An Ethnography of Nazi Law: The Intellectual Foundations of Ernst Fraenkel's Theory of Dictatorship

Jens Meierhenrich

INTRODUCTION

Though largely forgotten today, Ernst Fraenkel's *The Dual State: A Contribution to the Theory of Democracy*, first published in 1941, is one of the seminal works in the study of law and society. On September 20, 1938, Fraenkel, a German labor lawyer and social democrat of Jewish faith, fled the Nazi dictatorship. From the safety of his exile in the United States, he published, with Oxford University Press, an English-language edition of his pioneering account about the complicated relationship between authoritarianism and the rule of law in the early years of Hitler's Germany. Fraenkel had secretly drafted the original manuscript in Germany between 1936 and 1938. Because of these clandestine origins, one commentator recently described *The Dual State* as "the ultimate piece of intellectual resistance" to the Nazi regime.[1]

An ethnography of law crafted in the most forbidding of circumstances, *The Dual State* is one of the most erudite books on dictatorship ever written. It contained the first comprehensive, institutional analysis of the rise and nature of National Socialism, and it was the only such analysis written from within Germany. Although well received and widely reviewed upon publication in the United States in the early 1940s, the concept of the dual state, with its two halves—the *prerogative state* and the *normative*

[1] Jakob Zollmann, "The Law in Nazi Germany: Ideology, Opportunism, and the Perversion of Justice" (Book Review), *German History*, vol. 32 (2014), 496.

The Duel State: A Contribution to the Theory of Dictatorship. Ernst Fraenkel

state—has received only scant attention ever since. This is unfortunate, for as I have shown elsewhere, the idea of the dual state is of immediate relevance not only for the theory of dictatorship in the twenty-first century but for the theory of democracy as well.[2] This republication of Fraenkel's largely forgotten (and long out-of-print) monograph aims to restore it to its rightful place as a classic of law-and-society scholarship. It also endeavors to make it more widely available to scholars and students in related disciplines. Given the burgeoning literature on democracy and the rule of law—in all of its guises—as well as the ongoing policy concern with the promotion of both in changing societies the world over, a re-launch for our times of one of the most prescient accounts of legal contention is not only opportune, it is overdue.[3]

What follows is an account of the intellectual foundations of Fraenkel's theory of dictatorship. The analysis is organized into three sections. The first section provides the biographical and historical context necessary for understanding Fraenkel and his time. The second section turns to the gestation of the first, German-language manuscript of *The Dual State*, known as the *Urdoppelstaat* of 1938. The third and final section charts the transformation of this unpublished manuscript into the 1941 book that is reprinted in this volume.[4]

[2] Jens Meierhenrich, *The Legacies of Law: Long-Run Consequences of Legal Development in South Africa, 1652–2000* (Cambridge: Cambridge University Press, 2008).

[3] Relevant rule-of-law scholarship includes Thomas Carothers, *Promoting the Rule of Law Abroad: In Search of Knowledge* (Washington: Carnegie Endowment for International Peace, 2006); Jane Stromseth, David Wippman, and Rosa Brooks, eds., *Can Might Make Rights? Building the Rule of Law after Military Intervention* (Cambridge: Cambridge University Press, 2006); James E. Fleming, ed., *Getting to the Rule of Law*, Nomos L (New York: New York University Press, 2011); Rachel Kleinfeld, *Advancing the Rule of Law Abroad: Next Generation Reform* (Washington: Carnegie Endowment for International Peace, 2012); David Marshall, *The International Rule of Law Movement: A Crisis of Legitimacy and the Way Forward* (Cambridge: Harvard University Press, 2014); and Paul Gowder, *The Rule of Law in the Real World* (Cambridge: Cambridge University Press, 2016).

[4] This introductory chapter draws on Jens Meierhenrich, *The Remnants of the* Rechtsstaat: *An Ethnography of Nazi Law*, Book manuscript, September 2016.

