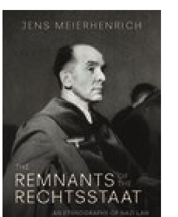

The Remnants of the Rechtsstaat: An Ethnography of Nazi Law
Jens Meierhenrich
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CHAPTER

5 The Debate about the *Rechtsstaat* in Nazi Germany, 1933–1936

Jens Meierhenrich

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Abstract

This chapter provides the legal and historical context necessary for appreciating the contribution of Fraenkel's ethnography of Nazi law. I begin with a brief history of the idea of the *Rechtsstaat* in Germany. I trace the term's evolution from its emergence in the early nineteenth century until 1933. In the second section I overview the most important Nazi critiques of the liberal *Rechtsstaat*, with a particular focus on the theoretical study of public law. The focus is on the major intellectual faultlines in the legal subfield of *Staatsrechtslehre*, from which Jewish protagonists were purged. In the third section, I focus on intellectual efforts inside the Nazi academy to "racialize" the *Rechtsstaat*, to bring it in line with the racial imaginary. The final section explains why, and when, the concept of *Rechtsstaat* was abandoned by legal theorists in the "Third Reich," and the consequences for the practice of law.

Keywords: Race, antisemitism, total state, Volk, Staatsrechtslehre, Carl Schmitt, Roland Freisler, Otto Koellreutter, Hans Frank

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One can be forgiven for thinking that the *Rechtsstaat* ceased to exist in Germany when the Nazis grabbed the reins of government in the course of their so-called *Machtergreifung* of January 30, 1933.[1] This narrative is prevalent in scholarly and popular accounts alike. And yet it distorts historical reality. It misconstrues not only the meaning of the concept of the *Rechtsstaat* in the early twentieth century but also the institutional development of the Nazi state in the early years of the Third Reich. In this chapter I correct these distortions of the theoretical and empirical record by analyzing in depth the debate about the *Rechtsstaat* in Nazi Germany that took place in the first years of the dictatorship. The debate was not just window dressing to placate the international community, although that was part of it. In the main it was a genuine battle over, about, and with ideas, abhorrent ideas, but ideas nonetheless.

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In a review of Edgar Tatarin-Tarnheyden's 1934 book *Werdendes Staatsrecht*, Otto Koellreutter, a key participant in the Nazi debate about the *Rechtsstaat*, held that the role of scholarship in the Third Reich was a critical one. To devise genuine solutions to the problems of the times, "slogans alone" ("*bloß Phrasen*") were not enough, he insisted: "Aside from the right attitude, the scholarly toolbox is required."[2] The debate about the *Rechtsstaat* was a serious intellectual contest among regime sympathizers, loyalists, and stalwarts —all of them jurists—concerning the contours and ideological foundations of the new state and its uses of law. Ideas mattered to almost all of the Nazis involved. The debate is indicative of a degree of legal consciousness that goes a long way toward explaining why, and, how, remnants of the *Rechtsstaat* mattered in the transition to authoritarian rule. In the midst of the debate, in June 1935, Carl Schmitt, Koellreutter's longstanding adversary in the legal academy, maintained that their "philosophical efforts [were] not non-legal ruminations, but an p. 96 ↳ immediately necessary part of the legal work involved in the clarification of a consequential and fateful concept" such as the *Rechtsstaat*.[3] His virulent antisemitism notwithstanding, Schmitt was right.

The debate about the *Rechtsstaat* was symptomatic of the institutional development to come. Like so many things at the time, it too was Janus-faced. The debate pitted against one another, on the one hand, theorists and practitioners who sought to retain, within Nazi reason, the terminology of the *Rechtsstaat*, and, on the other, far more extremist norm entrepreneurs who were insistent on doing away with the old nomenclature and keen to invent a new language to capture the revolutionary overhaul of the institutions of state. In the latter camp, however, disagreement was deep over which of the many proposed neologisms accommodated best the ideology of National Socialism. From administrative law to constitutional law, "[t]he clashes between party and state, between the prerogative state and the normative state, and between authoritarian and totalitarian currents were [...] played out in the terminology of [...] law. As in other areas, they remained unresolved right up to the end of the regime. However, the front lines shifted in tandem with the developmental phases of the entire regime."[4] The Nazi dictatorship was a dynamic institution, not a static one. Because legal practices were subject to, and crucial factors in, the institutional formation, deformation, and transformation of Nazi governance, it is essential to inquire into the changing character of law in the Third Reich, at the level of both theory and practice. Before I turn in subsequent chapters to everyday *practices* of Nazi law, I delineate in this chapter rival *theories* of Nazi law.

The analysis complements that in Chapter 2 and continues the intellectual history of the idea of the *Rechtsstaat* that I began in Chapter 4. I illuminate the dynamics of contention inside the dictatorship in an effort to debunk the myth of a Nazi behemoth. By examining in depth an important arena of Nazi intellectual life—legal thought—during the transition to and consolidation of authoritarian rule in Germany, I demonstrate that the law of Nazi dictatorship—at the moment of its most significant theorization—was not as uniform as we have been led to believe. I suggest that the Nazi debate about the *Rechtsstaat* bears out a number of claims of Fraenkel's theory of dictatorship. It epitomizes the struggle between (Nazi theorists of) the normative state and (those advocating for the expansion of) the prerogative state in the 1930s, thus mirroring key findings of Fraenkel's ethnography of law. I find that not just the *practice* of Nazi law was dual in nature, but that the *theory* of Nazi law was schizophrenic as well. Remnants of both the liberal *Rechtsstaat* and of the authoritarian *Rechtsstaat* were visible in everyday life up until 1938, and some of them were operational well into the war years. An improved p. 97 ↳ understanding of Nazi legal thought in the mid-1930s is useful for thinking about Nazi legal practice, which is why I take this detour before turning in detail to the findings Fraenkel derived from his research on, and participant observation in, the courts of the Third Reich. It is part of the historicization of law that I am attempting in this book, which for me is the task "of accurately describing the developments leading from one situation to another, or from one mindset to another."[5]

Although the shifting discourse about the nature and purpose of the *Rechtsstaat* in the period 1933–1936 contributed to its immediate devaluation and eventual destruction, it would be a mistake to dismiss the

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reflections about the concept of law in Nazi Germany as only a façade. On the one hand, Nazi stalwarts certainly advocated loudly for an abandonment of what they deemed a perversely liberal concept. More moderate Nazis, on the other hand, were reluctant to give up completely on the norms and institutions of the *Rechtsstaat*. They recognized their value for governing the dictatorship. For those among them who reasoned from a logic of consequences, the value of *Rechtsstaat* was purely instrumental; for others who argued from a logic of appropriateness, it was also the expressive function of the *Rechtsstaat* that in their eyes accounted for its value. To them, the *Rechtsstaat* was a cultural achievement, its formal embodiment of Germanic values appealing. These Nazis wanted to change the content of the form, not the form itself.

In order to make the idea of the *Rechtsstaat* usable in the Third Reich, both of these groups of Nazi legal theorists modified von Mohl's term of art with adjectives ranging from "national" to "National Socialist." In what follows, I reconstruct the convoluted three-year intellectual struggle to define the boundaries of authoritarian legalism as a practice of Nazi rule. Inasmuch as this struggle was, for most of those who partook, about ideas, it would be naïve to think that intellectual edification was the only motivation in play. Peter Caldwell's take on the logic of Nazi scholarship also applies to the discipline of law: "The 'theory industry' under Nazism was itself one of the areas of ravenous, opportunistic struggle among factions."[6]

The analysis is organized into four parts. I begin with an analysis of the Nazi concept of law, elaborating key tropes in Nazi critiques of the nineteenth century idea of the *Rechtsstaat*. I then disentangle the intellectual positions of those Nazi legal theorists who were inclined to retain the idea of the *Rechtsstaat*. The third part turns to their intellectual foes, comparing calls for the rejection of the *Rechtsstaat* as a conceptual—and political—variable. With the help of this juxtaposition I explain why the Nazi debate about the *Rechtsstaat* "was more than a mere disagreement over words," why it represented in fact "a fight over the very nature of ↳ Nazi politics."[7] Carl Schmitt and his ilk won the battle for the Nazi legal conscience: in the late 1930s, the term *Rechtsstaat* was purged from what Victor Klemperer had begun to call "LTI," the language of the Third Reich, or *lingua tertii imperii*.[8]

The Nazi Concept of Law

The debate about the *Rechtsstaat* in Nazi Germany got underway not long after the creation of the dictatorship. It centered on the question of whether the concept of the *Rechtsstaat* should be abandoned—or appropriated—to meet the demands of the "German revolution," as Nazi hardliners and sympathizers were wont to describe Hitler's seizure of power in the spring of 1933. Almost all of the protagonists of the Nazi debate about the *Rechtsstaat* were representatives of the subfield of *Staatsrechtslehre*, this peculiar theoretical branch of public law scholarship that dominated the German legal tradition in the early twentieth century.[9] Because the theory of law in the 1930s was "dictatorially homogenized," archconservative and extremist law scholars possessed the "interpretive power" ("*Interpretationsherrschaft*") to rethink the state in whichever way they saw fit.[10] Important intellectual (and other) cleavages divided these jurists, but what bound them together was a disdain for the idea of the nineteenth century *Rechtsstaat*, which they referred to as the "liberal" or "bourgeois" *Rechtsstaat*. This part analyzes the most important tropes in Nazi critiques of the nineteenth century idea of the *Rechtsstaat*. A trifecta of tropes stands out: (1) antiliberalism, (2) antiformalism, and (3) antisemitism. When considered in conjunction, they reveal a great deal about the Nazi concept of law.

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Antiliberalism

The intellectual theme uniting all of the protagonists in the Nazi debate about the *Rechtsstaat* was antiliberalism. Deep-seated and longstanding, the virulence of antiliberalism increased in the transition from democracy to dictatorship in the late 1920s and early 1930s. It reached its apotheosis in the immediate aftermath of the *Machtergreifung*, when the figurative and literal destruction of anything that smacked of liberalism was high on the Nazi agenda. The adjective "liberal" acquired a pejorative connotation, and with it anything that the ultimately unsuccessful revolutions of the previous century had introduced into politics, including parliaments, tolerance, and the rights of individuals.

p. 99 The rise of individualism in particular irked the legal theorists for the Reich. One of the first to revive the state as a conceptual variable was Julius Binder, a leading representative of Neo-Hegelianism in interwar legal thought.[11] In an extended meditation on the authority of the state, Binder critiqued the contractual tradition according to which statehood was a collective bargain, entered into by individuals seeking to escape Hobbes's *bellum omnium contra omnes*. This account of the state's authority was unconvincing, according to Binder: "[F]or us, the state is, in essence, authority. The state's rule over its citizens is unconditional and categorical. [...] [T]his authoritative nature of state power [...] [is] fundamental, original, and not at all derivative: it is not bestowed or derived or dependent on any earthly power. The state is not a means to an end, but is end in itself."[12] Binder's critique of individualism was partially inspired by Rudolf Smend, notably by the idea that the state is a living entity, an organic whole that can be traced back to an origin myth in response to which it also evolves and inspires commitment, and thus acquires legitimacy. This leads us back to the relationship between the individual and the state. Binder was convinced that the liberal turn had led to a categorical misunderstanding of this relationship. Liberals had imagined the individual as existing apart from the state, when, in fact, its existence was entirely contingent upon it. In Binder's argument, man is not the individual being that he thinks he is: the individual is only individual qua his group membership ("*er in seiner Einzelheit nur die Besonderheit eines Allgemeinen, ein Mensch als Glied seines Volkes ist*").[13] According to Binder, individuals are creatures of blood and soil. The formation of their interests is mediated by the culture of the state on the territory of which they live. Their preferences therefore are "concretely identical" ("*konkret identisch*") with the national interest of the state.[14] For Binder the state was the manifestation of a *Volk*'s will, an integrated and indivisible whole with a capacity for inspiring collective identity. He believed this idea of state was infinitely superior to that of the laissez-faire state favored by liberals.

The new statism in the interwar period had far-reaching consequences. As Heinrich Lange wrote gleefully at the time: "The new value system has pushed the individual off his throne. He is not valuable for his own sake. He is a serving member of society ('*Glied der Gemeinschaft*'), is of, and subordinate to, it."[15] Otto Koellreutter embraced "the idea of 'us' as the unity of a *Volk*" as the first and foremost attribute of statehood.[16] The mythology of community would eventually culminate in the invention of the *Volksgemeinschaft*, an ominous Nazi institution that received a great deal of scholarly attention in recent years.[17] By placing the interests of the community ahead of those of its individual members, Nazi jurists p. 100 ↳ radically reimagined the *Rechtsstaat*. In the racial imaginary, its purpose was not to protect the individual from the state, but the state from the individual; its nature was not passive, but interventionist. The Nazi theorist Wilhelm Glungler clarified this intellectual tenet during World War II: "Law's purpose is not to secure the so-called individual sphere and thus private life. The law of the state as the foundation of life for the *Volksgemeinschaft* has priority."[18]

There was widespread agreement among Nazi legal theorists that the function of law in the Nazi dictatorship was to create the conditions for the creation and maintenance of a strong state, one unencumbered by special interests, one not hamstrung by a liberal institutional design like von Mohl's. Liberal theories of law, according to this argument, had betrayed the achievements of German idealism and paved the way for unbridled decadence, as exemplified by the rampant rise of individualism and, in the

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words of Hans Frank, the "crassest materialism" ("*krassesten Materialismus*").[19] Nazi critics in the legal establishment disparaged the idea of freedom as an example of narcissistic self-interest pursued by moneyed classes. A supposed sense of entitlement had led to the legalization of politics in Weimar Germany, which in turn had resulted in a depoliticization of politics, an unacceptable condition that required a radical cure.[20] Depending on who made the diagnosis, the cure involved either the racialization of the *Rechtsstaat* or its abandonment.

Helmut Nicolai posited that the prevalent commitment to legal positivism in Weimar Germany had resulted in the comprehensive destruction of law as a moral idea ("*zu einer vollständigen Erschlagung des sittlichen Gedankens*"), not to mention the most awful materialism ("*übelstem Materialismus*").[21] The only way to combat the risk of arbitrariness that legal positivism was said to have created, according to Nicolai, was to look beyond the written law and let the underlying moral idea of law ("*den zentralen, ethischen Rechtsgedanken*") be the guide for assessing the validity of law, and thus its suitability for the creation and maintenance of Nazi order.[22] Carl Schmitt heaped additional scorn on the laissez-faire nature of the "bourgeois *Rechtsstaat*," as the liberal instantiation of von Mohl's neologism was often described in conservative and right-wing circles. But as Peter Caldwell has persuasively shown,

> The key to Schmitt's notion of the bourgeois *Rechtsstaat* is to be found as much in the adjective "bourgeois" as in the term "*Rechtsstaat*" itself. The bourgeoisie was, for Schmitt, more a moral and political stance than a social group. Its essential characteristics were individualism, liberalism, and support for government by parliament. It yearned for the "eternal conversation" of parliamentary debates rather than concrete decision. It was indecisive and unable to act. It avoided the "real" world of politics in favor of "political ↳ romanticism." Schmitt saw an intrinsic connection between the effeminate and indecisive bourgeoisie and the *Rechtsstaat*.[23]

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Schmitt was opposed to the limited nature of the liberal *Rechtsstaat*, which he saw falsely enshrined by the institutional separation of powers, a principle he detested. Prior to the Nazi dictatorship, in his constitutional treatise the *Verfassungslehre*, published in 1928, Schmitt had chronicled in great detail his reservations about the "bourgeois *Rechtsstaat*," and without giving it a name, the key features of the more authoritative (and authoritarian) state he was after—in both theory and practice. At the time, his assessment was critical but not yet disparaging. His summary of key tenets of the liberal *Rechtsstaat* was admirably clear and concise:

> The fully realized ideal of the bourgeois *Rechtsstaat* culminates in the conformity of the entire state life to *general judicial forms*. Under this *Rechtsstaat* ideal, there must be a procedure for every type of disagreement and dispute, whether it is among the highest state officials, between officials and individuals, or, in a federal state, between the federation and the member states or among the member states, without regard for the type of conflict and object of dispute, a process in which decisions are reached according to a procedure in accordance with legal forms. [...] [T]he most important presuppositions of this type of procedure are valid, general norms. For the judge is "independent" only so long as there is a valid norm on which he is unconditionally dependent, whereby under "norm" is understood only a general rule determined in advance.[24]

This state of affairs was unacceptable to Schmitt, not least because it meant that the state was mere "*Gesetzesstaat*" ("legislative state"), a pejorative term that was popular among conservatives at the time to denote a state lacking in soul, one that churned out legislation but neither housed nor inspired metaphysical meaning. The equation of law with statute was anathema to all Nazi legal theorists. Martin Wittig, for example, was convinced that statutory rule was arbitrary rule. His logic: Because any form of parliamentary representation was by definition temporary, any legislative act could only ever be an ad hoc solution to a political problem.[25] For Wittig, the problem was exacerbated by the fact that the political compromise that

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lay at the heart of any statute was invariably negotiated by a random selection of individuals and groups serving in parliament at a given time. Heinrich Lange also rejected the liberal idea of representation and claimed that the rise of statutory rule had marginalized such "eternal values" ("*Ewigkeitswerte*") as "God, *Volk*, homeland, blood, honor, duty."[26] By establishing a supremacy of facts, and by introducing a strict separation between "is" (*Sein*) and "ought" (*Sollen*), Nazi legal scholars believed, liberal theorists of law had rendered law meaningless—in all senses of the p. 102 ↳ word. As long as the "ought" was separated from the "is," Günther Krauß argued, it was impossible to account for either the origins of law, the substance of law, its binding character, or the purpose of law.[27]

Schmitt likewise was convinced that the state was "not merely a judicial organization," as he put it in one of his Weimar-era writings: "It is also something other than a merely neutral member of a conflict resolution body or an arbitrator. Its essence lies in the fact that it reaches the *political decision*."[28] Five years later, in 1933, Schmitt reconfigured his institutional theory to legitimate the emerging racial state, this "*Weltanschauungsstaat*."[29] All Nazi legal theorists desired an ideological state. All of them sought to overcome the separation of law and morals, which they portrayed (erroneously) as the common denominator of liberal theories of the *Rechtsstaat*.

Nazi theorists also worried about the effects of practices associated with the idea of the liberal *Rechtsstaat* in specific areas of the law. In the case of criminal law and procedure, for example, Schmitt objected to resolving the trade-off between liberty and security in favor of the individual rather than society. Referencing Friedrich von Liszt's quip that the principle of *nullum crimen, nulla poena sine lege* represented the "criminal's magna carta" ("*Magna Charta des Verbrechers*"), Schmitt argued the eighteenth century "positivistic" principle had fatefully supplanted the "just" principle of *nullum crimen sine poena*, or no crime without punishment.[30] For Schmitt, this state of law was to the detriment of the V*olksgemeinschaft* and incompatible with "today's National Socialist predicament" ("*heutige nationalsozialistische Problemstellung*").[31] Nicolai echoed this assessment, declaring that liberalism "due to its tolerance" was no longer capable of distinguishing "law and lawlessness" ("*Recht und Unrecht*").[32] By legalizing the state, so the argument went, liberals had taken "the lightness and nimbleness" ("*Leichtigkeit und Wendigkeit*") out of politics.[33]

Antiformalism

For the protagonists in the Nazi debate about the *Rechtsstaat*, Friedrich Julius Stahl was the enemy personified. He was the intellectual "other" whose institutional theory they sought to discredit, uproot, and overcome. Stahl's famous definition of the *Rechtsstaat* revolved around a strict separation of law and morals, which is why it was inherently objectionable to all legal theorists in the Third Reich.

In the mid-nineteenth century, Stahl described the idea of the *Rechtsstaat* as one that did not "denote the goal (*Ziel*) and content (*Inhalt*) of the state, but only the nature (*Art*) and character (*Charakter*) required to realize them."[34] This conceptual reduction of the idea of the *Rechtsstaat* p. 103 ↳ was unacceptable to a racist movement dedicated to ideological projection. It is therefore not surprising that all of our protagonists, albeit to different degrees, wanted to jettison the procedural concept of law that had dominated the late nineteenth and early twentieth centuries and establish in its stead a substantive concept of law, one infused with Nazi ideology. They imagined a state that would be receptive to, and reflective of, "higher values," as Ernst Forsthoff put it in his widely read pamphlet, *Der totale Staat* (*The Total State*).[35] With Schmitt they believed that the laws and statutes of the liberal *Rechtsstaat* amounted to nothing more than the "timetable of the bureaucratic machine" ("*Fahrplan der bürokratischen Maschine*").[36]

This empty formalism was anathema to the Nazi project, least of all due to the latter's insistence on the supremacy of the *Führerprinzip*, that is, the principle of Hitler's legitimate authority qua charismatic

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leadership. By subordinating legal authority, what they decried as "rule of statutes" ("*Herrschaft der Gesetze*"), to charismatic authority, Nazi theorists stood the idea of the liberal *Rechtsstaat* on its head. A ruler, not rules, was the apex of power. The principle of institutional self-binding was, at least in the highest echelon of power, discarded. Hitler was the final arbiter of law. It does not follow that law was meaningless, however. As we shall see, up to a point, legal norms and institutions mattered in the Third Reich. They enabled and constrained and were honored in the breach. They courted violence, sometimes muted it. They made dictatorship possible, and, on occasion, resistible. The effects of legal norms and institutions were contradictory: they governed and legitimated the Nazi dictatorship but every now and then also stood in its way. In other words, Nazi law was Janus-faced, which is why Fraenkel's institutional theory of dictatorship is so insightful.

The regime's legal theorists embraced antiformalism as a way to undermine the constraining effects of legal norms and institutions. The institutional validation of the *Führer* in Nazi legal theory was, among other things, a denigration of Kelsen's concept of the *Rechtsstaat*, in which "*Führerlosigkeit*," or lack of leadership, was a defining feature.[37] Inasmuch as Kelsen's concept was acknowledged to hold arbitrariness in check, the protagonists in the Nazi debate about the *Rechtsstaat* firmly believed that the achievement of legal certainty came at too high cost: at the price of leaving no room for the "genuine passion and genius virtue of the true statesman" ("*echter Leidenschaft und genialer Tugend des wahren Staatsmannes*").[38] Unless the ruler was left unmoored, the potential of his charismatic leadership could not be harnessed. He was, as Lange wrote in a reference to Jonathan Swift, a "bound Gulliver" ("*gefesselter Gulliver*").[39]

One cost of formalism that several of the Nazi legal theorists highlighted was the existing *Rechtsstaat*'s p. 104 supposed inability to govern the ↳ exception, or *Ausnahmezustand*, by which they meant, as one of them put it, "a case of extreme peril, a danger to the existence of the state, or the like."[40] Re-enter Schmitt, for whom "there exists no norm that is applicable to chaos."[41] Unsurprisingly, his institutional prescription was as straightforward as it was reactionary: "The precondition as well as the content of jurisdictional competence in such a case must necessarily be unlimited."[42] This contradicted von Mohl's concept of the *Rechtsstaat*: "When Robert von Mohl said that the test of whether an emergency exists cannot be a juristic one, he assumed that a decision in the legal sense must be derived entirely from the content of a norm. But this is the question. In the general sense in which Mohl articulated his argument, his notion is only an expression of constitutional liberalism and fails to apprehend the independent meaning of the decision."[43] In this argument, politics trumped law, and decisions were more important than norms. If we use Fraenkel's categories, we might say that Schmitt, the arch conservative-turned-Nazi, in his Weimar-era writings articulated a clear preference for a prerogative state over a normative state. Or, as Schmitt put it in 1922, "Like every order, the legal order rests on a decision and not on a norm."[44] For him, maintaining political order in extraordinary times was more important than preserving a given legal order, even though he recognized the contribution of legal norms and institutions to the maintenance of social order in ordinary times. The *Rechtsstaat* (with or without adjectives) was for Schmitt a relic of a bygone era.[45] He was after "politonomy," to use Martin Loughlin's useful term:

> [Schmitt] is to be situated within a tradition of understanding public law as political jurisprudence. This body of thought recognizes the necessity of addressing the relationship between the legal within the political for the purpose of explaining the constitution of modern political authority. Rather than postulating the autonomy of law, thereby cutting off inquiry into the nature of the relationship between law and politics, political jurisprudence insists on the necessity of undertaking an inquiry into the character of the fundamental laws of the political. In this sense, political jurisprudence is an alternative formulation of the discipline of politonomy.[46]

For Schmitt and others, "all law is situational law."[47] And only an almighty leviathan could ensure that social order was preserved. "For Schmitt, a monstrous state of affairs ensued when society presumed to

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enter the state, dictate the state's will, and thereby alter the abstract norms regulating society itself."[48] The idea of the *Rechtsstaat*, according to him, exemplified such an entry—society's invasion of the sacred state space. Already in 1930, Schmitt had likened liberal theorists of the state, like von Mohl, to "a great band of robbers": "When the 'earthly God' tumbles p. 105 ↳ from his throne and the realm of objective reason and ethics [*Sittlichkeit*] becomes a '*magnum latroconium*,' then the political parties butcher the mighty Leviathan and each cut their piece of flesh from his body."[49] The metaphor of the state being devoured by societal actors cuts to the heart of Schmitt's critique of liberalism.[50] It also sheds light on his reasons for rejecting the *Rechtsstaat* as an institutional design for orderly rule. For Schmitt, as for other hardliners in the debate about the *Rechtsstaat*, the idea of institutionally limiting the sovereign—whether king or *Führer*—was tantamount to treason. To take the place of "functional legality" ("*funktionale Legalität*"), Nazi legal theorists endeavored to institutionalize "substantive legitimacy" ("*substantzhafte Legitimität*"). All of these institutional designs started from the premise of antisemitism.

Antisemitism

Most of the contributors to the Nazi debate about the *Rechtsstaat* were convinced that liberalism's concern with legality and normativity was a manifestation of "Jewish legal thought" ("*jüdischen Rechtsdenkens*").[51]

The legal theorist most frequently targeted with antisemitic slurs in the debate about the *Rechtsstaat* was Stahl. According to Günther Krauß, Stahl's idea of the *Rechtsstaat* posed a "danger" ("*Gefährlichkeit*") to the incumbent regime.[52] Although the religious Stahl, who detested the revolutionary furor of 1830 and 1848, was a declared intellectual enemy of von Mohl's, and an advocate of an authoritarian *Rechtsstaat*, he was held responsible for having inspired Christian legal thought in Weimar Germany, the kind of conservative perspectives on law that theorists of the Third Reich condemned.[53] Krauß singled out Stahl for opprobrium because of the latter's rejection of Hegel. He put an antisemitic twist on the argument by claiming that Stahl had "chased the German," by which he meant Hegel, "out of his homeland" ("*den Deutschen aus seiner Heimat vertrieben*") which, by implication, meant that Germany was not Stahl's country.[54] In this antisemitic argument, the Nazi Reich belonged to Hegel's descendants, not Stahl's.

Binder also singled out Stahl. In a widely read article that he had completed before but published only after the *Machtergreifung*, in 1933, Binder spelled out the ideational and institutional demands of the authoritarian state of the future as he imagined it. He charged Stahl with having distorted "the true essence of the conservative and national concept of the state," and for having paved the way for liberalism and democratization through his advocacy for a monarchical principle on Christian foundations.[55] Others concurred, writing with concern about the fact that Stahl's arguments had become staples ("*Gemeinplätze*") of Weimar p. 106 ↳ legal thought.[56] Given the influence he was said to posthumously have wielded, Stahl's scholarship was consistently derided, as was his character: he was pejoratively referred to as "Stahl-Jolson," "Jolson-Stahl," or just "Jolson."

Born Julius Jolson to Jewish parents in 1802, Stahl converted to Protestantism at the age of seventeen and assumed the name Friedrich Julius Stahl.[57] The explicit references in Nazi Germany to Stahl's pre-Christian surname were a blatant attempt at "othering," a hateful tactic to denigrate Stahl's intellectual contribution by reminding readers, in a time when antisemitism was a widely accepted societal norm, of his erstwhile Jewish faith.[58] Günther Krauß fanned the flames of antisemitism when he insisted that "Stahl" was a fake name ("*Tarnungsname*") behind which "Jolson" hid his supposedly wicked Jewish character.[59] Schmitt, more than anyone, took aim at Stahl, borrowing heavily from the antisemitic repertoire of legal contention. As Heinrich Meier writes, "From 1933 to 1938 Stahl is the enemy whom Schmitt most frequently attacks by name and reviles personally."[60] The matter is far from trivial, and Schmitt's antisemitism far from incidental. We now know that Schmitt was a lifelong antisemite; his hatred of Jews was not a phase but a constant.[61] During the period under investigation, "enmity towards 'the Jews' is what binds Schmitt to

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National Socialism the longest."[62] He and many other Nazi legal theorists used the adjective "Jewish" and the noun "Jew" as intellectual weapons. Schmitt explained at some length why the weaponization of language was called for. He illustrated the issue with reference to what he termed "the problem of citations" and pointed to the example of Stahl:

> A Jewish author to us has no authority, not even "purely scholarly" authority. [...] A Jewish author, if he is even cited, is to us [nothing more than] a Jewish author. The addition of the word and label "Jewish" is not a minor point, but something essential [...]. Otherwise the cleansing of our legal literature is impossible. Whoever today writes "Stahl-Jolson" has, in a truly scientific manner, accomplished more than [he could] with grand observations directed against Jews that stay at a general level of abstraction, and, as a result of which, not a single Jew feels addressed *in concreto*.[63]

Schmitt uttered these words at the infamous 1936 conference "*Das Judentum in der Rechtswissenschaft*" which he convened in October of that year, among other things, to curry favor with the new authoritarians. In addition to Stahl, Schmitt singled out Paul Laband, Erich Kaufmann, Hans Kelsen, and Hermann Heller as legal scholars to be shunned.[64] "If for a substantive reason it is necessary to cite Jewish authors," Schmitt instructed his audience, "then only with the addition 'Jewish.' The mere mention of the word 'Jewish' will p. 107 bring about a healing exorcism."[65] ↳ Although some of Schmitt's rivals in the Nazi legal academy did not attend the 1936 conference, another important protagonist in the debate about the *Rechtsstaat* did participate: Edgar Tatarin-Tarnheyden.

