoing debate about posttraditional constitutionalism will want to pay special attention to this section of the analysis—is more complicated than Schmitt suggests: according to Kirchheimer, the integrative character of material protective clauses depends on many different factors. *Contra* Schmitt, posttraditional constitutionalism is *not* inevitably destined for the trash can of political history.[27]

Whereas Schmitt devotes much of his energy in *Legality and Legitimacy* to an analysis of the alleged irrationalities of the democratic ideal of an "equal chance," Kirchheimer shows that existing democracy, even with all of its well-known flaws, does a far better job of realizing this principle than Schmitt admits or his *own* authoritarian alternative could possibly achieve. A reformed democracy—namely one restructured in accordance with the young Kirchheimer's brand of democratic socialism—could allegedly do even better. Notwithstanding his claims to the contrary, Schmitt's proposed plebiscitary replacement for Weimar cannot be considered democratic, in part because his call for the destruction of parliamentary democracy's organizational core would fail to guarantee a "necessary minimum of freedom and equality." Democracy clearly has to involve more than a system in which, as Kirchheimer comments elsewhere,

> the people can only say "yes" or "no," it cannot counsel, deliberate, or discuss. It cannot govern or administer, nor can it posit norms; it can only sanction by its "yes" the draft norms presented to it. Nor, above all, can it put a question, but only answer by "yes" or "no" a question put to it.[28]

The real aim of Schmitt's *Legality and Legitimacy* is not to "save" the Weimar Republic, but to rob Weimar of its most elementary democratic elements by relying on a limited portion of the Weimar Constitution.

LAW AND POLITICS IN THE AUTHORITARIAN STATE

Soon after the Nazi takeover, Franz Neumann and Otto Kirchheimer joined the ranks of thousands of refugees who sought—tragically, and so often without success—asylum abroad. Neumann was able to gain a scholarship and complete a second dissertation in political theory[29] at the London School of Economics before joining the Institute for Social Research in New York in 1936. Kirchheimer first fled to Paris, but was able to become an affiliate of the Institute and join Neumann in New York in 1937.

Unsurprisingly, Neumann and Kirchheimer devoted their talents during this period to an analysis of the legal origins and structure of the National Socialist regime. The horrors of Nazism energized both thinkers intellectually; their most creative contributions to political and legal analysis stem from their attempts to come to grips with German fascism and its concrete assault on the mainstream of modern political and legal thought. Neumann's "The Change in the Function of Law in Modern Society" (1937), which appeared in the Institute's *Zeitschrift für Sozialforschung*, represents the centerpiece of this project. Kirchheimer's "State Structure and Law in the Third Reich" (1935) and "Criminal Law in National Socialist Germany" (1940) elaborate on many of the themes developed in Neumann's classic essay.

For Neumann, the most striking facet of legal development in the West was the struggle for the codification of law. For centuries, political and legal thinkers had argued that law could only secure a set of protective functions if it were *general* and relatively *unambiguous* in character. Inspired by Max Weber's account of Western legal history, Neumann endorses this view: whereas open-ended legal clauses provide extensive room for discretionary and potentially arbitrary exercises of state authority, cogent general norms bind state actors and thus provide a measure of legal security. In contrast to amorphous legal forms, general law works to regulate and thereby tame the exercise of state sovereignty. Neumann acknowledges the claim that the distinction between general norms and (discretionary) particular measures is often overstated, and that "[t]hose legal theorists who accept as legitimate only those concepts that lend themselves to a logically unambiguous formulation . . . will also reject the distinction between general norms and particular measures."[30] Nonetheless, he believes that jurists should hesitate before throwing the baby out with the bath water. However idealized, the traditional emphasis on the clarity and generality of the legal norm remains essential to the ideal of the rule of law. In his view, mean attacks on it in the twentieth century—Neumann has Carl Schmitt and his complicity in the ills of Nazi law in mind—have helped generate an increasingly *decisionist* system of law based on arbitrary "individual power commands" effectively unregulated by a coherent set of legal norms.

Although "The Change in the Function of Law in Modern Society" attributes a number of distinct functions to general law in both modern jurisprudence and real-life legal history, the marxist structure of Neumann's argument encourages him to emphasize the economic roots of the rise and subsequent disintegration of general law. Indeed, many scholars have rightly criticized the economistic core of Neumann's account of how the transition from "competitive" to "monopoly" capitalism results in the inevitable decay of the centerpiece of the rule of law, the general legal norm.[31] It would be naive to think that his underlying argument is defensible in the form presented here; indeed, Neumann himself concedes this point in the subsequent "The Concept of Political Freedom." At the same time, it would be a mistake to ignore the creativity of Neumann's 1937 essay—or the fact that a substantial body of empirical evidence buttresses at least some of Neumann's anxieties about the present fragility of classical liberal law.[32]

Neumann builds on Weber's famous argument for the interdependence of general law and capitalism, but he undertakes a crucial revision of his liberal predecessor's view. For Neumann, Weber was right to see an "elective affinity" between general law and capitalism, yet he obscured the fact that this relationship only obtains for a relatively early stage of capitalist development, when capitalism is still characterized by relatively competitive markets and the existence of proprietors roughly equal in size.[33] In contemporary capitalism, this "elective affinity" no longer exists. In Neumann's own bluntly marxist formulation,

> [i]n a monopolistically organized system the general law cannot be supreme. If the state is confronted only by a monopoly, it is pointless to regulate this monopoly by general law. In such a case the individual measure is the only appropriate expression of the sovereign power.[34]

Thus general law is anachronistic in light of the necessity of regulating massive individual firms. Not only does Neumann thereby suggest, in opposition to Weber and much of contemporary liberal jurisprudence, that capitalism and the rule of law increasingly *contradict* one another, but he starts to provide a provocative response to Weber's account of so-called antiformal legal trends as well.

Like many analysts of modern law, Weber had worried about growing evidence that legal evolution in the twentieth century tends to conflict with the traditional insistence on the ideal of a gapless system of cogent, general norms. Although liberal jurists classically sought to drive ambiguous standards (*Generalklauseln*, or "general principles," in Neumann's terminology) from the legal order, blanket clauses ("in good faith," "unconscionable," "in the public interest") undergo a renaissance with the emergence of modern forms of state intervention in social and economic life. Weber's account of this trend placed primary responsibility for it on the doorsteps of the

political left. Allegedly, the real threat to classical legal forms came from "irrational" antimodern social movements intent on establishing a system of welfare state–type legislation dependent on profoundly complex forms of governmental action unlikely to take a classical legal form.[35] In contrast, Neumann's restatement of Weber allows him to shift the blame for this alarming trend to those social and political forces which, in his view, show a willingness to defend contemporary capitalism at any cost, even if it means surrendering liberal democracy. According to Neumann, substantial empirical evidence from Germany and elsewhere suggests that

> legal standards of conduct [blanket clauses] serve the monopolist. . . . Not only is rational law unnecessary for him, it is often a fetter upon the full development of his productive forces, or more frequently, upon the limitations that he may desire; rational law, after all, serves also to protect the weak.[36]

The fact that fascist Germany, in Neumann's view, was aggressively defensive of capitalist privilege *and* ruthlessly bent on obliterating the most minimal remnants of the liberal legal tradition simply reinforced his suspicions about the basically deleterious qualities of nonclassical law: not only did Nazi law rest on a set of profoundly open-ended, amorphous legal forms, but, as he noted, "the antagonisms of capitalism are operating in Germany on a higher and, therefore, a more dangerous level."[37] In the context of such evidence, it made sense for Neumann to conclude his analysis of contemporary legal development by valorizing general law's protective functions. With the fate of the rule of law very much undecided in 1937, "The Change in the Function of Law in Modern Society" defends the claim that the rule of law plays a role that goes well beyond its services to classical capitalism, for "if the sovereign is permitted to decree individual measures, to arrest this man or that one, to confiscate this or that piece of property,"[38] then legal security is irresistibly undermined, and even the most basic measure of freedom is threatened. Despite Neumann's reliance on a series of traditional marxist claims, the Frankfurt School jurist thus reaches a very non-marxian conclusion: the rule of law possesses a historically transcendent "ethical" function.

Kirchheimer's "State Structure and Law in the Third Reich" and "Criminal Law in National Socialist Germany" (which appeared in the *Zeitschrift für Sozialforschung* in 1940 but has never been reprinted in English) similarly make the transition from competitive to monopoly capitalism the starting point of an analysis of National Socialist legal development. Kirchheimer, however, applies this global thesis to a far broader range of specific legal spheres than Neumann was ever able to achieve. He also shows its relevance for an area of the law that was of great significance for understanding Nazi law but of little interest to Neumann—criminal law. Kirchheimer chronicles in great detail the manner in which the Nazis either abandon or transform

traditional liberal democratic legal institutions so that they no longer perform protective functions. In their quest to jettison "vacuous" formalistic democratic law for the "material justice" of the nationalistic *Volksgemeinschaft*, new and rather ominous possibilities for analogous legal reasoning are tolerated, traditional legal ideals ("where there is no law, there can be no crime") are simply tossed to the wayside, amorphous standards ("healthy popular sentiment") proliferate, and other traditional categories are expanded and redefined in a manner giving judges and administrators far-reaching discretionary powers. Whereas liberal criminal law traditionally had tried to make an ascertainment of visible features of an offence central to the criminal law, Nazi criminal lawyers downplay such relatively objective factors in the criminal trial in favor of an emphasis on the underlying "will" or "innate character" of the criminal; Kirchheimer's essays provide an excellent account of the development of these ideas within Nazi legal theory and practice. Perhaps most dramatically, Nazi law undergoes "the disappearance of a unified system of criminal law behind innumerable special competences (departmentalization)."[39] The growing indeterminacy of law not only blurs any meaningful distinction between administrative and judicial decision making, but the Nazis' surrender of the most minimal elements of a liberal universalistic perspective, positing the basic equality of all human beings, results in an unprecedented *particularism* within the institutional core of the legal order. New types of courts (*Sondergerichte* and *Volksgerichte*) and an array of novel administrative units (the SS, Nazi Party, Labor Service) compete with the traditional court system, and action undertaken within their confines is often exempted from the scrutiny of the traditional courts. This not only results in a curtailment of the traditional judiciary's authority, but it subjects the populace as a whole to unmediated forms of political and social power to an extent impossible in liberal democracy.[40]

Somewhat paradoxically, Neumann argues in "The Change in the Function of Law in Modern Society" that the ongoing renaissance of moralistic standards in contemporary law *undermines* modern law's "ethical function." In a morally disenchanted world "there can be no unanimity on whether a given action, in a concrete case, is immoral or unreasonable, or whether a certain punishment corresponds to or runs counter to 'healthy popular sentiment,'"[41] and hence vague standards of this sort represent nothing but a mask for arbitrary action. They may have possessed moral substance when natural–law-ideals remained defensible, but in contemporary society they inevitably have been robbed of such substance.[42] Kirchheimer appears to have something similar in mind when he unfavorably contrasts Nazism's fusion of morality and legality to liberalism's "restriction of law to an ethical minimum," but the conclusion of "Criminal Law in National Socialist Germany" appears to leave open the possibility that a future legal order might

be able to bring legality and morality into a more intimate relationship without necessarily succumbing to the manifest ills that result from a subjection of law to crude antimodern moral categories like that undertaken by the Nazis. In Nazism, "[t]he attempt of the legislator and of the judiciary to use the criminal law to raise the moral standards of the community appears, when measured by the results achieved, as *a premature excursion by fascism into a field reserved for a better form of society*" (emphasis added).[43] Here Kirchheimer may intend more than the modest "ethical function" described by Neumann. Reminiscent of the theorizing of many of his colleagues at the Institute for Social Research, Kirchheimer finds himself highlighting liberalism's positive qualities in the face of Nazi horrors. He still seems to hope that a future political and social order might be able to overcome one of the central components of modern liberal jurisprudence—the view that morality and legality need to be distinguished.[44] But Kirchheimer—again, like his colleagues at the Institute—is able to say little here about the precise form that this supersession of liberal jurisprudence might take.