THE CONTEXT OF *THE DUAL STATE*

Ernst Fraenkel was born in Cologne on December 26, 1898. His father, Georg Fraenkel, a merchant, and his mother, Therese Epstein, both hailed from bourgeois households that practiced enlightened forms of Judaism. As a result, he and his two elder siblings grew up in a religiously progressive home. Yet Fraenkel's upbringing, though comfortable, was far from easy. Early on in life, Fraenkel lost both of his parents and one sibling. After these losses, Fraenkel and his older sister, Marta, relocated to Frankfurt am Main, where they lived with their uncle Joseph Epstein.[5] Of great significance for Fraenkel's political maturation was the influence of Wilhelm Epstein, who assisted his brother Joseph—the legal guardian—with the raising of the two Fraenkel children. The elder Epstein was very active in adult education. A pacifist and admirer of the Fabian Society, he helped build the *Frankfurter Ausschuss für Volksvorlesungen*, a local, private organization associated with the trade unions where he also taught so as to make education accessible to the masses.[6]

World War I cut short Fraenkel's schooling. He graduated in November 1916 and immediately joined the ongoing war effort, for which he had volunteered. As was the case with many of the country's Jews, the bellicose atmosphere made Fraenkel feel more German than ever: "Whatever Jewish consciousness I might have possessed, it was pushed into the background with the outbreak of war. I was deeply convinced that the war would mean the end of antisemitism."[7] On April 3, 1917, Fraenkel was ordered to join an infantry reserve unit stationed in Jablonna, Poland. Sequestered in a camp eighteen kilometers north of Warsaw, Fraenkel's unit underwent basic military training to get the young recruits ready for the Western front to where they were dispatched in July 1917. The experience of trench warfare for him was "soul destroying and intellectually sterile," but Fraenkel survived the carnage, leaving military service on January 28, 1919.[8]

[5] Simone Ladwig-Winters, *Ernst Fraenkel: Ein politisches Leben* (New York: Campus Verlag, 2009), 21–6.

[6] Hubertus Buchstein and Rainer Kühn, "Vorwort zu diesem Band," in Ernst Fraenkel, *Gesammelte Schriften*, vol. 1: *Recht und Politik in der Weimarer Republik*, edited by Hubertus Buchstein (Baden-Baden: Nomos, 1999), 17.

[7] Fraenkel, "Anstatt einer Vorrede," 15. Unless stated otherwise, all translations from the German are mine.

[8] Ibid., 20.

The Weimar Years

After the war, Fraenkel embarked on a law degree at the University of Frankfurt, a progressive, privately funded institution that had opened its doors just a few years earlier. There the lectures of Hugo Sinzheimer (1875–1945) left the deepest impressions on Fraenkel. Sinzheimer had joined the law faculty in 1920 to take up the first chair in Germany in the new field of labor law (*Arbeitsrecht*). Aside from advancing this new field, and his related interest, the sociological study of law, it was Sinzheimer's ambition to help train a new generation of lawyers, one that would be socially aware and committed to creating a fair and equitable society.[9] To this end, Sinzheimer also founded, and edited between 1925 and 1931, the journal *Die Justiz*, a publication of the Republican Federation of Judges (*Republikanischer Richterbund*) that sought to push against the dominance of doctrinalism and legal positivism in the legal profession. Sinzheimer's commitment to social justice—and his conception of labor law as a tool to advance it—exerted a lasting influence on Fraenkel.

Upon completing his legal education, and the applied training of his *Referendariat*, Fraenkel quickly turned to private practice. He also began to contribute more regularly commentary to left-leaning publications such as *Die Tat, Vorwärts*, and the *Jungsozialistische Blätter* as well as to specialized scholarly outlets like *Arbeitsrecht*. His passion for social causes in general, and labor law in particular, netted him invitations to workshops and conferences. It followed ever closer contact with the trade union movement.[10]

In February 1926, Fraenkel took up a position as legal adviser to the German Metalworkers Union (*Deutscher Metallarbeiterverband*). Under its auspices, he assumed a teaching position in Bad Dürrenberg, near Leipzig, where the trade union had just opened a *Wirtschaftsschule*, an educational institution aimed at instructing metalworkers in questions of law and economics as well as at introducing them to more general subjects.[11] Fraenkel saw his mission as that of contributing to "the struggle for the emancipation of the

[9] See Hugo Sinzheimer, "Was Wir Wollen," *Die Justiz*, no. 1 (1925), reprinted in Hugo Sinzheimer and Ernst Fraenkel, *Die Justiz in der Weimarer Republik: Eine Chronik*, edited by Thilo Ramm (Neuwied: Luchterhand, 1968), 19–23.

[10] Ladwig-Winters, *Ernst Fraenkel*, 56–7.