The focus of Tatarin-Tarnheyden's intervention, subsequently published as a monograph, was the role of Jewish thought in the theory and practice of the German state.[66] The "Jewish question" ("*Judenfrage*"), as he referred to it, was of critical significance to him because of the supposedly "fateful" ("*verhängnisvoll*") role that non-Aryan scholars had played in the development of nineteenth but especially twentieth century law. Tatarin-Tarnheyden's diagnosis: Jewish influences had "swamped" ("*überfremdet*") German legal thought, thereby soiling it.[67] Like Schmitt, he singled out Stahl, although he conceded that other scholars probably had more directly influenced Weimar legal culture. But Tatarin-Tarnheyden offered an extensive reading of Stahl's oeuvre nonetheless, one full of racial epithets, because, as he observed, in the writings of the nineteenth century conservative theorist "the Jewish" ("*das Jüdische*") was not always immediately noticeable—and thus important to bring to the attention of readers in the Third Reich who might otherwise mistake Stahl for one of their own.[68]

Among the many failings attributed to Stahl was his disregard of the *Volk* as a living organism. It was in this context, claimed Tatarin-Tarnheyden, that "his Jewish thinking" was "doubly evident."[69] Stahl was targeted because he thought the *Volk* was not a providential community, but simply another word for a population subject to the authority of the state. For Stahl it was indeed a descriptive designation, not a constitutive one. He thought in societal, not communal terms, which is why the Nazi institution of the *Volksgemeinschaft* ran afoul of his institutional belief in a separation between state and society. For this point of view, his "formal-statist" ("*formal-etatistisch*") concept of the *Volk*, Stahl was called to task in the Nazi debate about the *Rechtsstaat*. Stahl's legal thought as well as that of Kelsen and Laband and some of the other influential lawyers that we encountered in the previous chapter, the racial state deemed dispensable. It was described as lacking in "natural and cultural substance" ("*frei von aller naturhaften and kulturhaften Substanz*"), and, consequently, the "substantive ethos" ("*substanzhafter Ethos*") that the governance of a purified Germany required.[70] This pervasive lack of conviction, or moral hollowness, Tatarin-Tarnheyden claimed, had, in the cases of Kelsen, Laband, and "Stahl-Jolson," led to an objectionable dogmatism. In practical terms, he claimed, it had spawned two phenomena that needed to be uprooted: "*Gesetzespositivismus*" and "*Begriffsjurisprudenz*," or "statutory positivismus" and "conceptual jurisprudence."[71]

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p. 108 According to virtually every Nazi legal theorist writing at the time, the emphasis on formality and generality, on logic and abstraction, were quintessentially Jewish preoccupations that deserved to be condemned and eradicated from the theory and practice of law. Krauß, for example, argued that Stahl was predestined "by race" ("*seiner Rasse nach*") to believe in a normative state.[72] Such crude essentialism was commonplace in the debate about the *Rechtsstaat*. Nazi intellectuals also invoked the metaphor of a "phalanx" of Jewish legal theorists to exaggerate the supposed onslaught from legal positivism—the unified front of the invented other in law.[73] Tatarin-Tarnheyden's antisemitic pamphlet even announced a destructive ambition: After likening Germany's Jews to "parasitic" climbing plants that were tarnishing Aryan trees, he warned they should not be surprised if the weakened and exhausted tree trunk rose ("*aufbäumt*") to fight for its survival.[74] This slur is a quintessentially "chimerical assertion," as defined by the historian Gavin Langmuir.

In his effort to comprehend the precise function of communication in antisemitic utterances, Langmuir has distinguished among realistic, xenophobic, and chimerical assertions. He takes the latter to refer to "propositions that grammatically attribute with certitude to an outgroup and all its members characteristics that have never been empirically observed."[75] Schmitt, Krauß, Tatarin-Tarnheyden, and the other participants in the Nazi debate about the *Rechtsstaat* compiled a large repertoire of chimerical assertions about a group within the outgroup: lawyers. Despite important and obvious epistemological, theoretical, and methodological differences among German lawyers of Jewish ancestry, the distinguishing factors of their professional identities were erased, their individual selves violently reduced to an imagined, chimerical essence.[76] This essence was said to have undermined the long legal tradition of the "Nordic Urvolk," for whom, according to some of the Nazi legal theorists, law represented an indivisible trinity of race, law, and *Sittlichkeit*.[77] Helmut Nicolai in particular mythologized a "Germanic" way of law. By appropriating Friedrich Savigny's idea of the *Volksgeist*, or "spirit of the Volk," and declaring it a fundamental and perennial source of German law, he charted a course for the racialization of law.

According to Nicolai, the concept of the *Volksgeist* had temporarily—and unjustly—fallen out of favor because of a missing ingredient: race. Race was the animating idea behind Nicolai's idea of the *Volksgeist*. He drew inspiration especially from ancient German law in which, he claimed, race and law had existed in such a tight and mutually constitutive relationship that "the entire legal order was arranged along *völkisch*, racial, and biological lines."[78] Schmitt was looking in the same murky corners for ingredients with which to strengthen the cement of society: "We p. 109 ↳ are looking for a bond that is more credible, more alive, and deeper than the treacherous commitment to the twistable letters of the law contained in thousands of statutory provisions. Where else could this bond be found if not in ourselves and in our kind?"[79] Schmitt left no doubt that by "kind," he meant the Aryan race. In his pamphlet *Staat, Bewegung, Volk*, first published in 1933, he produced a forty-six-page justification of the Nazi racial order. In it, he insisted, among other things, that "racial equality" ("*Artgleichheit*") was a *sine qua non* of Nazi dictatorship.[80] I have elsewhere described this line of reasoning as "racial institutionalism": "What previously had been 'just' an example of extremist institutionalism [Schmitt] retrofitted with the trappings of National Socialism, including some of the ideological tenets that combined with the regime's 'eliminationist racism.' "[81]

However, antisemitic tropes were more prevalent in some of the contributions to the Nazi debate about the *Rechtsstaat* than in others. In the writings of Otto Koellreutter, Julius Binder, and Otto von Schweinichen, for example, anti-Jewish propaganda, although ever present, was communicated less virulently than in the contributions of Helmut Nicolai and Hans Frank—to draw attention to two Nazi theorists for whom the category of race was not of incidental but of central import. Nicolai was an ardent advocate of what he called "*rassengesetzliche Rechtslehre*," or "racial legal studies."[82] In his manifesto, Nicolai was quick to invoke recent advances in eugenics and race science ("*Erkenntnisse der neueren Vererbungs- und Rassenwissenschaft*") to lay the foundations for his racial theory of law.[83] For him law was a question of genetics. Respect for it was transmitted by blood, not statutes. Better humans, not better institutions,

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improved the law, or so he thought.[84] Nicolai was convinced that the idea of freedom of will was a smokescreen. In his argument, criminal behavior was always a consequence of genetic predisposition never the result of individual choice. Consequently, Nicolai favored severe punishment for any transgressions of the law. The notion that perpetrators could be rehabilitated, he dismissed as the brainchild of "democratic Jewry" ("*demokratischen Judentums*").[85] Because race determined being, the purpose of punishment had to be the removal of transgressive beings, either, in major cases, by elimination ("*Ausmerzung*"), or, in minor ones, by deterrence.[86]

At the time of the Nazi debate about the *Rechtsstaat*, Hans Frank was the most visible (though not the most influential) legal practitioner in the Third Reich. On April 25, 1933, Reich President Paul von Hindenburg had appointed him to the position of Reich Commissioner for the Centralization of the Judiciary and the Renewal of the Legal Order (*Reichskommissar für die Gleichschaltung der Justiz und für die Erneuerung* p. 110 ↳ *der Rechtsordnung*). In June of that year, Frank founded the *Akademie für Deutsches Recht*, the Berlin-based Academy of German Law, and in 1936 construction began in Munich on the *Haus des Deutschen Rechts*, a monumental building designed as a stage for his legal performances on behalf of the dictatorship.[87] Frank was an early ally of Hitler's. Starting in 1927, he defended Hitler in court on several dozen occasions, and in 1929 became the NSDAP's legal counsel. He also had a hand in the creation of the *Bund Nationalsozialistischer Deutscher Juristen* (BNDJ, Association of National Socialist German Jurists), and the *Leipziger Juristentage*, annual conventions of the country's Aryan lawyers that sought to mimick, on a smaller scale, the regime's Nuremberg rallies.[88]

Frank's hatred of Jews was often on display. In an address to jurists on May 12, 1933, he declared that the BNDJ "will never cease until all Jews are completely purged from legal life," a statement for which, according to the transcript, he earned strong applause.[89] Later that year, Frank introduced a number of principles meant to guide the purification of Nazi law. He decreed that legal scholarship was the sole preserve of German men ("*deutschen Männern vorbehalten*").[90] Moreover, publishers were barred from publishing new editions of law books by Jewish authors, and any existing such editions were to be removed from public libraries.[91] Reiterating a position he had first formulated ten years earlier, Frank, in 1936, declared that law was what benefitted the German *Volk*, and that whatever was to the detriment of the *Volk*, by definition, constituted lawlessness ("*Unrecht*"), a view that moderates and hardliners in the Nazi debate about the *Rechtsstaat* ultimately shared.[92] However, the "*Neue Rechtswissenschaft*," or "New Legal Science," a programmatic term that the so-called *Kieler Schule*, an influential stream within the Nazi legal academy, had invented, was more convincing at performing acts of "demarcation" ("*Abgrenzung*") than acts of constitution. Its members were adept at describing the kind of law they did *not* want to practice, but far less so at articulating a coherent conception of Nazi law.[93] Horst Dreier has used the term "negative consensus" ("*Negativkonsens*") to describe this predicament.[94]

A few dozen legal theorists and practitioners participated in the Nazi debate about the *Rechtsstaat*. All of them were "frightful jurists" ("*furchtbare Juristen*"), to borrow Ingo Müller's well-worn formulation. Unfortunately, the label, as befitting as it is, tells us little about the fierce infighting that divided the Nazi legal establishment in both the academy and government, and the consequences thereof for the legal terminology and institutional development of the Third Reich, including its normative state. With good reason, the legal philosopher Edin Šarčević has therefore implored scholars not to dismiss authoritarian critiques of p. 111 ↳ the liberal *Rechtsstaat* and their efforts to advance a Nazi concept of law. With Šarčević I believe it important to subject these critiques to analytical scrutiny so as to understand better than we currently do the legal origins of dictatorship, then and now.[95] In an effort to cut through the cacophony of voices in the Nazi debate about the *Rechtsstaat*, I distinguish two competing preferences on the part of the participating jurists: (1) racializing the *Rechtsstaat*; and (2) replacing the *Rechtsstaat*. As so often in life, the devil is in the details.

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Racializing the *Rechtsstaat*

It has been said that Nazi jurists retained the language of the *Rechtsstaat* in the early years of the dictatorship for strategic reasons, to curry favor with an international community in which some governments feared a return of German militarism and a renewed quest for mastery in Europe.[96] According to this rationalist argument, the Nazi debate about the *Rechtsstaat* was purely performative, not at all substantive. Several observers have pointed to the "legitimating" effects of an internationally recognizable "political-constitutional achievement."[97] It is also undeniable that some Nazi advocates of the *Rechtsstaat* hoped to appease the country's anxious monied classes, notably those who were concerned about the right to property and related protections of commercial activity.[98] And yet, it would be wrong to assume that this was the only, let alone, the most important reason for the Nazi debate about the *Rechtsstaat* to take place. In accounting for its emergence and the vigor (as well as the intellectual rigor) with which (much of) it was conducted, we need to consider a constructivist explanation as well. I propose that some Nazi legal theorists debated the *Rechtsstaat* at the highest level of abstraction also because it was socially meaningful for them to do so. Many of the elite jurists in the Third Reich were genuinely committed to broadening their country's legal imagination—however repulsive this Nazi legal conscience is by almost any standard. They certainly were self-interested actors, but whether as nemesis or katechon, the *Rechtsstaat* mattered to almost every one of them expressively. It gave social meaning to their intellectual struggle in the service of a dehumanizing ideology. It was a contest over identity: the collective identity of Nazi law, certainly, but also the individual and professional identities of theorists and practitioners of Nazi law, all of whom needed to come to terms—inwardly and outwardly—with the confusing signs of the times.[99]

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Legalizing the Volk

The most notable defender of the language of the *Rechtsstaat* was Otto Koellreutter. Koellreutter proposed to retain and modify the concept because he considered it a *general* category of analysis and practice. In a 1932 contribution, he proffered the concept of the "national *Rechtsstaat*." With it he hoped to uproot the liberal connotation of von Mohl's idea of the *Rechtsstaat*. According to Koellreutter, a national *Rechtsstaat* related "legal value" ("*Rechtswert*") to "political value" ("*politischen Wert*"), though the latter would always rank supreme. He attributed an explicit ordering function to this *Rechtsstaat*, which centered on the provision of legal formality and legal certainty. His idea of a racial *Rechtsstaat*, which he theorized further in 1933 and again in 1934 and 1935, was an "authoritarian state" ("*autoritärer Staat*") that, in Nazi Germany, he re-christened "authoritarian *Führerstaat*" ("*autoritärer Führerstaat*"). In Koellreutter's conception, this state was held together by an expressive "idea of law" ("*Rechtsidee*") derived from a constitutive "experience of community" ("*Gemeinschaftserlebnis*") and made possible by the *völkisch* "ideology" ("*Weltanschauung*") underpinning it. This idea of law was ingrained in and supported by a "legal order" ("*Rechtsordnung*"), a formal but weakly institutionalized structure designed to reduce transaction costs but *not* to constrain the racial dictatorship. In his 1933 textbook, he noted that the function of any legal order—its only function—was to give shape and form to the "energy field" ("*Kräftefeld*") where social and political forces meet.[100] This was the be-all and end-all of the Nazi *Rechtsstaat*, according to Koellreutter's vision: it enabled, but it did not constrain. His quest for an authoritarian state that was *authoritative* was not dissimilar to Binder's understanding of the adjective, of whom more below. For both theorists, an authoritarian state was a powerful state that governed through strength but primarily by way of the legitimacy that it acquired through the confidence vested in it by its people, the *Volk*.[101]

For Koellreutter the existence of the Nazi legal order was predicated exclusively on the will of the *Volksgemeinschaft*, as expressed in its "*Rechtsgefühl*," the community's sense of law, by which he meant everyday attitudes toward law's rightness. Immanent in it, according to Koellreutter, were the self-evident, "moral demands of justice" ("*ethische Forderungen der Gerechtigkeit*"), by which he meant not universal

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imperatives in the Kantian fashion but moral imperatives derived solely from the demands of the political.[102] Nazi justice was political justice. Or, to paraphrase Schmitt, Koellreutter's fiercest rival on the Nazi firmament: just is he who decides on the norm.[103] In 1934, Koellreutter coined the label "National p. 113 Socialist *Rechtsstaat*" to bring his expressivist ↳ institutional design even further in line with the precepts of Nazi ideology.[104] He declared that the supreme source of Nazi law was not legislation, that is, formally rational law, but the law itself ("*das Recht*"), by which he meant, in Weber's parlance, substantively irrational law.[105] In the transition from his concept of the "national *Rechtsstaat*" to that of the "National Socialist *Rechtsstaat*," Koellreutter altered his understanding of law in subtle but noteworthy ways. Whereas he previously worked with a non-positivist concept of law, he now relied on a "supra-positivist" ("*überpositiv*") one.[106] In his elaboration of the idea of the "national *Rechtsstaat*," Koellreutter had argued that a relationship of polarity ("*Polaritätsverhältnis*") existed between the "ethical" demands and "political necessities" of lawmaking.[107] By placing the binary of law/politics at the heart his concept of the *Rechtsstaat*, Koellreutter laid intellectual foundations for the emergence of a dual state *in practice*. By subsequently theorizing the "*völkisch* idea of law" ("*völkische Rechtsidee*") as the foremost *source* of law, rather than merely a guide for interpretation, as he had done previously, Koellreutter hollowed out the idea of the *Rechtsstaat* in a very particular way. His was a theoretical argument for removing the institutional separation that he maintained still kept law and politics apart. The so-called *Röhm Putsch* of 1934 illustrates the practical significance of this theoretical move. To use Fraenkel's terms, it exemplifies the normative state acting on behalf of the prerogative state.

In Koellreutter's reading, the violent intra-regime purge that took place between June 30 and July 2—in which extrajudicial death squads had assassinated Ernst Röhm, the leader of the SA, as well as other figures marked as troublesome—was legal because it was retroactively legalized.[108] Koellreutter was not in the least concerned with the ex post facto legalization of the killing spree. The legislation in defense of the state exemplified to him the regime's commitment to *both* formally rational law and substantively irrational law. The exception became the norm, so to speak, and in more senses than one. The violence of the 1934 exception, in Koellreutter's view, "positivized" itself, it acquired formal legality after the fact.[109] Substantive legality, to stay with Weber's terminology, the purge possessed all along, at least in Koellreutter's interpretation: "The law of exception (*Staatsnotrecht*) positivizes itself (*positiviert sich*) whenever the preservation of a *Volk*'s order of life is concerned (*Lebensordnung*), the preservation of which is the highest political and simultaneously a legal value (*Rechtswert*)."[110] Koellreutter's second revision of the *Rechtsstaat*-concept—his institutional sketch of the "National Socialist *Rechtsstaat*"—allowed him to legitimate the violent foray of Hitler's prerogative state in terms of law.

p. 114 Because he had turned the *völkisch* idea of law into a fully-fledged source of law, any act or omission carried out in accordance with this supra-positivist principle enjoyed legal validity in Koellreutter's world. With this theoretical construction, Koellreutter hoped to show that the Nazi state was a genuine state of law, a *Rechtsstaat*, albeit one with racial overtones. Like previous incarnations of the *Rechtsstaat*, he argued, the Nazi state was institutionally bound by law, except that in this latest manifestation, law's constitutive and constraining force derived from the *völkisch* idea of law and no longer the "rigid forms of statutory rule" ("*starren Formen des Gesetzes*").[111] In 1942, Koellreutter looked back upon the Nazi debate about the *Rechtsstaat* with regret.[112] Intellectually defeated, he bemoaned the inability of his intellectual (and professional) rivals to recognize the "eternal value" ("*Ewigkeitswert*") of the *Rechtsstaat*, which, he was still certain, fulfilled essential ordering functions in any polity, including the Nazi one.[113] Koellreutter was not the only Nazi theorist who tried to combine his trust in law with his faith in race.

Despite reservations about the idea of the *Rechtsstaat*, a notable number of Nazi intellectuals at first clung to the concept. Some did so out of an expressive conviction; others saw its instrumental value, from its regulatory power to its "suggestive power."[114] Regardless, "[m]uch was still up in the air during this first phase [of theoretical reflection about the concept of Nazi law], which lasted from January 1933 to about the

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summer of 1934. Still dominant was the hope," on the part of some participants and observers, "that the regime, after overcoming the revolutionary phase of transition, would set up a 'national *Rechtsstaat*.' "[115] Indeed, the 1934 edition of Germany's most trusted encyclopedia, the multi-volume *Brockhaus*, described the Hitler state as a "national *Rechtsstaat*."[116]

A Nazi Leviathan

Bodo Dennewitz, a Koellreutter student, built on the foundation of his mentor's conceptual innovation. His was by the far the most lucid and thoughtful contribution to the Nazi debate about the *Rechtsstaat*. It was not marred by the ideological fervor, opportunistic or otherwise, that was germane even to more moderate contributions, including, as we have seen, those by Koellreutter. He may not have felt the same professional pressures as his mentor, whose competition with Schmitt in the early years of dictatorship was not just a defining feature of Nazi legal thought but had surfaced in the conservative currents of the so-called *Staatsrechtsdebatte* during the breakdown of democracy in Weimar Germany.[117] Judging by his modest p. 115 output and professional conduct, Dennewitz may also ↳ have been less committed a Nazi than Koellreutter, who was considerably quicker (like Schmitt) to lace his scholarly publications with the language of the Third Reich. To be sure, Dennewitz was by no means a liberal thinker. But neither was he an ideologue, nor a theorist of the prerogative state, which is presumably why his attempt to reconfigure the *Rechtsstaat* for the "national revolution" ("*nationale Revolution*") found few adherents in the 1930s. To understand why the Nazi revolution left him, and his conservative ideas, behind, we must focus on Dennewitz's belief in what he called, unusually for the time, the "institutionalism of the *Rechtsstaat*" ("*rechtsstaatlichen Institutionalism*").[118] His was a sketch for a Nazi leviathan, a *völkisch* variant of Hobbes's institutional ideal of the all-powerful state.

Dennewitz began his defense of the *Rechtsstaat* with a bold assertion. Not only was the idea of the *Rechtsstaat* compatible ("*existenzfähig*") with the Nazi revolution, he claimed, its norms and institutions were "necessary" ("*notwendig*") to preserve the achievements of this revolution.[119] Like his mentor, Dennewitz thought of the national *Rechtsstaat* in terms of two institutions that made up its essence: a "neutral, legal factor" and a "political factor" that invested the former with meaning. The legal half in this dual state of Dennewitz's design represented the stable essence, the eternal value ("*unveränderten Grundton, den Ewigkeitswert*") of the idea of the *Rechtsstaat*.[120] Two attributes of this normative state stood out for him: first, and most important, that the exercise of state power was "bound by law and statute" ("*an Recht und Gesetz gebunden*"); and, second, that individuals possessed rights vis-à-vis the state.[121] The "protection" ("*Schutz*") of citizens from the state was a fundamental mark of Dennewitz's legal institutionalism. He believed the existence of a *Rechtsstaat* could be gleaned from the distribution of power in a polity, which is why he took the existence of a separation among judiciary, legislature, and executive in an institutional framework as an indicator of a "fundamental recognition" ("*grundsätzliche Anerkennung*") of the *Rechtsstaat*. The adjective "institutional" was crucial to Dennewitz. He reserved it to denote stable patterns of behavior, that is, institutional practices that evolved over time and gradually grew into defining attributes of state.[122] However, for Dennewitz, normative statehood was but one half of his national *Rechtsstaat*, a necessary but by no means sufficient attribute. Only the injection of political values was capable of turning an otherwise neutral institutional structure into a truly sovereign state.[123] For him, legal institutions made states useful, but only political ideas rendered them meaningful. It is worth noting that Dennewitz's conception of the national *Rechtsstaat* bears a striking resemblance to what Fraenkel a few years later came to theorize as the dual state.

p. 116 Importantly, for Dennewitz as well as for Koellreutter, the precise content of the state's political value could not be fixed at the conceptual level. It will always be the expression of a given era of politics, a "concrete historical epoch" ("*konkreten historischen Epoche*"), which is precisely why both of these legal thinkers attributed eternal value to the *Rechtsstaat*.[124] In the logic of their respective theories, the national *Rechtsstaat*

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of the 1930s *happened* to be National Socialist in character, but this was a reflection of the times, not a defining feature of the concept they were promoting. Dennewitz's metaphors of the state as a "living organism" and the "living embodiment of the *Volk* as a whole" give credence to this reading.[125] The language implicitly rendered the Nazi dictatorship as a stage in the institutional development of the German state, not a case *sui generis*.

Dennewitz's response to Koellreutter's modification of the *Rechtsstaat* concept resulted in its further diminuation. Unlike his erstwhile teacher, Dennewitz did not subscribe to the idea that the *Rechtsstaat* ought to fulfill a protective and ordering function (think Koellreutter's "*Sicherheits- und Ordnungselement*") that ensured legal security and legal predictability for the citizens of the Third Reich. Incorporating insights from Ernst Rudolf Huber's lengthy and contemporaneous critique of "*Grundrechte*," or basic rights, Dennewitz's was an argument for drastically curtailing the realm and the protection of individual freedom.[126] He summarized his concept of law in terms of three interrelated binaries. He insisted that it (1) be grounded in reality not abstract principles; (2) be dynamic, not static; and (3) be communitarian, not individual or formal.[127]

Although Dennewitz did not want to jettison the hard-won legalization of fundamental rights (*Grundrechte*) enshrined in the Weimar constitution, he argued that their legal status needed to be altered. He proposed to subordinate them to new, unwritten principles of constitutional law.[128] Dennewitz rejected the equation of law and statute, which he believed to be the essence of the "bourgeois-liberal" *Rechtsstaat*, because it took insufficient cognizance of the distribution of power in the national system, or the state's "*nationale Machtposition*."[129] Deeply skeptical of legal positivism, Dennewitz argued that the validity of constitutional law had to be interpreted through the lens of constitutional reality, notably what he called "constitutional life" ("*Verfassungsleben*").[130] Put differently, he did not seek to destroy the normative state of old, but to roll it back. The goal was to infuse the norms and institutions of law with a corporate spirit.[131] In cases of conflict between law on the books and the law of politics, "*Volksrecht*" was to automatically supersede positive law, which meant that the protection of the rights of individuals vis-à-vis the state were considerably weaker in Dennewitz's vision for the "national *Rechtsstaat*" than in Koellreutter's. As Christian Hilger writes, "The limits of state power […] ↳ are not immediately recognizable for the individual, which has a negative effect on legal security and legal predictability."[132] At the same time, Dennewitz did believe in placing legal limits on the Nazi state (writing as he did of a "*begrenzte Machtbefugnis des Staates*"). Rather than calling for a prerogative state tout court, he insisted that the Nazi state action required legitimation by either law or statute.[133] He described the institutional function of the national *Rechtsstaat* as the "neutral regulation of responsibilities" ("*neutrale Zuständigkeitsregelung*") in accordance with formal principles of organizational design ("*Organisations- und Zuständigkeitsprinzip*").[134] It is also significant that Dennewitz, despite the standard overtures, was not obsessed with race as a defining attribute of his reconfigured *Rechtsstaat*.

Gesetzesstaat *to* Rechtsstaat

Like Koellreutter and Dennewitz, Heinrich Lange and Otto von Schweinichen too saw a possibility of retaining the *Rechtsstaat* as a term of art, provided that the concept was reimagined "in a concrete sense" ("*im konkreten Sinne*").[135] However, unlike Koellreutter and Dennewitz, neither Lange nor von Schweinichen were willing to concede that the liberal *Rechtsstaat* ever represented a valid historical instantiation of the more general idea of the *Rechtsstaat*.

Lange, a private law scholar, dismissed the "bourgeois-liberal" *Rechtsstaat* as the outer shell of an empty legislative state ("*Gesetzesstaat*") whose legitimacy derived in large part from its exercise of power ("*Machtstaat*").[136] He contrasted this formal instantiation of the idea of the *Rechtsstaat* with the substantive one that, or so he claimed, the "National Socialist *Rechtsstaat*" had established, an institutional design that

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appealed to him because of the "inner value" ("*inneren Wert*") that it projected.[137] Lange's *Rechtsstaat* was an expression of the "*Volksgeist*," an amorphous term that he took to refer to a nation's "absolute spirit" (though he used the term in a non-Hegelian sense), the eternal values toward the realization of which the *Volk* is oriented.[138]

Although reminiscent of Koellreutter's "*völkische Rechtsidee*," Lange did not regard the *Volksgeist* as a source of law; it merely informed the "legal consciousness of the *Volk*" ("*Rechtsempfinden des Volkes*"), which itself was rooted in blood and soil.[139] In Lange's theoretical argument, the legal consciousness of the *Volk* represented the essence of law (*Recht*) and was institutionally superior to statute (*Gesetz*). He applauded the achievements of the Nazi revolution because it had, in his opinion, transformed the concept of law, from a "technology of statutory thought" ("*Technik des Gesetzesdenkens*") into an "ethics of legal consciousness" p. 118 ("*Ethik des* ↳ *Rechtsempfindens*").[140] But we must be careful not to read too much into Lange's critique of statutory rule: he retained a firm belief in the centrality of some form of normative state. Like Koellreutter, he emphasized the ordering function of law, which he saw fulfilling, in addition to the inculcation of Nazi morals, an important regulatory function in the racialized *Rechtsstaat*. Statutes spelled out the fundamental rules of the game. Enacted in accordance with the ruling ideology, they demarcated the institutional "boundaries, paths, and forms" ("*Grenzen, Bahnen und Formen*") of Nazi dictatorship.[141]

Lange used the same language as Koellreutter to advance his argument. The state was not mere "apparatus" ("*Apparat*") but the guardian of the *Volk*'s order of life (*"Lebensordnung"*). It was not sovereign but subordinate to the *Volk*. Governed by the *Führer* from the regime's helm, the Nazi movement and the state, according to Lange, were manifestations of *völkisch* rule, "the movement more in the realm of morals, the state more in that of technology" ("*die Bewegung mehr auf dem Gebiet des Ethischen, der Staat mehr auf dem des Technischen*").[142] Decisions of the "political leadership," he hastened to add, were not subject to the reach of the *Rechtsstaat*.[143] In a formulation that justified the rise of the prerogative state, Lange held that "no hard stop [exists] for the state as organized *Volksgemeinschaft*" ("*kein hartes Halt für den Staat als organisierte Volksgemeinschaft*").[144] And yet, in the same breath, he also acknowledged the value of remnants of the *Rechtsstaat*. Some institutions of the normative state, such as individual rights, Lange wrote, were not violated "without necessity" ("*ohne Not*").[145] Although his argument is vague, he insisted that such far-reaching infractions required legal authorization and could not be undertaken wantonly. However, the kind of normative restraint that Lange saw operating in the "National Socialist *Rechtsstaat*" was a watered-down version from that associated with previous incarnations of the *Rechtsstaat*. The normative protections that Lange had in mind were not enshrined in constitutional documents or legislative acts, but underwritten exclusively by the "healthy legal consciousness of the *Volk*."[146] In this conception of the *Rechtsstaat*, even the concentration camp was just another institution capable of protecting the law of the *Volk* ("*Rechtswahrung*").[147] For Lange, the Nazi state remained a *Rechtsstaat* as long as its conduct was oriented toward the *Volksgeist*, which is where elective affinities with Dennewitz come into view. The existence and operation of a normative state (with its emphasis on statutory rule) alongside a prerogative state (with its penchant for violent rule) for Lange was an incidental consequence of stable governance, not a defining attribute of his racialized *Rechtsstaat*. Lange's theoretical design, although a minority view in the Nazi p. 119 debate about the *Rechtsstaat*, bears a ↳ notable resemblance to the everyday life of Nazi law, especially in the period 1933–1938, as captured by Ernst Fraenkel's metaphor of the dual state.