The figure of Carl Schmitt continues to play a pivotal role in the writings of the Frankfurt School jurists from this period. For Neumann and Kirchheimer this is justified by the fact that increasingly the "legal theory and legal practice of bourgeois society are, as Carl Schmitt put it, *Situationsjurisprudenz*," according to which, "law is a mere technique for the conquest and maintenance of power."[45] In other words, trends in contemporary capitalist society that suggest the ongoing replacement of a norm-guided system of liberal law by a discretionary, situational legal system *correspond* to Carl Schmitt's theoretical endorsement of a system of arbitrary law based on the exigencies of the "exception" and "individual situation." Because Schmitt's theory thus captures real and quite worrisome tendencies in contemporary law, the political battle against the decline of the rule of law simultaneously needs to take the form of an intellectual assault on Carl Schmitt's political and legal theory.

Nothing better demonstrates this facet of Neumann's and Kirchheimer's agenda than the origins of "State Structure and Law in the Third Reich," which here appears for the first time in English. Smuggled into Germany in 1935 in the form of a pamphlet written under the pseudonym of Hermann Seitz, the essay seems to have had two central purposes. Kirchheimer hoped to awaken interest among the German people in the barbarities of the emerging Nazi legal order (thus the essay's sarcastic and polemical style) *and* bring an awareness of these ills to criminologists, like those attending the Eleventh International Penal and Prison Congress in Berlin in 1935. The pamphlet served a further purpose as well. As "Leader" of the Nazi law professors' guild and State Councillor for Prussia, Carl Schmitt belonged to the

most influential circles of Nazi jurists during this period, and Kirchheimer's brochure was cleverly structured so as to embarrass Schmitt; its format suggested that it was volume twelve in a Nazi-inspired series on "the new contemporary German state" that Schmitt was editor of, and its title was more than slightly similar to a study by Schmitt that had recently appeared in the same series.[46] Unsurprisingly, Schmitt responded in kind. The *Deutsche Juristen Zeitung*, which Schmitt edited, immediately published in its pages a nasty response in which Kirchheimer was accused of belonging to an "international clique" obsessed with misrepresenting Nazism's unambiguously peaceful intentions.[47]

TOWARD A CRITICAL DEMOCRATIC THEORY

The postwar writings of Franz Neumann and Otto Kirchheimer reveal a degree of theoretical and political sobriety that some of their earlier contributions lacked. The horrors of Nazism undeniably had provided an immediate incentive even for the marxist-oriented Neumann and Kirchheimer to reconsider the status of key liberal legal and political categories. In the aftermath of the defeat of Nazism, Neumann and Kirchheimer *systematically* integrate the concerns of political liberalism into their increasingly eclectic political and legal theorizing. Commentators have rightly associated Neumann and Kirchheimer with a rich tradition (which commenced with Lukacs's classic *History and Class Consciousness*) that attempted syntheses of Marx and Weber. One qualification of this categorization is probably in order here: Neumann's and Kirchheimer's pre-1950 writings surely tend toward the marxist end of this spectrum, whereas their subsequent contributions suggest at least a gradual movement toward its Weberian side. However one chooses to evaluate the migration of their theory from the world of Frankfurt School neo-Marxism to somewhere "between Marxism and liberal democracy,"[48] there is no doubt that the postwar writings of Neumann and Kirchheimer continue to pose questions of surprising relevance for contemporary intellectual and political disputes.

Not only do the Frankfurt School jurists distance themselves from some features of classical Marxism but they also offer a more modest assessment of the tasks of the rule of law in modern democratic societies. Although remaining adamant defenders of the ideal of the rule of law, they now seem to doubt that it alone is capable of preserving the relatively extensive degree of freedom that many classical liberal jurists believed possible. Yet in contrast to those who seize upon the limits of the rule of law in order to belittle its achievements, the Frankfurt School writers instead focus their efforts in many of their writings from this period on the problem of *supplementing* an analysis of the rule of law with an adequate understanding of the workings of democratic politics.[49] This, they seem to believe, might allow us to begin to compensate for some of the limitations inherent in legal protections in contemporary society.

Neumann's 1953 "The Concept of Political Freedom," which can be read as a democratic antipode to Carl Schmitt's protofascistic *The Concept of the Political*,[50] is crucial for grasping the intellectual contours of this intellectual sea change. Although his previous writings had pointed to the outlines of the problem, Neumann now openly concedes that the traditional demand for cogent, general legal rules necessarily has limited applicability in the contemporary world, where there is a clear necessity for substantial state activity in social and economic affairs. In contrast to free-market critics of totalitarianism like Friedrich Hayek, Neumann does not believe that a return to laissez-faire capitalism constitutes a reasonable response to Nazism and its legal ills;[51] in contemporary organized capitalism, Neumann argues, free-market thinking constitutes nothing but an ideological mask for the most powerful, entrenched economic interests. At the same time, Neumann is forced to admit that increased state intervention raises difficult questions for defenders of the rule of law: as democracy is forced to regulate "power concentrations" in the interest of the public good, the rule of law is inevitably replaced "by clandestine individual measures." Complex state activity requires equally complex forms of nontraditional law. Monopoly capitalism may still lie at the root of the problem, but there is no guarantee that democratic socialism can automatically resolve the basic dilemma at hand—even if, as Neumann writes in "Labor Law in Modern Society," "socialization solves many problems."[52] Neumann then tries to skirt the potentially dreary implications of this concession by insisting that legal freedom should be seen as constituting only one part of a broader set of elements that go into the makeup of political freedom. Even if legal security is irresistibly undermined to some extent in contemporary society, democracy can still hope to realize "cognitive freedom," which in Neumann's view helps provide us with intellectual mastery over natural and historical processes as well as "volitional freedom," which allows active participation in the decision-making process. *Legal rationality* may have to remain incomplete in modern society, but a broader democratic system that strives for a *rational system of self-government* may be able to compensate for some of the ills stemming from this loss.

At the analytical level, Neumann thus clearly believes that the deepening of democracy can help make up for a decline in legal security. But he remains unsure about the actual institutional structure that democratic reforms should take. As a result, Neumann's "The Concept of Political Freedom" leaves the reader with a series of questions that remain unanswered even today. The most important of these is: can we be so sure that new

forms of interest-based corporatist representation, like those that have become widespread in the welfare state, contribute to the responsiveness and openness of the democratic process? As Neumann points out, such reforms often have resulted in situations where governmental bodies have simply been captured by narrow interest groups. At other times they have robbed political movements of their independence and helped transform them into little more than stultified bureaucratic structures. Neumann had earlier argued that the Weimar labor movement had succumbed to this fate. What protections are there against such dangers today? Further, the institutionalization of social rights does not provide an easy answer to the enigmas of contemporary democracy. Neumann does not share Schmitt's suggestion in *Legality and Legitimacy* that such rights inevitably undermine liberal democracy; at the same time, he is more skeptical about demands for legally based social rights than either he or Kirchheimer had been in some of their Weimar-era essays. Neumann now openly concedes that "it is extremely doubtful whether it is wise to designate as civil rights positive demands upon the state." Such demands risk overburdening governmental authorities, and they serve only social utility and thus do not constitute "the very essence of a democratic political system." In the process, their institutionalization inadvertently might lead to a degradation of classical civil liberties, which government is more likely to be able to protect effectively. Too often their defenders ignore such potential perils.[53] At some junctures "The Concept of Political Freedom" seems to endorse a traditional model of parliamentary democracy in which a conventional bureaucratic apparatus would be responsible to elected legislators outfitted with the task of overseeing administrative activities. But Neumann hesitates before openly endorsing a model along these lines: he is well aware of the fact that legislative authority has disintegrated substantially in many contemporary liberal democracies, and he seems to believe that the possibilities for reversing them often appear quite limited.

Although concerned with a distinct set of issues of immediate concern, Kirchheimer's "The *Rechtsstaat* as Magic Wall" echoes many of the basic themes of Neumann's final essays from the early 1950s. Kirchheimer is reluctant to concede that complex welfare state–type regulatory activities inevitably necessitate the demise of the rule of law. He writes that "it is not intelligible why social security rules cannot be as carefully framed, and the community burdens as well calculated, as rules concerning damage claims,"[54] and he struggles to offer a response to free-market critics of welfare state law like Friedrich Hayek and Bruno Leoni.[55] Readers should pay special attention to this facet of Kirchheimer's essay: in 1966, such free-market arguments appeared to Kirchheimer to be little more than "rearguard skirmishes," but in recent years they have gained a substantial number of followers. Kirchheimer worries that the mere availability of possibilities for legal redress cannot alone guarantee a humane political order; in Neumann's terms, guarantees of legal security fail to exhaust the agenda of political freedom. To make his point, Kirchheimer recounts the sad story of postwar Germany's failure to prosecute Nazi war criminals. Despite a universe of juridical and bureaucratic remedies available for the prosecution of former Nazis, legal action was undertaken against them only on occasion, and judicial, administrative, and elected officials were far too ready simply to ignore the fact that legal remedies were rarely exploited. For Kirchheimer, "this whole episode shows that the *Rechtsstaat* concept can be honored by scrupulous observation of all prescribed forms and proceedings while its spirit is constantly violated."[56] Although "The *Rechtsstaat* as Magic Wall" says little about how we might successfully overcome this problem, Kirchheimer clearly believes that political freedom in contemporary society rightfully consists of more than the existence of a potpourri of possibilities for legal appeal or even a mass of judges and administrators given the job of looking after them. Elsewhere, he at least hints at an answer to this question that is not altogether unlike Neumann's: political apathy stems from a "missing link between high-level decision and individual fate."[57] Moreover,

> while the technical and, though to a somewhat smaller degree, the social forms of human existence in the West have undergone immense changes in the last half-century, our political arsenal has been refurbished mainly with new dimensions and techniques of domination and manipulation rather than with—what is admittedly more difficult—new means of participation. . . . Political innovations that could remedy this imbalance have been rare everywhere.[58]

An adequate response to the limited nature of legal security in our epoch seems to require an expansion of democratic politics and new possibilities for participation and political self-education. The nature of the institutional innovations required in order to bring about this change, however, remain murky.