[11] See Ernst Fraenkel, "Die Wirtschaftsschule des Deutschen Metallarbeiterverbandes in Bad Dürrenberg" [1926], in Fraenkel, *Gesammelte Schriften*, vol. 1, 163–6.

proletariat."[12] During his foray into teaching, he continued to publish widely on the social questions of the time. He also completed his longest publication to date, the forty-five-page pamphlet *Zur Soziologie der Klassenjustiz* (*On the Sociology of Class Justice*), first published in 1927.[13] It was an attempt to draw attention to structural determinants of Weimar jurisprudence, notably the reification of capitalist values in the education of judges. Although his essay bore the mark of Marxist ideas, his aim, Fraenkel wrote in the pamphlet's preface, was "not to indict, but to explain."[14]

The publication of *Zur Soziologie der Klassenjustiz* marked Fraenkel's transition from lecturer to lawyer in private practice. Though he retained close ties with the German Metalworkers Union, in March 1927 Fraenkel opened a private law firm in Berlin. Located at *Tempelhofer Ufer* 16a, in Kreuzberg, he specialized in labor law and represented private clients as well as the German Metalworkers Union. He appears to have been a regular at the *Landesarbeitsgericht*, Berlin's regional labor court.[15] This time was also an intellectually rewarding and productive one for Fraenkel. He continued to write on topics in labor law, though mostly from a strictly doctrinal legal perspective. In 1928, he managed to publish seventeen essays and articles, eleven in 1929.[16] For the purpose of this introduction, the most important among them was "Rechtssoziologie als Wissenschaft" ("The Sociology of Law as Science").[17] In it, Fraenkel contemplated the political utility of the social sciences, notably Sinzheimer's preferred methodology for understanding legal developments: the sociology of law. Though the argument, from our vantage point in the twenty-first century, may at first glance seem unremarkable, it is important to recognize the absolute dominance of the doctrinal analysis of law in the early twentieth century, in Germany and elsewhere. Critical approaches to law, especially mixed or non-legal methodologies, were the exception. But Fraenkel's 1929 article was not just pioneering, it was also programmatic, a sketch of Fraenkel's analytical trajectory to come.

[12] Ibid., 163.

[13] Ernst Fraenkel, *Zur Soziologie der Klassenjustiz* [1927], in Fraenkel, *Gesammelte Schriften*, vol. 1, 177–211.

[14] Ibid., 177. [15] Ladwig-Winters, *Ernst Fraenkel*, 65.

[16] Ibid., 75. Most of these writings are available in Fraenkel, *Gesammelte Schriften*, vol. 1.

[17] Ernst Fraenkel, "Kollektive Demokratie" [1929], in Fraenkel, *Gesammelte Schriften*, vol. 1, 343–57; Ernst Fraenkel, "Rechtssoziologie als Wissenschaft" [1929], in Fraenkel, *Gesammelte Schriften*, vol. 1, 370–9.

Fraenkel sought to establish "*Rechtssoziologie*" ("sociology of law") as a legitimate approach to the study of legal phenomena. He proposed that it was as valuable as—and therefore should be seen as methodologically equal to—the conventional approach of "*Rechtswissenschaft*" ("legal science") as well as to established auxiliary approaches in the subfield of "*Rechtstheorie*" ("legal theory"), namely "*Rechtsphilosophie*" ("legal philosophy"), "*Rechtsgeschichte*" ("legal history"), and "*Rechtspolitik*" ("politics of law").[18] For Fraenkel, legal science was mere "*Rechtsanwendungslehre*," nothing more than the tallying and interpretation of black letter law for the purpose of legal practice.[19] For Fraenkel, it was an applied approach, not a learned one. He wanted to work with data, not doctrine. He held in higher regard the auxiliary approaches in legal theory. And yet, Fraenkel did not think that the philosophical, historical, and political studies of law as such were sufficient as analytical approaches. A distinctly sociological approach was also needed, he claimed. He positioned this approach in direct opposition to Paul Laband's brand of legal positivism, which was hugely influential at that time.[20]

According to Laband, "[a]ll historical, political, and philosophical considerations" were "without significance" in the study of law. His legal positivism (known as *Staatsrechtspositivismus*, or state law positivism) was wary of extra-legal considerations and advocated a "retracing of individual [legal] norms to general [legal] concepts."[21] Laband's was legal science par excellence. As Stefan Korioth writes:

> For the first time, attempts were made to offer a state law theory that could provide rational, logically grounded, and reliable answers in the field of constitutional law; in short, positivism established a doctrine of constitutional law. In addition, positivist procedure linked the field of law with the methods of the expanding natural sciences and the tendency, characteristic of nineteenth century thought [as well as of twenty-first century thought], to turn all of life into science. The positivist trust in "what is" corresponded to the general trend in the

[18] Fraenkel, "Rechtssoziologie als Wissenschaft," 370–1. [19] Ibid., 370.