Otto von Schweinichen also saw value in the concept of the *Rechsstaat*. Like Lange, he took aim at the *Gesetzesstaat*, or legislative state, of the Weimar Republic, which, or so he claimed, had encapsulated but a fraction of the idea of the *Rechtsstaat* as it *ought* to be understood.[148] The essence of the kind of law-governed state that he envisaged was its rejection of abstract formalism. The question of whether law was just did not at all concern von Schweinichen.[149] For him this was a nonsensical question because law (*Recht*) as an institution was inherently just. Encasing a polity's fundamental norms, it served as a "pure guideline" ("*reine Richtschnur*") for politics and society from which "factual guidelines" ("*tatsächliche Richtschnuren*")

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were derived. As a given polity's "highest normative principle" ("*höchste Normprinzip*"), law, thus defined, was binding on whoever lived within its reach. Forged out of historical experience, it defined "true" duties and permissions ("*'echtes' Sollen oder Dürfen*"), giving expression to an ideational universe ("*ideell Angehendes*") that is culturally appropriate to the polity in question.[150] Von Schweinichen theorized law as a concrete abstraction.

Significantly, von Schweinichen, unlike prominent Nazi legal theorists like Larenz and Binder, drew a clear distinction between law (*Recht*) and statute (*Gesetz*). Although he recognized the regulative importance of "rules" ("*Bestimmungen*"), he was careful not to attribute a defining role to these institutions. He described statutes, directives, decrees, custom, and the like as de facto concretizations of a polity's fundamental norms. As "mere facts" ("*bloße Tatsächlichkeiten*"), their normative significance was regulative, not constitutive.[151] They existed, but they only made social life possible, not meaningful. Meaningful norms, what von Schweinichen theorized as "true norms" ("*echte Normen*") reflected a polity's ideational universe, its moral imperative. Proto-norms ("*Normanmaßungen*") such as those contained in statutes were capable of becoming true norms.[152] But only pure law—not the mere application of law—generated rights and obligations, according to von Schweinichen: law was normative, statutes were not. Law, thus defined, was to be found not in procedure, but in substance. Law for him was the essence of morality ("*der Inbegriff des Sittlichen*"), and, as such, supra-positivist in nature. Statutes might well *attain* "the character of supra-positivity" ("*den Charakter des Überpositiven*"), but they do not inherently possess it.[153] Conceptually speaking, statutes were auxiliary to law, not institutions of it.

The conceptual point held theoretical as well as political significance for von Schweinichen who had little p. 120 patience for what he decried as Larenz and Binder's uncritical use of the language of liberalism. Von ↳ Schweinichen believed it was but a short step from exaggerating the normative import of statutes to resurrecting legal positivism. On his interpretation, Larenz and Binder erroneously equated norms and statutes (whereas he subordinated the latter to the former).

When it comes to analyzing the relationship between law and statute in Nazi legal thought, it is important to distinguish between two dimensions of statutory law: the *primacy of statute* (what is known as *Vorrang des Gesetzes* in German law) and the *principle of legality* (*Vorbehalt des Gesetzes*). Both were defining features of the administration of justice in Wilhelmine Germany and Weimar Germany alike. A commitment to the primacy of statute means that a legal order regards statutes as the foremost source of law; it trumps utterances about the law emanating from other organs of state. It follows from this commitment that all branches of government, including the judiciary, are statutorily bound. Next, a commitment to the principle of legality means that all administrative action must be authorized *ex ante* by statute. Without prior statutory authorization, an administrative action would be legally invalid.[154] The legalization of administrative action was a gradual outgrowth of the rise of the *Rechtsstaat* as an idea in the nineteenth century. As Stolleis writes, "The constitutional movement and the interest of a society that was becoming more autonomous economically and politically gave rise to the call for the *Rechtsstaat*. Concretely, it meant that the administration should act in accordance with the rules of law, and that it should be subject to oversight by the courts in this regard."[155]

The distinction between the primacy of statute and the principle of legality is crucial for the analysis to come. In the Nazi debate about the *Rechtsstaat*, some participants—despite their unified rejection of the so-called *Gesetzesstaat*—attacked one, others none, and yet others both of the aforementioned dimensions of statutory rule. The variation is noteworthy because it illustrates the heterogeneity of Nazi legal thought. The greater a theorist's faith in statutory rule, the more likely he was, on balance, to invoke the language of the *Rechtsstaat*. Let me illustrate the point with reference to Carl Schmitt, who was vehemently opposed to retaining the language of the *Rechtsstaat*.

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Schmitt initially argued that a resort to Nazi principles (as laid out in the NSDAP platform) in the adjudication or application of law was invalid unless authorized by statute. He first articulated this position in an address at the 1934 convention of the Association of National Socialist German Legal Professionals (*Bund Nationalsozialistischer Deutscher Juristen*, or BNSDJ) in Cologne. Schmitt, echoing Freisler, argued that judges were bound by Hitler's "enacted norms" ("*durch den Führer gesetzten Normen*").[156] A year earlier, he p. 121 had written that a commitment to ↳ statutory rule was required to preserve the independence of judges in the Third Reich.[157] Schmitt's was a fleeting commitment to formality that co-existed with his faith in Nazi ideology. Despite his remarks about the utility of statutory form, Schmitt, like most of the dictatorship's legal intelligentsia, denied that Nazi statutes or otherwise enacted norms could be subject to judicial review.[158] In line with his vanishing commitment to the statute as an institutional constraint on authoritarian rule, Schmitt also began to reinterpret the statute as a concept. In 1935 he announced that, henceforth, statutory rule no longer meant normative rule but prerogative rule. "For us," he wrote, a statute ceased to be an abstract norm that gave institutional form to a preference of the past. Instead, he argued, the idea of statute was now synonymous with Hitler's "plan and will" ("*Gesetz ist Plan und Wille des Führers*").[159]

Because not all extant statutes could be revoked or rewritten in these early years of Nazi dictatorship, Schmitt (building on Freisler) theorized a compromise. Unless explicitly revoked, all statutes enjoyed bounded validity, according to this proposal. Statutes continued to matter as regulatory norms but were emptied of the substantive values that had informed them at the moment of their adoption. What Schmitt proposed was that a given statute from the Wilhelmine or Weimar eras could be retained in Nazi Germany provided it operated only as a "functional norm of the bureaucratic apparatus" ("*Funktionsnorm des staatlichen Behördenapparates*") and was neither applied nor adjudicated in accordance with the values that had prevailed "in the old state."[160] The so-called *Generalklauseln* are a case in point. General clauses are responses to gaps in the law.[161] They serve as placeholders in statutes, and the notion of *Treu und Glauben* is the most prominent *Generalklausel* in German private law. Others include *Billigkeit* and *Sittenwidrigkeit*. Because much hinges on the interpretation of general clauses, Schmitt called for judges to interpret "absolutely and unreservedly" ("*unbedingt und vorbehaltlos*") all of Germany's *Generalklauseln* and through the lens of Nazi ideology.[162] The promotion of general clauses as a tool of Nazi law found many adherents in the regime, which is why Bernd Rüthers identified them as "gateways" ("*Einfallstore*") through which Nazi legal thought entered the edifice of the *Rechtsstaat*, dismantling it from within.[163]

Mind you, Schmitt did not deny the relevance of statutory rule as such, but he radically reimagined what it meant to act in accordance with statute.[164] He debased the nineteenth century conception of statutory rule because it, or so he claimed, was backward-looking, informed by the concerns of a distant past, not the immediate present and the all-important future, as the Nazi dictatorship purported it was. The notion of p. 122 statutory self-binding, key to both the liberal and conservative ideas of ↳ formally rational law, Schmitt regarded as unnecessarily inhibiting. How is the Nazi sovereign supposed to "plan," he asked, if he is constrained by legislative responses to long forgotten challenges from the past? How could the *Führer* be ready for governing the exception—and defending the realm—if his hands are tied by the principle of legality? Schmitt's solution: abandon the separation of powers. Planning, he argued, required a fusion of powers. Borrowing from René Capitan the aphorism "*gouverner c'est légiférer*" ("governing is legislating"), Schmitt claimed that the positivist idea of statutory rule was on its way out, and not just in Germany but the world over.[165] In support of this bold claim, Schmitt singled out the example of the U.S. Supreme Court, which in 1935 had declared unconstitutional President Franklin D. Roosevelt's National Industrial Recovery Act (NIRA), the well-known legislative effort to attenuate (in conjunction with other pieces of New Deal legislation) the economic effects of the Great Depression. Schmitt pitied FDR's inability to engage in long-term policy planning without legislative oversight and judicial review. Because the *Führer*, by contrast, possessed both executive and legislative power (and was not subject to judicial checks or balances either), Schmitt had no doubt that this state of affairs placed Nazi Germany in the vanguard of legal innovators in

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the international system.[166] As Hitler's "plan and will," a statute in Nazi Germany was what the *Führer* made of it. Or, as Ernst Rudolf Huber put it in 1939: "[O]nly one legislator [exists] in the German Reich: that is the Führer himself."[167] No longer a backward-looking, abstract norm, Schmitt and others redefined the law as a forward-looking concrete decision.[168]

The Content of the Form

Facticity trumped formality in the Nazi concept of law. Legality continued to matter, but it was beginning to mean something different from what German jurists had been taught to believe for generations. Horst Dreier has come up with the useful term "*Formindifferenz*" ("indifference to form") to describe this attitudinal shift. The Nazi scholar Ulrich Scheuner exemplified it, when, in 1940, he maintained that all forms of Hitlerian lawmaking were of the "same standing" ("*gleichen Ranges*"), their authority indistinguishable.[169] The Nazi indifference to form eventually led to a "*Formverlust*" ("loss of form"). This loss was most noticeable when it came to law's publicity. Over time the number of promulgated statutes and related instruments decreased steadily *despite* an increase in the number of such instruments, especially of so-called *Führererlasse* (*Führer* decrees), that were issued.[170] Theodor Maunz and Johannes Heckel were among those who defended the practice. p. 123 ↳ Taking inspiration from Scheuner, Maunz distinguished four equal modes of lawmaking: "*Gesetzgebungsverfahren*" (formal enactment), "*Normenschöpfungsverfahren*" (norm creation), "*Einzelweisung*" (singular directive), and "*Einzelbilligung*" (singular authorization). Because the will of the *Führer* was, in his eyes, the only arbiter of law, Maunz was unperturbed by the decline in legal promulgation. Heckel, by contrast, defended the lack of publicity in lawmaking by citing the security interests of the state, which, he proposed, justified keeping "state law" under lock and key ("*Staatsrecht im Panzerschrank*").[171]

Maunz and Heckel legitimated what was impossible to stop. With Nazi Germany's turn to aggressive war, the prerogative state was in full control of the normative state. The *Rechtsstaat* was hollowed out, a mere shell of its former self. And yet, Nazi legal thought was not as cohesive as one might expect. Werner Weber, Otto Koellreutter, and Ernst Rudolf Huber each called into question the wisdom of undermining the publicity of law—and thus the professional judgments of their colleagues. It is worth recalling their arguments because they complicate conventional wisdom about norm entrepreneurs in the legal academy of the Third Reich. Like the Nazi state, a significant number of Nazi lawyers also possessed split personalities and responded differently to conflicting imperatives, just like the dual state itself.

Werner Weber, a former doctoral student of Schmitt's, is a case in point. He was the first to critique the secrecy of Nazi lawmaking. In a 1942 monograph he reminded his readers that in the tradition of the occident (*Abendland*) the public promulgation of laws was a defining feature of legal order. The belief that publicity was indispensable to law acquiring validity, he argued, was an "old truth" ("*alte Wahrheit*"), thereby implying that the Nazi dictatorship would do well to act on it.[172] And just in case his message was not received as clearly as intended, he added that *Führer* decrees had to be published in the *Reichsgesetzblatt*, the official gazette, to be legally valid.[173] At the height of totalitarianism, Koellreutter also rediscovered his respect for the *Rechtsstaat*, echoing Weber's concerns. He even warned that Nazi law was subject to a "cold Bolshevikization" ("*kalte Bolschewisierung*").[174] Dreier has drawn attention to the rhetorical power of this metaphor, for it was Koellreutter who, almost ten years earlier, had held up the Soviet Union as an example of a "*Nichrechtsstaat*," a lawless state, that is, the kind of unworthy polity that he contrasted with the national *Rechtsstaat* of Nazi Germany.[175] Raising the specter of lawlessness in 1942, Koellreutter appears to have lost faith in the Nazi way of law. Also inching toward a *volte face* was Ernst Rudolf Huber. His enthusiasm for the Nazi project, like Koellreutter's, had also waned, as evidenced by a sympathetic review from 1944 of Weber's little book. It p. 124 ↳ served him as a platform from which to critique vehemently the neglect of meaningful statutory rule. Huber's argument was simple: because lawmaking had been steadily

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deformalized, it was teetering on the verge of arbitrariness. It was hanging by a thread—and the promulgation of laws was this thread. As he punchily put it,

> The promulgation [of statutes and comparable instruments] has therefore increased in importance; it now bears responsibility alone for fulfilling certain functions that previously were distributed among a number of institutional forms. The [act of] promulgation is today the minimum of form, which cannot be dispensed with unless the statute as a manifestation of law as such is to be destroyed.[176]

One reason for Koellreutter's disillusionment with Nazi law in what we now know to have been the final years of the dictatorship, may have to do with the fact that the regime did not just destroy the idea of the *Rechtsstaat* but eventually also assaulted the more fundamental idea of the orderly state, the *Ordnungsstaat*.[177] For many conservative theorists and practitioners felt an allegiance to this idea of state, a commitment that preceded, and sometimes rivaled, their loyalty to the *Führer*. There are reasons to think that some Nazi jurists—Weber, Koellreutter, and Huber are but examples—were willing to countenance (and help legitimate) totalitarian rule, but were too conservative in their legal imagination to lend a hand to the construction of wanton rule. The idea of form is capable of separating one from the other. In fact, for many thinkers of the early twentieth century, the degree of institutionalization in a given state spelled the difference between anarchy and order.[178] Weber, Koellreutter, and Huber can be counted among this group, which explains why the impending death of one of the last surviving remnants of the *Rechtsstaat* caused these three unlikely rebels to voice their dissent in the early 1940s.

The episode underscores the processual and gradual character of the Nazi reconstruction of the legal system. It shows why Fraenkel's metaphor of the dual state is so helpful for capturing the liminality of law in the mid-1930s, by which I mean the ambiguity and disorientation that characterized defining stages in the legal development of the Third Reich, especially the long and winding consolidation of the dictatorship that took place in the period 1933–1938. Like everyone else in Germany, Nazi jurists stood at the threshold, facing the unknown. To steady themselves, some held on to remnants of the *Rechtsstaat* of old; others dove straight into the abyss and emerged with genuinely new (if reprehensible) solutions to the problem of legal order. Always the maverick, Schmitt belonged to the latter group.

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"*Collaborators of the* Führer"

In theorizing the role of adjudication in the racial state, Schmitt described judges as "collaborators of the *Führer*'s will and plan" ("*Mitarbeiter des Führerwillens und -planes*").[179] It was a broadside against the liberal *Rechtsstaat*. In one sense, it amounted to an intellectual demotion of judges, whom Schmitt put in their new, marginal place. In another sense, he elevated the role of judges. By calling for politicized judges, Schmitt emboldened the regime's adjudicating jurists. Whereas judges in Wilhelmine and Weimar Germany subsumed facts under abstract and publicized norms, Nazi judges faced no such straitjacket. With great powers of discretion at their disposal, they were allowed, in fact encouraged, to become activist judges. Schmitt regarded judicial restraint as an indefensible remnant of the liberal *Rechtsstaat*. For him judicial activism was indispensable to the Nazi way of law. As collaborators of the *Führer*, he expected the regime's judges to fill any and all gaps in the law, all the while being mindful of Hitler's will. In practice, this meant reading his mind: by concretizing deliberately broad principles of law and by anticipating his expectations in hard cases. One might say, with a nod to Adam Smith, that Nazi judges had to adjudicate with a *partial spectator* in mind: they needed to possess the ability to stand outside themselves and see their judicial behavior as if through Hitler's eyes.[180] As the "man within," this imaginary Aryan spectator represented the voice of Nazi conscience.[181] In deciding cases, judges were expected to let their racial imagination roam. As "guardians of the law" (*Rechtswahrer*), their function was to render racially appropriate judgments, by which I mean judgments in keeping with the spirit of Nazi ideology. In the province of law, as in other areas of the Third Reich, uncertainty was a deliberate feature of institutional design. It created room for maneuver, which accounts for (and legitimated at the time) the rise of judicial activism, defined as adjudication based on political considerations.

Schmitt had two policy prescriptions for how to establish the "new" statutory rule in judicial practice. He rejected both codification (*Kodifikation*) and amendment (*Novellierung*) for the legalization of Nazi mores, as he feared that they could give rise to a new era of normativism and rule by the "twistable letters of a thousand laws" ("*verdrehbaren Buchstaben von tausend Gesetzesparagraphen*").[182] Better suited to the demands of dictatorship, Schmitt argued, were guiding principles (*Leitsätze*) and the modification of select statutory provisions.[183] Schmitt turned to the so-called *Analogieverbot*, the prohibition of analogical reasoning in German law, to illustrate the latter technique. On June 28, 1935, an amendment to the *Strafgesetzbuch*, the country's criminal code, had ↳ retired the prohibition. (p. 126) The motivation for the institutional re-design was obvious: to enable judges to *make* law. The return of analogical reasoning meant that activist, politicized judges in the mid-1930s were empowered to construe crimes in the *Strafgesetzbuch* far more broadly than the drafters of that document had intended in 1871. As a result, the character of criminal law was unrecognizable. By overturning the *Analogieverbot*, the regime had not just dismantled a disliked provision; it had struck a blow to—and fatally damaged—the liberal architecture of the *Strafgesetzbuch* as a whole. This fundamentally transformed the institutional foundations of Nazi criminal law, further weakening the remnants of the *Rechtsstaat*.[184] It is easy to understand why Schmitt advocated surgical strikes like the one just described: their institutional effects could be more easily concealed—and more quickly brought about—than legal alterations by codification or more comprehensive amendments. The practice of appending guiding principles (*Leitsätze*) to legislation, of which Schmitt also approved, was another feature of the "new" statutory rule in the Third Reich. The inclusion of guiding principles—say in the form of preambles (*Vorsprüche*)—ensured that formal law was saturated with substantive values, that is, the regime's racial ideology. Related tools such as *Auslegungsregeln*, or rules of interpretation, as well as the notorious *Richterbriefe*—monthly missives sent by the Ministry of Justice between October 1942 and December 1944 to all of the country's judges to streamline the administration of Nazi justice—served the same function as *Leitsätze*: they contributed to the Nazi unification of law and morals.[185] Bernd Rüthers has come up with a moniker for the practice of Nazi adjudication that the imposition of guiding principles inaugurated: "interpretation without limits" ("*die unbegrenzte Auslegung*").[186]

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It is one thing to put Hitler on a pedestal and present theoretical justifications for the concentration of executive, legislative, and judicial power in his person, as Schmitt, Larenz, and many others jurists did. However, it is quite another to make such an institutional framework work *in practice*.[187] Huber, among other Nazi theorists, conceded that an informal proceduralism—the so-called *Umlaufverfahren*—regularly stood in for Hitler's sovereign will in the legalization of the racial order, even during the war years.[188] What this means is that the everyday demands of dictatorship appear to have placed an informal, temporary limit on the rise of the prerogative state. Another way of saying this is that proceduralism and decisionism co-existed, albeit in different ways and to different degrees depending on the area of law concerned.

Even though Hitler was omnipotent de jure, he was de facto dependant on those who did, or did not, involve p. 127 him in the process of legalization, as even Schmitt acknowledged after the war, in 1947. In his autopsy of ↳ the dead Nazi body politic, Schmitt shone light on the regime's institutional "abnormality" ("*Abnormität*").[189] Most relevant for our discussion is his claim that the Hitler regime experienced an "emerging compulsion to forms and norm-creation" ("*eintretenden Zwang zu Formen und Normierungen*").[190] A consequence of this revival of formality, Schmitt suggested, was a return, at least in part, to a legal way of doing things ("*zu einer gewissen Legalität der Methoden*"): "Legality is the functional mode of any bureaucracy. For this reason the need for a modicum of at least outward legality entered the Hitler regime at precisely this point," where it connected "with the grand command apparatus of the 'state.' "[191] Even though the NSDAP as the political party was supposed to hover over the state (which in the language of the Third Reich included only the civil service), Schmitt held that at this time of the dictatorship the administrative state "was still the true executive" ("*war immer noch die eigentliche Exekutive*").[192] Why? Because ensuring the effectiveness of the Nazi dictatorship demanded that the state govern efficiently and expeditiously, which meant that the bureaucrats staffing it had, for the most part, little choice but to respond to the multitude of governance tasks in a quasi-formally rational way.[193] And respond they did, which is why "[t]he civil service, far from having been integrated into the National Socialist community, appeared to its political masters an alien, and to its own leaders an alienated institution."[194] Even though checks and balances were a thing of the past, it dawned on the architects of dictatorship that even arbitrary rule required a modicum of formalization if it was to be sustainable. Schmitt points to the promulgation of laws and ordinances in the *Reichsgesetzblatt* as an example of how form continued to play an integral part in the Nazi theater of law—and *despite* Hitler's reported hatred of formalization.[195]

It was not unusual for judges and bureaucrats in the Third Reich to be left to their own devices. As Jane Caplan has found, depite the institutional sketches of Nazi jurists like Koellreutter and Schmitt, many functionaries of the Nazi state were left to muddle through as best they could, certainly in "less critical areas."[196] The imperative to govern meant legal theory and practice diverged in the administration of justice when the demands of dictatorship required it. Another way of putting this is to say that the powers that were could not afford to rid themselves of *all* remnants of the *Rechtsstaat*. As Caplan writes,

> As far as any shared conclusions were reached at a theoretical level, the tendency was to argue that although the separation of powers, administrative law, and individual rights in the liberal sense had clearly been superseded by the conditions of the National Socialist state, this did not p. 128 necessarily mean either that laws as such were no longer needed, or that all forms of ↳ administrative law were nugatory. Typically, this argument involved reformulating the principle of the separation of powers and the consequent relationship between individual and state in terms more appropriate to Nazi ideology. […] The most common solution was to argue that administrative law did not protect the rights of individuals, but the needs of the community; the administrative court system could be seen as the "guardian of objective order", therefore, and continue to function. This contrivance represented an acceptable theoretical justification for the persistence of administrative review, while explaining why its sphere of application was more narrowly constructed under National Socialism than before.[197]

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Fraenkel found an appropriate label for this contrivance: the dual state. But as we shall see in more detail in the chapters to come, this institutional hybrid was partly the result of institutional design and partly the product of institutional practice. It appears to have been mostly "defenders of traditional legal means and institutions" who were willing to adjust to this new reality, many of them mid-level bureaucrats.[198] According to the historian Hans Mommsen, the bureaucracy of Nazi Germany remained an instantiation of the normative state, one that continued to function "until the end of the Third Reich."[199] He believed that its "technical, routinely functioning and self-sufficient apparatus" provided a counterweight to the NSDAP's vision of the prerogative state.[200] Michael Stolleis in his study of administrative courts (*Verwaltungsgerichte*) has come to a similar conclusion. As in the case of many ministries, institutional continuity was pervasive in the administrative courts, which the stalwarts of the Nazi dictatorship therefore viewed with suspicion. In their eyes, the administrative courts were decidedly liberal remnants of the *Rechtsstaat* and one that impeded the racial revolution.[201] This is not to say that these quasi-normative institutions did not also aid the Third Reich. They certainty did. In fact, the arrangement was mutually beneficial: the leadership of the regime co-opted nationalist and conservative judges—many of whom were beholden to the ideal of the nineteenth century *Rechtsstaat*—by tolerating a rudimentary normative state in select areas. Where it threatened to thwart ambitions of the Nazi elite, the prerogative state stepped in to re-equilibrate the dictatorship, aligning norms with facts.

Eventually the abolition of the principle of legality and the expanded duty to obey (*Gehorsamspflicht*) for civil servants hollowed out the legal foundations of Nazi administration, resulting in a "corrosion of the state's substance."[202] When the representatives of the prerogative state turned on the functionaries of the normative state, what had functioned for a while as a "well-organized chaos" led to "the decline of the state as such."[203] Such are the legacies of the Nazis' degenerate law.

Degenerate Law

After this analysis of the transformation and deformation of statutory law in Nazi Germany, we are in a position to return to the debate about the *Rechtsstaat*. Like Koellreutter, von Schweinichen argued that the concept of the *Rechtsstaat* was not just an "*Individualbegriff*," a term applicable only to the nineteenth century, as some Nazi theorists vehemently insisted at the time, but a valid concept usable for comparative historical analysis ("*Analogiebegriff*").[204] Yet for von Schweinichen, the liberal *Rechtsstaat* was not a *Rechtsstaat* "in the true sense" ("*im wahren Sinne*") because it constrained the state. In a "true" *Rechtsstaat*, he argued, law was not "limit" ("*Schranke*"), but merely form.[205] For this reason, the Nazi *Rechtsstaat* had nothing in common with the liberal *Rechtsstaat*; it was "something fundamentally different" ("*etwas wesentlich anderes*").[206] The liberal *Rechtsstaat*, he claimed, was a degenerate example ("*Entartungserscheinung*") of the *Rechtsstaat* as a conceptual type.[207] A "true" *Rechtsstaat*, as von Schweinichen conceived of it, was a "*Volksstaat*," not mere "*Gesellschaftsstaat*."[208] It satisfied the concrete needs of a homogenous *Volk*; it did not cater to the abstract demands of a heterogeneous society. In the Nazi *Rechtsstaat*, fostering collective identity was essential, not accommodating individual interests. Applying his distinction, Schweinichen concluded that nineteenth century Prussia had not been a *Rechtsstaat* in the true sense, which is why he described the institutional structure variously as a "non-*Rechtsstaat*" ("*Nichtrechtsstaat*") and a "state of lawlessness" ("*Staat des Unrechts*").[209]

Von Schweinichen was convinced the institution of the *Rechtsstaat* needed to be theorized as a form *of* rule, not a constraint *on* rule.[210] It was by definition an enabler, not a limit. In order to avoid any confusion with the liberal *Rechtsstaat*, he recommended that theorists and practitioners in the Third Reich speak of a "concrete *Rechtsstaat*" ("*konkreter Rechtsstaat*") when describing the institutional form that Nazi legalism was taking.[211] Krauß, von Schweinichen's intellectual rival, was not persuaded by these conceptual acrobatics. He complained that efforts to recycle the language of the *Rechtsstaat* were born of "laziness"

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("*Bequemlichkeit*"), that they amounted to an objectionable "habit" ("*Angewohnheit*") inculcated into young minds by three generations of liberals.[212]

However, even a Nazi practitioner as radical as Roland Freisler apparently was unable to kick the habit. Time and time again he borrowed the language of the *Rechtsstaat*, relying upon it until 1937, by which time the Nazi debate about the concept had been concluded and the word all but banished. Freisler had first p. 130 pronounced on the subject in 1931, in the *Völkischer Beobachter*, where he sketched a biopolitical concept ↳ of the *Rechtsstaat*.[213] It took him six years to complete his sketch.[214] For Freisler, as for numerous other Nazi legal theorists, the law was not an end in itself, but simply a means for the advancement of the *Volk*. Accordingly, he declared the "healthy consciousness of the *Volk*" ("*gesundes Volksempfinden*") to be the only true source of law.[215] Like Koellreutter and Dennewitz, before him, he imagined a concept of Nazi law in which the validity of its norms and institutions was contingent upon their being in concordance with political perceptions of what is just and proper. The purpose of law, argued Freisler, was to advance "substance justice" ("*materielle Gerechtigkeit*"), not "Shylock justice" ("*Shylockgerechtigkeit*"), an antisemitic swipe at defenders of nineteenth century varieties of the *Rechtsstaat*, both liberal and conservative.[216] He crafted a qualified argument for racializing the concept of the *Rechtsstaat*: "Adolf Hitler's National Socialist state is [...] not a *Rechtsstaat* in [the liberal] sense. But a *Rechtsstaat* it is nonetheless, albeit in a very different [...], higher, internal, natural, and thus true sense."[217] Freisler bolted a racial superstructure onto the foundation of an anthropomorphic conception of the *Volk*, the natural interest and protection of which are served by the state.