Like so many others addressed by Neumann and Kirchheimer, this problem remains surprisingly contemporary. Of course, Neumann and Kirchheimer fail to provide a complete answer to it—or to many of a host of related questions posed by their work. Yet they formulate many of the most important questions within contemporary political and legal thought with refreshing clarity. Ultimately, it is this feature of their work that makes it so relevant even today.

NOTES

1. Mark Kelman, *A Guide to Critical Legal Studies* (Cambridge: Harvard University Press, 1987), pp. 59–61, 258.
2. Roberto M. Unger, *Law in Modern Society* (New York: Free Press, 1976), pp.

221–222, 238–242; also, Duncan Kennedy, "Legal Formality," *The Journal of Legal Studies* 2 (June 1973): 351–398. Critical Legal Studies is a diverse and provocative movement; I only can raise tentative questions about *some* of its argumentative strategies here. For a sympathetic, well-grounded criticism of CLS see Andrew Altman, *Critical Legal Studies: A Liberal Critique* (Princeton: Princeton University Press, 1990).

3. There is a growing literature, especially in German, on Neumann and Kirchheimer. See Alfons Söllner, *Franz Neumann zur Einführung* (Hannover: SOAK, 1982); Alfons Söllner, *Geschichte und Herrschaft* (Frankfurt: Suhrkamp, 1979); Joachim Perels, ed., *Recht, Demokratie, und Kapitalismus. Aktualität und Probleme der Theorie Franz L. Neumanns* (Baden-Baden: Nomos, 1984); Rainer Erd, ed., *Resignation und Reform, Gespräche über Franz L. Neumann* (Frankfurt: Suhrkamp, 1985). In English see William E. Scheuerman *Between the Norm and the Exception: The Frankfurt School and the Rule of Law* (Cambridge: MIT Press, 1994); H. Stuart Hughes, "Franz Neumann: Between Marxism and Liberal Democracy," in *The Intellectual Migration: Europe and America, 1930–1960*, ed. Donald Fleming and Bernard Bailyn (Cambridge: Harvard University Press, 1969). Jürgen Habermas's recent contributions to legal theory parallel at least some of the themes of his predecessors at the Institute for Social Research. See Habermas, *Between Facts and Norms: A Democratic Theory of the Rule of Law* (Cambridge: MIT Press, 1996). For a discussion of the relationship between Neumann and Habermas, my "Neumann v. Habermas: The Frankfurt School and the Rule of Law," *Praxis International* 13 (1993): 50-67.

4. For discussions of the role of Neumann and Kirchheimer in Frankfurt critical theory see Martin Jay, *The Dialectical Imagination* (Boston: Little, Brown & Co., 1973), esp. ch. 5; Rolf Wiggershaus, *The Frankfurt School: Its History, Theories, and Political Significance* (Cambridge: MIT Press, 1994), esp. ch. 4; William E. Scheuerman, *Between the Norm and the Exception: The Frankfurt School and the Rule of Law* (Cambridge: MIT Press, 1994), pp. 149–164.

5. Joseph Bendersky, *Carl Schmitt: Theorist for the Reich* (Princeton: Princeton University Press, 1983); George Schwab, *The Challenge of the Exception: An Introduction to the Ideas of Carl Schmitt* (New York: Greenwood, 1989). In a series of thoughtful essays, Richard Wolin has criticized much of the ongoing Schmitt renaissance in North America: "Carl Schmitt—The Conservative Revolutionary: Habitus and Aesthetics of Horror," *Political Theory* 20, no. 3 (1992): 424–447, and "Carl Schmitt, Political Existentialism, and the Total State," *Theory and Society* 19, no. 4 (1990): 389–416. I should add that scholarship on Schmitt (and Weimar political thought in general) has improved dramatically in recent years: scholars like David Dyzenhaus, Renato Cristi, Paul Caldwell, Stanley L. Paulson, and John McCormick are in the process of revolutionizing our understanding of Weimar political and legal thought.

6. Schmitt was Kirchheimer's doctoral dissertation advisor, and many of Kirchheimer's earliest essays clearly were influenced by Schmitt. Neumann's early work was also influenced, although far more modestly, by Schmitt. See Scheuerman, *Between the Norm and the Exception*, pp. 13–63; and, as well, the essays by Ellen Kennedy, Martin Jay, Ulrich Preuß, and Alfons Söllner in *Telos*, no. 71 (Spring 1987).

7. Carl Schmitt, *The Concept of the Political*, trans. George Schwab (New Brunswick, N.J.: Rutgers, 1976), p. 67.

8. Martin Jay has suggested to me that it was *more* the belief in an unregulated, irrational sovereign *will* that constituted the core of fascist law than the *indeterminacy* of law per se. Jay's point is well taken. But Schmitt and many fascist legal scholars saw these two facets of fascist law as *inextricably* linked: in their view, vague legal standards permitted the greatest possible leeway for acts of unregulated, irrational sovereignty. In contrast, determinate liberal law shackled the sovereign will in a manner incompatible with the unlimited "power decisions" romanticized by fascist thought. The key text here is Carl Schmitt, *Über die drei Arten des rechtswissenschaftlichen Denkens* (Hamburg: Hanseatische Verlagsanstalt, 1934), where Schmitt argues for a revalorization of amorphous legal stands (for example, "good faith") in order to help bring about thorough Nazi domination of the legal system. Schmitt also authored innumerable short polemical pieces during this period. Especially revealing are "Nationalsozialismus und Rechtsstaat," *Juristische Wochenschrift* 63, nos. 12–13 (March 24/31, 1934), and "Nationalsozialistisches Rechtsdenken," *Deutsches Recht* 4, no. 10 (May 25, 1934). There is a massive literature in German on Schmitt's relationship to Nazi law. A helpful introduction is provided by Bernd Rüthers, *Entartes Recht, Rechtslehren und Kronjuristen im Dritten Reich* (Munich: C. H. Beck, 1988).

9. For an argument along these lines inspired by Neumann and Kirchheimer see Ingeborg Maus, *Rechtstheorie und politische Theorie im Industriekapitalismus* (Munich: Wilhelm Fink, 1986). On the alleged disintegration of classical law in the United States see Theodore Lowi, *The End of Liberalism* (New York: Norton, 1979). For the free-market liberal view of these trends see Friedrich Hayek, *Law, Liberty, and Legislation*, vols. 1–3 (London: Routledge & Kegan, 1976).

10. This volume, p. 41.

11. Franz L. Neumann, *Behemoth: The Structure and Practice of National Socialism* (New York: Harper & Row, 1944).

12. This volume, p. 41.

13. I am following the translation provided in Howard L. McBain and Lindsay Rogers, *The New Constitutions of Europe* (New York: Doubleday, 1923). At times I have altered it when I felt that this was necessary. On the Weimar Constitution see Hermann Potthoff, "Das Weimarer Verfassungswerk und die deutsche Linke," *Archiv für Sozialgeschichte* 12 (1972).

14. Otto Kirchheimer originally belonged to this group of critics. See "Weimar—and What Then?" in *Politics, Law, and Social Change: Selected Essays of Otto Kirchheimer*, ed. Frederic S. Burin and Kurt Shell (New York: Columbia University Press, 1969), pp. 33–74.

15. For an overview of the recent German debate on these issues see Bernd Guggenberger and Tine Stein, ed., *Die Verfassungsdiskussion im Jahre der deutschen Einheit* (Munich: Carl Hanser Verlag, 1991).

16. See S. L. Elkin and K. E. Soltan, eds., *A New Constitutionalism: Designing Political Institutions for a Good Society* (Chicago: University of Chicago, 1993); Ulrich K. Preuß, ed., *Zum Begriff der Verfassung* (Frankfurt: Fischer, 1994).

17. These essays have also been very influential in left-wing jurisprudence in the Federal Republic of Germany. Ulrich Preuß, for example, relied on Kirchheimer's account here in order to provide a critical analysis of the practices of the German Constitutional Court. Ulrich Preuß, *Legalität und Pluralismus. Beiträge zum Verfassungsrecht der Bundesrepublik Deutschland* (Frankfurt: Suhrkamp, 1973).

18. At times, Weber gave his famous account of the three basic types of legitimacy—traditional charismatic, and legal-rational—an evolutionary gloss: legal rationality was seen as constituting the most advanced form of legitimacy. Kirchheimer builds upon this evolutionary strand in Weber's thought in order to discredit tradition and charisma-based appeals to legitimacy in Weimar's final years. Max Weber, *Economy and Society* (Berkeley: University of California, 1979), pp. 212–299.

19. Kirchheimer notes that the concept of legality emerged out of a "rationalization" of the right to resistance. Because he emphasizes the democratic features of rational legal authority, Kirchheimer seems to believe that his reliance on this aspect of Weber's theory does not require him to subscribe to Weber's own rather problematic brand of value-relativism. This becomes even more clear in "Remarks on Carl Schmitt's *Legality and Legitimacy*," where Kirchheimer provides a normative justification for democracy and also argues that both parliamentary and direct-democratic, plebiscitary forms of decision making represent forms of *democratic legitimacy*. This is a crucial point: Schmitt and his defenders have repeatedly claimed that arguments like those developed by Kirchheimer here were morally nihilistic and thus incapable of proving a normative justification for democracy. To a great extent, this is a myth. The Frankfurt political theorist, Ingeborg Maus, has demonstrated this quite effectively: see Ingeborg Maus, *Bürgerliche Rechtstheorie und Faschismus. Zur sozialen Funktion und aktuellen Wirkung der Theorie Carl Schmitts* (Munich: Wilhelm Funk, 1980); Ingeborg Maus, "'Gesetzbindung' der Justiz und der Struktur der nationalsozialistischen Rechtsnormen," in *Recht und Justiz im 'Dritten Reich'*, ed. Ralf Dreier and Wolfgang Sellert (Frankfurt: Suhrkamp, 1989).

20. Hans Boldt, "Article 48 of the Weimar Constitution, Its Historical and Political Implications," in *German Democracy and the Triumph of Hitler*, ed. Anthony Nicholls and Erich Matthias (London: George Allen & Unwin, 1971), p. 93. For an excellent survey of Weimar's demise and the debate on it see Gotthard Jasper, *Die gescheiterte Zähmung. Wege zur Machtergreifung Hitlers, 1930–1934* (Frankfurt: Suhrkamp, 1986).