[20] Paul Laband, *Das Staatsrecht des deutschen Reiches*, 3 vols., second edition (Tübingen: Mohr, 1888).

[21] I quote Laband in the translation provided in Stefan Korioth, "The Shattering of Methods in Late Wilhelmine Germany," in Arthur J. Jacobson and Bernhard Schlink, eds., *Weimar: A Jurisprudence of Crisis* (Berkeley: University of California Press, 2000), 43.

humanities that followed the collapse of philosophical idealism in the first half of the century.[22]

Methodologically, Fraenkel objected to the theoretical reductionism at the heart of *Staatsrechtspositivismus*; politically, he objected to its built-in status-quo bias. Throughout his long life and far-reaching thought, Fraenkel was driven by, to borrow a phrase of Karl Jaspers, "the unqualified will to know."[23] As a result of his social democratic upbringing, he also never ceased to question the status quo. He had internalized the lesson that it was usually the haves—rarely the have-nots—who benefit from it. It is for these reasons that Fraenkel responded so strongly, in methodological terms, to Laband's legal positivism. In an effort to upend it, Fraenkel invoked with admiration the achievements of Anton Menger, Eugen Ehrlich, and Karl Renner.[24] He considered the three leading Austrian jurists to be at the forefront of the sociology of law—the kinds of scholars that Germany sorely lacked. It did not hurt that Ehrlich formulated a theoretical position that was, at the time at least, also Fraenkel's: "The law and thus also legal rules are merely a superstructure of the economic order."[25] This article of faith served as the normative foundation for many of Fraenkel's occasional writings (as well as of the *Urdoppelstaat*) in the Nazi years.

True to his call in 1929 for an interdisciplinary approach to the study of law, Fraenkel combined, and fully integrated, as we shall see, insights from legal science, legal theory, legal philosophy, and legal history to arrive at his sociological account of Nazi law. Unbeknownst to him, he also relied on techniques from the emerging anthropology of law. Fraenkel's use of ethnographic data about the role(s) of law in everyday life—culled from his own legal practice—underlined the analytical value of participant observation as yet another useful methodological approach to the study of law in society. *The Dual State* was

[22] Ibid., 43.

[23] Karl Jaspers, *The Idea of the University*, edited by Karl W. Deutsch, translated by H. A. T. Reich and H. F. Vanderschmidt (London: Peter Owen, 1960), 37.

[24] Anton Menger, *Das bürgerliche Recht und die besitzlosen Volksklassen* (Tübingen: Mohr, 1890); Eugen Ehrlich, *Grundlegung der Soziologie des Rechts* (Munich: Duncker & Humblot, 1913); Karl Renner, *Die Rechtsinstitute des Privatrechts und ihre soziale Funktion: Ein Beitrag zur Kritik des bürgerlichen Rechts* (Tübingen: Mohr, 1929).

[25] Ehrlich, *Grundlegung der Soziologie des Rechts*, 172.

an early and pioneering example of interdisciplinary legal scholarship, daringly conceived and masterfully crafted in extraordinary times.

In the latter half of the twentieth century, Roger Cotterrell appraised the role of interdisciplinary legal scholarship thus: "The list of great men in the history of scholarship who have refused to limit their vision within the confines of the disciplinary boundaries of their era is sufficiently impressive to reassure modern teachers and researchers that, despite all the problem involved in interdisciplinarity, it has a sound and respectable history as one of the eminently productive and innovatory varieties of intellectual non-conformity."[26] We know from his postwar statements that for Fraenkel, the writing of the *Urdoppelstaat*, and subsequently of *The Dual State*, were such acts of non-conformity. Except that Fraenkel's non-conformity was considerably more dangerous than interdisciplinary research should be. Fraenkel's was a valiant act of resistance couched in the form of an ethnography of Nazi law.

But before Fraenkel was forced to turn his life over to the analysis of the law of the "Third Reich"—which, in the late 1920s, was still but a distant fear—he stayed true to the practice of labor law. Fraenkel joined forces with Neumann and opened a law firm in the newly built headquarters of the German Metalworkers Union at *Alte Jakobstraße* 148–155. Designed by the architect Erich Mendelsohn, and completed in 1930, the imposing building allowed for continued access to one of Fraenkel's most important clients.