Not unlike von Schweinichen, he was convinced that the Nazi debate about the *Rechtsstaat* could be settled easily: by retaining the language of the *Rechtsstaat* and downplaying the significance of its institutions and its norms in the administration of justice. As he put it, "That this state [the Nazi state] is a *Rechtsstaat*, is a given [...], but not more."[218] The state's essence, Freisler insisted, no longer revolved around law but Hitler and the *Volk*. To bolster his argument, he invoked Gustav Adolf Walz's widely used concept of the "*völkischer Führerstaat*," which had become a calling card for the highflying international lawyer and likely contributed to Walz's surprising appointment, in December 1933, as rector of Breslau University, in Lower Silesia, which the Nazi regime a few years later designated as a storm-trooping institution ("*Stoßtruppfakultät*").[219] Although Freisler and Walz emphasized to a greater degree than Koellreutter and von Schweinichen legal discontinuity in the transition from democracy to dictatorship (with Walz advocating to jettison the language of the *Rechtsstaat* altogether), it bears pointing out that both nonetheless conceded that a nominal *Rechtsstaat* was buried in the depths of the dictatorship from where it occasionally reared its head. The persistence of this institutional remnant troubled neither of them, which is where we notice intellectual affinities between them and the later concerns of Weber, Koellreutter, and Huber. Walz, for one, exclaimed that "the new Reich [was] a *Rechtsstaat* in two senses" ("*das neue Reich ein Rechtsstaat im doppelten Sinn*").[220] For him the Nazi polity was a *Rechtsstaat* in a conventional sense because it complied with the norms, rules, p. 131 and statutes ↳ that it enacted; it was a *Rechtsstaat* in a second sense because its principal mission was the pursuit of *völkisch* justice, which for Walz was synonymous with and identical to law, its raison d'être, so to speak. The incorporation of the institution of the "*Führer*" into the concept of statehood itself was crucial for Walz (as well as for other theorists of various neologisms, as we shall see) because he was keen to stress the plenipotentiary nature of the state's institutional apex, which he labored hard to distinguish from the institution of the king (in the Wilhelmine *Rechtsstaat*) on the one hand, and from the institution of the president (in the Weimar *Rechtsstaat*) on the other.

Freisler and Walz explicitly rejected Koellreutter's and Dennewitz's talk of a "national *Rechtsstaat*." Freisler's argument was simple: the term reified the idea of statehood. By so doing, it distorted the essence of Nazi dictatorship, sacrificing what really mattered to Hitler and the NSDAP—"the dynamic, the lively, the moving, the power of struggle" ("*das Dynamische, Lebende, Sichbewegende, die kämpferische Kraft*")—to safeguard what was dispensable—"the stationary, the organized, the formal" ("*dem Stationären,*

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Organisierten, Formalen").[221] Walz concurred, adding that, in contrast to Italian fascism, which worshipped the state, National Socialism gave greater priority to race, what he called "the völkisch" ("*das Völkische*").[222] The language of the Third Reich thus needed to find a way to express what for him was the defining feature of Nazi statehood—its pursuit of racial purity ("*Reinheit des Volkes*").[223] But Walz was wary of the label "authoritarian state" that was making the rounds.[224] It smacked too much of the "Weimar system" for his liking.[225] Walz argued that the concept of the authoritarian state "had specific, recent political connotations, namely reliance on presidential power as enshrined in the Weimar constitution [...]. The underlying point was that the concept [...] conjured up the viewpoint of those who had sought to establish an authoritarian alternative to *both* the democratic order of Weimar *and* to the National Socialist."[226]

The cases of Walz and Freisler are illuminating because they show that even some of the staunchest Nazi functionaries saw a modicum of value in the *Rechtsstaat* as an institutional structure, however perverted their constructions of the underlying idea ultimately became. Freisler in particular saw not just instrumental value, but demonstrated varying degrees of expressive commitment to the idea of the *Rechtsstaat* and for a whole host of reasons. In 1933, for example, he defended a quasi-liberal conception of statutory law. When he declared that Nazi judges were *bound* by statute, and had to follow the letter of the law regardless of whether this letter was of liberal or National Socialist origin, Freisler showed a certain appreciation for the legacies of law.[227]

 Such commitments to the idea of the *Rechtsstaat* surely are significant because there was no shortage of alternative monikers for the Nazi polity, as demonstrated by Walz's innovation. They also are noteworthy because they cut against the grain of the general Nazi discourse in the 1930s in which the concept of the state was increasingly being replaced by the concept of community, specifically that of the *Volksgemeinschaft*. This goes to show that the distribution of preferences in the debate about the *Rechtsstaat* cut across a whole array of cleavages in Nazi Germany.

Regulating the Race

It would be a mistake to assume that the intellectual positions that jurists assumed in the Nazi debate about the *Rechtsstaat* could be mapped easily onto a continuum ranging from hardliners to moderates in the regime. The Freisler example illustrates as much.[228] Freisler's intervention is not only remarkable for its timing, but also for its revival of *another* deeply contested concept in Nazi Germany—that of the state itself. In the early years of the dictatorship, the idea of the racial community, the *Volksgemeinschaft*, was fast replacing that of the racial state. By bringing the state back in, Freisler found himself at loggerheads with another ardent Nazi intellectual: Reinhard Höhn. Höhn won the intellectual tussle, but Freisler prevailed as far as the everyday law of the Third Reich was concerned: "[F]or all jurists who thought in practical terms the state seemed indispensable as a personal point of attribution, whether as a tax authority, as the responsible agent for administrative acts, or in international law."[229] This pragmatism was especially pronounced in the area of administration, despite attempts to de-legalize it. The Nazification of administrative law was more difficult to accomplish than the overhaul of Germany's *Staatsrecht*, or state law. As Stolleis writes, "administrative law proved tenacious and so strongly tied to practice that it could not be so readily shunted aside."[230] The extraordinary planning needs of an expanding state meant that remnants of the *Rechtsstaat* related to aspects of administration survived until 1939:

> Administrative law was not only an ideological battleground, but also a place of refuge for objective contributions of the kind that was [*sic*] no longer possible in state law. Here one could still write in a more or less neutral fashion about issues of communal and tax law, questions of building and planning law, expropriation law or trade law.[231]

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To be sure, these remnants of the *Rechtsstaat* served the dictatorship. And their theorists facilitated Nazi criminality: "[L]ike other branches of the legal sciences, the discipline of administrative law was [...] part of p. 133 the ↳ system; it supported the functioning of the administration in theory and practice, it created the semblance of the normality of an administration that operated according to the law and was controllable, and in this way it solidified the temporary pact between the Nazi state and the world of civil values."[232]

Positioned closest to this "world of civil values" were Martin Wittig, Hans Helfritz, Edgar Tatarin-Tarnheyden, and Kurt Groß-Fengels. These four theorists of the *Rechtsstaat* borrowed most heavily from the existing reservoir of legal norms and values.

Wittig was the most moderate of the bunch.[233] His 1933 doctoral dissertation performed a variation on the theme of the "national *Rechtsstaat*." Interestingly, Wittig was beholden to key tenets of the liberal Rechtsstaat. He singled out three and welded them into a tripartite concept with universal reach: (1) the legality of administration ("*Gesetzesmäßigkeit der Verwaltung*"); (2) the legality of the administration of justice ("*Gesetzesmäßigkeit der Rechtspflege*"); and (3) the legality of lawmaking ("*Bindung des Gesetzgebers an das Recht*"). Such were, for Wittig, the defining attributes of "*Rechtsstaatlichkeit*."[234] He was in no doubt that the newly created Nazi state conformed to the first two criteria.[235] The third criterium proved trickier, but he persevered. To this end, Wittig, who was keen to keep "arbitrariness" ("*Willkür*") in check, reinterpreted its meaning. Whereas for Fraenkel, a decline in formally rational law was an indicator of arbitrary rule, Wittig gave the concept of arbitrariness a decidedly substantive gloss.

This brings us back to *Behemoth*.[236] Like Neumann, Wittig objected to law as technology. He saw it as essential to jettison the idea of law's "technical" validity. Like Neumann, he believed in the ethical function of law (though in pursuit of a vastly different normative project). Law's "ethos" ("*Ethos*"), as Wittig saw it, was bound up with the "life and flourishing of the nation" ("*Leben und Gedeihen der Nation*").[237] In this sense, he approved of Koellreutter's rendering of the national *Rechtsstaat*. More specifically, and inspired by Plato, Wittig prized the satisfaction of collective wants over the protection of individual rights. To this end, he outlined a series of key functions for which the sovereign state, in his view, had "definite responsibility" ("*unbedingte Verantwortlichkeit*").[238] As long as the state protected the integrity of its borders, safeguarded the *Volk*'s existence, maintained the population's "racial purity" ("*rassenmäßige Reinheit*"), and preserved its "soil" ("*Boden*"), Wittig argued, its actions, or those of its organs, would be legal. It would be a true *Rechtsstaat*. All that was required was conformity with the Nazi ethos, which he equated with existential security for the *Volk* ("*Sicherheit der nationalen Lebensordnung*").[239] In this idea of the *Rechtsstaat*, substance p. 134 mattered ↳ more than form. Wittig's was a racial (and racist) argument for the unification of law and morals, albeit one that borrowed heavily from pre-Nazi mores. Perhaps most interesting in this context was Wittig's policy proposal to balance the *Führerprinzip*, the leadership principle, with a corporatist principle, specifically a *Ständestaat*. The point of the latter, wrote Wittig, was to pre-empt the "isolation and alienation" ("*Abkapselung und Entfremdung*") of governing elites in the national *Rechtsstaat*.[240] Wittig entertained limits for the Nazi *Rechtsstaat*, which meant he cut a lonely figure in the Nazi debate, although Hans Helfritz, leader of the arch-conservative *Deutschnationale Volkspartei* (DNVP) in Breslau, saw eye to eye with him in some respects.[241]

In fact, Helfritz held on to more of the essence of the liberal *Rechtsstaat* than Wittig. Perhaps due to this political leanings, Helfritz did not seem to think the protection of racial purity was a desirable *raison d'état*. A fervent monarchist, he certainly was comfortably countenancing, within limits, prerogative excess. For example, he thought it possible that executive action could be legal even without statutory authorization, provided that such overreach was the exception, not the norm.[242] This position indicates a preference for positive law. Much of what the other contributors to the Nazi debate about the *Rechtsstaat* theorized as a new form of law, for Helfritz was something else: "*Rechtspolitik*," or "legal politics." He was unequivocal that the noun "*Recht*" was reserved for law on the books ("*wie es ist*").[243]

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How did Helfritz's idea of the *Rechtsstaat* differ from the "liberal-bourgeois" variant? Two aspects are worth mentioning. First, he rejected a purely procedural conception of the *Rechtsstaat*. To define the nature and purpose of the *Rechtsstaat* solely in terms of the legal rules of the game that it provided struck him as ludicrous and ahistorical: "No state has [ever] been content with offering its members nothing more than a legal order and its maintenance."[244] Consequently, Helfritz dismissed the concept of the *Rechtsstaat* "in this older sense" ("*in diesem älteren Sinne*").[245] He also found wanting (his interpretation of) Friedrich Darmstädter's well-known Weimar-era attempt to conceptually demarcate the *Rechtsstaat* from the "*Machtsstaat*," that is, the idea of a law-governed state from that of a power-driven state.[246] Helfritz did not think that law and power were incompatible or that they could be easily disentangled in real life. Indeed he believed that law possessed "physical" ("*physisch*") and "psychological" ("*psychisch*") power, the former visible in the enforcement of norms, the latter more amorphous.[247] Because Helfritz also believed that not all politics could be conducted by way of law, he rejected calls for an "absolute concept" ("*absoluter Begriff*") of the *Rechtsstaat*.[248] The concept of the *Rechtsstaat*, or so he argued, needed p. 135 ↳ to accommodate both legalism ("*Entscheidung nach Rechtssatz*") and decisionism ("*Ermessensentscheidung*").[249] He was willing to concede that cost-benefit analysis ("*Zweckmäßigkeitsabwägungen*") sometimes trumped the demands of legality.[250] Helfritz's concept accommodated *degrees* of *Rechtsstaatlichkeit*.[251] For Helfritz the *Rechtsstaat* was a continuous variable of politics, which reminds of Fraenkel's approach.

Like Wittig before him, Helfritz placed great importance on the legality of administration as well as the legality of the administration of justice, both of which, together with a system of administrative courts (*Verwaltungsgerichtsbarkeit*), he regarded as fundamental institutions of the *Rechtsstaat*. And like Wittig, Helfritz too was optimistic in his assessment of the extent to which the law of the Third Reich met his criteria of the *Rechtsstaat*. He believed that the administration of justice in the areas of civil and criminal law continued to be governed by statute, and he took public pronouncements by Hans Frank and Carl Schmitt about the independence of Nazi judges at face value. He also did not think the legality of administration diminished, though he acknowledged that in the transition to authoritarianism, what he termed the "transitional period" ("*Übergangszeit*"), not all administrative measures had had a basis in statute.[252] This was par for the course, he thought, because, on balance, the national interest was of greater political significance than any rights of individuals that might be abrogated in its defense. Unlike Wittig, Helfritz did not set limits on this exceptionally powerful *Rechtsstaat*. His scholarship leaves little doubt that he regarded near limitless discretion as a necessary attribute of Nazi legalism, which is why Hilger concluded that Helfritz's concept of the *Rechtsstaat*, though indebted to nineteenth century norms and value, muddies the dividing line between law and lawlessness.[253] Another way of putting this is that Helfritz noticed early on, like Fraenkel would a little later, that the Nazi dictatorship was governed by a dual state whose constitutive halves operated in accordance with two different—but often complementary—logics of rule. Helfritz assumed the rectorship of Breslau University in the spring of 1933 but was removed barely half a year later, likely because his enthusiasm for the Nazi dictatorship was muted.[254] Walz, a considerably more radical contributor to the Nazi debate about the *Rechtsstaat* succeeded him at the university's helm.[255]

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Hard, Unrelenting Legal Norms

Elements of a radical legalism can also be found in the writings of Edgar Tatarin-Tarnheyden, whose perspective on the *Rechtsstaat* had much in common with those of Wittig and Helfritz, but whose p. 136 racialization ↳ of the term also meant that he straddled the border between the two camps in the Nazi debate, occupying a rather unique position that combined aspects of legal positivism and biological racism. To begin with, Tatarin-Tarnheyden believed in a separation of law and morals, and he deemed both to be distinct from politics.[256] For him law was about the regulation of wants in society, morals about the regulation of wants in the minds of individuals, and politics about the "crafting of a social totality" ("*Gestaltung einer sozialen Ganzheit*").[257] He distanced himself from Schmitt, whose distinction between law and politics he thought misleading. While recognizing that law and politics "in practice often overlap," Tatarin-Tarnheyden argued that fundamental differences in the nature of both phenomena made it impermissible to conflate them conceptually.[258] This assumption made it possible for him to distinguish two stages of revolutionary activity in Nazi Germany. He claimed that at the time of his writing, in 1934, the Nazi revolution had come to an end ("*beendet*") but was not yet complete ("*vollendet*").[259] Still to come in the institutional development of Nazi dictatorship was what he dubbed the "stage of legal construction" ("*Stadium gesetzmäßiger Aufbauarbeit*").[260] He believed, mistakenly as we now know, that the " 'wild' actions" of roving revolutionaries and their "transgressions of legality" were a thing of the past, that the foundations of a "new legality" ("*neue Legalität*") had been laid.[261] His commitment to the *Rechtsstaat*-tradition of old is evident in his insistence that "henceforth [the revolutionizing] must proceed in a 'legal' framework" ("*von nun an muß sich [die Revolutionierung] in 'legalem' Rahmen abspielen*").[262] But not just any legal framework would do. Tatarin-Tarnheyden, consummate legal positivist that he was, expected more than that: "It is essential to create norms, that is, [...] to place the new state on a well-balanced, statutory foundation [...]. Formal legal norms should not be disrespected."[263]

Tatarin-Tarnheyden's unusual commitment to achievements of an earlier era of the *Rechtsstaat* becomes understandable once we appreciate the cultural value he attributed to law. He considered the institution of the *Rechtsstaat* "one of the greatest socio-cultural goods of a *Volk*," which is why, in 1934, he had high hopes for legal "self-binding" ("*Selbstbindung*").[264] He was convinced that "legality" ("*Rechtmäßigkeit*"), especially in the form of "firm statutoriness" ("*fester Gesetzlichkeit*"), was an indispensable feature of a *Volk*'s cultural order ("*Kulturbau*").[265] The binding nature of "hard, unrelenting" ("*harte, unnachsichtlich* [*sic*]") legal norms applicable equally to all persons for Tatarin-Tarnheyden cut to the heart of the *Rechtsstaat* as a universal institution. The independence of the judiciary was another attribute of p. 137 *Rechtsstaatlichkeit* that he elevated to the rank of a defining feature. This faith in law brings us to ↳ Tatarin-Tarnheyden's unusual call for the protection of individual rights, which set him apart from almost all of the other protagonists in the Nazi debate about the *Rechtsstaat*, notably from Helmut Nicolai, whose scholarship he critiqued.[266]

Tatarin-Tarnheyden felt that the attack on individual rights was ill-advised, least of all because it discouraged entrepreneurship, economic and otherwise. Some the worst ills of the Weimar Republic, according to his diagnosis, were servility, selfishness, and a general lack of ambition.[267] Favoring the collective over the individual, he reasoned, would be counterproductive. It could worsen the *Volk*'s lackluster condition, which is why he proposed to re-invent individual rights as "national individual rights" ("*nationale persönliche Rechtsgüter*").[268] Three in particular were deserving of legal protection, according to Tatarin-Tarnheyden: honor, freedom, and property.[269] He intended these hybrid rights to protect the kind of space necessary to encourage individual creativity and the commercial activity to which it might lead. Or, as Tatarin-Tarnheyden put it, "the new state has no need for vassals" ("*der neue Staat kann keine Knechte brauchen*").[270] He invoked Ernst Forsthoff in support, who in the previous year had made the case for preserving a realm for private decision-making ("*persönlicher Handlungsspielraum*").[271] He even adorned his plea for private property with a surprising reference to Immanuel Kant. But by involving Richard Wagner's

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epic *The Ring of the Nibelung* (*Der Ring des Nibelungen*), Tatarin-Tarnheyden immediately tempered the progressiveness of his stance on individual rights. It led to this caveat: To enjoy legal protection, all private economic activity had to contribute to the *völkisch* public good. If it did not, Tatarin-Tarnheyden was willing to "limit" the exercise of national individual rights, and even thought expropriation appropriate.[272] This brings us to the darker side in Tatarin-Tarnheyden's *Rechtsstaat*-concept: his biological racism.

Tatarin-Tarnheyden's economic worldview may have been progressive, but his politics were that of a Nazi hardliner. His progressive ideas co-existed with a reactionary streak in his legal thought. Whereas Wittig resembled a run-of-the-mill conservative legalist, Tatarin-Tarnheyden was a racist legalist par excellence. This becomes immediately clear if we turn to his notion of the "*Rechtsidee*," by which he meant law's underlying morality. This "idea of law" to him was "always concrete, always blood-based, always morally grounded," unlike the abstract "concept of law," or "*Rechtsbegriff*," favored in the nineteenth and early twentieth century by adherents of the rationalist-deductive movement of the so-called *Begriffsjurisprudenz*, a polemical moniker for the legal idealism that Christian Wolff inspired.[273] Echoing Binder's rejection of this p. 138 variant of legal positivism, Tatarin-Tarnheyden introduced the concept of ↳ the "*Ur-Nomos*," or original nomos, which he described as the moral foundation, the "base value of the state" ("*staatlicher Grundwert*").[274] The Nazi "revolution," he argued, had given rise to a new *Rechtsidee*. This "new spirit of state" ("neuer *Staatsgeist*") was the "highest norm" for the interpretation of Nazi law, especially in the operation of *Generalklauseln* and ad-hoc decisions.[275] Whenever pre-Nazi norms were in conflict with Nazi norms, Tatarin-Tarnheyden theorized, reference to the *Ur-Nomos*, his version of a basic norm, would either infuse, in "galvanizing fashion," pre-Nazi norms with new meaning, or it would put Weimar-era norms "on ice" ("*lethargischen Gefrierzustand*").[276] The latter, in other words, would not be rescinded or destroyed, merely incapacitated. What Tatarin-Tarnheyden had in mind, though he never used the term, was a dual state: He was certain that the *Ur-Nosmos* could co-exist with what had preceded it. In *Werdendes Staatsrecht*, he argued that the *Rechtsstaat* as a guarantor of social order required precisely formed law.[277] His vision was to erect in the ruins—and with the remnants—of Weimar law a racial *Rechtsstaat*. For he abhorred nothing more than arbitrariness. He relied on metaphors from architecture to get his point across indirectly, presumably so as to not run afoul of other Nazi hardliners. He told his readers that a "complete plan" ("*Gesamptlan*") was needed for the institutional development of the Nazi dictatorship.[278] Elsewhere, he reminded them that, the progress during the insurgent phase revolution notwithstanding, future additions to the institutional design ought to follow an "integrated blueprint for construction" ("*einheitlichen Bauplan*").[279] This blueprint needed to achieve a harmony of its parts.[280] Tatarin-Tarnheyden's qualified defense of the *Rechtsstaat* was in the main an argument from the logic of appropriateness. He was the embodiment of a Nazi legal conscience.

Kurt Groß-Fengels, finally, is important to include in this analysis of Nazi jurists who expressed a rudimentary respect for the idea of the *Rechtsstaat* because his concept of Nazi law, which he developed in a 1936 doctoral dissertation, had more in common with liberal concepts of law than that of any other participant in the debate about the *Rechtsstaat*.[281] Unlike his colleagues, Groß-Fengels hoped to preserve a surprising number of legal innovations from the Wilhelmine and Weimar eras, including, *inter alia*, the separation-of-powers doctrine, the principle of statutory rule, the catalogue of fundamental rights, and the system of administrative courts.[282] His has been described as an attempt to approximate ("*Versuch einer Annäherung*") the liberal *Rechtsstaat*, and the description is accurate. Groß-Fengels too had faith in the *Rechtsstaat* as an eternal idea. He had no doubt that some legacies of liberalism could help to realize certain goals of antiliberalism. As late as 1936, he made a case for the economic utility of legal predictability p. 139 ("*Vorraussehbarkeit*") ↳ and legal certainty ("*Rechtssicherheit*"), both quintessentially liberal values.[283] By endorsing, naively or daringly, "the justice of positivity" ("*Gerechtigkeit der Positivität*"), he contradicted a key tenet of Nazi legalism: antiformalism.[284]

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Groß-Fengels was a lone proceduralist. In his institutional design for the Nazi dictatorship, substantive justice did not trump procedural justice, as it did in contending conceptions of Nazi law. For Groß-Fengels, the achievement of substantive justice was impossible without institutional foundations that were stable and reliable. Legal predictability was a *sine qua non* of his racial *Rechtsstaat*. To claim otherwise, or so he wrote, would destroy the "bases for a healthy development of the life of the *Volk*" ("*Grundlagen für eine gesunde Lebensentwicklung des Volkes*").[285] Yet he conceded that "revolutionary transformations" ("*revolutionäre Umgestaltungen*") may require a temporary suspension of the supremacy of legality. In times of transition, statutory compliance *could* spell injustice, according to Groß-Fengels, especially if the substantive content of law (*Recht*) and statute (*Gesetz*) are incongruent.[286] This sentiment is similar to that of other jurists discussed in this section. What distinguishes Groß-Fengels from all of them, however, are the qualms he had about trampling on rules. He was not fond of the prospect of a commissarial dictatorship. Indeed, he argued that any authoritarian rule by exception had to be strictly limited, and a return to normalcy promptly pursued. As he saw it, no victorious revolution could afford to dispense with statutory rule.[287] To not diminish the value of law in the long-run, a period of strict compliance, Groß-Fengels argued, was needed in the aftermath of any state of exception (*Ausnahmezustand*), to compensate for the reputational costs of non-compliance. It comes as no surprise that Groß-Fengels was a critic of Schmitt's. He rejected Schmitt's "concrete-order thinking" ("*konkretes Ordnungsdenken*") with the argument that it was unfit for everyday life. It provided no basis for reliable governance. Logically underdeveloped, Schmitt's institutional design, in Groß-Fengels's reading, would invariably lead to "rulelessness" ("*Regellosigkeit*"), and, as a direct consequence, "disorder" ("*Unordnung*").[288]

In most respects, Groß-Fengels's argument for reconfiguring the *Rechtsstaat* was that of a conservative rather than a bona fide Nazi jurist. Although his dissertation included a series of stated commitments to a *völkisch* way of life, his institutional design contained so many prescriptions for self-binding, and protections of individual freedom, that it stands out in the Nazi debate about the *Rechtsstaat* for its continuation of liberalism by other means. He was the only jurist, aside from Koellreutter and Tatarin-Tarnheyden, who contemplated the value of *Volksgenossen*, who saw individuals, not just comrades. Theirs were efforts to keep "arbitrary ↳ decisionism" in check.[289] But progressive ideas for the protection of *Volksgenossen* from the *Volksgemeinschaft* was not what the victors in the Nazi debate about the *Rechtsstaat* were after.

Replacing the *Rechtsstaat*

Around 1936 the essentially contested, nineteenth century concept of the *Rechtsstaat* began to disappear from Nazi legal discourse. Those jurists who argued for replacing—rather than reconstituting—the concept of the *Rechtsstaat*, won the day. Most of them we have already encountered, which means a brief analysis will suffice to complete my intellectual history of select Nazi legal thought.

For three years, Carl Schmitt and like-minded legal theorists battled their intellectual rivals inside the dictatorship. It was a fierce battle over the meaning of law's vocabulary. Most adamant in their rejection of the *Rechtsstaat* as a category of practice as well as of analysis, aside from Schmitt, were Günther Krauß, Ernst Forsthoff, Helmut Nicolai, Hans Frank, and Werner Best. Reinhard Höhn and Wilhelm Stuckart also intervened to help purge Mr. von Mohl's term of art from the language of the Third Reich. Considering who they were up against inside the dictatorship, the efforts by advocates of a racialized *Rechtsstaat*, from Koellreutter to Groß-Fengels, is remarkable. Koellreutter and others were, without a doubt, reprehensible scholars. But it was their intellectual rivals who truly unleashed the violence of law.[290]

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Law’s Violence

As so often in those years, Schmitt was one of the first to nail his colours to the mast. In May 1933, in a contribution to the Nazi broadsheet *Westdeutscher Beobachter*, Schmitt opined that anyone who invoked the idea of the *Rechtsstaat* was only after one thing: retarding the “German revolution” (“*zur Hemmung der deutschen Revolution*”).[291] Schmitt’s fear was partially rooted in his conceptual thought. In 1930, he had famously declared, “Every political concept is a polemical concept. It has a political enemy in mind and, with respect to its intellectual rank, intellectual force, and historical significance, it is determined by this enemy.”[292] The political enemies *he* mobilized against in the Nazi debate about the *Rechtsstaat* were liberals, Jews, and his intellectual rivals in the Nazi regime. The most formidable of them was Otto Koellreutter, who, as we have seen, saw value in the *Rechtsstaat*, eternal value, in fact. Schmitt was having none of it.

 He saw no point in racializing the *Rechtsstaat*. For him the term was of, and for, a bygone era.[293] In von Schweinichen’s parlance, the *Rechtsstaat* for Schmitt was “*Individualbegriff*,” not “*Analogiebegriff*.”[294] He made known his reservations about the language of the *Rechtsstaat* with fanfare from the outset of the Nazi dictatorship, when he very briefly entertained the idea of reconfiguring the concept: “Whoever uses the word *Rechtsstaat* will have to be clear about what he understands by it, how his *Rechtsstaat* is different from the liberal *Rechtsstaat*, and the extent to which his *Rechtsstaat* is meant to be a *National Socialist* one or one of the many other types of *Rechtsstaat*.”[295] For Schmitt, conceptual imprecision spelled “the danger of political abuse.”[296] If the concept of the *Rechtsstaat* was not right away imbued with Nazi morals, he prophesized, “the enemies of the National Socialist state” would seize it to bring alternative conceptions in position and challenge “the law and justice of the National Socialist state” (“*das Recht und die Gerechtigkeit des nationalsozialistischen Staates*”).[297] But Schmitt’s doubts persisted. Sooner than most of the participants in the debate about the *Rechtsstaat* in Nazi Germany, he made a case for abandoning the concept altogether, asking rhetorically, in 1935: “Does not the word ‘*Rechtsstaat*’ also belong to those indestructible words of German legal and *Volk* history?”[298] His answer was unequivocal: “I do not think so.”[299]

For Schmitt, the *Rechtsstaat* possessed no intrinsic value; it was a mere *Gesetzesstaat*, a legislative state. Instead of waging lawfare with a blunt instrument forged in Weimar, he was keen to battle liberals, Jews, and other supposed enemies with a sharp weapon made in Nazi Germany.[300]

A new language was needed to prepare for this violent struggle. As Peter Stirk writes, “Even the once-favored *Allgemeine Staatslehre*,” as a field of study and instruction, “was consigned to the past. Carl Schmitt dismissed this ‘category’ as a ‘typical concern of the liberal nineteenth century’. The very word *allgemein* (general) suggested a form of state of universal validity. That was incompatible with the idea that the National Socialist state was distinctive and distinctively German.”[301] Schmitt believed it was “no historical coincidence” that “the word and concept of the *Rechtsstaat*” (“*Wort und Begriff des Rechtsstaates*”) emerged in Germany “only around 1830.”[302] He cast aspersions on the term’s valence in German legal thought. A concept of such recent pedigree as the *Rechtsstaat*, he implied, could not possibly be culturally meaningful and thus was semantically inappropriate. He was convinced it lacked the gravitas to demand obedience, the metaphysical air to inspire loyalty; it was a manifestation of degenerate law. The Nazi debate about the *Rechtsstaat* epitomizes the quest to overhaul the vocabulary of law. “The more ambitious, both personally and intellectually, staked everything on ↳ National Socialist victory.”[303] These thinkers, and the few practitioners among their ranks, further radicalized the Nazi concept of law. In their obsessive quest for an organic way of law, they cobbled together an ideology of *extremist legalism*.[304]

Günther Krauß, a onetime student of Schmitt’s, fired a notable salvo in the battle for rhetorical mastery in Nazi Germany. Like his mentor, he objected to the idea that being a *Rechtsstaat* could be a legitimate reason of state. The raison d’être of statehood, he was convinced, had to be sought elsewhere. Because the liberal *Rechtsstaat*, according to Krauß, artificially juxtaposed law and state power, law had become associated with powerlessness in the interwar period. This he deemed unacceptable, which is why he argued stridently in

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favor of abandoning the idea of the *Rechtsstaat* and everything associated with it: "Language usage in the nineteenth century has fixed the meaning of the concept *Rechtsstaat*, word and concept are inextricably intertwined. It is essential to prevent both from infiltrating the twentieth century state courtesy of dull nominalist thinking and technology."[305] Whereas Koellreutter as well as Wittig, Helfritz, and Tatarin-Tarnheyden regarded the concept of the *Rechtsstaat* as a general category with lasting value, Krauß refused to accept that it could amount to a valid term of art, let alone an eternal one. He denied its utility for the Nazi revolution, insisting that the word for, and concept of, law had to be indivisible.