21. For a fine critical discussion of this argument see Manfred Walther, "Hat der juristische Positivismus die deutschen Juristen im 'Dritten Reich' wehrlos gemacht?" in *Recht und Justiz im 'Dritten Reich,'* ed. Ralf Dreier and Wolfgang Sellert. For a short, popular account of this debate see Ingo Müller, *Hitler's Justice: The Courts of the Third Reich* (Cambridge: Harvard University Press, 1991).

22. It is important to point out that the Weimar Constitution provides no place for a constitutional court outfitted with the authority to determine the constitutionality of parliamentary law. Weimar progressives like Neumann and Kirchheimer were skeptical of attempts to develop such a court in Weimar Germany because they feared, not unjustly, that it would serve as an additional political instrument for antidemocratic elites in the judiciary.

23. Schmitt places these procedures under the rubric of parliamentary *legality*.

24. Carl Schmitt, *Legalität und Legitimität* (Munich: Duncker & Humblot, 1932), pp. 41, 98.

25. Schmitt, *Legalität und Legitimität*, p. 87.

26. Schmitt, *Legalität und Legitimität*, p. 94.

27. But this should *not* suggest that either Kirchheimer or Neumann had an altogether uncritical attitude toward the emergence of new constitutionally based social rights. As we will see, their postwar writings offer a refreshingly sober assessment of social rights.

28. Schmitt, cited in Otto Kirchheimer, "Constitutional Reaction in 1932," in his *Politics, Law, and Social Change*, p. 78.

29. Written under the guidance of Harold Laski and Karl Mannheim, it has recently appeared under the title *The Rule of Law: Political Theory and the Legal System in Modern Society* (Leamington Spa: Berg, 1986).

30. This volume, p. 106.

31. See Matthias Ruete's foreword, "Post-Weimar Legal Theory in Exile," to Neumann, *The Rule of Law*. The limitations of Neumann's Marxism are most evident in his *Behemoth*. However powerful in other respects, Neumann's marxist analysis of German fascism leaves little room for an analysis of Nazism as a mass-based popular movement, or for an account of Nazi antisemitism that adequately acknowledges its central role. For Neumann, Nazism is primarily a *counterrevolutionary* movement in the interests of German monopoly capital and directed against the German working class; this basic position never seems to permit him to grasp the relatively autonomous dynamics of Nazi anti-Semitism. For a discussion of this issue see Martin Jay, "The Jews and the Frankfurt School: Critical Theory's Analysis of Anti-Semitism," in his *Permanent Exiles: Essays on the Intellectual Migration from Germany to America* (New York: Columbia University Press, 1986).

32. Maus, *Rechtstheorie und politische Theorie im Industriekapitalismus*; Lowi, *End of Liberalism*; Dieter Grimm, *Die Zukunft der Verfassung* (Frankfurt: Suhrkamp, 1991), pp. 159–175.

33. For example, a law setting the length of the working day at ten hours for some firms and eight hours for others contradicts the principle of the equality of competitors essential to classical capitalism.

34. This volume, p. 126.

35. Weber, *Economy and Society*, pp. 880–895. Radical jurists today often try to adduce evidence for the purportedly indeterminate character of the rule of law by focusing on such open-ended legal clauses. Stanley Fish, for example, focuses on the clause "usage of trade" in order to attack liberal legal ideas; see Stanley Fish, *There's No Such Thing As Free Speech and It's a Good Thing, Too* (New York: Oxford University, 1994), pp. 148–151, 169. But Weber's argument here already suggests why this is at least somewhat misleading: liberals themselves were very concerned about such standards, and they long fought to minimize their role in the legal order. To take them as *prima facie* evidence for the incoherence of the ideal of the rule of law obscures how its defenders (including Montesquieu, Locke, Beccaria, Rousseau, Kant, Hegel, and Bentham) emphasized the necessity of *codifying* the legal order in as clear and concise a manner as possible.

36. Neumann, *Behemoth*, pp. 446–447.

37. Neumann, *Behemoth*, p. 227.

38. This volume, p. 118.

39. This volume, pp. 178–179.

40. Much of this account of Nazi law has inspired subsequent scholarship in Germany. See Dreier and Sellert, *Recht und Justiz im 'Dritten Reich'*; Hubert Rottleuthner, ed., *Recht, Rechtsphilosophie und Nationalsozialismus* (Wiesbaden: Franz Steiner, 1983);

Ernst-Wolfgang Böckenförde, ed., *Staatsrecht und Staatsrechtslehre im Dritten Reich* (Heidelberg: C. F. Müller Juristischer Verlag, 1983); Bernard Diestelkamp and Michael Stolleis, eds. *Justizalltag im Dritten Reich* (Frankfurt: Fischer, 1988). The English-language literature on Nazi law remains paltry, but Ernst Fraenkel's classic study remains reliable: *The Dual State* (Chicago: University of Chicago, 1941).

41. This volume, p. 107.

42. Franz Neumann, "Natural Law," in Franz Neumann, *The Democratic and Authoritarian State* (New York: The Free Press, 1957).

43. This volume, p. 186.

44. Recall Adorno's rather defensive portrayal of the artistic achievements of classic modernity, as well as the reservations expressed in his famous quarrel with Walter Benjamin about a politicization of aesthetic experience.

In contemporary jurisprudence, Ronald Dworkin has argued that the border between the spheres of legality and morality needs to be made much more permeable than traditional liberalism permits. Dworkin, in turn, is building on the arguments of natural law theorists like Lon Fuller who attacked legal positivists (including Dworkin's own favorite target, H. L. Hart) in the '50s and '60s. In these debates, differing interpretations of the Nazi legal experience played a crucial role. Antipositivists like Fuller tried to make positivism complicit in the Nazi disaster; unsurprisingly, positivists disputed this view. For an excellent recent account of the origins of this debate see Stanley L. Paulson, "Lon L. Fuller, Gustav Radbruch, and the 'Positivist' Theses," *Law and Philosophy* 13 (1994): 313–334.

45. Neumann, *The Rule of Law*, p. 6. Neumann's concerns here about Schmitt's radically decisionistic conception of law—that is, the idea that law at its base is nothing but an expression of arbitrary power—are again quite relevant in light of recent debates within political and legal theory. In a provocative recent essay, Stanley Fish has gone so far as to criticize contemporary Critical Legal Studies for its inadequately radical intellectual aspirations. Fish believes that CLS authors are right to focus on the unavoidable indeterminacy of all legal experience. In his view, however, too many CLS authors implicitly accept liberal legal ideals by seeing law's ad hoc character as constituting a failing or weakness. For Fish, law's willful or ad hoc core is not to be lamented or regretted. Rather, it should be seen as essential to the workings of law and, it seems, something that we might even celebrate. In demanding that we valorize law's (alleged) roots in pure acts of will, Fish's position at times becomes disturbingly reminiscent of Schmitt's decisionism. Of course, Fish offers no discussion of the potential dangers of this type of position in his analysis: he seems uninterested in anything as mundane as the history of fascist law or, for that matter, the ongoing disintegration of formal law and the possible threats it poses for the weak and socially oppressed. Fish, *There's No Such Thing as Free Speech*, pp. 141–179. Fish's valorization of law's inherently arbitrary, willful nature is increasingly common among authors influenced by French poststructuralism. For a powerful analysis of these trends see Seyla Benhabib, "Democracy and Difference: Reflections on the Metapolitics of Lyotard and Derrida," *The Journal of Political Philosophy* 2, no. 1 (1994): 1–23.

46. Carl Schmitt, *Staatsgefüge und Zusammenbruch des zweiten Reiches* (Hamburg: Hanseatische Verlagsanstalt, 1934).

47. *Deutsche Juristen-Zeitung* 40 (September 15, 1935): 1104. For a full account of this moment in the history of the early Frankfurt School see Wolfgang Luthardt, "Einleitung zu Otto Kirchheimer, *Staatsgefüge und Recht des Dritten Reichs*," *Kritische Justiz* 9 (1976).

48. Hughes, "Franz Neumann."

49. For Otto Kirchheimer this task is primarily empirical. Much of his postwar writing is devoted to an analysis of the roots of a purported "decline of political opposition"—in other words, a free-wheeling public space—in welfare state capitalist democracies. Many of these essays have been collected in Kirchheimer, *Politics, Law, and Social Change*.

50. This becomes most clear in the essay's concluding paragraphs, where the "integrative" element of fascism is identified with "the existence of an enemy whom one must be willing to exterminate physically." This integrative element is contrasted with democracy's political freedom, which is the object of Neumann's piece.

51. Friedrich Hayek, *The Road to Serfdom* (Chicago: University of Chicago, 1944). I should add that Hayek borrows from Schmitt both in this text and in many others. See my "The Unholy Alliance of Carl Schmitt and Friedrich Hayek," *Constellations: An International Journal of Critical and Democratic Theory* 3 (1996), as well as Renato Cristi's extremely thoughtful "Hayek and Schmitt on the Rule of Law," *Canadian Journal of Political Science* 17, no. 3 (1984): 521–536.

52. This volume, p. 232.

53. Neumann's postwar critique of social rights probably focuses less on limits posed to their institutionalization by specifically *economic* factors (for example, the possibility that a "right to work" may be unachievable in a capitalist market economy) than on *their direct dangers to legal security itself*: an inflationary view of civil liberties may lead us to obscure vital differences between rights that can be effectively protected by traditional judicial devices and those which cannot. For a critical discussion of the "right to work" from a political perspective not unlike the elder Neumann's see Jon Elster, "Is There (or Should There Be) a Right to Work," in *Democracy and the Welfare State*, ed. Amy Gutmann (Princeton: Princeton University, 1988).