When Sinzheimer, disillusioned by the state of democracy in Weimar Germany, relinquished, in 1931, the lead editorship of *Die Justiz*, Fraenkel continued in his stead and published, until the journal ceased publication in 1933, sharply worded commentary in support of his ideal of a democratic society.[27] In eleven incisive essays in total, Fraenkel analyzed legal and intellectual developments ranging from proposals for a reform of civil procedure to the increasing use of the notorious Article 48 of the Weimar Constitution, what he termed the "*Diktaturparagraphen*," or "dictator's provision"; and from the implications of Carl Schmitt's "friend–enemy" distinction for the administration of criminal justice to the political fallout of the important

[26] Roger B. M. Cotterrell, "Interdisciplinarity: The Expansion of Knowledge and the Design of Research," *Higher Education Review*, vol. 11 (1979), 55.

[27] Otto Kirchheimer, "Einführung," in Sinzheimer and Fraenkel, *Die Justiz in der Weimarer Republik*, 14–15.

1932 proceeding *Preussen contra Reich* before the *Staatsgerichtshof*, Weimar Germany's constitutional court in Leipzig.

The Nazi Years

Just before the burning of the Reichstag in Berlin on February 27, 1933, Fraenkel threw down the gauntlet, issuing a daring challenge to the insurgent Nazis. In his final article for *Die Justiz* he voiced his opposition to the brownshirt revolution in no uncertain terms: "We proudly fly the flag. On this flag these words are written: Against arbitrary rule!"[28] We now know that Fraenkel at the time underestimated the threat that the Nazis posed. He misjudged how few adherents the democratic ideal truly had in his native Germany and how irreparably divided the fledgling anti-Nazi alliance was. The gravity of the situation was driven home on a personal level at the end of March, when police detained Hugo Sinzheimer, Fraenkel's mentor, in Frankfurt, and placed him in protective custody (*Schutzhaft*), ostensibly for his own protection.[29] It was the beginning of the destruction of Jewish life and thought in Nazi Germany.[30]

On May 2, 1933, the new regime outlawed the country's trade unions, including the German Metalworkers Union. SA forces stormed the headquarters at *Alte Jakobstraße* and systematically rounded up suspected enemies of the state, including Franz Neumann. On May 9, Fraenkel received his *Vertretungsverbot*, an official notification that he, as a Jew, was henceforth prohibited from representing clients in a German court of law.[31] Neumann received the same notice and took the opportunity to flee abroad before things could get worse. Fraenkel decided to stay in Berlin. He appealed his prohibition to practice law, as did around 1,700 other Jewish lawyers in the city. Although the Nazis were only tolerating Jewish lawyers with a *Frontkämpfer*-background, that is, individuals who had been involved in military

[28] Ernst Fraenkel, "XLIII," *Die Justiz*, February 1933, reprinted in Sinzheimer and Fraenkel, *Die Justiz in der Weimarer Republik*, 396.

[29] Ladwig-Winters, *Ernst Fraenkel*, 92.

[30] For a comprehensive overview, see Saul Friedländer, *Nazi Germany and the Jews*, vol. 1: *The Years of Persecution, 1933–1939* (London: Weidenfeld and Nicolson, 1997). See also Martin Dean, *Robbing the Jews: The Confiscation of Jewish Property in the Holocaust, 1933–1945* (Cambridge: Cambridge University Press, 2008) and Wolfgang Benz, ed., *Die Juden in Deutschland 1933–1945: Leben unter nationalsozialistischer Herrschaft* (Munich: Beck, 1988).

[31] Ladwig-Winters, *Ernst Fraenkel*, 99.

combat on the frontlines of World War I, Fraenkel was able to provide the requisite testimonies and the prohibition against him was lifted on May 11, 1933.[32] Thus began Fraenkel's adventure inside the belly of what would become, in the late 1930s, the Nazi behemoth.

Though his file was reviewed once more in 1934, this time for suspected "communist activity," Fraenkel managed to muddle through, taking on ever more sensitive cases. While his roster of clients had previously centered on those caught up in labor law-related disputes, Fraenkel in the following years became increasingly involved in the legal representation of political activists on the left. He later recalled that it was common, even for defense attorneys, to push for lengthy prison sentences in order to spare clients the terror of the Nazi concentration camps to where they would likely have been sent in the event of an acquittal or lesser sentence.[33] Fraenkel readily acknowledged the collusion of "humane judges" ("*humane Richter*") who for the same reason imposed lengthy prison sentences on defendants who stood to otherwise fall into the hands of the prerogative state.[34]

But Fraenkel resisted the regime not just in the courtroom but also in print. In 1934, under the pseudonym "Frank III," he published a provocative analysis of Nazi criminal justice in the *Sozialistische Warte*, the periodical of the *Internationaler Sozialistischer Kampfbund* (International Socialist Militant League, ISK).[35] It recounts, *pars pro toto*, the criminal proceeding against Oskar Schulze, a metalworker

[32] It bears emphasizing that Neumann's situation was different from Fraenkel's. He did not enjoy the limited and temporary privilege of a former *Frontsoldat*, which is why his situation in 1933 was more precarious than Fraenkel's.