Where Koellreutter, von Schweinichen, Lange, and Dennewitz all attempted—in different ways and to different degrees—to racialize the *Rechtsstaat*, Krauß dismissed such efforts on ontological grounds. He believed that his intellectual adversaries were misguided in tearing apart a social phenomenon that existed as an organic whole. Where they searched for differentiation, he saw natural unity. He faulted not only the distinction between word and concept, but also that between form and substance, the letter of the law and its spirit, as well as body and soul. Krauß spoke of "*Trennungs- und Zergliederungsdenken*" and attributed it to the supposedly pernicious legacies of legal positivism.[306] The notion of the *Rechtsstaat* was useless in the Third Reich, he reasoned, because, in addition to subverting the idea of the law of the Swastika, it kept alive the modernist imagination: not only did it promote an inorganic way of law, it also perpetuated an inorganic way of life. The conceptual binary of the *Rechtsstaat*/*Gesetzestaat* to which some of the Nazi proponents of a racialized *Rechtsstaat* clung, Krauß dismissed as pointless ("*sinnlos*").[307] For him, the "retrospective" ("*nachträglich*") reinterpretation of the *Rechtsstaat* into an "other" of the legislative state for the sole purpose of utilizing Mr. Mohl's term of art in the Nazi revolution was akin to denying the victory of this revolution in the first place.[308]

p. 143 Given the fact that Krauß was after an unfettered state, the language of law had to be scrubbed clean of all liberal and legal positivist stains. As he put it: "If we retain the concept of the *Rechtsstaat*, we relativize the *Führerstaat*. For 'law' will once again be defined as self-constraint of the leadership, conformity with statutory law [...]."[309] From this vantage point, all talk of a "National Socialist *Rechtsstaat*" was both tautological and inappropriate. In Krauß's reading, the addition of the adjective "National Socialist" was tautological because it précised the Nazi state and thus served as a superfluous descriptor; it was inappropriate because it qualified the *Rechtsstaat*, thereby making the contested noun the new term's principal referent and elevating it to a prominence that Krauß felt it did not deserve in Nazi dictatorship. As he wrote: "National Socialism is primary, not the *Rechtsstaat*."[310]

Ernst Forsthoff, a doctoral student of Schmitt's in the Weimar Republic, covered his supervisor's flank. Although not a direct participant in the Nazi debate about the *Rechtsstaat*, he jumped into the breach on the side of the hardliners with a highly critical review of Koellreutter's treatise *Der deutsche Führerstaat*. According to Forsthoff, the concept *Rechtsstaat* was a semantic invention that could be traced back exclusively to liberal thought ("*rein aus dem liberalen Denken hervorgegangen*").[311] It was impossible to purge it of the legacies of liberalism. This being so, "whoever deliberately appropriates or retains such a word, is guilty of more than a terminological error (*terminologischen Mißgriff*); he invariably unleashes the connotations and emotions that are associated with a word such as the *Rechtsstaat*."[312] Dangerous minds think alike: Schmitt and Krauß and Forsthoff were, at this juncture at least, in complete agreement in their rejection of the *Rechtsstaat*. They desired a new vocabulary of law.

This brings us to Reinhard Höhn and Werner Best, whose intellectual contributions to the Nazi debate about the *Rechtsstaat* were slight, but whose positions as central cogs in the wheel of the dictatorship meant their political influence was considerable—and quickly felt in everyday life. In October 1936, Best, who with Heinrich Himmler and Reinhard Heydrich formed the triumvirate at the helm of the German Police, from where the expansion of the prerogative state was orchestrated, became chairman of a working group on police law at the Academy of German law.[313] This *Ausschuß für Polizeirecht*, which Höhn supported as Best's deputy, is pertinent to this analysis because its (incomplete) work accelerated the destruction of the

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Rechtsstaat. It ensured that the most radical arguments in Nazi legal thought found expression in the real world. And Best was the leader of the pack. Although his tortuous definition of what the concept of policing entailed found no adherents in the working group, and was not adopted, select aspects are worth pondering because their spirit ↳ informed the deliberations—and determined their outcome. First, policing, according to Best, comprised "all state activity" that used coercive violence in pursuit of "the preservation and development of the *Volk*."[314] Best wanted police violence to be directed at any individuals or collectivities who posed a threat to "the *Volk*'s leadership and communal order."[315] In order to stave off "disturbance" and "destruction" of these orders, Best wanted his organization to be the sole arbiter of deciding when police violence was called for. He wanted his organization to be in charge of judging the necessity of the use of force.[316] It was a push for autonomy.

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And even though Best's definitional foray was quashed by the other members of his working group, he won the battle over substance. His principal objective after all was to free policing practices in the Nazi dictatorship from as many remaining constraints of the *Rechtsstaat* as possible. Best had his sights set especially on statutory limits placed on police powers as well as on what he considered the inhibiting demands of administrative law. But it was *not* rampant lawlessness that he was after. What Best envisaged was a dual state. He wanted legalism for Aryans, and decisionism for their enemies. As he wrote in 1937, summarizing the results of his working group, "The state's normative self-binding [...] is generally appropriate vis-à-vis all positive and constructive forces of the *Volk*."[317] But, as Best hastened to add, in confronting the "*destructive forces*" ("*zerstörende Kräfte*"), that is, the dictatorship's enemies, legal constraints that would limit the choice of "necessary defensive measures" ("*notwendigen Abwehrmaßnahmen*") were out of the question.[318]

Best's resistance to the codification of *Polizeirecht*, or police law, was rooted in a fear of unnecessary self-binding, which is why the inability of the *Polizeirechtsausschuß*, the working group on which he served, to make progress with the legalization of police affairs, was not an institutional failure, but a success. It represented a resounding victory of the regime's praetorians over its bureaucrats. Rather than contributing to the regulation of the police, the working group facilitated its deregulation. It effectively exempted the police from the remnants of the *Rechtsstaat*. The police were the face of the prerogative state. Its reconstitution as "*innere Wehrmacht*," or internal army, meant that the realm of law had shrunk quite significantly. For Best, the re-equilibration of the dual state represented revolutionary progress. By balancing rifles and rules, he was convinced, the Nazi dictatorship was sustainable.[319]

Ulrich Herbert has credited Best with intellectual sophistication , and with good reason. Absent scholarly sensibilities and experience of legal reasoning, he argued, Best would have been hardpressed to legitimate law's violence in the face of more moderate Nazi functionaries in the police apparatus, which, in 1937, was still that of an authoritarian—not yet of ↳ a totalitarian—regime.[320] Best's was an effort to make lawlessness appear legal, to cultivate it, but within limits. It was about keeping up appearances, and to not unduly interfere with the Aryan way of life.

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Best was among those who advanced the expansion of the prerogative state, notably "Himmler's attempts to free the political police from all irksome legal bonds."[321] In a series of articles in *Deutsches Recht*, the official journal of the Academy of German Law of which Frank served as editor-in-chief, Best, in spring and summer 1936, provided the intellectual underpinnings for the marginalization of the normative state. It is therefore not surprising that Best belonged to the hardliners in the Nazi debate about the *Rechtsstaat*. The most vociferous participants were jurists on the payroll of the NSDAP or the SS, that is, stalwarts of the new "movement." No mere sympathizers of the Nazi cause, their zeal was fuelled by ideological faith in the *Volksgemeinschaft*, this imagined community of race. Foremost among them was Reinhard Höhn, a member of both NSDAP and SS and an ambitious and rambunctious jurist who relished taking on the likes of Koellreutter, Scheuner, Schmitt, and Tatarin-Tarnheyden all of whom he believed insufficiently committed to the racial order. Koellreutter voiced very publicly his doubts about "whether Höhn and Maunz are correct

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in their belief that our entire existing stock of legal tools must be smashed because it has been compromised as a result of having been taken over by liberalistic conceptions," accusing his rivals of peddling "legal astrology."[322] Höhn was one of the reasons why Koellreutter was defeated and legal astrology won the day.

A onetime protégé of Schmitt's, Höhn was a newly minted professor of law when the debate about the *Rechtsstaat* was in full swing. With a 1934 *Habilitation* from Heidelberg, he began teaching in Berlin in 1935, where he succeeded Rudolf Smend, who had been forced out. But Höhn was an intellectual with ambitions. His goal was to outperform both of the two leading lights on the Nazi legal stage: Schmitt and Koellreutter. He attacked the latter by talking about the decline of the state as a conceptual—and political—variable.

An important dividing line between Nazi moderates and Nazi radicals in the debate about the *Rechtsstaat* revolved around their diametrically opposed thinking regarding the nature of the newly emerging polity: was it a racial *state* or a racial *community*? As a term of art, the *Rechtsstaat* was unacceptable to any Nazi jurist who thought the concept of the state had outlived its relevance. Hans Helfritz, among others, criticized the political use of legal language and the hollowing out of legal instruments, notably the attempt to turn the *Volksgemeinschaft* into a legal person (*juristische Person*) and to have it take the place of the state as the fundamental reference point of the new public law.[323] Koellreutter agreed and in a slew p. 146 ↳ of publications objected to Höhn's aggressive "scientific campaign" ("*wissenschaftlichen Feldzug*").[324] Stolleis has described the substantive difference between these two lawyers of the Nazi dictatorship in terms of their contending conceptions of self: Koellreutter, as a nationalist, was oriented toward the state; Höhn, as a revolutionary, wanted to transcend it.[325] Consequently, it was inherently impossible for them to agree on a law of the Third Reich that served both goals, though the dual state may have existed for as long as it did in order to create space for a rapprochement between opposing camps. Eventually, however, time ran out. The sword proved mightier than the pen: Höhn managed to overcome intellectual opposition to his ideas with a show of force. "He constantly harried those whom he suspected, rightly or wrongly, of less-than-wholehearted commitment to the new order."[326]

It did not hurt that Höhn had friends in high places, which brings me to his silencing of Schmitt, who had supported his appointment in Berlin.[327] Between 1933 and 1935, Höhn served as a department head in the Main Office of the *Sicherheitsdienst*, the Security Service of the SS, known by its acronym SD. In the Berlin-based *Hauptamt*, his immediate superior was Heydrich. We already saw that Höhn also had Best's support, as whose deputy he served in the earlier mentioned working group on the legalization of police affairs. In October 1936, he used his expanding authority in the security services to open an intelligence file on "Prof. Dr. Carl Schmitt." By December of the same year, *Das Schwarze Korps*, the official mouthpiece of the SS, had published two articles calling into question Schmitt's Nazi credentials, which ended his rise through the ranks of the dictatorship, though it did not end his intellectual services to it.[328]

The Nazi debate about the *Rechtsstaat* ended better for those who were able to wield real and not just symbolic power. Best and Höhn were among them, as were Frank and Freisler. As servants of the prerogative state, these men's concept of law placed close to no value on formal rationality or legal certainty. It was not a *Rechtsstaat* these "150-percenters" were after.[329] The all-encompassing rule of which they dreamt knew no bounds, which is why they managed to defeat advocates of the *Rechtsstaat* inside the dictatorship so soundly despite starting out in the minority.

Having reconstructed the contours of the debate about the *Rechtsstaat* in the Third Reich, what is its relevance? Why should anyone care about the disagreements among a handful of despicable Nazi intellectuals? What difference, if any, did their extended ruminations make to the presentation of law in everyday life?[330] My answer revolves around the expressive function of law.

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The Expressive Function of Law

In a frequently cited article, Cass Sunstein reasoned constructively about the law. In the late twentieth century, he reminded his colleagues in U.S. law schools of what social scientists have known at least since the posthumous publication of Max Weber's *Wirtschaft und Gesellschaft* at the beginning of that century: "Actions are expressive; they carry meanings."[331] Starting from this deceptively simple premise, Sunstein developed a new answer to the question of why law is invented and obeyed. As he wrote, "sometimes people support a law, not because of its effects on norms, but because they believe that it is intrinsically valuable for the relevant 'statement' to be made."[332] According to Sunstein, "Many debates over the appropriate content of law are really debates over the statement that law makes, independent of its (direct) consequences."[333] The Nazi debate about the *Rechtsstaat* is evidence of this proposition. Although law's consequences were clearly on the minds of many of the participating jurists, it is immediately apparent how much importance most of the Nazi jurists involved also placed on law's meaning.

Meanings matter to agents, individual and otherwise, as social constructivists across the disciplines have made abundantly clear. Kenneth Ledford has staked a similar claim for a subset of agents in the case at hand, contending that "explanations of the behavior of lawyers in 1933 must move beyond analyses based upon economic exigency, de-professionalization, or moral and ethical failure."[334] In Ledford's important analysis, liberal and conservative lawyers in the transition to authoritarian rule failed to develop an alternative legal conscience, a legal imaginary capable of rivaling the emerging Nazi concept of law: "[L]awyers demonstrated the limited integrative power of procedural conceptions of liberalism and its inherent weakness in the face of opponents mobilized by substantive ideas of justice."[335]

If we believe Michael Stolleis, the Nazi debate about the *Rechtsstaat* "ended in a grotesquerie and was soon abandoned."[336] This assessment is not wrong. The debate's sophistication declined as some of the participants were marginalized (or took themselves out of the crosshairs of the NSDAP and SS who were gunning for them) and the racial dictatorship consolidated itself. And yet Stolleis's perfunctory assessment —he only devotes two pages to it in his magisterial, four-volume history of German public law—risks our bypassing a large window into the "Nazi conscience." The historian Claudia Koonz, who came up with the heuristic, has peered through this window.[337] But her eye caught something else than mine. Koonz focused on the substance of Nazi law, the invention of racial categories by "ethnocrats" like Hans Globke, one of the co-drafters p. 148 ↳ of the Nuremberg Race Laws of 1935, and the bureaucratic infighting that accompanied this "incremental racialization."[338] A focus on substantive law is the mainstay of scholarship on Nazi law by non-legal scholars. By contrast, I am more concerned with practices of formation, deformation, and transformation of Nazi law. I consider the long-run consequences of its procedures, as well as their emotional import, including the various conceptions of it that leading intellectuals debated in the formative years of the Third Reich in their quest to provide the Hitler regime with an institutional design for a sustainable dictatorship. Where Koonz historicized law's substance, I inquire into law's form, the media through which jurists communicated its abhorrent content to the *Volk*, and the social meaning(s) it had for those performing the law.

Nazi Legal Conscience

Much has been written in recent years about Nazi morality.[339] It is at once enlightening and utterly disturbing to think that policies which culminated in the destruction of the European Jews could have started out as moral sentiments. And yet they did, which is precisely what Koonz wants us to appreciate. And her evidence is convincing:

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> The Final Solution did not develop as evil incarnate but rather as the dark side of ethnic righteousness. Conscience, originally seen to protect the integrity of the individual from the inhumane demands of the group, in the Third Reich became a means of underwriting the attack by the strong against the weak. To Germans caught up in a simulacrum of high moral purpose, purification of racial aliens became a difficult but necessary duty. [...] In offering the faithful a vision of sanctified life in the *Volk*, it resembled a religion. Its condemnation of egotism and celebration of self-denial had much in common with ethical postulates elsewhere.[340]

The discourse about law in the 1930s was fueled by expressions or extensions of neo-conservative patterns of thought.[341] Neo-Hegelianism was one such pattern that informed the new legal imagination.[342] It supplied a respected philosophical foundation for the intellectual struggle over the meaning of Nazi law. The debate about the *Rechtsstaat* was but one battle, if a major one, in this larger struggle. It was not without significance that the year 1931 marked the 100th anniversary of Hegel's death; it rejuvenated the reception of his philosophy. Julius Binder, whom I already discussed, brought the "Hegel renaissance" to law.[343] Together with Karl Larenz and a small band of like-minded jurists—Walther Schönfeld, Martin Busse, Gerhard Dulckeit, Carl August Emge, and Wilhelm Sauer—he outlined a moral philosophy of Nazi law.[344] p. 149 They desperately wanted their colleagues in the legal profession to recognize that an appreciation ↳ of "true reality" ("*wahre Wirklichkeit*") was more important for advancing the *Volk* than positive law.

A defining feature of neo-Hegelian thought was the redefinition of the philosophical notions of "*Begriff*" ("concept"), "*Wirklichkeit*" ("reality"), and "*Idee*" ("idea"). In contrast to legal positivists, neo-Hegelians like Binder and Larenz regarded law's reality as a social construct whose existence could not be grasped by mere description. Rather, they were certain that reality was more than what was observable in the real world; it referred to a higher reality. In his most important works, the 1935 *Grundlegung zur Rechtsphilosophie* and the 1937 *System der Rechtsphilosophie*, Binder therefore developed arguments about the nature of law from what he termed "absolute idealism" ("*absoluter Idealismus*").[345]

Unlike Neo-Kantians, Neo-Hegelians did not use concepts to describe or categorize this reality. Why? Because in the latter interpretation concepts were not analytical tools but philosophical states. For Binder and Larenz, the concept was the form that human understanding (*Begreifen*) took when it captured an objectively ideal reality.[346] Put differently, "the real" and "the ideal" were indivisible for neo-Hegelians. The idea, next, Larenz defined as a "creative force" ("*schöpferische Macht*").[347] Alive and perpetually in motion, ideas are not norms, wrote Larenz, nor are they valid or purposive; rather, they represented "*das in Wahrheit Seiende*," that which truly exists.[348] Reality in this system of thought referred to more than a state of bare existence ("*äußerliches Dasein*"); reality was the idea's "manifestation" ("*Erscheinung*"), its "concretion" ("*Konkretion*").[349] Because an idea is one with reality ("*mit ihr eins*"), for Binder and Larenz, Nazi legal concepts such as *Vertrag* (contract), *Strafe* (punishment), *Gemeinschaft* (community), or *Führerstaat* (Hitler state) were not in need of exhaustive definitions.[350] Because only "one reality" existed under this extreme form of philosophical idealism, disagreements were logically inconceivable. Given its absolutist claims, Oliver Lepsius has written of the "revolutionary ambition" of neo-Hegelian legal thought in Nazi Germany.[351] This ambition was not of the Nazis' making, but the neo-Hegelian philosophical agenda in the interwar period coincided (and subsequently became enmeshed) with the revolutionary ethos of Hitler's NSDAP.

The example of Neo-Hegelianism is immediately relevant to the idea of a Nazi legal conscience because for Binder and Larenz—who in my analysis only stand in as examples for the various intellectual efforts in the Third Reich to legitimate Nazi legality philosophically—thinking about the Nazi concept of law was primarily an expressive act, and only secondarily an instrumental one. By appropriating from the early 1920s to the late 1930s neo-Hegelian ideas for their evolving legal thought, Binder and Larenz adumbrated the emergence of a Nazi legal conscience. And p. 150 ↳ yet, although Neo-Hegelianism undeniably played a major

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role in legitimating Nazi legalism, Steffen Kluck has shown that this effect was not always "intentional."[352] We must thus be careful to avoid retrospective determinism when studying the development of legal norms and institutions in the Third Reich. Neither Nazi legal thought nor Nazi legal practice were as uniform as they are often portrayed to be. Nor was either fully Nazified, as Stolleis made clear in his 1974 *Habilitation*. His analysis of the Nazi reconstitution of the idea of the *Gemeinwohl*, or public good, showed that the legal system of the Third Reich consisted "primarily" ("*überwiegend*") of norms that antedated the Nazi dictatorship, remnants of the *Rechtsstaat* all.[353] While the bulk of valid law stemmed from the Wilhelmine and Weimar eras, numerous legal norms were enacted in earlier periods.[354] Despite constant propaganda to the contrary, Nazi law in the main was old law, a product of the *Rechtsstaat* desperately needed "to avoid chaos."[355] Nazi jurists refurbished the existing norms and legal instruments, putting on them a racial gloss in keeping with absolute idealism.[356] The result was a dual state.

The instrumentalization in the law of the Third Reich of the concept of the *Gemeinwohl* shows as much. Stolleis unearthed evidence of both "radicalism" and a "continuity of the *Rechtsstaat*" in the process of its legalization.[357] The example of the Nazi appropriation of the idea of the *Gemeinwohl* illustrates why the concept of Nazi legal conscience has analytical purchase: it accommodates the real and the ideal, "*Anspruch*" and "*Realität*."[358]*Gemeinwohlformeln*, these vague formulas of the public good, undeniably undermined law's positivity regularly and often in Nazi Germany, thereby fulfilling the intended purpose of their institutional design. The institutional effect was not anomie, however; *pace* conventional wisdom, law was not just façade. *Gemeinwohlformeln* at times had unintended consequences that were at odds with the dictatorship.

This brings into view a causal link between the Nazi debate about the *Rechtsstaat* and the dual state, between legal thought and legal practice. Variation in the usage of *Gemeinwohlformeln* especially by courts, Stolleis argues, is evidence of what he calls "hidden pluralism" ("*verdeckter Pluralismus*").[359] This "factual pluralism" ("*faktischer Pluralismus*"), which the regime's propaganda concealed, in Stolleis's estimation, ringfenced a "field of battle" ("*Kampffeld*") in the struggle against the Nazi dictatorship.[360] At the level of the everyday, the reach of the will of the *Führer* was more limited than at the elite level, which meant that the influx and impact of *Gemeinwohlformeln* was less absolute than imagined at the moment of institutional design. Legal practitioners in the periphery were able to exploit interpretive disagreements ("*Divergenzen*") among legal theorists at the center. It gave them room for maneuver in "enclaves p. 151 ↳ of freedom" ("*Freiheitsräume*").[361] In key respects, the everyday law that Stolleis studied was more polycratic law than it was totalitarian. His 1974 study remains important because it exposed the Hitler myth in law. The evidence he presented lent support to Fraenkel's argument about institutional hybridity. It showed that Hitler's will may have ranked supreme in Nazi legal thought, but it did not in Nazi legal practice. This dissonance should not, however, affect our sense of the moral guilt that intellectuals who pledged their allegiance to Nazi law incurred.

Schreibtischtäter

The intellectual heterogeneity among the *dramatis personae* in the Nazi debate about the *Rechtsstaat* must not distract from the reactionary values around which their contending conceptions of law converged. Hans Helfritz, one of the participating Nazi jurists, put it memorably: "In dispute was not the issue, but the name" ("*Strittig war nicht die Sache, sondern ihr Name*").[362]

Virtually all of the participants in the Nazi debate about the *Rechtsstaat* were members of the "*Neue Rechtswissenschaft*," the aforementioned judicial network of lawyers formed to cultivate a new legal science.[363] These reactionary modernists were *Schreibtischtäter*. A quintessentially German expression, the term refers to a perpetrator of large-scale violence, like Adolf Eichmann, who orders, plans, administers, or otherwise contributes to mass death without directly participating in the act of killing.[364] Many of the

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Schreibtischtäter in the Third Reich did not act out of base motives but—disturbingly—in keeping with what they considered a higher morality. Their attachments to the law of the Third Reich were emotional as well as instrumental.

The example of Franz Gürtner, Reich minister of justice in the Third Reich between 1932 and 1941 is a case in point. The hold that the memory of the *Rechtsstaat* appears to have had on Gürnter meant that he played the role of Freisler's nemesis when, in June 1934, the task arose to criminalize the supposed offense of *Rassenschande*, or racial treason. Along with other "ethnocrats," all of them lawyers, Gürnter for a short while retarded Freisler's ambition to racialize the law at breakneck speed. "Despite the obvious pressure from Freisler, they [...] forestalled the criminalization of 'mixed-race' intercourse, thwarted a law against criticism of racial dogma, and headed off further encroachment on Jews' civil rights."[365] Their behavior, Koonz believes, was suggestive of "unease with the ethical and legal issues engaged by sweeping proposals for racial persecution."[366] The reason? "As trained jurists, these ethnocrats thought analogically and reasoned from precedent."[367] Whereas Freisler, though also p. 152 ↳ a lawyer, placed more stock in race than in law, Gürnter and like-minded colleagues apparently were still flying a tattered flag for the conservative tradition of the *Rechtsstaat*. This is remarkable, but not entirely surprising, considering that Gürnter had served the Weimar *Rechtsstaat* for more than ten years, first as Bavarian minister of justice between 1922 and 1932, and then, from 1932, as Reich minister of justice. However, he and other moderate Nazi practitioners came around, and it did not take long. Attitudinally and behaviorally, they transitioned from extremist institutionalism to racial institutionalism within less than two years.[368] After deliberations that lasted from April 1933 until September 1935, Freisler's investment in the racialization of the *Rechtsstaat* had paid off. A large practical step away from the normative state and toward the prerogative state had been taken.[369]

If one compares the making of the Nuremberg Race Laws and the Nazi debate about the *Rechtsstaat*, one notices a striking similarity between the behavior of Koonz's ethnocrats and that of the Nazi jurists discussed in this chapter. In both instances, the lawyers involved eventually "behaved as Max Weber had predicted they ought to: they internalized commands from a legitimate authority."[370] Virtually all "accommodated themselves to a Nazi conscience appropriate to the tasks ahead."[371] Nazi jurists in favor of appropriating the language of the *Rechtsstaat* acquiesced. They tacitly accepted the dominant view, which may or may not have been the majority view among them at the time. Years of tense exchanges in numerous fora and across multiple intellectual and other divides had created, if not unanimity, at least a working consensus between institutional extremists and institutional pragmatists. Like Koonz's ethnocrats, the defeated jurists in the Nazi debate about the *Rechtsstaat* "could think of themselves as moderates because they endorsed orderly methods and eschewed vulgar racism."[372]

In the legalization of his dictatorship, Hitler "endorsed both bureaucratic and radical goals."[373] It was the dual state in operation, its two constituent halves working in unison to consolidate the racial order. Inside the normative state, the excesses of the prerogative state were denied. The regime's bureaucratic functionaries, or "ethnocrats," as Koonz calls them, displayed extraordinary levels of cognitive dissonance: "Ineluctably, networks had coalesced and collegiality drew them into a shared bureaucratic space. In place of the fundamental ethical questions that plagued them in the early years of the Third Reich, by the late 1930s ethnocrats' moral field narrowed to questions of definitional and procedural consistency."[374] The prerogative half of the dual state loomed over the normative half. The p. 153 ↳ structural imbalance between them grew in the war years. It was Heinrich Himmler whose drive to expand his institutional authority and access to levers of infrastructural power was chiefly responsible for this final gutting of the *Rechtsstaat*. The manufactured judicial crisis ("*Justizkrise*") of 1942, which led to the appointment of Otto Georg Thierack as minister of justice, was his doing. Most significantly, the intensification of law's totalization meant an even greater dependence of judges. Thierack's tactics to bring the judiciary fully in line with the totalitarian dictatorship included an increase in individual directives to steer judicial behavior, the above mentioned

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Richterbriefe with which the regime leaned on its judges, pre- and reviews of their judgments, a reporting requirement, and inspection visits.[375] The abandoning of the *Rechtsstaat* on the theoretical level did not augur well for its remnants in the real world. It precipitated the decline of the normative state in the life of the dictatorship. Among other violence this institutional development caused, it forced Ernst Fraenkel to flee the increasingly violent Reich.