54. This volume, p. 247.

55. Hayek, *Law, Legislation, and Liberty*, and *The Road to Serfdom*.

56. This volume, p. 254.

57. Otto Kirchheimer, "Private Man and Society," in *Politics, Law, and Social Change*, p. 462.

58. Otto Kirchheimer, "Germany Democracy in the 1950s," in *World Politics* 13 (1961): 265.

TWO

Legality and Legitimacy

Otto Kirchheimer

I

Every social system possesses a need for a certain legitimization and strives, as Max Weber expressed it in *Economy and Society*, to transform itself from a set of factual relations of power into a cosmos of acquired rights. The immanent yearning of every social order for legal stabilization is not the topic of this essay, for the social order's need for legitimization and the operating legal order do not contradict one another; on the contrary, the legitimation of the given system of social power is achieved through the forms of the existing legal order. It belongs precisely to the essence of a legal order that has become rational—and is no longer feudal or bound to tradition—that it provides opponents of the existing social system with a certain opportunity of at least formally equal treatment by the law, so that existing law is applied without regard to individual persons in a nondiscriminatory manner. In order to guarantee this opportunity, the separation of the legislative and executive authorities—as it was more or less completely implemented throughout Europe in the nineteenth century—is a necessary precondition. At the juncture when this division is nullified for a period of time having an indeterminate duration, as is now the case in Germany, this opportunity for formal equality vanishes. As the government—which now fuses legislative and executive authority—attempts to obtain for itself a legitimization transcending the formal consensus of Parliament, it does so by trying to make up for its loss of an indubitable legal basis by strengthening its ties to the people as a whole. In order to achieve this, it invokes its own authority and, in particular, that of the federal president; in its goals and basic orientation this authority is then taken to be binding on all segments of the people. Such a demand for authority based on a principle of legitimacy was

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already formulated at the beginning of the last century as absolutism reacted to the revolutionary bourgeoisie. An anonymous French journalist, writing in 1814 in the period of the Congress of Vienna, gave expression to the distinct characteristics of this principle even better than Talleyrand was able to do: "A lucky general who by chance controls an army is not for that reason—even with the best possible conduct—a real power, while a legitimate king remains a power to be reckoned with even if he is in exile or in shackles."[1] Having sacred origins beyond the pale of discussion, this form of power possesses an eternal legal character. But since the monarchical principle of legitimacy made way for parliamentary monarchy, legitimacy has been transformed into a mere symbol for the national and social order represented by parliamentary government.

Today, however, the rule of a new form of legitimate power is emerging in Germany. In the face of the impotence of the contemporary legislative state, the problems of a class-divided democracy have made the professional bureaucracy *the* key power bloc. What is more natural than that the bureaucracy try to take advantage of the opportunities presented by the present situation? The bureaucracy is striving to make its supposed position "beyond class" independent of the interplay of class relations and to establish itself as the unmediated representative of the national order, independent of all social and political constellations. The bureaucracy seeks the legitimation for this power position in the special relationship between the civil service and the state; allegedly, one thereby can do without the mediation of a democratic concept of popular sovereignty. We do not believe that this unparalleled situation, in which the relative impotence of social mass organizations coincides with the growth and usurpation of state activities by the administrative apparatus, can in the long run prepare the way for the domination of some type of "bureaucratic aristocracy." Just as little as the legitimate monarchy was spared the choice between the position of head of state in a seignorial aristocracy and its diminished functions in liberal constitutionalism, so too shall a bureaucracy that has become independent prove unable to consolidate its socially neutral position between the bourgeoisie and proletariat in the form of a lasting, free-standing system of political rule. The certainty that we are dealing only with a passing phenomenon still does not free us from the duty of analyzing the ongoing decay of the legislative state[2] or the question of how the intermediate stage of rule by an all-embracing administrative bureaucracy can consolidate itself—if only provisionally.

II

Nineteenth-century political theory does not acknowledge the right to resistance anymore, even though it had dominated the structure of oppositional political discourse under absolutism. Along with constitutional practice, the

absorptive power of democratic ideology contributed to the elimination of the right to resistance; it was the product of a social order that had not yet been fully rationalized. Indeed, one can go so far as to identify the distinguishing mark of the modern state with its degradation of the right to resistance to a catalog of constitutional rights. The rationalized concept of law stepped into the place of an indeterminate right to resistance, whose strength lay exclusively in being anchored in popular consciousness—that is to say, in its substantially unlimited character.

It is by no means superfluous today to recall that both the origins and significance of the concept of legality, which presently appears to be undergoing a process of decay, emptying it of its original meaning, is intimately indebted to the nineteenth-century concept of law. The concept of legality has a certain safeguarding function; it is not supposed to perpetuate the right to resistance, but instead make it superfluous. The expressions *légalité constitutionelle* (in the constitutional language of the Continent) and *rule of law* (in Anglo-Saxon legal circles) refer to the necessity of an agreement between every governmental or administrative act and the laws of the country in question. The rationalization of the concept of law corresponds to the formalization of the concept of legality. This, in turn, secures a more effective system of control over the administration than the competing German concept of the *Rechtsstaat*, which always tries to rework historical events that have already taken place.

It is no accident that it is precisely in France that the concept of legality, in the context of the recent and altogether unambiguous rejection of an independent "empire" of administrative bodies, has been determined by tracing it back to legal norms that are supposed to lie at the basis of administrative action.[5] Since they contain only organizational norms but no laws of a material nature, the constitutional laws of France, the so-called *lois organiques* of 1875, clearly have promoted the process of formalization; this process constitutes the basis of the concept of legality. These laws placed limits on the jurisdiction of the sovereignty of the democratic parliament but no material restraints on it. In those settings where appeals to the constitution can be juxtaposed to a particular law—and thus the problem of a system of "dual legality" emerges—this is likely to lead the bureaucracy to develop its own concept of legality based on its own particular interpretation of the constitution. But in France, the maxim that law must be in accordance with the constitution—found alongside the maxim that administrative action must agree with the law—is not permitted to take on any special significance because of the purely formal character of constitutional laws there. Quite consistently, French legal praxis never permitted courts to test the constitutionality of the law, thus harnessing the concept of legality to the framework of the statute. In the process, the French secured a broader sphere of applicability for the concept of legality than has often

been realized in Germany. Indeed, the second part of the Weimar Constitution contains a rich variety of material-legal standards open to an infinite number of interpretations. In a country characterized by the intensive cultivation of so many different political interests, this inevitably leads to frequent attempts to appeal to the constitution against the legislature. In the hands of the judicial bureaucracy, the precision of the individual technical law is neglected in favor of the interpretable structural framework of the Constitution. Well before the appearance of the present system of rule by emergency decree, the judicial bureaucracy had in many cases already become the guardian of a system of dual legality that hindered the formalization and operationalization of the concept of legality in Germany.[4] Still, no "pluralism of concepts of legality," as Carl Schmitt describes it,[5] has emerged yet, because here, too, the concept of legality is aligned with the statute. This is true even though the confrontation between the statute and the Constitution gives significant leeway to the judiciary's cravings to usurp power.

The determination of the legality of an administrative body's activities presupposes, in any event, that the standard for evaluating such activities is neither indirectly nor directly furnished by the discretion of the very same administrative body. Legal transfers of special power (*Spezialermächtigungen*) to the administration do not affect the question of legality. The legislative body is allowed to transfer its authority as long as it determines the exact extent and scope of that transfer. Article 48 of the Weimar Constitution itself provides provisions for such a transfer of authority. More precisely, the constitution not only prescribes but anticipates it in a special case and only refers to the possibility of parliamentary intervention in a subsequent phase of the procedures. In the case of a significant disturbance of the peace and threat to the political order, the Constitution transfers exceptional powers to the federal president.[6] Only the character of this transfer of exceptional power guarantees that the system of legality as a whole is not suspended; only in particular cases to be determined by the discretion of the federal president (who is to exercise his power in accordance with the duties of his office), is legality partially suspended. In this case, legality consists of the existence of a legal norm that covers administrative practices; the determination of legality of action in the case of Article 48 is restricted to ascertaining that in the replacement of a legal norm by the federal president's special powers the delineated boundaries of that article have not been transgressed. According to judicial practice, the necessity of individual measures remains up to the discretion of the federal president. In order to preserve the essential character of such an exceptional grant of legal authority, however, it is necessary that the temporary (*Einstweiligkeit*) nature of the measures in question be strictly preserved. As soon as emergency lawmaking transgresses this characteristic—as soon as its provisional character is abandoned in favor of "an indeterminate time period probably of a lengthy

duration"[7]—then governmental practice can no longer be described in terms of the traditional concept of legality.

One cannot respond by claiming that a clear and practically relevant difference exists between "an indeterminate time period probably of a lengthy duration" and an unlimited period of time. Some of the decrees undertaken under the auspices of the emergency legal powers (such as the budget and bank guarantees) are provisional, but this is attributable more to their very nature than the will of the federal president. In other cases (involving, for example, alterations in judicial practices and procedures) no evidence whatsoever justifies the expectation that we are dealing with decrees having a temporary character. In contrast to what is often falsely assumed, the power of Parliament to suspend such decrees after they have been issued does not imply that the failure to use it constitutes a retroactive legalization. For the moment, we do not need to consider to what extent parliamentary failure to demand the suspension of such decrees is significant for their constitutionality, nor do we need to determine whether Article 48 of the Constitution should pertain to budgetary laws in the first place. For, the question of their constitutional status is losing any immediate significance: administrative bodies subordinate to the federal president are complying with the administrative decrees because they are orders of their superiors, and the courts regularly accept the constitutionality of this practice. Of course, such administrative and judicial practices cannot hide the fact that the concept of legality is undergoing a structural transformation. In any event, the replacement of the legislative functions of Parliament with the federal president's emergency decree–based rule means that the concept of legality has been robbed of its previous meaning. We are not dealing here with a set of passing incidents. Rather, rule by emergency decree—and thus the fusion of legislative and executive authority—has taken on a permanent character in such a manner so as to leave no room for the core element of the principle of legality, the scrutiny of the administration against the yardstick of the law. So when there is talk today about the legality of government action as a way of contrasting its actions to those of "illegal" oppositional groups, obviously an altered version of the traditional conceptualization of legality is inherent in this discourse. The so-called legality of the executive organs focuses on the fact that they did not obtain their positions of power in antagonism to the Constitution, but along constitutionally ordained paths. Reference is made to the constitutionally based popular election of the federal president—who, after all, is given emergency powers by Article 48—and to the fact that the cabinet has yet to receive a vote of no confidence. It is then easy to draw a parallel to the relationship of the people to Parliament: since the people have no direct influence over the content of laws passed by Parliament, there is no qualitative difference in relationship to the federal president's system of authoritarian rule by decree. But whoever draws this parallel is simply missing a profound distinction: the difference between parliamentary democracy and dictatorship. The legislative state, parliamentary democracy, knows no form of legitimacy beyond that of its origins. Since any legislative resolution of a majority of the people constitutes a law, the legitimacy of this form of government consists simply in its legality. The emergency regime, secured by the plebiscitary personage of the federal president and executed by the administrative authorities, is not characterized by legality but by legitimacy, an appeal to the indisputable correctness of its actions and goals. Essential to the concept of legality is not simply the fact that power has been acquired by legal means, but, more important, that it be exercised in a legal fashion. Nothing makes the shift in accent from a political system based on legality to one based on an appeal to legitimacy more clear than Chancellor Brüning's now famous comment: "If you gained power by legal means but then declared that you intended to disregard legal boundaries, that cannot be considered legality."