[33] Fraenkel describes one such case in Appendix II to the 1974 German Edition of *The Dual State*. His summary of the proceeding before the *Amtsgericht* (district court) Berlin appears in this volume for the first time in English translation.

[34] Fraenkel reflected on this time and its legal tactics, in a typically detached fashion, in "Auflösung und Verfall des Rechts im III. Reich" [1960], in Ernst Fraenkel, *Gesammelte Schriften*, vol. 2: *Nationalsozialismus und Widerstand*, edited by Alexander v. Brünneck, Hubertus Buchstein, and Gerhard Göhler (Baden-Baden: Nomos, 1999), 617–18. For a discussion of specific cases, see Douglas G. Morris, "The Dual State Reframed: Ernst Fraenkel's Political Clients and His Theory of the Nazi Legal System," *Leo Baeck Institute Yearbook*, vol. 58 (2013), 5–21. For a recent account of a "humane" Nazi judge, in Fraenkel's parlance, see Herlinde Pauer-Studer and J. David Velleman, *Konrad Morgen: The Conscience of a Nazi Judge* (London: Palgrave, 2015).

[35] Ernst Fraenkel, "In der Maschine der politischen Strafjustiz des III. Reiches" [1934], in Fraenkel, *Gesammelte Schriften*, vol. 2, 475–484. On the ISK's role and strategies of contention in the resistance to Nazism, see Sabine Lemke-Müller, ed., *Ethik des Widerstands: Der Kampf des Internationalen Sozialistischen Kampfbundes (ISK) gegen den Nationalsozialismus* (Bonn: Dietz, 1996).

from Berlin, its perverse outcome, and the investigation and adjudication that directly led to it. For Fraenkel, it was meaningful, and thus important to publicize, because as an example of political justice it represented "an everyday occurrence" ("*eine alltägliche Geschichte*").[36] In 1935, this time under the pseudonym "Fritz Dreher," Fraenkel published again in the *Sozialistische Warte*.[37] This time it was a rallying cry. Fraenkel was seized by a desire to energize and fortify resistance to Nazi rule. His biographer has observed that it was at this moment that Fraenkel gave up his analytical detachment and "political action became the center" of his depleted life.[38] During this more overt phase of his resistance, Fraenkel called upon "socialist workers" to take on a leadership role.[39] Had Nazi authorities uncovered Fraenkel's pseudonymous identity, he would most certainly have been tried—and sentenced—for high treason. His legal representation of some of the resisting Jews of Berlin was already a thorn in the Nazi authorities' side. In the fall of 1938, the Fraenkels left Nazi Germany in great haste. Fraenkel's name had appeared on a Gestapo list. His life was now in danger.

After a brief spell in Great Britain, Fraenkel and his wife found refuge in the United States. It was an extraordinarily trying time for him. His professional life was in tatters, income meager or non-existent. With no other prospects, he decided to become a student again. In the fall of 1939, he enrolled for a J.D. at the University of Chicago Law School. To finance his studies, Fraenkel applied and received a highly competitive scholarship from the American Committee for the Guidance of Professional Personnel. As part of his application, Fraenkel had included the second English-language draft of *The Dual State*.

In the remainder, I chart the long and winding road that led to the publication of *The Dual State*. Fraenkel certainly took the one less traveled by. I show why, and how, this made all the difference: how it resulted in the making of a slow-burning classic, the intellectual significance of which far surpasses that of the other, more influential book about the Nazi dictatorship that appeared in the early 1940s—Franz

[36] Fraenkel, "In der Maschine der politischen Strafjustiz des III. Reiches" [1934], 475.

[37] Ernst Fraenkel, "Der Sinn illegaler Arbeit," in Fraenkel, *Gesammelte Schriften*, vol. 2, 491–7.

[38] Ladwig-Winters, *Ernst Fraenkel*, 116.

[39] Fraenkel, "Der Sinn illegaler Arbeit," 495.