The Legal Imaginary

By feeling the dictatorship in 1938, Fraenkel followed in Franz Neumann's footsteps. In his 1942 book *Behemoth*, Neumann put to use Hobbes's interpretation of the mythical land monster. It served him as the linchpin in his analysis of "the structure and practice of National Socialism." In Job 40: 15-24, the beast is described thus:

> Look at Behemoth,
> which I made just as I made you;
> it eats grass like an ox.
> Its strength is in its loins,
> and its power in the muscles of its belly.
> It makes its tail stiff like a cedar;
> the sinews of its thighs are knit together.
> Its bones are tubes of bronze,
> its limbs like bars of iron.[376]

Hobbes, as Stephen Holmes reminds us, "employed Leviathan as a symbol for the peacekeeping state and Behemoth as a symbol for rebellion and civil war."[377] A year before Fraenkel's flight from the Reich, Karl Loewenstein, like Neumann in 1942, also borrowed from Hobbes to describe the state of the Third Reich. But p. 154 he chose the sea monster as his metaphor. He considered the creature of the leviathan a more ↳ befitting metaphor than that of the behemoth: "National Socialism in its present aspect is certainly the most thoroughgoing organization of social life, the most omnipotent leviathan, in Hobbes' phrase, known in modern history."[378] Assuming that Loewenstein knew his Hobbes, he had a less dystopian outlook on the Nazi dictatorship than Neumann. Even more striking about Loewenstein's speech act is that the Nazi phenomenon he identified in 1937 bears a close resemblance to the institutional structure that Fraenkel had begun to describe thickly around the same time: "Paradoxically," Loewenstein wrote, "it is the most notable feature of the Third Reich that it has succeeded in organizing arbitrariness in the form of law."[379]

To better understand the origins and effects of this remarkable institutional development, I excavated in this chapter and in the one preceding it the intellectual history of the *Rechtsstaat* up until the late 1930s. A purely rationalist approach to authoritarian legalism in the Third Reich would have missed the cultural dimensions that accompanied the gradual destruction in the 1930s of the nineteenth century *Rechtsstaat* that von Mohl had invented. I wrote of the expressive function of Nazi law in order to draw attention to these normative roots, and also to the continuity of law across the 1933 juncture. Lepsius has argued that the majority of Germany's legal theorists and practicing lawyers—those whose lives the Nazis had not threatened or diminished or taken—experienced the onset of authoritarian legalism not as a *novum* but as the completion of an incipient reality.[380]

This strengthens the case for taking seriously Nazi legal conscience as a useful *explanandum*. The case becomes even stronger if we remind ourselves of the role that conservative revolutionaries such as Martin Heidegger, Ernst Jünger, and Carl Schmitt played in the transition to authoritarian rule. Let us not forget that "they were viewed and they viewed themselves as a cultural elite with a special responsibility and ability to work with traditions, ideas, symbols, and meanings in an effort to make sense of their times."[381] A

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sizable army of German intellectuals was seized by the idea of Nazi dictatorship, eager to contribute their brain power.[382] A veritable labor front, they were united by a faith in "*Sittlichkeit*," or ethicality, Hegel's term for a distinctly German form of morality, and an interest in those aspects of German tradition that were compatible with the kind of exclusionary nationalism that they wanted to see realized, "namely, romanticism, *völkisch* ideology, the existentialist language of the self and authenticity, a widespread acceptance of social Darwinism, *Lebensphilosophie*, Wagnerian visions of apocalypse and transformations, Nietzsche's amoral celebration of aesthetics, and a general antipathy to Enlightenment thought and morality."[383] "Like so many p. 155 ↳ of their peers," Koonz writes, with Heidegger and Schmitt in mind, they "welcomed ethnic solidarity in a time of political confusion, economic dislocation, and cultural pluralism. In their lecture halls and scholarship they had expressed a vague longing for a harmonious community (*Gemeinschaft*). After watching politics from the sidelines, these [...] powerful thinkers cast their lot with a former front-fighter who represented stridently masculine values and ethnic authenticity. It is a mark of success of Hitler's public persona" that Heidegger and Schmitt "not only fell in with the mood of ethnic solidarity in 1933 but elaborated their own very different visions of what might be accomplished. Succumbing to the atmosphere of battle—against Communism, cultural decadence, and Jews—they embraced a virile ethos."[384]

Even after a cursory look at the Nazi debate about the *Rechtsstaat*, and the variation—sometimes dramatic, but often subtle—among the many voices that made themselves heard during the four years that it took to settle it, one would be hard-pressed to miss the expressive energy that went into it. The jurists involved "celebrated the heroic values that elevated the community over the individual, instinct over reason, authenticity over rationality, and hardness over empathy."[385] What Koonz wrote about Heidegger and Schmitt's conduct in 1933 applies to virtually all of the participants whose contributions I discussed in this chapter:

> At this critical juncture, while Hitler himself was silent on the subject, [they] stepped in to translate the Nazis' crude slogans and repellant images into intellectual respectable justifications not only for dictatorship but also for antisemitism. [...] They advanced the values of the Nazi conscience in their praise of a communitarian ethnic utopia. Each, in his own way, contributed to the redefinition of courage as the capacity to harm the vulnerable without shirking, in the name of the *Volk*.[386]

This, then, is why the Nazi debate about the *Rechtsstaat* matters. It points to a neglected social mechanism in the making of the Nazi dictatorship: the reconstitution of legal norms. By acknowledging the Nazi quest for normativity (to which the phenomenon of ideology is related but from which it must be analytically distinguished), we are in a position to understand better why remnants of the *Rechtsstaat* survived, at least for a while, the Nazi assault on liberal legalism. The social construction of the Nazi concept of law, which gained new and sharper contours in the period 1933–1937, amounted to a legal imaginary, which gradually took hold of the Nazi legal conscience.

Few theorists have done more to advance the idea of the "social imaginary" ("*l'imaginaire social*") than the Greek-French philosopher Cornelius Castoriadis.[387] Even though the notion originated in the early p. 156 ↳ work of Jacques Lacan in the 1950s, it was Castoriadis's rendering of it that convinced social theorists to take note. Pathbreaking about Catoriadis's contribution was his assertion that the imaginary element of the social world represented not a reflection of reality, "a specular image of what is already there," as mainstream thought had long assumed, but a reality in its own right.[388] The imaginary, in this account, is an elementary form of social life. According to Castoriadis,

> This element, which endows the functionality of each institutional system with its specific orientation, which overdetermines the choice and connections of symbolic networks, which creates for each historical period its singular way of living, seeing and making its own existence,

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> its world and its relations to it, this originary structuring, this central signifier-signified, source of what is each time given as indisputable and indisputed sense, support of the articulations and distinctions of what matters and of what does not, origin of the augmented being (*surcroit d'être*) of the individual or collective objects of practical, affective and intellectual investment—this element is nothing other than the *imaginary* of the society or period concerned.[389]

Elsewhere Castoriadis described "the central imaginary significations of a society" memorably as "the laces which tie a society together and the forms which define what, for a given society, is 'real.' "[390] If we accept this premise, the Nazi debate about the *Rechtsstaat* tells us a great deal more about life in the Third Reich than it should, and than Radbruch's formula or Neumann's *Behemoth* arguably ever could.[391] Rather than representing an insignificant sideshow, it is a rich (and largely untapped) source for prima facie evidence of the "pre-reflexive parameters" within which Nazi jurists imagined their legal existence.[392]

In this sense, law was what Nazis made of it. This is the reality of law at the level of *legal theory*. The self-understandings of agents matter apart from the conduct in which individual or collective agents might engage. "[I]n this context one looks at the ways in which lawyers, judges and other participants in the 'interpretive community', law, understood what they were doing between 1933 and 1945. Did they act as if they were still lawyers and judges, within a 'legal' system, albeit a new or revolutionary Nazi legal system? On this question, there can be little debate."[393] The Nazi debate about the *Rechtsstaat* shows that even the most hardened jurist thought of himself as an agent of law. Authoritarian legalism in the Third Reich, in short, was invented but meaningful. If we take Peter Winch's idea of social science as our guide, the fact that Nazi legalism was an invented tradition is of secondary significance. For as Winch writes, "[a]ll behaviour which is meaningful (therefore all specifically human behaviour) is *ipso facto* rule-governed."[394] When p. 157 speaking of "rule-governed" ↳ behavior, what Winch had in mind were any and all social practices that were based on common understandings.[395] Despite the myriad differences and disagreements among the participants in the Nazi debate about the *Rechtsstaat*, their habitual invocation in critiques of the nineteenth century idea of the *Rechtsstaat* of what I have called the trifecta of tropes—antiliberalism, antiformalism, and antisemitism—is indicative of the strength of the repugnant ideas that bound them together. Because the intentions of their scholarly contributions to the Nazi debate about the *Rechtsstaat* were discernable to anyone who cared to pay attention, the participating jurists, in Winch's definition, reasoned not wantonly but in accordance with revised rules of the game. Nazi legal thought, then, was an activity like any other.[396]

But law was real in a second sense as well. This is the reality of law at the level of *legal practice*. We must consult both dimensions of legal reality if we hope to make reliable inferences about the state of law—and the law of the state—in the Third Reich. David Fraser rightly cautions that "all who reject the 'legality' of Nazi Germany are still faced with the existential reality of a legal system which continued to function much as it had before."[397] The tradition of legalism in Germany, which dates back to a time before von Mohl invented the idea of the *Rechtsstaat*, exercised an ideational pull on a subset of Nazi intellectuals that partially constrained the theory and practice of authoritarian rule. As Karl Loewenstein remarked from the safety of his American exile, "Bent upon the creation of fundamentally new legal concepts, National Socialist constitutional jurisprudence takes pride in pretending that it has established a legal system which is *sui generis* and beyond the reach of comparative standards."[398] It is an apt summary of the Nazi legal conscience in 1937, the year in which the debate about the *Rechtsstaat* was settled. Friedrich Roetter, writing in 1945, when Radbruch's philosophical interest was also peaked, did not see any reason to disagree with Loewenstein's prewar finding. Himself a refugee from the Reich and erstwhile insurgent lawyer, he summarized succinctly the contribution that the Nazi legal imaginary in the preceding twelve years had made to the dictatorship:

> Although Nazi doctrines may have been conceived in cool calculation as a means to power and nurtured through emotion, the point of interest to the lawyer is that the acts of the Nazi regime

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> were committed under law. The Nazis recognized the necessity of law. But their law had little in common with what lawyers had theretofore called law.[399]

For Roetter, just as for Fraenkel, as we shall see in more detail in the next few chapters, Nazi legalism was p. 158 neither law (*Recht*) nor lawlessness (*Unrecht*), but gray law. Both thought it important, for all the suffering ↳ that Germany's Nazis made them endure, to recognize and try to understand the operation of law amidst lawlessness. Because the demand for legalization was considerable in the early life of the Third Reich, it was impossible to purge the Nazi legal system of all norms and institutions of the ancien régime(s). And because Nazi legalism was predicated on new, racialized legal norms, the existing institutions into which these norms were transplanted came to be seen as less threatening by Nazi functionaries than they had in the run-up to dictatorship, when they appeared to represent bastions of liberalism. It was thus that remnants of the *Rechtsstaat* came to govern the Nazi dictatorship, where they gave hope to a lawyer with a cause.

Notes

1. On the concept of, and the discourse surrounding, the so-called *Machtergreifung*, see Norbert Frei, "'Machtergreifung': Anmerkungen zu einem historischen Begriff," *Vierteljahrshefte für Zeitgeschichte*, Vol. 31 (1983), pp. 136–45. For an account of the immediate run-up to the government takeover, see Henry Ashby Turner, Jr., *Thirty Days to Power: January 1933* (Reading: Addison-Wesley, 1996). Though slightly dated, the most comprehensive treatment of the early dictatorship remains Karl Dietrich Bracher, Wolfgang Sauer, and Gerhard Schulz, *Die nationalsozialistische Machtergreifung: Studien zur Errichtung des totalitären Herrschaftssystems in Deutschland 1933/34* (Cologne: Westdeutscher Verlag, 1960).
2. "*Dazu genügen nicht bloß Phrasen, sondern dazu bedarf es neben der geistigen Haltung auch des wissenschaftlichen Rüstzeuges*." Otto Koellreutter, "Edgar Tatarin-Tarnheyden, Werdendes Staatsrecht" (Book review), *Archiv des öffentlichen Rechts*, Vol. 26 (1935), p. 128.
3. Carl Schmitt, "Nachwort," in Günther Krauß and Otto von Schweinichen, *Disputation über den Rechtsstaat* (Hamburg: Hanseatische Verlagsanstalt, 1935), p. 88.
4. "The Science of Administrative Law under National Socialism," in idem., *The Law under the Swastika: Studies on Legal History in Nazi Germany*, translated by Thomas Dunlap (Chicago: University of Chicago Press, [1985] 1998), p. 103.
5. Dieter Thomä, "The Difficulty of Democracy: Rethinking the Political in the Philosophy of the Thirties (Gehlen, Schmitt, Heidegger)," in Wolfgang Bialas and Anson Rabinbach, eds., *Nazi Germany and the Humanities: How German Academics Embraced Nazism* (London: Oneworld, 2007), p. 96.
6. Peter Caldwell, "National Socialism and Constitutional Law: Carl Schmitt, Otto Koellreutter, and the Debate over the Nature of the Nazi State, 1993–1937," *Cardozo Law Review*, Vol. 16 (1994), p. 400.
7. Caldwell, "National Socialism and Constitutional Law," p. 399.
8. Victor Klemperer, *LTI: Notizbuch eines Philologen*, Twenty-fifth edition (Stuttgart: Reclam, [1947] 2015).
9. In order to avoid confusion, a clarification of terms is in order, notably of *Staatslehre* (state theory), *Verfassungslehre* (constitutional theory), and *Staatsrechtslehre* (state law theory). At one point or another, each of these topoi stood for a distinct approach to the study of public law in modern Germany. For a discussion, see Peter Häberle, "Allgemeines Staatsrecht, Verfassungslehre oder Staatsrechtslehre? Bemerkungen aus Anlaß der 5. Auflage der Allgemeinen Staatslehre von G. u. E. Küchenhoff (1964)," *Zeitschrift für Politik*, Vol. 12 (1965), pp. 381–95. The issue is also addressed throughout Martin Loughlin, *Foundations of Public Law* (Oxford: Oxford University Press, 2010); and Murkens, *From Empire to Union*. For an attempt to revive elements of early twentieth century Germany's *Staatsrechtslehre* for the study of constitutional law in the twenty-first century, see David Dyzenhaus, "The Idea of a Constitution: A Plea for *Staatsrechtslehre*," in David Dyzenhaus and Malcolm Thorburn, eds., *Philosophical Foundations of Constitutional Law* (Oxford: Oxford University Press, 2016), pp. 1–32.
10. Joachim Perels, "Zur Rechtslehre vor und nach 1945," in Eva Schumann, ed., *Kontinuitäten und Zäsuren: Rechtswissenschaft und Justiz im "Dritten Reich" und in der Nachkriegszeit* (Göttingen: Wallstein, 2008), p. 126.
11. Other leading representatives in the legal profession included Karl Larenz, Gerhard Dulckeit, and Martin Busse.
12. Julius Binder, "Der autoritäre Staat," *Logos*, Vol. 22 (1933), p. 153.
13. Binder, "Der autoritäre Staat," p. 156.
14. Binder, "Der autoritäre Staat," p. 158.
15. "*Die neue Lebenswertung hat den einzelnen von seinem Throne gestoßen. Er ist nicht um seiner selbst willen von Wert, er ist dienendes Glied der Gemeinschaft, ist ihr ein- und untergeordnet*." Heinrich Lange, *Vom Gesetzesstaat zum Rechtsstaat: Ein*

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Vortrag (Tübingen: Mohr, 1934), p. 20.

16. Otto Koellreutter, *Grundriß der allgemeinen Staatslehre* (Tübingen: Mohr, 1933), p. 61.
17. See, most important, Michael Wildt, *Volksgemeinschaft als Selbstermächtigung. Gewalt gegen Juden in der deutschen Provinz 1919 bis 1939* (Hamburg: Hamburger Edition, 2007)*;*Ian Kershaw, " 'Volksgemeinschaft': Potential und Grenzen eines neuen Forschungskonzepts," *Vierteljahrshefte für Zeitgeschichte*, Vol. 59 (2011), pp. 1–17; Michael Wildt, " 'Volksgemeinschaft': Eine Antwort auf Ian Kershaw," *Zeithistorische Forschungen*, Vol. 8 (2011), pp. 102–9; and the contributions in Martina Steber and Bernhard Gotto, eds., *Visions of Community in Nazi Germany: Social Engineering and Private Lives* (Oxford: Oxford University Press, 2014).
18. "*Das Recht ist nicht etwa dazu da, die sog. Individualsphäre zu sichern und damit das Privatleben zu umhegen. Das Recht des Staates als Lebensordnung der Volksgemeinschaft geht vielmehr vor*." Wilhelm Glungler, *Theorie der Politik: Grundlehren einer Wissenschaft von Volk und Staat* (Munich: Voglrider, 1941), p. 301.
19. Hans Frank, "Eike von Repgow der Künder und Kämpfer des Rechts," *Deutsches Recht*, Vol. 6 (1936), p. 298.
20. Otto Koellreutter, "Volk und Staat in der Verfassungskrise: Zugleich eine Auseinandersetzung mit der Verfassungslehre Carl Schmitts," *Jahrbuch für politische Forschung*, Vol. 1 (1933), p. 36; Edgar Tatarin-Tarnheyden, *Werdendes Staatsrecht* (Berlin: Heymanns, 1934), p. 21; Lange, *Vom Gesetzesstaat zum Rechtsstaat: Ein Vortrag*, p. 14.
21. Helmut Nicolai, *Grundlagen der kommenden Verfassung: Über den staats-rechtlichen Aufbau des deutschen Reiches* (Berlin: Hobbing, 1933), p. 18.
22. Nicolai, *Grundlagen der kommenden Verfassung*, p. 19.
23. Peter C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory and Practice of Weimar Constitutionalism* (Durham: Duke University Press, 1997), pp. 102–3.
24. Carl Schmitt, *Constitutional Theory*, translated and edited by Jeffrey Seitzer (Durham: Duke University Press, [1928] 2008), p. 176. Emphases added.
25. Martin Wittig, *Der Rechtsstaat im Wandel der Staatsformen* (Greifswald: Panzig, 1933), p. 32.
26. Lange, *Vom Gesetzesstaat zum Rechtsstaat: Ein Vortrag*, p. 6.
27. Günther Krauß, "These: Der Begriff des Rechtsstaats ist an die verfassungsrechtliche Lage des 19. Jahrhunderts gebunden; für den Staat des 20. Jahrhunderts hat er keine Berechtigung mehr," in Günther Krauß and Otto von Schweinichen, *Disputation über den Rechtsstaat* (Hamburg: Hanseatische Verlagsanstalt, 1935), pp. 22–4.
28. Schmitt, *Constitutional Theory*, p. 176.
29. Meierhenrich, "Fearing the Disorder of Things: The Development of Carl Schmitt's Institutional Theory, 1919–1942," in Jens Meierhenrich and Oliver Simons, eds., *The Oxford Handbook of Carl Schmitt* (Oxford: Oxford University Press, 2016), esp. pp. 192–202.
30. Carl Schmitt, "Der Rechtsstaat," in Hans Frank, ed., *Nationalsozialistisches Handbuch für Recht und Gesetzgebung* (Munich: Zentralverlag der NSDAP, 1935), p. 9.
31. Schmitt, "Der Rechtsstaat," p. 9.
32. Helmut Nicolai, *Der Staat im nationalsozialistischen Weltbild* (Leipzig: Hirschfeld, 1933), p. 20.
33. Lange, *Vom Gesetzesstaat zum Rechtsstaat*, p. 15.
34. Friedrich Julius Stahl, *Die Philosophie des Rechts*, vol. 2: *Rechts- und Staatslehre auf der Grundlage christlicher Weltanschauung*, Third edition (Heidelberg: Mohr, 1856), §30.
35. Ernst Forsthoff, *Der totale Staat* (Hamburg: Hanseatische Verlagsanstalt, 1933), p. 13.
36. Carl Schmitt, "Was bedeutet der Streit um den 'Rechtsstaat'?," *Zeitschrift für die gesamte Staatswissenschaft*, Vol. 95 (1935), p. 192.
37. Hans Kelsen, *Vom Wesen und Wert der Demokratie*, Second edition (Tübingen, 1929), p. 79.
38. Forsthoff, *Der totale Staat*, p. 12.
39. Lange, *Vom Gesetzesstaat zum Rechtsstaat*, p. 13. Note, however, that both Forsthoff and Walz, despite their support for a distinct Nazi concept of law, had reservations about the centrality of the leadership principle in the legalization of the dictatorship. Forsthoff worried about the transient nature and finite duration of all leadership, Walz was not all too enamored with the "unmetaphysical" quality of any form of leadership. See Forsthoff, *Der totale Staat*, p. 31; Peter M. R. Stirk, *Twentieth-Century German Political Thought* (Edinburgh: Edinburgh University Press, 2006), p. 89.
40. Schmitt, *Political Theology*, p. 6.
41. Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, translated by George Schwab (Chicago: University of Chicago Press, [1922] 2005), p. 13. For an early but still useful discussion of the relationship between norm and decision in Schmitt's thought, see Peter Schneider, *Ausnahmezustand und Norm: Eine Studie zur Rechtslehre von Carl Schmitt* (Stuttgart: Deutsche Verlags-Anstalt, 1957), pp. 259–66.
42. Schmitt, *Political Theology*, p. 7.
43. Schmitt, *Political Theology*, p. 6.
44. Schmitt, *Political Theology*, p. 10.

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45. As Caldwell writes, “Schmitt’s concept of the unpolitical bourgeois *Rechtsstaat* sought to theorize the refeudalized ‘judicial’ state that lacked a strong center. […] The parliamentary component of the constitutional system [in the Weimar Republic], which Schmitt identified as part of the bourgeois *Rechtsstaat*, had failed to provide a unified political system.” Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law*, pp. 112, 113–14.
46. Martin Loughlin, “Politonomy,” in Jens Meierhenrich and Oliver Simons, eds., *The Oxford Handbook of Carl Schmitt* (Oxford: Oxford University Press, 2016), p. 582.
47. Schmitt, *Political Theology*, p. 13.
48. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law*, p. 118.
49. Carl Schmitt, “Staatsethik und pluralistischer Staat” (1930), in idem., *Positionen und Begriffe im Kampf mit Weimar–Genf–Versailles 1923–1939*, Third edition (Berlin: Duncker & Humblot, [1940] 1994), p. 152. Emphasis added.
50. Generally, see John P. McCormick, *Carl Schmitt’s Critique of Liberalism: Against Politics as Technology* (Cambridge: Cambridge University Press, 1997).
51. Carl Schmitt, “Nationalsozialistisches Rechtsdenken,” *Deutsches Recht*, Vol. 4 (1934), pp. 225–9.
52. Günther Krauß, “These,” p. 21.
53. Binder, “Der autoritäre Staat,” pp. 126–60.
54. Krauß, “These,” p. 21. On the appropriation of Hegelian thought by theorists in the Third Reich, including Julius Binder, see Ernst Topitsch, *Die Sozialphilosophie Hegels als Heilslehre und Herrschaftsideologie* (Neuwied: Luchterhand, 1967), pp. 63–88; Hubert Kiesewetter,*Von Hegel zu Hitler: Eine Analyse der Hegelschen Machtstaatsideologie und der politischen Wirkungsgeschichte des Rechtshegelianismus* (Hamburg: Hoffmann und Campe, 1974), esp. pp. 233–323; and Kluck, “Transpersonalismus,” pp. 129–67.
55. Binder, “Der autoritäre Staat,” p. 148.
56. Krauß, “These,” p. 21.
57. For a general account that situates Stahl’s scholarship and faith in historical perspective, see Doron Avraham, “The Idea of a Jewish Nation in the German Discourse about Emancipation,” *Nations and Nationalism*, Vol. 22 (2016), pp. 505–23.
58. On the salience of antisemitism in German politics, society, and culture, with reference to elite constructions and everyday life, respectively, see Paul Lawrence Rose, *German Question/Jewish Question: Revolutionary Antisemitism in Germany from Kant to Wagner*, New edition (Princeton: Princeton University Press, 2006); Marion A. Kaplan, ed., *Jewish Daily Life in Germany, 1618–1945* (Oxford: Oxford University Press, 2005).
59. Krauß, “These,” p. 14, fn. 1.
60. Heinrich Meier, *The Lesson of Carl Schmitt: Four Chapters on the Distinction between Political Theology and Political Philosophy*, Expanded edition (Chicago: University of Chicago Press, 2011), p. 152, fn. 78.
61. Most recently, see Raphael Gross, “The ‘True Enemy’: Antisemitism in Carl Schmitt’s Life and Work,” in Jens Meierhenrich and Oliver Simons, eds., *The Oxford Handbook of Carl Schmitt* (Oxford: Oxford University Press, 2016), pp. 96–116. See also Jens Meierhenrich, *In the Belly of the Fish: Carl Schmitt in Nazi Germany*, Unpublished book manuscript, London School of Economics and Political Science, 2016.
62. Meier, *The Lesson of Carl Schmitt*, p. 153.
63. “*Ein jüdischer Autor hat für uns keine Autorität, auch keine ‘rein wissenschaftliche’ Autorität. […] Ein jüdischer Autor ist für uns, wenn er überhaupt zitiert wird, ein jüdischer Autor. Die Beifügung des Wortes und der Bezeichnung ‘jüdisch’ ist keine Äußerlichkeit, sondern etwas Wesentliches […]. Sonst ist die Reinigung unserer Rechtsliteratur nicht möglich. Wer heute ‘Stahl-Jolson’ schreibt, hat dadurch in einer echt wissenschaftlichen klaren Weise mehr bewirkt, als durch große Ausführungen gegen die Juden, die sich in allgemeinen abstrakten Wendungen bewegen und durch die kein einizger Jude sich in concreto betroffen fühlt*.” Carl Schmitt, “Schlußwort des Reichsgruppenwalters Staatsrat Prof. Dr. Carl Schmitt,” in idem., *Das Judentum in der Rechtswissenschaft,* vol. 1: *Die deutsche Rechtswissenschaft im Kampf gegen den jüdischen Geist* (Berlin: Deutscher Rechts-Verlag, 1936), pp. 29–30. Several of the presentations at the 1936 conference were subsequently published as short monographs. Nine of them appeared between 1936 and 1938.
64. Carl Schmitt, “Vorbemerkung,” in Edgar Tatarin-Tarnheyden, *Das Judentum in der Rechtswissenschaft,* vol. 5: *Der Einfluß des Judentums in Staatsrecht und Staatslehre* (Berlin: Deutscher Rechts-Verlag, 1938), p. 4.
65. “*Wenn es aus einem sachlichen Grunde notwendig ist, jüdische Autoren zu zitieren, dann nur mit dem Zusatz ‘jüdisch.’ Schon von der bloßen Nennung des Wortes ‘jüdisch’ wird ein heilsamer Exorzismus ausgehen*.” Schmitt, “Schlußwort des Reichsgruppenwalters Staatsrat Prof. Dr. Carl Schmitt,” p. 30.
66. Tatarin-Tarnheyden, *Das Judentum in der Rechtswissenschaft,* vol. 5. On the circumstances surrounding the 1936 conference, see Reinhard Mehring, *Carl Schmitt: Aufstieg und Fall* (Munich: Beck, 2009), pp. 372–8.
67. Tatarin-Tarnheyden, *Das Judentum in der Rechtswissenschaft* vol. 5., p. 6.
68. Tatarin-Tarnheyden, *Das Judentum in der Rechtswissenschaft* vol. 5., pp. 8, 11–12. Tatarin-Tarnheyden singled out Erich Kaufmann for a similar antisemitic treatment. See ibid, pp. 19–24.
69. Tatarin-Tarnheyden, *Das Judentum in der Rechtswissenschaft,* vol. 5., p. 15.

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70. Tatarin-Tarnheyden, *Das Judentum in der Rechtswissenschaft,* vol. 5., p. 27.
71. Tatarin-Tarnheyden, *Das Judentum in der Rechtswissenschaft,* vol. 5., p. 27.
72. Krauß, “These,” p. 23.
73. Hanns-Jürgen Wiegand, *Das Vermächtnis Friedrich Julius Stahls: Ein Beitrag zur Geschichte konservativen Rechts- und Ordnungsdenken* (Königstein: Athenäum, 1980), p. 22.
74. Tatarin-Tarnheyden, *Das Judentum in der Rechtswissenschaft,* vol. 5, p. 32. The play on words in the original is impossible to convey in translation.
75. Gavin I. Langmuir, *Toward a Definition of Antisemitism* (Berkeley: University of California Press, 1990), p. 328.
76. On the violence of language, see, for example, Thomas Pegelow Kaplan, *The Language of Nazi Genocide: Linguistic Violence and the Struggle of Germans of Jewish Ancestry* (Cambridge: Cambridge University Press, 2009).
77. For a useful and sophisticated discussion of the Hegelian concepts of “*Geist*” and “*Sittlichkeit*,” which are relevant here, see, for example, Charles Taylor, *Hegel and Modern Society* (Cambridge: Cambridge University Press, 1979).
78. Nicolai, *Grundlagen der kommenden Verfassung*, p. 16.
79. “*Wir suchen eine Bindung, die zuverlässiger, lebendiger und tiefer ist als die trügerische Bindung an die verdrehbaren Buchstaben von tausend Gesetzesparagraphen. Wo anders könnte sie liegen als in uns selbst und in unserer eigenen Art?*” Carl Schmitt, *Staat, Bewegung, Volk: Die Dreigliederung der politischen Einheit* (Hamburg: Hanseatische Verlagsanstalt, 1933), p. 46.
80. Schmitt, *Staat, Bewegung, Volk*, esp. pp. 32–46.
81. Meierhenrich, “Fearing the Disorder of Things,” p. 194.
82. Helmut Nicolai, *Die rassengesetzliche Rechtslehre: Grundzüge einer nationalsozialistischen Rechtsphilosophie*, Third edition (Munich: Eher, 1934). See also Helmut Nicolai, *Rasse und Recht: Vortrag gehalten auf dem deutschen Juristentage des Bundes nationalsozialistischer deutscher Juristen am 2. Oktober 1933 in Leipzig* (Berlin: Hobbing, 1933).
83. Helmut Nicolai, *Die rassengesetzliche Rechtslehre: Grundzüge einer nationalsozialistischen Rechtsphilosophie*, Second edition (Munich: Eher, 1933), p. 28.
84. Nicolai, *Die rassengesetzliche Rechtslehre*, p. 44.
85. Nicolai, *Die rassengesetzliche Rechtslehre*, p. 44.
86. Nicolai, *Die rassengesetzliche Rechtslehre*, p. 47.
87. On Frank’s tendency to self-promotion and accumulation of titles and positions, see Dieter Schenk, *Hans Frank: Hitlers Kronjurist und Generalgouverneur* (Frankfurt: Fischer, 2006), pp. 117–28. See also Dietmar Willoweit, “Deutsche Rechtsgeschichte und nationalsozialistische Weltanschauung: das Beispiel Hans Frank,” in Michael Stolleis and Dieter Simon, eds., *Rechtsgeschichte im Nationalsozialismus: Beiträge zur Geschichte einer Disziplin* (Tübingen: Mohr, 1989), pp. 25–42.
88. Schenk, *Hans Frank*, pp. 66–7, 127–8.
89. As quoted in Schenk, *Hans Frank*, p. 99.
90. Hans Frank, “Die Juden in der Rechtswissenschaft,” *Deutsches Recht*, Vol. 6 (1936), p. 394.
91. Frank, “Die Juden in der Rechtswissenschaft,” p. 394.
92. “Recht ist, was dem Volke nützt—Was dem Volke schädlich ist, muß Unrecht sein.” Hans Frank, “Die Zeit des Rechts,” p. 3.
93. Majer, *Grundlagen des nationalsozialistischen Rechtssystems: Führerprinzip, Sonderrecht, Einheitspartei* (Stuttgart: Kohlhammer, 1987), p. 25. On the “Kieler Schule,” see Dieter Grimm, “Die ‘Neue Rechtswissenschaft,’ ” in Peter Lundgren, ed., *Wissenschaft im Dritten Reich* (Frankfurt: Suhrkamp, 1985), pp. 31–54; and Christina Wiener, *Kieler Fakultät und “Kieler Schule”: Die Rechtslehrer an der Rechts- und Staatswissenschaftlichen Fakultät zu Kiel in der Zeit des Nationalsozialismus und ihre Entnazifizierung* (Baden-Baden: Nomos, 2013).
94. Horst Dreier, “Die deutsche Staatsrechtslehre in der Zeit des Nationalsozialismus,” in idem., *Staatsrecht in Demokratie und Diktatur: Studien zur Weimarer Republik und zum Nationalsozialismus*, edited by Matthias Jestaedt and Stanley L. Paulson (Tübingen: Mohr, [2001] 2016), p. 201.
95. Edin Šarčević, “Mißbrauch eines Begriffs–Rechtsstaat und Nationalsozialismus,” *Rechtstheorie*, Vol. 24 (1993), p. 207.
96. For a well-known comparative account of Germany’s earlier quests, see A. J. P. Taylor, *The Struggle for Mastery in Europe 1848–1918* (Oxford: Clarendon Press, 1954).
97. *Pars pro toto*, see Carsten Bäcker, *Gerechtigkeit im Rechtsstaat: Das Bundesverfassungsgericht an der Grenze des Grundgesetzes* (Tübingen: Mohr, 2015), p. 148.
98. Volker Neumann, *Carl Schmitt als Jurist* (Tübingen: Mohr, 2015, p. 341.
99. For an important, theoretical treatment of the relationship between identity and identification that is relevant here, see Rogers Brubaker and Frederick Cooper, “Beyond ‘Identity,’ ” *Theory and Society*, Vol. 29 (2000), pp. 1–47.
100. Otto Koellreutter, *Grundriß der allgemeinen Staatslehre*, p. 74.
101. Koellreutter, “Volk und Staat in der Verfassungskrise;” Binder, “Der autoritäre Staat.”
102. Koellreutter, *Grundriß der allgemeinen Staatslehre*, p. 74.