The legal path to power here again refers to law-based origins, but what does "legal boundary" mean in this context? Since legislative and administrative functions have been unified in the hands of the government, legal boundaries—according to the juristic meaning of the word legality—are only to be located in those sections of Article 48 of the Weimar Constitution that cannot be suspended. It is apparent that Chancellor Brüning envisaged something other than those minimal features of the Constitution that cannot be suspended by Article 48; in the face of resolute government action, these do not amount to very much—just think of the abrogation of property rights or of the right to free assembly, or the substantial interventions into the autonomy of regional and municipal governments that are permissible according to contemporary judicial practice.[8] Apparently, legal boundaries are being equated with the legitimacy of the regime's goals. Which of those goals are legitimate, though, is determined solely by the ruling cabinet. An instructive essay published in the journal *Tat*[9] refers to a "concept of legality of the ruling cabinet" that does not allow it to take responsibility for ceding the government to a politically catastrophic majority coalition. One can only agree with the author when he concludes on the basis of this claim that "it (that is to say, the refusal to hand over the governmental apparatus to such a majority) will unleash a domestic struggle for the legality, i.e. the legitimacy, of power." One only needs to add that we do not have to await the refusal to hand over power to a "catastrophic" political majority before a battle for the legitimacy of power is unleashed. The transition from majority-based parliamentary lawmaking—the sanctioned abridgment of social power struggles—to a system of rule by emergency decree that supersedes the law really constitutes the decisive stage in the struggle for the legitimacy of power: by claiming that its goals are universally binding, a

government unregulated by law is trying to bestow upon itself a broad consensus that it lacks in everyday political reality.

III

The same transformation observable within the federal government on the basis of its extensive use of Article 48 has been partially achieved in regional governments through the establishment of a series of temporary governments. Until now, the federal legislature has not withdrawn its confidence in the federal government, but in the states of Saxony, Hesse, and Hamburg this has been the case. The respective state constitutions contain provisions calling for governments that have been toppled by the legislature to stay in power as a caretaker government until a new government is appointed by the legislature. Such governments are only supposed to fulfill a temporary replacement function. The constitutions refer explicitly to the provisional character of these caretaker governments by stating that only the authority to pursue "ongoing business" is to be conferred on them. In Prussia, this term has been discussed on previous occasions; to be sure, there it was still a question of a temporary government that was replaced by a parliamentary cabinet after a relatively short period of time. Hence, problems that emerge when governments limited to "ongoing business" take on a permanent character were never fully played out. At least there is widespread agreement that "ongoing business" does not refer to all business underway at that particular moment when a government loses power.[10] The distinction between ongoing transactions and political decisions, however, remains questionable. Perhaps this distinction is practically meaningful for a caretaker government in power for a reasonable period of time. But because the concept of a political decision cannot be delineated a priori in light of the fact that the degree of intensity of a particular governmental act can vary according to the historical situation (just think of Hitler's appointment to the governmental council in Brunswick), the distinction lacks theoretical clarity. Since it is impossible to determine an objective limit on the forms of activities appropriate to a caretaker government, it can undertake all the same types of actions as a regular government. Thus, a peculiar situation emerges. The caretaker government, which the state legislature cannot topple, possesses substantial political autonomy and is not responsible to the legislature. As a consolation it is often mentioned that there is a possibility of indicting government ministers. Apart from the practical meaninglessness of this leftover from early southwest German constitutionalism—it does not lead to the removal of the minister from office, but at the most to a ruling that specific actions are irreconcilable with existing constitutional law—it remains questionable whether a governmental minister can be indicted

on the basis of acts undertaken during the temporary government's term of office.[11]

One can deny the constitutionality of permanent caretaker governments by referring to Article 17 of the federal Constitution, which prescribes a parliamentary form of government for the individual states as well. On the basis of this, one might conclude that the federal government has the authority, by means of the second paragraph of Article 48, to suspend such governments and then replace them with a federal commissioner.[12] But the obscure nature of this solution should be evident enough. If the continued reliance on a device provided by the Constitution as a mere makeshift has to be seen as implying an amendment of the Constitution, repeated encroachments against the sovereignty of state governments by means of Article 48 have to be seen as entailing a dictatorial alteration of the Constitution. Essential for this discussion is merely the insight that a shift in the basis of the existence of the state governments has actually occurred. But if the state legislatures have gotten on the wrong track because they can no longer control their respective governments, those governments themselves have, by the same token, simply traded in their old masters for new ones. Even though the state governments no longer possess a legal basis for their activities, their survival is secured as long as their activity is seen by the national government as being in agreement with its own—in other words, as long as it accords with the national government's concept of legitimacy.

IV

As of late, the problem of the legality of political parties has gained substantial public attention. This issue raises no special questions for the concept of legality. As long as legislative and executive instances were separate, the so-called legality of a party was identical with the lawfulness of its actions. The lawfulness of party activity was determined primarily according to general laws valid for all citizens; the scope of the criminal law was especially significant for disputes of this sort. In addition, it was always left up to the sovereign decision of democratic parliaments to fight specific political groups in a more or less hostile fashion. Parliament could do that by making certain political actions or convictions punishable beyond the scope of the common penal laws. One only needs to recall the notorious example of the laws passed on the 23 Ventôse and 22 Prairial of Year II by the revolutionary French National Convention, which effectively declared all of the political enemies of the convention majority traitors to the fatherland and enemies of the people.[13] In Germany, neither the constitutional assembly nor the legislature ever decided to subject specific political groups to exceptional criminal laws on account of their political aims or convictions. At

best, one can find a tentative starting point for this type of practice in paragraph 4 of the Defense of the Republic Act, which threatens a prison sentence of no less than three months to anyone who takes part in a secret or subversive organization aspiring to overthrow the constitutionally established republican form of government at either the state or the federal level. The real meaning of this law can only be correctly appreciated by taking into consideration its references to paragraphs 128 and 129 of the criminal code and to the idea of a constitutionally established form of government. Both references involve an attempt at formalizing this law with the aim of realizing a more effective legal defense of the Constitution without subjecting particular political groups to a set of exceptional laws. The notion of a party "hostile to the political order" was defined in reference to the Constitution and a set of general laws valid for everyone; no attempt was made to defame a specific set of political views by legal means. So if the government wanted to persecute certain political groups on account of their activities (which was common enough given the intensity and depth of divisions among political parties in Germany), it was necessary to rely on the fiction that they were not being persecuted on the basis of their convictions but as organizations "hostile to the political order." In short, the government had to try to prove that concrete offences against provisions of the criminal law had taken place. Even this method of persecution was limited: its employment was impermissible against the organizational core of the political party, its parliamentary representatives. This organizational core was considered unassailable from the perspective of the law even when, as occasionally happened, an entire political party was declared an illegal organization and thus an attempt was made to prevent it from engaging in effective political work. Legislatures have never undertaken to develop legal distinctions between parties by referring to the contents of their worldviews and actions. For example, the December 1927 Prussian law that regulates the organization of local government expressly determines that "an elected representative cannot be denied his seat on the basis of membership in a particular political party." The constitutional right of every political party to participate in Parliament—along with all of its auxiliary rights, the most important of which is the right to wage a political campaign—was always preserved. As long as Parliament still functioned in a regular manner, the only thing that mattered for determining the legality of a party was whether it relied on illegal methods to gain political power. Since no constitutional or other type of legal norm insisted on the universally binding character of a set of specific social views, the ultimate political or social goals of a party were irrelevant in the determination of the legality of a party. Even the administration was generally required to respect these limits when pursuing political opponents. The federal courts occasionally failed to exercise these supervisory functions effectively, but such transgressions only took place occasionally against the Communist Party (KPD), and even then, quite typically, courts avoided the formulation of new legal principles. Instead, they preferred to rely on an extremely extensive interpretation of the category of treason that clearly overstepped the boundaries of the law.

Such trends seemed alien to the spirit of an otherwise uniform system as law—as long as there was no opportunity to supplement the concept of legality by means of the legal standard of a "revolutionary party." Recently, Otto Koellreutter has undertaken precisely this task.[14] He wants a principled distinction within the legal order between revolutionary parties and those capable of exercising governmental authority. All those parties that can be seen as representatives of the existing political order belong to the latter; they can be seen as parts of a unified people, since they possess a conscious will for political unity which, in turn, constitutes the basis of national unity. Such parties extend from the National Socialists to Social Democrats, and though one cannot eliminate the possibility that they might opt at some juncture to undertake a putsch, they are to enjoy all the advantages of the official presumption of legality. Since they seem to deserve a presumption of legality on their behalf, the burden of proof to the contrary lies with their opponents. However, Koellreutter seems to have overlooked the fact that revolutionary parties historically have proven themselves to be the most dependable source of a "national will." Thus, it has been correctly argued against him that his conceptual innovations can discredit no one but the anarchists.[15]

In reality, the question of social structure lurks behind the concept of a national "life order." At another juncture in his exposition, Koellreutter concretizes—in fact, reduces—the concept of national unity to a belief in the sanctity of private property, marriage, and religion. If we disregard marriage for a moment (which, as far as I can tell, no one wants to abolish), the question of the transformation of private property is really what must be of concern to Koellreutter—the structure of which, by the way, is already undergoing a functional transformation much more profound than that achieved by many revolutionary transformations,[16] even though no constitutional changes in the organization of property have been undertaken. The exclusion of a revolutionary party from the framework of the existing constitutional order would presuppose that German constitutional law had developed a category in accordance with the French idea of "supra-legal constitutionality." But "supra-legal constitutionality" means nothing more than the acknowledgment of the legitimacy of a specific set of cultural values.[17] Whether the juristic legitimacy of a supra-positive individualistic legal order, standing above constitutional and legal texts, exists in France, it certainly does not in Germany. The second part of the Weimar Constitution provides possibilities for too many different types of legal appeals to justify the claim that its structure is exclusively individualistic in character.[18] But,

by implication, this also eliminates the possibility of a material criterion, existing alongside the principle of legality, according to which one could evaluate party activity. Since Koellreutter himself admits that a party lacking a revolutionary character could act illegally, there really does not seem to be a need for the category of a revolutionary party. As long as a revolutionary acts in a legal fashion, it is irrelevant from the perspective of the legal order whether his present legality rests on revolutionary objectives or on "legal cretinism." Yet if the revolutionary acts in an illegal fashion, he inevitably comes into conflict with the existing legal order. This holds true whether his illegal activities are based on revolutionary considerations or merely on the "romance of illegality."[19]

The legal order does not reproach the revolutionary for relativizing the concepts of legality and illegality. Instead, he is reproached because his thought process sometimes leads him into the sphere of illegality that brings him into conflict with the legal order. It is equally irrelevant for the existing legal order whether a party happens to belong to the circle of "good parties" if, while on its path to power, that party conceives the idea of ignoring criminal laws. We dare not be so presumptuous as to claim the ability to anticipate what only the historian is entitled to: the highly relative distinction between revolutionary and "good" parties.