Neumann's widely known *Behemoth: The Structure and Practice of National Socialism*, also published by Oxford University Press, in 1942, and in a substantially enlarged edition in 1944. Fraenkel's unique experiences and dangerous encounters in Nazi Germany alienated him from most of the German Jewish refugees that he came across in exile in the United States. But his fiercely independent streak and intellectual confidence ensured that he weathered unharmed the criticism with which some of the cognoscenti in New York—especially at the New School for Social Research—greeted his ideas about the institutional logic(s) of Nazi rule.

THE GESTATION OF *THE DUAL STATE*

Fraenkel completed the manuscript for the English edition of *The Dual State* on June 15, 1940.[40] Oxford University Press published it in early 1941. But the journey from the book's conception to its eventual publication was arduous and probably more so than Fraenkel anticipated when he first commenced his research in Nazi Germany in 1936.

Fraenkel was one of the most visible jurists in Weimar Germany. Alongside Max Alsberg, Hermann Heller, Max Hirschberg, Hans Kelsen, Otto Kahn-Freund, Otto Kirchheimer, Franz Neumann, Gustav Radbruch, Carl Schmitt, and Hugo Sinzheimer, to name but the most recognizable theorists and practitioners, he was a party to some of the most important legal debates of his time.[41] As a veteran of World War I, he was allowed to practice law until November 30, 1938, when all remaining lawyers of Jewish ancestry were banned from their profession. With the "Fifth Ordinance of the Reich Citizenship Law" (*Fünfte Verordnung zum Reichsbürgergesetz*) of September 27, 1938, the Nazi regime completed its purge of the legal profession.[42]

[40] Ernst Fraenkel, "Preface to the 1974 German Edition," in this volume, xiii–xxi.

[41] For biographical sketches of left-leaning jurists in Weimar and Nazi Germany, see, most notably, Kritische Justiz, ed., *Streitbare Juristen: Eine andere Tradition* (Baden-Baden: Nomos, 1988); and Bundesrechtsanwaltskammer, ed., *Anwalt ohne Recht: Schicksale jüdischer Anwälte in Deutschland nach 1933* (Berlin: be.bra Verlag, 2007).

[42] *Reichsgesetzblatt* 1938 I, 1403–1406. For a comprehensive compilation of Nazi decrees, legislation, and other legal instruments, see Ingo von Münch, ed., *Gesetze des NS-Staates: Dokumente eines Unrechtssystems*, third, enlarged edition (Paderborn: Schöningh, 1994).

The first, partial purge had taken place shortly after Hitler's seizure of power in 1933, when the newly installed regime, in connection with the more general "Law for the Restoration of the Professional Civil Service" (*Gesetz zur Wiederherstellung des Berufsbeamtentums*), on April 7, 1933 adopted a law mandating the disbarment of Jewish lawyers by September 30 of that year.[43] At the time, the 4,394 German lawyers with a Jewish background accounted for 20 percent of the approximately 19,500 members of the Bar in Germany.[44]

Yet to the chagrin of various legal representatives of the Nazi regime, Fraenkel and a considerable number of other Jewish lawyers were exempt from the provisions of this "Law on Admission to the Bar" (*Gesetz über die Zulassung zur Rechtsanwaltschaft*).[45] Either they had, like Fraenkel, contributed to the war effort, had lost fathers or sons in World War I, or they had opened their legal practice prior to 1914, in which case they were classified as *Altanwälte* ("Old Lawyers") and thus also entitled to continued bar membership.[46] Konrad Jarausch estimates that 60 percent of all Jewish lawyers fell into one of these categories and thus outside of the purview of the legal ban.[47] Ingo Müller found that an even larger percentage escaped the draconian legislation: He calculated that 2,900 Jewish lawyers, or 65 percent of their total number, "were still permitted to practice," whereas 1,500 were stripped off their Bar membership during this first concerted effort at displacing Germany's Jews from legal life.[48] Saul Friedländer, finally, suggests that as many as 70 percent of Jewish lawyers were

[43] *Reichsgesetzblatt* 1933 I, 175–7.

[44] Ingo Müller, *Hitler's Justice: The Courts of the Third Reich*, translated by Deborah Lucas Schneider (Cambridge: Harvard University Press, 1991), 61. See also Fritz Osler, "Rechtsanwälte in der NS-Zeit," *Anwaltsblatt*, vol. 33 (1983), 59. Jarausch puts the number of attorneys and notaries who were practicing in Germany in 1933 at 19,364. On his count, the legal profession that year was comprised of 10,450 judges. See Konrad Jarausch, *The Unfree Professions: German Lawyers, Teachers, and Engineers, 1900–1950* (New York: Oxford University Press, 1990), 237. For an overview of the development of the German Bar from its establishment in 1878 until 1945, with particular reference to the period of Nazi dictatorship, see Kenneth C. H. Willig, "The Bar in the Third Reich," *American Journal of Legal History*, vol. 20 (1976), 1–14.