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103. Mine is a play on Carl Schmitt's famous formula "Sovereign is he who decides on the exception." Schmitt, *Political Theology*, p. 5.
104. Otto Koellreutter, *Der nationale Rechtsstaat: Zum Wandel der deutschen Staatsidee* (Tübingen: Mohr, 1932); idem., "Der nationale Rechtsstaat," *Deutsche Juristen-Zeitung*, Vol. 38 (1933), pp. 517–24; idem., "Der nationalsozialistische Rechtsstaat," in Hans Heinrich Lammers and Hans Pfundtner, eds., *Die Verwaltungsakademie: Ein Handbuch für den Beamten im nationalsozialistischen Staat* (Berlin: Industrieverlag Spaeth und Linde, 1934), pp. 1–15.
105. Otto Koellreutter, "Quellen des nationalsozialistischen Staatsrechts," in Lammers and Pfundtner, eds., *Die Verwaltungsakademie*, p. 2.
106. Hilger, *Rechtsstaatsbegriffe im Dritten Reich: Eine Strukturanalyse* (Tübingen: Mohr, 2003), p. 60.
107. Otto Koellreutter, "Der nationale Rechtsstaat," *Deutsche Juristen-Zeitung*, Vol. 38 (1933), p. 523.
108. Gesetz über Maßnahmen der Staatsnotwehr vom 3. Juli 1934, RGBl. 1933.
109. Koellreutter, "Der nationalsozialistische Rechtsstaat," pp. 6–7; Hilger, *Rechtsstaatsbegriffe im Dritten Reich*, p. 65.
110. Koellreutter, "Der nationalsozialistische Rechtsstaat," p. 6.
111. Otto Koellreutter, "Das Wesen des 'Politischen' in der öffentlichen Verwaltung," *Reichsverwaltungsblatt*, Vol. 54 (1933), p. 483.
112. Hilger, *Rechtsstaatsbegriffe im Dritten Reich*, p. 70.
113. Otto Koellreutter, "Recht und Richter in England und Deutschland," *Verwaltungsarchiv*, Vol. 47 (1942), p. 210. As Koellreutter's most formidable rival, Schmitt insisted that the word "*Rechtsstaat*" was not made for eternity ("*kein ewiges Wort sein kann*"). See his "Nachwort," p. 85.
114. I have borrowed the term "suggestive power" ("*suggestive Macht*") from Ulrich Schellenberg, "Die Rechtsstaatskritik: Vom liberalen zum nationalen und nationalsozialistischen Rechtsstaat," in Ernst-Wolfgang Böckenförde, ed., *Staatsrecht und Staatsrechtslehre* (Heidelberg: Müller, 1985), p. 71.
115. Stolleis, "The Science of Administrative Law under National Socialism," p. 102.
116. "Staat," in *Der große Brockhaus: Handbuch des Wissens in zwanzig Bänden*, Vol. 18 (Leipzig: Brockhaus, 1934), p. 7.
117. On this debate, see, among others, Jürgen Meinck, *Weimarer Staatslehre und Nationalsozialismus: Eine Studie zum Problem der Kontinuität im staats-rechtlichen Denken in Deutschland 1928 bis 1936* (Frankfurt: Campus, 1978); Gangl, ed., *Die Weimarer Staatsrechtsdebatte*.
118. Bodo Dennewitz, *Das nationale Deutschland ein Rechtsstaat: Die Rechtsgrundlagen des neuen deutschen Staates* (Berlin: Vahlen, 1933), pp. 7–8.
119. Dennewitz, *Das nationale Deutschland ein Rechtsstaat*, p. 9.
120. Dennewitz, *Das nationale Deutschland ein Rechtsstaat*, p. 7.
121. Dennewitz, *Das nationale Deutschland ein Rechtsstaat*, pp. 7, 8.
122. Dennewitz, *Das nationale Deutschland ein Rechtsstaat*, p. 7. This anticipates assumptions of historical institutionalism. See, for example, Pierson, *Politics in Time*.
123. Dennewitz, *Das nationale Deutschland ein Rechtsstaat*, p. 8.
124. Dennewitz, *Das nationale Deutschland ein Rechtsstaat*, p. 11.
125. Dennewitz, *Das nationale Deutschland ein Rechtsstaat*, p. 10.
126. Ernst Rudolf Huber, "Bedeutungswandel der Grundrechte," *Archiv des öffentlichen Rechts*, Vol. 62 (1933), pp. 1–98.
127. Bodo Dennewitz, *Staatslehre und nationalsozialistischer Staat* (Berlin: Vahlen, 1934), p. 18.
128. Dennewitz, *Das nationale Deutschland ein Rechtsstaat*, pp. 12–25.
129. Dennewitz, *Das nationale Deutschland ein Rechtsstaat*, p. 23.
130. Dennewitz, *Das nationale Deutschland ein Rechtsstaat*, p. 23.
131. Dennewitz, *Das nationale Deutschland ein Rechtsstaat*, p. 29.
132. Hilger, *Rechtsstaatsbegriffe im Dritten Reich*, p. 155.
133. Dennewitz, *Das nationale Deutschland ein Rechtsstaat*, p. 7.
134. Dennewitz, *Das nationale Deutschland ein Rechtsstaat*, pp. 7, 9.
135. Lange, *Vom Gesetzesstaat zum Rechtsstaat*, p. 10.
136. Lange, *Vom Gesetzesstaat zum Rechtsstaat*, p. 3.
137. Lange, *Vom Gesetzesstaat zum Rechtsstaat*, p. 4.
138. Hubert Kiesewetter, in a comprehensive, though not always fully convincing, analysis of the role of Hegelian ideas in the Third Reich, has described as "antipositivist metaphysics of law" the effort of integrating Hitler's racism and Hegel's idealism in Nazi legal thought, Kiesewetter, *Von Hegel zu Hitler*, p. 303.
139. Lange, *Vom Gesetzesstaat zum Rechtsstaat*, pp. 21, 40; Hilger, *Rechtsstaatsbegriffe im Dritten Reich*, p. 139.
140. Lange, *Vom Gesetzesstaat zum Rechtsstaat*, p. 21.
141. Lange, *Vom Gesetzesstaat zum Rechtsstaat*, p. 26.
142. Lange, *Vom Gesetzesstaat zum Rechtsstaat*, p. 27.

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143. Lange, *Vom Gesetzesstaat zum Rechtsstaat*, p. 35.
144. Lange, *Vom Gesetzesstaat zum Rechtsstaat*, p. 30.
145. Lange, *Vom Gesetzesstaat zum Rechtsstaat*, p. 30.
146. Lange, *Vom Gesetzesstaat zum Rechtsstaat*, p. 30.
147. Lange, *Vom Gesetzesstaat zum Rechtsstaat*, p. 30.
148. Otto von Schweinichen, "Gegenthese: Das Wort Rechtsstaat kann so gebraucht warden, daß es den typischen Zusammenhang von Staat und Rechtsverwirklichung bezeichnet; dann hat es so viele Rechtsstaaten in der Geschichte gegeben wie es Staaten gegeben hat, in denen Recht in typischer Weise Geltung gefunden hat; von hier aus betrachtet, erscheint der Staat des 19. Jahrhunderts als typischer Gesetzesstaat, während der nationalsozialistische Staat Rechtsstaat im wahren Sinne ist," in Günther Krauß and Otto von Schweinichen, *Disputation über den Rechtsstaat* (Hamburg: Hanseatische Verlagsanstalt, 1935), pp. 39, 51.
149. von Schweinichen, "Gegenthese," p. 45.
150. von Schweinichen, "Gegenthese," pp. 40–1.
151. von Schweinichen, "Gegenthese," p. 41.
152. von Schweinichen, "Gegenthese," p. 42. Von Schweinichen borrowed the concept of "*Normanmaßung*" (which he contemplated retiring in favor of the term "*Normpotential*," or "norm potential") from the legal philosopher Carl August Emge, a member of the NSDAP since 1931. Ibid, p. 43, fn. 1. For Emge's contributions, see his *Vorschule der Rechtsphilosophie* (Berlin: Rothschild, 1925); and idem., *Geschichte der Rechtsphilosophie* (Berlin: Junker und Dünnhaupt, 1931).
153. von Schweinichen, "Gegenthese," p. 42.
154. Note that in both Wilhelmine Germany and Weimar Germany the principle of legality governed *only* executive (including administrative) action affecting individual freedom and private property. Gerhard Anschütz, *Die gegenwärtigen Theorien über den Begriff der gesetzgebenden Gewalt und den Umfang des königlichen Verordnungsrechts nach preußischem Staatsrecht*, Second edition (Tübingen: Mohr, 1901), p. 86; Neumann, *Carl Schmitt als Jurist*, p. 344.
155. Michael Stolleis, *Public Law in Germany: A Historical Introduction from the 16th to the 21st Century*, translated by Thomas Dunlap (Oxford: Oxford University Press, 2017) p. 69. Emphasis added.
156. Carl Schmitt, "Nationalsozialismus und Rechtsstaat," *Juristische Wochenschrift*, Vol. 63 (1934), p. 716.
157. Schmitt, "Neue Leitsätze für die Rechtspraxis," *Juristische Wochenschrift*, Vol. 62 (1933), p. 2793.
158. See, for example, Georg Dahm, Karl August Eckhardt, Reinhard Höhn, Paul Ritterbusch, and Wolfgang Siebert, "Leitsätze über die Stellung und Aufgaben des Richters," *Deutsche Rechtswissenschaft*, Vol. 1 (1936), pp. 123–4. The prohibition of judicial review was the third of five "guiding principles" that a working group under Georg Dahm's leadership drew up, and which Hans Frank proclaimed on January 14, 1936.
159. Carl Schmitt, "Die Rechtswissenschaft im Führerstaat," *Zeitschrift der Akademie für Deutsches Recht*, Vol. 2 (1935), p. 439. Larenz and Koellreutter used almost identical formulations as Schmitt. Larenz defined the statute as an "expression of the will of the leadership" ("*Ausdruck des Willens der Führung*"), Koellreutter as an "expression of the political will of the leadership" ("*Ausdruck des politischen Willens der Führung*"). Karl Larenz, *Rechts- und Staatsphilosophie der Gegenwart* (Berlin: Junker und Dünnhaupt, 1935), p. 155; Otto Koellreutter,*Deutsches Verfassungsrecht: Ein Grundriß* (Berlin: Junker und Dünnhaupt, 1935), p. 56.
160. Schmitt, "Nationalsozialismus und Rechtsstaat," p. 717.
161. For a seminal analysis of the politicization of *Generalklauseln* and the politics of legal interpretion in Nazi Germany, see Bernd Rüthers, *Die unbegrenzte Auslegung: Zum Wandel der Privatrechtsordnung im Nationalsozialismus*, Sixth edition (Tübingen: Mohr, [1968] 2005), esp. pp. 175–270. On prevalent methods of legal interpretation in the period 1850–1933, including a discussion of earlier responses to gaps in the law, see Jan Schröder, *Recht als Wissenschaft: Geschichte der juristischen Methodenlehre in der Neuzeit (1500–1933)*, Second, revised and expanded edition (Munich: Beck, 2012), pp. 329–92.
162. Schmitt, "Nationalsozialismus und Rechtsstaat," p. 717.
163. Rüthers, *Die unbegrenzte Auslegung*, pp. 262, 265.
164. On the Nazis' radical transformation of the nineteenth century idea of the statute, see also Ingeborg Maus, "'Gesetzesbindung' der Justiz und die Struktur der nationalsozialistischen Rechtsnormen," in Ralf Dreier and Wolfgang Sellert, eds., *Recht und Justiz im "Dritten Reich"* (Frankfurt: Suhrkamp, 1989), p. 84.
165. Schmitt, "Die Rechtswissenschaft im Führerstaat," p. 439. Note that Schmitt, as so often, distorted the meaning of Capitan's aphorism. The latter clearly envisaged a control function for parliament, something that Schmitt failed to acknowledge. René Capitan, *La réforme du parlamentarisme* (Paris: Recueil Sirey, 1934), p. 10.
166. Schmitt, "Die Rechtswissenschaft im Führerstaat," p. 439.
167. Ernst Rudolf Huber, *Verfassungsrecht des Großdeutschen Reiches*, Second edition (Hamburg: Hanseatische Verlagsanstalt, 1939), p. 237. Karl Loewenstein, the exiled political scientist, put it similarly at around the same time: "The law as a

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command of the Leader does not brook the control involved in judicial review." See his "Dictatorship and the German Constitution: 1933–1937," *University of Chicago Law Review*, Vol. 4 (1937), p. 565.

168. For a brief discussion, see also Dietrich Kirschenmann, *"Gesetz" im Staatsrecht und in der Staatsrechtslehre des NS* (Berlin: Duncker & Humblot, 1970), pp. 93–5.
169. Ulrich Scheuner, "Die deutsche Staatsführung im Kriege," *Deutsche Rechtswissenschaft*, Vol. 5 (1940), p. 34. For an in-depth assessment of the modes of Nazi lawmaking, see Bernd Mertens, *Rechtsetzung im Nationalsozialismus* (Tübingen: Mohr, 2009).
170. For a complete list of all unpublished *Führer* decrees issued during World War II, of which there were an estimated 400, see Martin Moll, ed., *Führer-Erlasse 1939–1945* (Stuttgart: Steiner, 1997).
171. Theodor Maunz, *Gestalt und Recht der Polizei* (Hamburg: Hanseatische Verlagsanstalt, 1943), esp. pp. 25–30; Johannes Heckel, "Wehrrecht und Wehrmachtbeamtentum," *Heeresverwaltung*, Vol. 6 (1941), p. 58. Cf. Loewenstein, "Dictatorship and the German Constitution," p. 562, who noted that whereas, in 1937, "[t]he customary distinction between formal statutory law, subject to parliamentary participation even if the content is no general rule but a political measure, and material statutory rule, meaning the establishment of general rules of law which are not necessarily subject to parliamentary participation is abandoned, […] the traditional formalities of publication (*Verkündung*) and promulgation (*Ausfertigung*) are still observed." Emphases added. The marked decline in law's publicity is indicative of the progress that the Nazis made in the span of a few years in the de-institutionalization of the *Rechtsstaat*. It speaks to the importance of recognizing the Nazi dictatorship's institutional development in the realm of law. The institutional formation, deformation, and transformation of Nazi law was a dynamic process that neither a metatheoretical nor a macrohistorical account will be able to adequately represent.
172. Werner Weber, *Die Verkündung von Rechtsvorschriften* (Stuttgart: Kohlhammer, 1942), p. 7.
173. Weber, *Die Verkündung der Rechtsvorschriften*, p. 27.
174. Otto Koellreutter, "Recht und Richter in England und Deutschland," p. 228, fn. 44.
175. Otto Koellreutter, *Vom Sinn und Wesen der nationalen Revolution* (Tübingen: Mohr, 1933), p. 12.
176. "*Die Verkündung hat damit an Bedeutung zugenommen; sie erfüllt gewisse Funktionen nun allein, die früher auf eine Mehrzahl von Formelementen verteilt waren. Die Verkündung ist heute das Minimum an Form, auf das nicht verzichtet werden kann, wenn nicht überhaupt das Gesetz als Erscheinungsform des Rechts zertstört werden soll*." Ernst Rudolf Huber, "Werner Weber, Die Verkündung von Rechtsvorschriften" (Book review), *Zeitschrift für die gesamte Staatswissenschaft*, Vol. 104 (1944), p. 336.
177. I owe this idea to Horst Dreier. See his "Rechtszerfall und Kontinuität," p. 58.
178. For a discussion of the cultural significance of "orderly thought" in the early twentieth century, see, for example, Frieder Günther, "Ordnen, gestalten, bewahren: Radikales Ordnungsdenken von deutschen Rechtsintellektuellen der Rechtswissenschaft 1920 bis 1960," *Vierteljahrshefte für Zeitgeschichte*, Vol. 59 (2011), pp. 353–84. See also Meierhenrich, "Fearing the Disorder of Things." More generally, see Andreas Anter, *Die Macht der Ordnung: Aspekte einer Grundkategorie des Politischen* (Tübingen: Mohr, 2004). One of the most influential arguments from the mid-twentieth century about the significance of institutional form for the creation and maintenance of political order is Samuel P. Huntington, *Political Order in Changing Societies* (New Haven: Yale University Press, 1968).
179. Carl Schmitt, "Kodifikation oder Novelle? Über die Aufgabe und Methode der heutigen Gesetzgebung," *Deutsche Juristen-Zeitung*, Vol. 40 (1935), pp. 924–5.
180. In his *Theory of Moral Sentiments*, Adam Smith famously invented the figure of the "impartial spectator" as the imaginary guardian of morally acceptable behavior, an observing self that is capable of detaching from our self-interested state of mind and of producing an unvarnished assessment of the extent to which our acts and omissions are praiseworthy or blameworthy: "Whenever I endeavor to examine my own conduct […] I divide myself as it were into two persons: and that I, the examiner and judge, represent a different character from that other I, the person whose conduct is examined into and judged of. The first is the spectator […]. The second is the agent." Adam Smith, *The Theory of Moral Sentiments*, edited by D. D. Raphael and A. L. Macfie (Oxford: Clarendon Press, [1759] 1976), III. 1.6. See also D. D. Raphael, *The Impartial Spectator: Adam Smith's Moral Philosophy* (Oxford: Oxford University Press, 2007).
181. In this context it is worth recalling that Smith spoke of the impartial spectator as "the voice of conscience," which he equated with "the voice of God." On the idea of "Nazi conscience," see Claudia Koonz, *The Nazi Conscience* (Cambridge: Belknap Press of Harvard University Press, 2003).
182. Schmitt, *Staat, Bewegung, Volk*, p. 46; Schmitt, "Kodifikation oder Novelle?," p. 921.
183. Schmitt, "Kodifikation oder Novelle?," pp. 922–3.
184. Schmitt, "Kodifikation oder Novelle?," p. 923.
185. On the institution of the *Richterbrief*, see Ralph Angermund, *Deutsche Richterschaft 1919–1945: Krisenerfahrung, Illusion, politische Rechtsprechung* (Frankfurt: Fischer, 1990), pp. 220–45; Heinz Boberach, ed., *Richterbriefe: Dokumente zur Beeinflussung der deutschen Rechtsprechung 1942–1944* (Boppard: Boldt, 1975).

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186. Rüthers, *Die unbegrenzte Auslegung*, pp. 185–8, where he also examines three key interpretative techniques of Nazi law.
187. Kirschenmann, *"Gesetz" im Staatsrecht und in der Staatsrechtslehre des NS*, p. 107.
188. Ernst Rudolf Huber, "Reichsgewalt und Reichsführung im Kriege," *Zeitschrift für die gesamte Staatswissenschaft*, Vol. 101 (1941), p. 555.
189. Schmitt, "Der Zugang zum Machthaber, ein zentrales verfassungsrechtliches Problem," in idem., *Verfassungsrechtliche Aufsätze aus den Jahren 1924–1954: Materialen zu einer Verfassungslehre*, Fourth edition (Berlin: Duncker & Humblot, 2003), p. 436.
190. Schmitt, "Der Zugang zum Machthaber, ein zentrales verfassungsrechtliches Problem," p. 434.
191. "*Die Legalität ist ein Funktionsmodus jeder staatlichen Bürokratie. Deshalb trat die Notwendigkeit einer gewissen, wenigstens äußerlichen Legalität gerade an dieser Stelle in das Hitler-Regime ein, an dem Verbindungspunkt mit der großen Befehlsapparatur 'Staat' […]*." Schmitt, "Der Zugang zum Machthaber, ein zentrales verfassungsrechtliches Problem," p. 434.
192. Schmitt, "Der Zugang zum Machthaber, ein zentrales verfassungsrechtliches Problem," p. 433.
193. On the bureaucratic dimensions of the Nazi dictatorship, see, for example, Hans Mommsen, *Beamtentum im Dritten Reich: Mit ausgewählten Quellen zur nationalsozialistischen Beamtenpolitik* (Stuttgart: Deutsche Verlags-Anstalt, 1966); Jane Caplan, *Government without Administration: State and Civil Society in Weimar and Nazi Germany* (Oxford: Clarendon Press, 1988), esp. pp. 131–228; Dieter Rebentisch and Karl Teppe, eds., *Verwaltung contra Menschenführung im Staat Hitlers* (Göttingen: Vandenhoeck und Ruprecht, 1986); and, most recently, Sven Reichardt and Wolfgang Seibel, eds., *Der prekäre Staat: Herrschen und Verwalten im Nationalsozialismus* (Frankfurt: Campus, 2011).
194. Caplan, *Government without Administration*, p. 228.
195. Schmitt, "Der Zugang zum Machthaber, ein zentrales verfassungsrechtliches Problem," pp. 434, 436.
196. Caplan, *Government without Administration*, p. 200.
197. Caplan, *Government without Administration*, pp. 201–2.
198. Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, vol. 3: *Staats- und Verwaltungsrechtswissenschaft in Republik und Diktatur 1914–1945* (Munich: Beck, 1999), p. 361.
199. Mommsen, *Beamtentum im Dritten Reich*, p. 121.
200. Mommsen, *Beamtentum im Dritten Reich*, pp. 121, 122–3.
201. Martin Stolleis, "Die Verwaltungsgerichtsbarkeit im Nationalsozialismus," in Bernhard Diestelkamp and Michael Stolleis, eds., *Justizalltag im Dritten Reich* (Frankfurt: Fischer, 1988), p. 36. On the role of judges across the entire universe of Nazi courts, see Angermund, *Deutsche Richterschaft 1919–1945*.
202. Mommsen, *Beamtentum im Dritten Reich*, p. 123. In the course of changing the way its bureaucracy worked, the Nazi regime replaced the principle of legality (*Prinzip der Gesetzmäßigkeit*) with the so-called principle of law (*Prinzip der Rechtmäßigkeit*). As a result, administrative action no longer had to be sanctioned by a statute; it sufficed that it was congruent with the Nazi concept of law, as discussed above. For this argument, see Theodor Maunz, "Die Rechtmäßigkeit der Verwaltung," in Hans Frank, ed., *Deutsches Verwaltungsrecht* (Munich: Eher, 1937), pp. 51–65. Disturbingly, Maunz served as a prominent lawyer in *both* Nazi Germany and postwar Germany. For a brief, important discussion of the relationship between "new" (post-1933) and "old" (pre-1933) administrative law, see Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, vol. 3
203. Mommsen, *Beamtentum im Dritten Reich*, p. 123.
204. von Schweinichen, "Gegenthese," p. 36.
205. von Schweinichen, "Gegenthese," pp. 36, 39, 61, 69.
206. von Schweinichen, "Gegenthese," p. 50.
207. von Schweinichen, "Gegenthese," p. 53.
208. von Schweinichen, "Gegenthese," p. 61.
209. von Schweinichen, "Gegenthese," p. 56; 61.
210. von Schweinichen, "Gegenthese," p. 49.
211. He also used the terms "*unmittelbar gerechter Staat*," or inherently just state; "*Rechtswahrstaat,*" a state committed to preserving law; and "*Rechtsgeltungsstaat*," a state committed to governing by law, to describe his conceptual alternative to that of the liberal *Rechtsstaat*. von Schweinichen, "Gegenthese," pp. 53, 67, 69.
212. Günther Krauß, "Erwiderung: Als Antwort auf die Ausführungen meines Gegners gebe ich meiner These folgende Abwandlung: der Begriff des Rechtsstaates ist gerade als Allgemeinbegriff an die Verfassungslage des 19. Jahrunderts gebunden," in Günther Krauß and Otto von Schweinichen, *Disputation über den Rechtsstaat* (Hamburg: Hanseatische Verlagsanstalt, 1935), p. 83.
213. Roland Freisler, "Rechtsstaat: Eine staatsbiologische Betrachtung," *Völkischer Beobachter*, December 20/21, 1931.
214. Roland Freisler, "Der Rechtsstaat," *Deutsche Juristen-Zeitung*, Vol. 42 (1937), pp. 151–5.
215. Freisler, "Der Rechtsstaat," p. 152.

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216. Freisler, "Der Rechtsstaat," p. 152.
217. "*Der nationalsozialistische Staat Adolf Hitlers, das Deutsche Reich, ist […] kein Rechtsstaat [im liberalen] Sinne. Aber ein Rechtsstaat ist er doch, freilich in einem ganz anderen […], höheren, innerlichen, natürlichen und damit wahren Sinne*." Roland Freisler, "Rechtsstaat," in Erich Volkmar, Alexander Elster, and Günther Küchenhoff, eds., *Handwörterbuch der Rechtswissenschaft*, vol. 8: *Die Rechtsentwicklung der Jahre 1933 bis 1935/36* (Berlin: de Gruyter, 1937), p. 572.
218. "*Daß dieser Staat ein Rechtsstaat […] ist, ist […] eine Selbstverständlichkeit, mehr aber auch nicht*." Freisler, "Der Rechtsstaat," p. 154.
219. Gustav Adolf Walz, "Autoritärer Staat, nationaler Rechtsstaat oder völkischer Führerstaat?," *Deutsche Juristen-Zeitung*, Vol. 38 (1933), pp. 1334–40. See also Thomas Ditt, "*Stoßtruppfakultät Breslau": Rechtswissenschaft im "Grenzland Schlesien" 1933–1945* (Tübingen: Mohr, 2011), esp. pp. 52–66.
220. Walz, "Autoritärer Staat, nationaler Rechtsstaat oder völkischer Führerstaat?," p. 1338.
221. Freisler, "Der Rechtsstaat," p. 154. Note that Freisler here borrowed explicitly from Hitler's *Mein Kampf*.
222. Gustav Adolf Walz, "Faschismus und Nationalsozialismus," *Deutsches Recht*, Vol. 5 (1935), pp. 315–19. See also idem., *Das Ende der Zwischenverfassung: Betrachtungen zur Entstehung des nationalsozialistischen Staates* (Stuttgart: Kohlhammer, 1933) p. 44.
223. Gustav Adolf Walz, "Autoritäre Staatsordnung und völkischer Führerstaat," *Bücherkunde*, Vol. 4 (1937), p. 77.
224. Herbert Krüger, a Smend pupil, was among those who believed that the "principle" of the authoritarian state represented "the constitution of the National Socialist state." idem., "Das neue Staatsrecht des dritten Reiches," *Fischers Zeitschrift für Verwaltungsrecht*, Vol. 70 (1934), p. 291.
225. Walz, "Autoritärer Staat, nationaler Rechtsstaat oder völkischer Führerstaat?," p. 1338.
226. Stirk, *Twentieth-Century German Political Thought*, p. 88. Emphases added.
227. Roland Freisler, "Recht, Richter und Gesetz," *Deutsche Justiz*, Vol. 95 (1933), p. 696. I would be remiss if I did not point out that Freisler quickly changed his tune. By 1936, his idea of what was required in the interpretation of Nazi statutes had changed dramatically. Not law but ideology, he now argued, was what primarily bound judges in the racial dictatorship: "The binding nature of ideology gives the judge the freedom to interpret and apply statutes in a sovereign fashion." ("*Die Weltanschauungsgebundenheit gibt auch dem Richter die Freiheit souveräner Gesetzesauslegung und Gesetzesanwendung.")*Roland Freisler, "Richter und Gesetz," in Hans Heinrich Lammers and Hans Pfundtner, eds., *Die Verwaltungs-Akademie: Ein Handbuch für den Beamten im nationalsozialistischen Staat*, vol. 1: *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates* (Berlin: Industrieverlag Spaeth und Linde, 1936), p. 9. See also Maus, " 'Gesetzesbindung' der Justiz und die Struktur der nationalsozialistischen Rechtsnormen," pp. 88–9.
228. The analytical distinction between moderates and hardliners is a staple in the political science literature on democratization, first drawn by Adam Przeworski in the 1990s to facilitate game theoretical models of payoffs in transitions from authoritarian rule. Adam Przeworski, *Democracy and the Market: Political and Economic Reforms in Eastern Europe and Latin America* (Cambridge: Cambridge University Press, 1991). See also Josep M. Colomer, *Strategic Transitions: Game Theory and Democratization* (Baltimore: Johns Hopkins University Press, 2000). Volker Neumann has also cautioned against simplifying the complexity of the Nazi debate about the *Rechtsstaat*. See his *Carl Schmitt als Jurist* (Tübingen: Mohr, 2015), p. 341.
229. Stolleis, *Public Law in Germany*, p. 108.
230. Stolleis, *Public Law in Germany*, p. 112.
231. Stolleis, *Public Law in Germany*, pp. 113–14.
232. Stolleis, *Public Law in Germany*, p. 116.
233. My discussion of Wittig and Helfritz is indebted to Hilger, *Rechtsstaatsbegriffe im Dritten Reich*.
234. Wittig, *Der Rechtsstaat im Wandel der Staatsformen*, p. 16.
235. Wittig, *Der Rechtsstaat im Wandel der Staatsformen*, pp. 11–12, 40.
236. See Chapter 2 above.
237. Wittig, *Der Rechtsstaat im Wandel der Staatsformen*, p. 40.
238. Wittig, *Der Rechtsstaat im Wandel der Staatsformen*, p. 36.
239. Wittig, *Der Rechtsstaat im Wandel der Staatsformen*, pp. 37–8.
240. Wittig, *Der Rechtsstaat im Wandel der Staatsformen*, p. 42.
241. Hans Helfritz, "Rechtsstaat und nationalsozialistischer Staat," *Deutsche Juristen-Zeitung*, Vol. 39 (1934), pp. 425–33.
242. Helfritz, "Rechtsstaat und nationalsozialistischer Staat," p. 433.
243. Helfritz, "Rechtsstaat und nationalsozialistischer Staat," pp. 428–9.
244. "*Kein Staat hat sich damit begnügt, seinen Angehörigen nichts anderes zu bieten als eine Rechtsordnung und deren Aufrechterhaltung*." Helfritz, "Rechtsstaat und nationalsozialistischer Staat," p. 431.
245. Helfritz, "Rechtsstaat und nationalsozialistischer Staat," p. 431.
246. Cf. Friedrich Darmstädter, *Rechtsstaat oder Machtstaat? Eine Frage nach der Geltung der Weimarer Verfassung* (Berlin:

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Rothschild, 1932).