We need to ask to what extent the contemporary system of rule by decree, as well as the administrative and judicial practices associated with it, has abandoned the formal character of the principle of legality and a certain type of liberalism. Although its opponents prefer to overlook this, this liberalism has less to do with a fundamental commitment to liberal ideals than to the fact that it proved to be a practical organizational principle for a class-divided country. The system of emergency decrees, which has caused problems for almost every party because of the indeterminacy of its constantly changing regulations (just think of the manner in which uniforms and political insignia have been banned), has not resorted to declaring specific parties *hors de la loi,* that is, beyond the scope of the law. This has not happened in particular because an unwelcome discrepancy in relation to the principle of the equal treatment of all parties, which is still considered a component of valid parliamentary law, would thereby have become apparent. But, undoubtedly, the indeterminate legal structure of rule by emergency decree (the reference to "vital life interests" in the emergency decree of August 10, 1931, for example, or the extensive blanket powers given the administration in the regulation of some of the most basic civil rights) has allowed administrative bodies to discriminate against those parties whose legal character remains a matter of dispute. The extent to which parties are able to act autonomously is now determined by administrative decisions. These often stand beyond the scope of effective legal scrutiny either because they cannot be appealed or because of a lapse of time. The question

of whether a specific meeting or poster is acceptable is no longer determined by general rules but by specific conceptions of public order held by the police. The manner in which administrative bodies make use of this discretionary authority is determined in accordance with the general character of the party in question. In other words, evidence for the legality of political action in a particular case loses significance in relation to the general presumption of legality. In turn, whether such a presumption of legality can be made is primarily determined by the orders of central administrative bodies; to a lesser degree, it is determined by court decisions. In deciding whether a party can be presumed to possess a legal character, the key administrative units ultimately find it very difficult to separate the question of the legality of particular acts from the question of the legitimacy of a particular set of political goals. Through equal treatment of the National Socialist and Communist parties, the Prussian decrees guarantee a certain formal approach by emphasizing the role of violence as a political instrument.[20] But, typically, even there reference is made to violent subversion as a goal and not a means.

The recent decree of Defense Minister Groener constitutes a deviation from the dominant administrative practices to the extent that it is not concerned with the question of illegality, but rather with issuing a certificate of good behavior to the NSDAP valid throughout Groener's jurisdiction.[21] On the basis of the decree's general context and its political objectives, one can conclude that the belief in the legality of the National Socialists no longer depends chiefly on the behavior of the party members, but rather on their acknowledgment of a set of so-called "national aims."

The position of the courts (understood here as every independent institution having the power to settle individual cases authoritatively) in a political system with a separation between the executive and legislature is shaped most fundamentally by their power to verify administrative acts according to the law. Courts undergo a functional transformation when there is no longer a legislature distinct from the administration. Previously, the courts were only occasionally able to utilize their usurped power of testing the constitutionality of laws. But now they possess the authority to make sure that every emergency decree is in accordance with the limits to emergency power outlined in Article 48. It is only the failure to make use of this veto power that ensures the undisturbed functioning of the system of emergency rule over subordinate administrative bodies and the citizenry. The courts have continually shielded and sanctioned the practice of rule by emergency decree. The caution they exercised by focusing on individual cases stemmed from the judiciary's aspiration not to lose its acquired share in the exercise of political power by establishing legal precedents, but to preserve it. Once the courts sanctioned the emergency decrees, they were in fact bound to their contents. But as far as the question of the legality of parties was

concerned, their judgment was not binding since the relevant decrees of the administration lacked a legal character. In contrast to subordinate administrative bodies for which the decisions of superior administrative bodies on the presumption of legality or illegality were binding, even the lowest disciplinary court could make decisions on a case-by-case basis without having to refer to anything but paragraphs 128 and 129 of the criminal code or paragraph 4 of the Defense of the Republic Act.[22]

To the extent that unanimity was found in the administration (in other words, in the case of the Communist Party), the courts have considered the presumption of illegality to be the determining factor. They went a step further and eliminated the very possibility of proving the opposite. The Higher Administrative Court of Thüringen ruled that dissident Communists (KPO)[23] at the present time are not pursuing armed rebellion, but the court then proceeded to deny any significance to this concession. The reason given for this is that "they differ from the Communist Party (KPD) only in their political tactics and in their view of the present political situation. In contrast to the Communist Party (KPD), they do not believe that the possibility of seizing power is imminent. However, this changes nothing as far as their revolutionary goals are concerned."[24] In the face of the court's presumption of illegality, even its own well-considered acknowledgment of evidence suggesting the legality of the actions of the KPO at the present time is rendered inconsequential; the only thing that really counts is the KPO's illegitimate goal, its "revolutionary objectives." As far as the case of the National Socialists is concerned, there is as little unanimity within the judiciary as within administrative bodies. Most of the decisions, mainly those from Prussian higher disciplinary courts,[25] focus on the illegality of the political means employed by the National Socialists. But there are also other rulings, consistent with the Thuringia ruling, that have been determined on the basis of an evaluation of the legality of party objectives.[26] Here again we can begin to detect the outlines of a tendency to downplay the sphere of legal norms (which demand an exact determination of the illegality of a party's political means) in favor of repudiating illegitimate social goals unacceptable to the administrative apparatus. In the process, it no longer makes much of a difference whether the administration reaches this result by presuming the legality or illegality of party action that is binding within its jurisdiction, or whether the judiciary announces that in the face of the illegality of the social goals, any evidence pointing to the legality of the political means used by the group is simply irrelevant.

V

Although the concept of the legitimate party, like the system of rule by emergency decree and administrative practices, still faces obstacles stem-

ming from Germany's democratic and constitutional political structure, it nonetheless has managed to become relatively commonplace in the area of labor law. Theoretically, German labor law is distinguished from fascist labor law by its refusal to outfit bargaining parties with a legally based monopoly position. The system of labor contracts simply presupposes the existence of bargaining units having the will and the capacity to wage labor disputes, to conclude collective agreements, and to adhere to them. No one could have blamed the judiciary for taking special care before acknowledging the bargaining position of economically independent organizations whose reliability in the sphere of labor law was still untested, especially to the extent that the political character of such organizations raised serious questions about their interest in respecting labor contracts. Yet such doubts would have only been permitted to take on legal significance until the opposite was proven. When the Federal Labor Court refused to recognize the bargaining status of the *Allgemeine Arbeiterunion*[27] despite the fact that this organization not only had proven capable of settling labor disputes by means of collective bargaining agreements but clearly had respected such agreements over the course of many years, it was evidently relying on the increasingly widespread notion that the illegitimacy of a particular set of social goals can lead to a permanent denial of the right to make use of legal rights in a legal way. The concept of the legitimate works council is accompanied by the concept of the legitimate bargaining unit. Does the Works Council Law permit the election of an individual to the works council committee who is willing to exercise his authority within the framework of the Works Council Law but who belongs to an organization which in principle hopes to satisfy the needs of the working class by means of revolutionary class struggle?[28] According to the principles of the legal order that had been in existence, the only thing that matters is whether the individual's actions are in agreement with the law in question. As soon as the principle of legitimacy is taken as a basis, however, it is inevitable that the right to be a member of the works council committee is declared to be incompatible with membership in the Revolutionary Union Opposition (Revolutionäre Gewerkschaftsopposition).[29] But the idea of a legitimate bargaining unit or even of legitimate organizations forming the works council is not the judiciary's only invention. Its most dangerous creation is a concept of legitimacy that focuses on the nature of the aims of labor disputes; it threatens to hinder the working class's capacity for waging labor disputes. The following characteristic statement of the Federal Labor Court provides evidence enough for this trend:

> One of the consequences of concluding a bargaining agreement is the duty to abandon unjustified labor disturbances and to initiate hostile actions only when economic aims are pursued, or when there is a legitimate cause for such action. If such measures ensue without economic aims being pursued or a

> justified cause being evident, this signifies, even if no contractual responsibilities are concerned, that a breach of the general duty to maintain peaceful relations, based in the collective bargaining agreement, has occurred.[50]

The freedom to engage in union activity is thereby vastly limited. The simple assertion of labor union claims to power—when no evident economic goal is at stake—is now impermissible. The labor court alone decides which goals are of an economic nature (that is to say, have a legitimate character) and which are political (that is, illegitimate)[51]—a typical example of how the administrative apparatus is both fencing in and submitting the labor unions, which understandably are trying to act in a unified fashion against their economic opponents, to a system of licensing.

VI

The prospects of every system of legality-based political rule depend on the possibility of incorporating the dialectic of historical change more smoothly than a system of rule based on an appeal to legitimacy can accomplish. The latter is only capable of surviving to the extent that it succeeds in attributing the appearance of eternal validity to the political and social conditions of a particular historical moment. It was the unheroic task of the German legal order of unstable coalition governments to undertake to balance social antagonisms at the level of the existing relations of power between social classes and groups without being able to get rid of the underlying sources of social tension. The independence of that part of the bureaucracy that remained intact grew to the extent that an increasingly trying set of conditions nationwide made it impossible to achieve autonomous compromises between key power groups by means of parliamentary laws. On the basis of its position as a neutral mediator, functioning as a trustee in a situation of rough balance between social constituencies, the bureaucracy became the decisive power in the political system; the closed character of its ranks and filial ties to the armed forces facilitated this development. The bureaucracy is the champion of a new system of legitimacy-based rule that is superseding the epoch of legality-based parliamentary democracy. This new system legitimizes itself by means of the concept of a legitimate government, it undermines the autonomy of its intransigent foes by means of the idea of a legitimate party, and, armed with the notion of a legitimate bargaining unit and legitimate labor dispute, it proceeds to dominate the sphere of labor law by bureaucratic means. Nonetheless, the social basis of this system is too weak to permit the bureaucracy to function as a truly independent mediating force, standing above and beyond feuding economic groups and capable of achieving genuine compromises between them and

thereby preserving the presuppositions of the political unity of the German people.[52] Certainly, the bureaucracy "makes the formal spirit of the state or the true spiritlessness of the state a categorical imperative,"[53] and its neutrality and nonpartisan character are only an ideological veil for the fact that the bureaucracy takes itself to be the "final end goal of the state." But this static social ideal can only be realized by the bureaucracy if it gains support from social groups having an interest in stabilizing the process of capitalist development at a stage that may appear relatively auspicious to a retrospective observer. By repeatedly commenting that we need to go back to the more simple and frugal economic foundations of the prewar years, it is Chancellor Brüning who is giving expression to the aspirations of the bourgeoisie, petty bourgeoisie, and bureaucracy. Eternal value is attributed to something that has irreversibly vanished in the stream of social development. In opposition to such restorative aspirations, the progressive will of the democratic populace must seem to be a dangerous anachronism. The present emergency situation seems to provide the best opportunity for permanently squelching that will. Popitz—a prominent and so-typical representative for the entire bureaucracy—has made the liquidation of this anachronism the starting point for his consciously weighted proposals for revising financial relations among political units within the federal system.[54] Of course, those phenomena that for us perhaps seem to be explosive manifestations of rapid transformations undergone in the postwar period are attributed by Popitz to party corruption, abuse of power, irresponsibility, and the ills of partisan political deals; these ills are then unfavorably contrasted to the civic-mindedness and sense of duty allegedly characteristic of the prewar years. But is not a social order forced to appeal to a concept of legitimacy based on the borrowed luster of an idealized past, and incapable of achieving legitimacy by internal means, doomed to fail even before it has been fully realized?