247. Helfritz, “Rechtsstaat und nationalsozialistischer Staat,” p. 431.
248. Helfritz, “Rechtsstaat und nationalsozialistischer Staat,” p. 432.
249. Helfritz, “Rechtsstaat und nationalsozialistischer Staat,” p. 430.
250. Helfritz, “Rechtsstaat und nationalsozialistischer Staat,” p. 430.
251. Hilger, *Rechtsstaatsbegriffe im Dritten Reich*, p. 165.
252. Helfritz, “Rechtsstaat und nationalsozialistischer Staat,” p. 433.
253. Hilger, *Rechtsstaatsbegriffe im Dritten Reich*, p. 167.
254. Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, vol. 3, p. 161, fn. 35.
255. See, for example, Walz, “Autoritärer Staat, nationaler Rechtsstaat oder völkischer Führerstaat?,” pp. 1334–40. Despite his loss of the rectorship, Helfritz retained his professorship of law at Breslau university.
256. His insistence on the separation of law and morals stood in direct contrast to both Hitler’s and Hans Frank’s pronouncements on the nature of Nazi law, as Tatarin-Tarnheyden himself acknowledged. See *Werdendes Staatsrecht*, pp. 13–15.
257. Edgar Tatarin-Tarnheyden, “Staat und Sittlichkeit,” *Kantstudien*, Vol. 35 (1930), p. 46; Tatarin-Tarnheyden, *Werdendes Staatsrecht*, p. 19.
258. Tatarin-Tarnheyden, *Werdendes Staatsrecht*, p. 19.
259. Tatarin-Tarnheyden, *Werdendes Staatsrecht*, p. 22.
260. Tatarin-Tarnheyden, *Werdendes Staatsrecht*, p. 22.
261. Tatarin-Tarnheyden, *Werdendes Staatsrecht*, p. 22.
262. Tatarin-Tarnheyden, *Werdendes Staatsrecht*, p. 23. Tatarin-Tarnheyden distinguished between “outer revolution” and “inner revolution,” with the latter following on the heels of the former. The first revolutionary stage concerned the transition to dictatorship, the second the consolidation (and “material” grounding) of this dictatorship.
263. “*Es kommt darauf an, Normen zu schaffen, d.h., […] die neue Staatsordnung auf ein wohlgefügtes gesetzliches Fundament zu stellen […]. Man soll geformte Rechtsnormen nicht gering achten*.” Tatarin-Tarnheyden, *Werdendes Staatsrecht*, p. 23.
264. Tatarin-Tarnheyden, *Werdendes Staatsrecht*, p. 18.
265. Tatarin-Tarnheyden, *Werdendes Staatsrecht*, p. 18.
266. Tatarin-Tarnheyden, *Werdendes Staatsrecht*, p. 151.
267. Tatarin-Tarnheyden, *Werdendes Staatsrecht*, p. 153.
268. Tatarin-Tarnheyden, *Werdendes Staatsrecht*, p. 152.
269. Tatarin-Tarnheyden, *Werdendes Staatsrecht*, pp. 154–9.
270. Edgar Tatarin-Tarnheyden, “Grundlagen des Verwaltungsrechts im neuen Staat,” *Archiv des öffentlichen Rechts*, Vol. 24 (1934), p. 354.
271. Tatarin-Tarnheyden, *Werdendes Staatsrecht*, p. 153; Forsthoff, *Der totale Staat*, p. 42.
272. Tatarin-Tarnheyden, *Werdendes Staatsrecht*, pp. 157–8.
273. Tatarin-Tarnheyden, *Werdendes Staatsrecht*, p. 15.
274. Tatarin-Tarnheyden, *Werdendes Staatsrecht*, p. 5.
275. Tatarin-Tarnheyden, “Grundlagen des Verwaltungsrechts im neuen Staat,” p. 349.
276. Tatarin-Tarnheyden, *Werdendes Staatsrecht*, p. 30.
277. “*[D]er Rechtsstaat als sozialer, die Willkür ausschließender Ordnungswert bedarf auch weiter einer festen und unverletzbaren Grundlage exakt geformten Rechtes*.” Tatarin-Tarnheyden, *Werdendes Staatsrecht*, p. 30.
278. Tatarin-Tarnheyden, *Werdendes Staatsrecht*, p. 30.
279. Tatarin-Tarnheyden, *Werdendes Staatsrecht*, p. 30.
280. Tatarin-Tarnheyden, *Werdendes Staatsrecht*, p. 31.
281. Kurt Groß-Fengels, “Der Streit um den Rechtsstaat,” Ph.D. dissertation, Universität Marburg, 1936.
282. Hilger, *Rechtsstaatsbegriffe im Dritten Reich*, p. 178.
283. Groß-Fengels, “Der Streit um den Rechtsstaat,” p. 12.
284. Groß-Fengels, “Der Streit um den Rechtsstaat,” p. 12.
285. Groß-Fengels, “Der Streit um den Rechtsstaat,” p. 15.
286. Groß-Fengels, “Der Streit um den Rechtsstaat,” p. 14.
287. Groß-Fengels, “Der Streit um den Rechtsstaat,” p. 14.
288. Groß-Fengels, “Der Streit um den Rechtsstaat,” p. 36.
289. Hilger, *Rechtsstaatsbegriffe im Dritten Reich*, p. 229.
290. On the violent dimensions of what he termed the Nazis’ “substantalization of formal law,” see Hubert Rottleuthner, “Die Substantialisierung des Formalrechts: Zur Rolle des Neuhegelianismus in der deutschen Juriprudenz,” in Oskar Negt, ed., *Aktualität und Folgen der Philosophie Hegels* (Frankfurt: Suhrkamp, 1973), p. 258.

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291. Carl Schmitt, “Das gute Recht der deutschen Revolution,” *Westdeutscher Beobachter*, May 12, 1933.
292. Carl Schmitt, *Hugo Preuss: Sein Staatsbegriff und seine Stellung in der deutschen Staatslehre* (Tübingen: Mohr, 1930), p. 5. In the same passage, Schmitt continued thus: “Words such as ‘sovereignty,’ ‘freedom,’ ‘*Rechtsstaat*,’ and ‘democracy,’ obtain their precise meaning only through a concrete antithesis.” Ibid.
293. Schmitt, “Nachwort,” p. 85.
294. Cf. von Schweinichen, “Gegenthese,” p. 36.
295. Carl Schmitt, “Neue Leitsätze zur Rechtspraxis,” *Juristische Wochenschrift*, Vol. 62 (1933), p. 351.
296. Schmitt, “Neue Leitsätze zur Rechtspraxis,” p. 351.
297. Schmitt, “Neue Leitsätze zur Rechtspraxis,” p. 351.
298. Schmitt, “Was bedeutet der Streit um den ‘Rechtsstaat’?,” p. 200.
299. Schmitt, “Was bedeutet der Streit um den ‘Rechtsstaat’?,” p. 200.
300. On lawfare as a strategy of conflict, see Jens Meierhenrich, *Lawfare: A Genealogy* (Cambridge: Cambridge University Press, 2018).
301. Stirk, *Twentieth-Century German Political Thought* p. 86.
302. Schmitt, “Was bedeutet der Streit um den ‘Rechtsstaat’?,” p. 190.
303. Stirk, *Twentieth-Century German Political Thought*, p. 91.
304. I consider what I call “extremist legalism” to be a manifestation of the more genetal category of “extremist institutionalism,” which I have defined elsewhere. See my “Fearing the Disorder of Things.”
305. Krauß, “These,” pp. 23, 24, 28–9.
306. Krauß, “These,” p. 10.
307. Krauß, “These,” p. 32.
308. Krauß, “These,” p. 31.
309. “*Wenn wir an dem Begriff Rechtsstaat festhalten, wird der Führerstaat relativiert. Denn schließlich wird dann das ‘Recht’ wieder definiert als Selbstbeschränkung der Führung, Einhaltung des gesetzlichen Rechts […]*.” Krauß, “These,” p. 31. In support of his argument, Krauß specifically invoked Walz, “Autoritärer Staat, nationaler Rechtsstaat oder völkischer Führerstaat?,” p. 1338.
310. Krauß, “These,” p. 30.
311. Ernst Forsthoff, “Otto Koellreutter, Der deutsche Führerstaat” (Book review), *Juristische Wochenschrift*, Vol. 63 (1934), p. 538.
312. Forsthoff, “Otto Koellreutter,” p. 538.
313. On June 17, 1936, Hitler appointed Himmler *Reichsführer* (Reich Leader) SS and Chief of German Police. Himmer streamlined the dictatorship’s police forces by creating two main offices, the *Hauptamt Sicherheitspolizei* (Security Police Main Office, headed by Heydrich, with Best as his deputy), and the *Hauptamt Ordnungspolizei* (Order Police Main Office, with Kurt Daluege in charge). The former was further divided into three additional offices: *Amt Verwaltung und Recht* (Office of Administration and Law, headed by Best), *Amt Politische Polizei* (Office of Political Police, run by Heydrich), and the *Kriminalpolizeiamt*, which governed the country’s detective forces and was also overseen by Heydrich. For a quick overview, see Herbert, *Best*, p. 598, fn. 105.
314. In full, Best’s definition reads as follows: “ *‘Polizei’ ist alle staatliche Tätigkeit, die um der Erhaltung und Entfaltung des Volkes […] willen nach selbständig festgelegter Notwendigkeit mit der Gewalt zur Anwendung von Zwang gegen Einzelmenschen und Mehrheiten solcher dem Schutze der Führungsund Gemeinschaftsordnung des Volkes gegen Störung und Zerstörung durch Einzelne und Mehrheiten solcher dient*.” As quoted in Best, Ulrich Herbert, *Best: Biographische Studien über Radikalismus, Weltanschauung und Vernunft 1903–1989* (Munich: Beck, 2016), p. 195.
315. Herbert, *Best*, p. 195.
316. Herbert, *Best*, p. 195.
317. “*Diese Selbstbeschränkung des Staates durch Normierung seiner künftigen Maßnahmen ist […] im allgemeinen angebracht gegenber allen positiven aufbauenden Kräften des Volkes.*”Werner Best, “*Neubegründung des Polizeirechts*,” *Jahrbuch der Akademie für Deutsches Recht*, Vol. 4 (1937), pp. 132–8. For the sake of readability, I somewhat simplified the translation.
318. Best, “Neubegründung des Polizeirechts.”
319. Herbert, *Best*, esp. pp. 195–213.
320. Herbert, *Best*, p. 183.
321. Peter Longerich, *Heinrich Himmler*, translated by Jeremy Noakes and Lesley Sharpe (Oxford: Oxford University Press, [2008] 2012), p. 196.
322. As quoted in Michael Stolleis, *A History of Public Law in Germany 1914–1945*, translated by Thomas Dunlap (Oxford: Oxford University Press, [1999] 2004), p. 347.
323. Hans Helfritz, “Rechtsstaat und nationalsozialistischer Staat,” p. 427. Cf. Reinhard Höhn, *Der individualistische Staatsbegriff und die juristische Staatsperson* (Berlin: Heymann, 1935). See also Ronald Car, “Community of Neighbours vs

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Society of Merchants: The Genesis of Reinhard Höhn's Nazi State Theory," *Politics, Religion, and Ideology*, Vol. 16 (2015), pp. 1–22.

324. See, for example, Otto Koellreutter, "Führung und Verwaltung: Zum Problem einer neuen Begriffsjurisprudenz," in Roland Freisler, George A. Loening, H. C. Nipperdey, eds., *Festschrift für Justus Wilhelm Hedemann zum 60. Geburtstag* (Jena: Frommansche Buchhandlung, 1938), pp. 95–105.
325. Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, vol. 3, p. 329.
326. Stirk, *Twentieth-Century German Political Thought*, p. 90.
327. Anna- Maria Gräfin von Lösch, *Der nackte Geist: Die Juristische Fakultät der Berliner Universität im Umbruch von 1933* (Tübingen: Mohr, 1999), p. 402.
328. Mehring, *Carl Schmitt*, pp. 378–80.
329. Stolleis reports the use of this moniker, a reference to their ideological steadfastness, in *Geschichte des öffentlichen Rechts in Deutschland*, vol. 3, p. 322.
330. For a theoretical treatment, see Jens Meierhenrich, "The Presentation of Law in Everyday Life," Unpublished article manuscript, Harvard University, 2002.
331. Cass R. Sunstein, "On the Expressive Function of Law," *University of Pennsylvania Law Review*, Vol. 144 (1996), p. 2021.
332. Sunstein, "On the Expressive Function of Law," p. 2026. See also Lawrence Lessig, "The Regulation of Social Meaning," *University of Chicago Law Review*, Vol. 62 (1995), pp. 943–1045. For a discussion of varieties of expressive claims about law, see Richard H. McAdams, *The Expressive Powers of Law: Theories and Limits* (Cambridge: Harvard University Press, 2015).
333. Sunstein, "On the Expressive Function of Law," p. 2051.
334. Ledford, *From General Estate to Special Interest: German Lawyers 1878–1933* (Cambridge: Cambridge University Press, 1996), p. 296.
335. Ledford, *From General Estate to Special Interest*, p. 299.
336. Stolleis, *Public Law in Germany*, p. 108.
337. Koonz, *The Nazi Conscience*.
338. Koonz, *The Nazi Conscience*, p. 168. Koonz did not address the operation of law outside of what the Nazi regime euphemistically called "the Jewish question." For a new assessment of the Nuremberg Race Laws, see Magnus Brechtken, Hans-Christian Jasch, Christoph Kreutzmüller, and Niels Weise, eds., *Die Nürnberger Gesetze–80 Jahre danach: Vorgeschichte, Entstehung, Auswirkungen* (Göttingen: Wallstein, 2017).
339. See, for example, Raphael Gross, *Anständig geblieben: Nationalsozialistische Moral* (Munich: Fischer, 2010); Wolfgang Bialas,*Moralische Ordnungen des Nationalsozialismus* (Göttingen: Vandenhoeck und Ruprecht, 2014); Werner Konitzer, ed., *Moralität des Bösen: Ethik und nationalsozialistische Verbrechen* (Frankfurt: Campus, 2009); Wolfgang Bialas and Lothar Fritze, eds., *Ideologie und Moral im Nationalsozialismus* (Göttingen: Vandenhoeck und Ruprecht, 2013); Werner Konitzer and David Palme, eds., *"Arbeit", "Volk", "Gemeinschaft": Ethik und Ethiken im Nationalsozialismus* (Frankfurt: Campus, 2016).
340. Koonz, *The Nazi Conscience*, p. 273.
341. Wolfgang Bialas, "Nationalsozialistische Ethik und Moral: Konzepte, Probleme, offene Fragen," in Bialas and Fritze, eds., *Ideologie und Moral im Nationalsozialismus*, pp. 23–63.
342. Kluck, "Transpersonalismus," p. 131. Note, however, that its effect on legal practice is in dispute. Taking opposing views are Ernst Topitsch, *Die Sozialphilosophie Hegels als Heilslehre und Herrschaftsideologie* (Neuwied: Luchterhand, 1967), who claims a central role for Neo-Hegelianism; and Rottleuthner, "Die Substantialisierung des Formalrechts," pp. 211–64, who doubts its relevance outside of Nazi legal thought.
343. For a contemporary account of the Hegel revival in German philosophy, see Heinrich Levy, *Die Hegel-Renaissance in der deutschen Philosophie: Mit besonderer Berücksichtigung des Neukantianismus* (Berlin: Heise, 1927).
344. Oliver Lepsius, *Die gegensatzaufhebende Begriffsbildung: Methodenentwicklungen in der Weimarer Republik und ihr Verhältnis zur Ideologisierung der Rechtswissenschaft unter dem Nationalsozialismus* (Munich: Beck, 1994), pp. 284–5.
345. Julius Binder, *Grundlegung zur Rechtsphilosophie* (Tübingen: Mohr, 1935); idem., *System der Rechtsphilosophie*, Second edition (Berlin: Stilke, 1937).
346. Lepsius, *Die gegensatzaufhebende Begriffsbildung*, p. 281.
347. Karl Larenz, *Rechts- und Staatsphilosophie der Gegenwart*, Second edition (Berlin: Junker und Dünnhaupt, 1935), p. 109.
348. Larenz, *Rechts- und Staatsphilosophie der Gegenwart*, p. 109.
349. Larenz, *Rechts- und Staatsphilosophie der Gegenwart*, p. 156.
350. Larenz, *Rechts- und Staatsphilosophie der Gegenwart*, p. 161.
351. Lepsius, *Die gegensatzaufhebende Begriffsbildung*, p. 281.
352. Steffen Kluck, "Transpersonalismus: Zur normativen Dimension der neuhegelianischen Rechtsphilosophie," in Werner Konitzer and David Palme, eds., *"Arbeit", "Volk", "Gemeinschaft": Ethik und Ethiken im Nationalsozialismus*, p. 130.
353. Michael Stolleis, *Gemeinwohlformeln im nationalsozialistischen Recht* (Berlin: Schweitzer, 1974), p. 196. For an overview of

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meanings and usages of the *Gemeinwohl*-concept in Nazi law, see idem., pp. 10–11.

354. Stolleis, *Gemeinwohlformeln im nationalsozialistischen Recht*, p. 297.
355. Stolleis, *Gemeinwohlformeln im nationalsozialistischen Recht*, p. 297.
356. Stolleis, *Gemeinwohlformeln im nationalsozialistischen Recht*, p. 297.
357. Stolleis, *Gemeinwohlformeln im nationalsozialistischen Recht*, p. 298.
358. Stolleis, *Gemeinwohlformeln im nationalsozialistischen Recht*, p. 300.
359. Stolleis, *Gemeinwohlformeln im nationalsozialistischen Recht*, p. 299.
360. Stolleis, *Gemeinwohlformeln im nationalsozialistischen Recht*, p. 300.
361. Stolleis, *Gemeinwohlformeln im nationalsozialistischen Recht*, p. 298. On room for judicial maneuver in the period 1942–1945, see Frank Laudenklos, *Die Autonomie des Rechts im Nationalsozialismus*, Ph.D. dissertation, Universität Frankfurt, 2003. Laudenklos has found evidence of *greater* judicial independence in everyday law at the time when judicial independence was further curtailed. During his three-year reign, Otto Georg Thierack, whom Hitler appointed as minister of justice on August 20, 1942, radicalized the law to an unprecedented degree. But, as Laudenklos has shown, the destruction of further conventions of legality inadvertently also created a degree of interpretive autonomy for judges that they did *not* possess during the early years of the dictatorship.
362. Hans Helfritz, "Rechtsstaat und nationalsozialistischer Staat," p. 426.
363. For a discussion, see Grimm, "Die 'Neue Rechtswissenschaft.'"
364. I treat Carl Schmitt as a *Schreibtischtäter* in Meierhenrich, *In the Belly of the Fish*, Chapter 4.
365. Koonz, *The Nazi Conscience*, p. 177.
366. Koonz, *The Nazi Conscience*, p. 176. Koonz borrowed the term "ethnocrats" from Michael Burleigh. On Nazi technocrats in the context of the "Jewish question" more generally, see also the controversial book by Götz Aly and Susanne Heim, *Architects of Annihilation: Auschwitz and the Logic of Destruction*, translated by A. G. Blunden (Princeton: Princeton University Press, [1991] 2002); and Stefan Kühl, *Ganz normale Organisationen: Zur Soziologie des Holocaust* (Frankfurt: Suhrkamp, 2014).
367. Koonz, *The Nazi Conscience*, p. 176.
368. Although he only joined the NSDAP in 1937, Gürtner played an active and important role in cementing the legal foundations of the Nazi dictatorship. A detailed and exhaustive account is Lothar Gruchmann, *Justiz im Dritten Reich, 1933–1940: Anpassung und Unterwerfung in der Ära Gürtner*, Third edition (Munich: Oldenbourg, 2001). I develop the categories of extremist institutionalism and racial institutionalism in Meierhenrich, "Fearing the Disorder of Things," esp. pp. 172–3, 194–202.
369. Elsewhere I analyze the Nazi use of law to advance the persecution and destruction of Jews as an example of lawfare. See Meierhenrich, *Lawfare*.
370. Koonz, *The Nazi Conscience*, p. 188.
371. Koonz, *The Nazi Conscience*, p. 189.
372. I deliberately borrow here some of the language that Koonz uses to characterize the culmination of the internal Nazi debate over the creation of the 1935 Nuremberg Racial Laws. See Koonz, *The Nazi Conscience*, p. 188.
373. Koonz, *The Nazi Conscience*, p. 188.
374. Koonz, *The Nazi Conscience*, p. 188.
375. Sarah Schädler, *"Justizkrise" und "Justizreform" im Nationalsozialismus: Das Reichsministerium unter Reichsjustizminister Thierack (1942–1945)* (Tübingen: Mohr, 2009), p. 329. On Thierack's predecessor, the more moderate Franz Schlegelberger, who had served commissarially during the year after the death of Franz Gürtner, the previous Nazi minister of justice, see Michael Förster, *Jurist im Dienst des Unrechts: Leben und Werk des ehemaligen Staatssekretärs im Reichsjustizministerium, Franz Schlegelberger (1876–1970)* (Baden-Baden: Nomos, 1995).
376. Bible, Job 40: 15–18, New Revised Standard Version.
377. Stephen Holmes, "Introduction," in Thomas Hobbes, *Behemoth or The Long Parliament*, edited by Ferdinand Tönnies, with an Introduction by Stephen Holmes (Chicago: University of Chicago Press, [1682] 1990), p. ix.
378. Loewenstein, "Dictatorship and the German Constitution," p. 574. On the salience of Hobessian ideas in the interwar period, see, among others, David Dyzenhaus, "Leviathan in the 1930s: The Reception of Hobbes in the Third Reich," in John P. McCormick, ed., *Confronting Mass Democracy and Industrial Technology: Political and Social Theory from Nietzsche to Habermas* (Durham: Duke University Press, 2002), pp. 163–91; and Tomaz Mastnak, "Hobbes in Kiel, 1938: From Ferdinand Tönnies to Carl Schmitt," *History of European Ideas*, Vol. 41 (2015), pp. 966–91.
379. Loewenstein, "Dictatorship and the German Constitution," p. 574. Also interesting are the biographical entanglements: Loewenstein went on to interrogate Carl Schmitt on behalf of the U.S. prosecution team at the IMT in Nuremberg.
380. Lepsius, *Die gegensatzaufhebende Begriffsbildung*, pp. 381–2.
381. Herf, *Reactionary Modernism: Technology, Culture, and Politics in Weimar and the Third Reich* (Cambridge: Cambridge University Press, 1984), p. 28. Generally, see also Max Weinreich, *Hitler's Professors: The Part of Scholarship in Germany's*

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Crimes against the Jewish People, with an Introduction by Martin Gilbert (New Haven: Yale University Press, [1946] 1999); Andreas Flitner, ed., *Deutsches Geistesleben und Nationalsozialismus* (Tübingen: Wunderlich, 1965); Karl Corino, ed., *Intellektuelle im Bann des Nationalsozialismus* (Hamburg: Hoffmann und Campe, 1980); Peter Lundgren, ed., *Wissenschaft im Dritten Reich*; Notker Hammerstein,*Die Deutsche Forschungsgemeinschaft in der Weimarer Republik und im Dritten Reich: Wissenschaftspolitik in Republik und Diktatur* (Munich: Beck, 1999); Wolfgang Bialas and Manfred Gangl, eds., *Intellektuelle im Nationalsozialismus* (New York: Lang, 2000). On Heidegger's involvement in the Third Reich, which has been studied extensively, see, most recently, Marion Heinz and Sidonie Kellerer, eds., *Martin Heideggers »Schwarze Hefte«: Eine philosophisch-politische Debatte* (Frankfurt: Suhrkamp, 2016).

382. The collaboration of Heidegger, Schmitt, and others with the Nazi regime did not lead to their being ostracized abroad. For the purpose of illustration, consider, for example, the legitimating role played by the world's most renowned university: Harvard University. "From 1933 through 1937, as the Nazi menace steadily increased and as Germany's savage persecution of Jews was widely reported in the United States, President [James Bryant] Conant's administration at Harvard was complicit in enhancing the prestige of the Hitler regime by seeking and maintaining friendly and respectful relations with Nazi universities and leaders." Stephen H. Norwood, *The Third Reich in the Ivory Tower: Complicity and Conflict on American Campuses* (Cambridge: Cambridge University Press, 2009), p. 73. If the President and Fellows of Harvard University were not going to look askance at Heidegger, Schmitt, et al. for supporting the Nazi dictatorship, what incentives—other than a commitment to human decency—did these theorists for the Reich have to disavow their *Führer*?
383. Herf, *Reactionary Modernism*, p. 29.
384. Koonz, *The Nazi Conscience*, p. 67.
385. Koonz, *The Nazi Conscience*, p. 68. Hilger distinguishes, among other things, between emotion-driven approaches and race-driven approaches to the concept of law by Nazi jurists involved in the debate about the Rechtsstaat. Hilger, *Rechtsstaatsbegriffe im Dritten Reich*, pp. 206–8.
386. Koonz, *The Nazi Conscience*, p. 68.
387. Cornelius Castoriadis, *L'Institution imaginaire de la societe* (Paris: Seuil, 1975).
388. John B. Thompson, "Ideology and the Social Imaginary: An Appraisal of Castoriadis and Lefort," *Theory and Society*, Vol. 11 (1982), p. 664.
389. Castoriadis, *L'Institution imaginaire de la societe*, p. 203, as quoted in Thompson, "Ideology and the Social Imaginary," p. 664.
390. As quoted in John B. Thompson, *Studies in the Theory of Ideology* (London: Wiley, 1984), p. 24.
391. In the index of Richard Bessel's well-known collection *Life in the Third Reich* (Oxford: Oxford University Press, 1987), the institution of law receives only two entries and four mentions. (Four additional entries reference specific legislation.)
392. Manfred B. Steger and Paul James, "Levels of Subjective Globalization: Ideologies, Imaginaries, Ontologies," *Perspectives on Global Development and Technology*, Vol. 12 (2013), p. 23.
393. David Fraser, *Law after Auschwitz: Towards a Jurisprudence of the Holocaust* (Durham: Carolina Academic Press, 2005), p. 28.
394. Peter Winch, *The Idea of a Social Science and Its Relation to Philosophy* (London: Routledge, 1958), p. 52.
395. Anthony King, *The Structure of Social Theory* (London: Routledge, 2004), pp. 58–9.
396. As Anthony King writes, "To follow a rule, and, therefore, to act appropriately in social life is not to apply a formula individually but to perform acts that others can understand." King, *The Structure of Social Theory*, p. 58.
397. Fraser, *Law after Auschwitz*, p. 23.
398. Loewenstein, "Dictatorship and the German Constitution," p. 538.
399. Friedrich Roetter, "The Impact of Nazi Law," *Wisconsin Law Review* (1945), p. 516.

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