(Translated by Anke Grosskopf and William E. Scheuerman)

NOTES

1. Editor's Note: Kirchheimer here is making use of the famous typology of *legitimacy* developed by Weber in *Economy and Society*, but the historical reference suggests that Kirchheimer is also relying on a second possible meaning of the term "legitimacy": he believes that he can draw parallels between authoritarian legal trends in Germany and the ideas and practices of one variety of nineteenth-century royalist political thought, *legitimism*. For helpful surveys of legitimist political thought see Charlotte Touzalin Muret, *French Royalist Doctrines Since the Revolution* [New York:

Columbia University Press, 1933]; John A. Hawgood, *Modern Constitutions Since 1787* (New York: D. Van Nostrand, 1939).

2. See Carl Schmitt, "Grundsätzliches zur heutigen Notverordnungspraxis," *Reichsverwaltungsblatt* 53 (1932): 161.

3. Raymond Carre de Malberg, *La Loi expression de la volonte generale* (Paris, 1931).

4. Editor's Note: The French Constitution of 1875 consisted of a set of concise rules overwhelmingly *organizational* in character. It limited itself to a set of *formal procedures* that described the manner in which governmental officials were to be chosen and the respective jurisdictions of distinct governmental bodies defined. As discussed in the Introduction, the Weimar Constitution outlined a similar set of organizational norms (in Part I), but a lengthy additional section included provisions for nearly seventy "fundamental rights and duties" that often possessed a rather indeterminate legal character. A few examples might provide some sense of the character of these clauses: Article 119 announced that marriage constituted "the foundation of family life" and should enjoy "special protection"; Article 133 demanded that all citizens have a duty to "perform special services for the state"; Article 151 entailed that "the organization of economic life must conform to the principles of justice to the end that all may be guaranteed a decent standard of living." Although Kirchheimer qualifies his criticisms in the subsequent "Remarks on Carl Schmitt's *Legality and Legitimacy*," here he refers to the potential dangers of a constitution including a panoply of amorphous, so-called material clauses. In Germany, they allegedly provide a constitutional starting point for undermining the principle of formal legality and the political authority of the democratically elected parliament.

5. Carl Schmitt, *Der Hüter der Verfassung* (Tübingen, 1931), p. 91.

Editor's Note: The reference here is to Schmitt's claim in *The Guardian of the Constitution* that intense political polarization in Weimar Germany had led to a situation where no universally acceptable concept of legality was any longer possible. In Schmitt's eyes, the concept of legality had become nothing but an instrument of political struggle; references to it constituted a "veil" (*Schleier*) for the power interests of particular political groupings. Political groups described all conceivable practices essential to achieving their aims legal, whereas their opponents were inevitably deemed illegal. A "pluralism of concepts of legality" thus results.

6. Editor's Note: Article 48 read as follows:

> If a state fails to carry out the duties imposed upon it by the national constitution or national laws, the President of the Republic may compel performance with the aid of armed force.
>
> If public safety or order are seriously disturbed or threatened within the German Reich, the President of the Reich may take the necessary measures to restore public safety and order; if necessary, with the aid of the armed forces. For this purpose he may temporarily suspend in whole or in part the fundamental rights enumerated in Article 114 (inviolability of the person), Article 115 (inviolability of the private resident), Article 117 (the inviolability of the mails), Article 118 (the right to free speech), Article 123 (the right to assembly), Article 124 (the right to form associations), Article 153 (the right to property).
>
> The President of the Reich must immediately communicate to the Reichstag all measures taken by virtue of Paragraph 1 or Paragraph 2 of this Article. On demand of the Reichstag these measures may be abrogated.
>
> If there is a danger in delay, the state ministry may, for its own territory, take such temporary measures as are indicated in Paragraph 2. On demand by the President of the Reich or by the Reichstag such measures shall be abrogated.
>
> Detailed regulations (of this Article) shall be prescribed by a national law.

A vast literature on Article 48 exists both in German and English. A helpful comparative analysis is provided by Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in Modern Democracies* (Princeton: Princeton University Press, 1948); see also Hans Boldt, "Article 48 of the Weimar Constitution: Its Historical and Political Implications," in *German Democracy and the Triumph of Hitler*, ed. A. Nichols and E. Matthias (London: Allen & Unwin, 1971).

7. Compare the decisions of the state court in *Juristische Wochenschrift* 61, no. 7 (1932): 513.

Editor's Note: A contemporary commentator has made the same point: "The most curious thing of all is that these decrees were never annulled, and that several of them are in force to this day." Boldt, "Article 48 of the Weimar Constitution," p. 92.

8. Editor's Note: In other words: those rights that can be legally suspended in accordance with Article 48 of the Weimar Constitution.

9. Horst Grüneberg, "Das neue Staatsbild," *Die Tat* (January 1932): 822.

10. This was the view of Prussian Minister President Marx in the parliamentary debates that took place in the Prussian state legislature on March 27, 1925.

11. See the remarks of Stier-Somlos who, like many others, believes that this is possible without providing an adequate justification for this view: "Geschäftsministerium, laufende Geschäfte, ständiger Ausschuss und Notverordnungen nach preussischem Verfassungsrecht," *Archiv des öffentlichen Rechts* 9 (1925): 218.

12. Ernst Huber, "Die Stellung der Geschäftsregierung in den deutschen Ländern," *Deutsche Juristenzeitung* 37 (1932), beginning at column 194.

Editor's Note: This issue took on special significance in 1932 and 1933: the federal government's usurpation of regional authority proved crucial to the rise of the authoritarian state in Germany. A particularly egregious example of such a usurpation took place in the conflict between the Social Democratic Prussian state government and the right-wing Papen regime in the summer of 1932. Enthusiastically endorsed by authoritarian jurists such as Carl Schmitt, the Papen government managed to remove the freely elected Prussian Social Democrats. Despite the blatant unconstitutionality of this act, the German judiciary tolerated it.

13. The text of the law is available in F.-A. Aulard, *Histoire politique de la revolution francaise* (1921), p. 365f.

14. Otto Koellreutter, "Parteien und Verfassung im heutigen Deutschland," in *Festgabe für Richard Schmidt* (Leipzig, 1932), beginning on p. 107.

Editor's Note: The reference here is to Otto Koellreutter, an authoritarian jurist who became one of the most enthusiastic defenders of the Nazis. For a fine introduction to his ideas see Peter Caldwell, "National Socialism and Constitutional Law: Carl Schmitt, Otto Koellreutter, and the Debate Over the Nature of the Nazi State, 1933–1937," *Cardozo Law Review* 16 (1995).

15. Haentzschel, "Der Konfliktfall Reich-Thüringen in der Frage der Polizeikostenzuschüsse," *Archiv des öffentlichen Rechts* 20 (1931): 385.

16. Editor's Note: This is possibly a reference to Karl Renner's highly influential account of the transformation of capitalist private property in *The Institutions of Private Law and Their Social Functions* (London: Kegan & Paul, 1949).

17. Such a position is defended by the well-known political theorist Maurice Hauriou in *Precis de Droit constitutionnel* (Paris, 1929), p. 239.

18. See Carl Schmitt's comments in *Handbuch des Staatsrechts* (Tübingen, 1930), paragraph 101, point II.

19. On the relationship between revolutionary thought and the legal order see Georg Lukacs, "Legalität und Illegalität," in his *Geschichte und Klassenbewusstsein Studien uber marxistische Dialektik* (Berlin, 1923).

20. See the Decree of July 3, 1930, which has been printed in the *Justizministerialblatt* (Berlin, 1930), p. 220.

21. Editor's Note: The reference is to a set of decrees from January 29, 1932, that reversed the previous policy of preventing Nazis from belonging to the military.

22. See Glockner in *Die politische Betätigung der Beamten* (Bühl, 1930), an expert opinion issued on behalf of the teachers' organization in Baden.

23. Editor's Note: The KPO refers to the Kommunistische Partei Opposition, a group of "rightist" Communists who were driven from the (Stalinist) Deutsche Kommunistische Partei (KPD) in 1928 and thereafter set up their own organization.

24. Reprinted in Koellreutter, "Parteien und Verfassung im heutigen Deutschland," p. 122.

25. See the ruling of the Prussian Disciplinary Court for tenured bureaucrats who do not exercise judicial capacities, reprinted in the *Frankfurter Zeitung* on February 25, 1932.

26. See the decision of the Lübeck Disciplinary Court in Koellreutter, "Parteien und Verfassung im heutigen Deutschland," p. 128.

27. *Entscheidungen des Reicharbeitsgerichts* 6 (1931): 63.

Editor's Note: It is not quite clear which labor union Kirchheimer has in mind; in the legal decision cited here, the reference is to the *Freie* Arbeiter Union.

28. Editor's Note: Article 165 of the Weimar Constitution called upon workers and employees "to cooperate in common with employers, and on equal footing, in the regulation of salaries and working conditions, as well as in the entire field of the economic development of the forces of production." The Works Council Law of 1927, regulating councils for the purposing of advancing working class economic goals, was intended to help provide the rather ambitions aims outlined in Article 165 with substance.

29. See the resolution of the state labor court in Ulm, discussed by Ernst Fraenkel in *Justiz* 7, no. 4 (1931/32): 194.

Editor's Note: The Revolutionary Union Opposition (RGO) was a labor organization allied with the Communist Party.

30. See *Entscheidungen des Reichsarbeitsgerichts* 5 (1930): 252. A precise evaluation of these tendencies is provided by Otto Kahn-Freund, "Der Funktionswandel des Arbeitsrechts," *Archiv für Sozialwissenschaft* 67 (April 1932).

31. The contrast of "political vs. economic" is based in a set of pure value judgments about social behavior. Since a more detailed justification of these categories is usually not provided by the administrative bodies in question, it is difficult to determine in general to what extent the courts are conscious of the contemporary significance of this problematic. See Carl Schmitt, *Der Begriff des Politischen* (München: 1932).

32. Compare Ernst Huber, *Das Deutsche Reich als Wirtschaftsstaat* (Tübingen: Mohr, 1931), p. 29.

33. Karl Marx, *Kritik der Hegelschen Staatsphilosophie*, in his *Der Historische Materialismus, Frühschriften I* (Leipzig, 1932), p. 78.

34. Johannes Popitz, *Der künftige Finanzausgleich zwischen Reich, Ländern und Gemeinden* (Berlin: Verlag von Otto Leibmann, 1932). See the comments by Rinner in *Die Gesellschaft* 9 (April 1932).