[45] *Reichsgesetzblatt* 1933 I, 188–9.

[46] This exemption was included in the legislation at the urging of Reich President Paul von Hindenburg.

[47] Jarausch, *The Unfree Professions*, 129.

[48] Müller, *Hitler's Justice*, 61. See also Fritz Osler, "Rechstanwälte in der NS-Zeit," *Anwaltsblatt*, vol. 33 (1983), 61.

nominally allowed to continue to work in their chosen profession.[49] Whatever the exact figure may be, a substantial number of Jewish lawyers remained visible in public life, if only for a few more years. But this visibility must not be misinterpreted, and even it declined almost immediately:

> Though still allowed to practice, Jewish lawyers were excluded from the national association of lawyers and listed not in its annual directory but in a separate guide; all in all, notwithstanding the support of some Aryan institutions and individuals, they worked under a "boycott by fear."[50]

The restrictions for Jewish lawyers were becoming ever more comprehensive and ultimately culminated in the outright ban of 1938. This worsening of conditions ultimately caused Fraenkel to flee his native Germany.

During the five interim years—that is, the period 1933–1938—Fraenkel was reluctantly afforded a very uncomfortable and often dangerous front row seat to the gradual destruction of the German *Rechtsstaat*. He had horrifying (but scholarly invaluable) access as a participant observer to one of the most far-reaching—and violent—legal transformations ever undertaken. *The Dual State* is the product of this extraordinary exposure to, and sustained reflection on, the legal origins of Nazi dictatorship. From his unique vantage point, and with a declining roster of clients, Fraenkel made theoretical sense, as best he could, of what was happening around him. Drawing on his disciplinary training in both law and history—and taking a leaf from the methodology of the social sciences that Max Weber had propagated—Fraenkel embarked on what he conceived of as an exercise in the sociology of law.[51]

[49] Friedländer, *Nazi Germany and the Jews,* vol. 1, 29. Friedländer works with a slightly larger starting figure than Müller, writing of 4,585 Jewish lawyers to begin with. Of these he believes, 3,167 initially retained their Bar membership. Out of 717 Jewish judges and state prosecutors, another 336 continued their work. Based on these figures, Friedländer claims that Jews, in June 1933, still comprised more than 16 percent "of all practicing lawyers in Germany." Ibid., 29. For his figures, Friedländer draws on Avraham Barkai, *From Boycott to Annihilation: The Economic Struggle of German Jews, 1933–1943*, translated by William Templer (Hanover: University Press of New England, 1989), 4.

[50] Friedländer, *Nazi Germany and the Jews,* vol. 1, 29.

[51] Ernst Fraenkel, "Das Dritte Reich als Doppelstaat" [1937], in Fraenkel, *Gesammelte Schriften*, vol. 2, 504.

"The Third Reich as a Dual State" (1937)

The concept of the dual state first found its way into print in 1937 in an article that Fraenkel wrote under the pseudonym "Conrad Jürgens" for the *Sozialistische Warte*, entitled "Das Dritte Reich as Doppelstaat" ("The Third Reich as a Dual State").[52] In this publication, Fraenkel chronicled the breakdown of democracy and the rise of dictatorship in Weimar Germany. He started with the observation that Nazi Germany, far from being the unitary state that the Hitler regime proclaimed it had established, consisted of two *parallel* and *contending* halves.[53] State power ("*Staatsgewalt*"), Fraenkel argued, resided in each of these halves. The institutional structures were located side-by-side ("*nebeneinander*") but operating at loggerheads ("*gegeneinander*").[54] But, and this is where Fraenkel's analysis departed from other critical perspectives on the Nazi state that existed at the time, the institutional divide that he thought to be most significant did not separate the Nazi state from the NSDAP. According to Fraenkel, state and party were institutionally fused, virtually indistinguishable in conceptual terms. More important than the superficial (and empirically meaningless) distinction between state and party, Fraenkel argued, was the division that existed *within* the state. He believed it essential to introduce a standard of institutional differentiation "into the structure of the state" ("*in das Gefüge des Staates*") itself.[55] In his first attempt at theorizing the nature of the Nazi state, Fraenkel distinguished between what he called "the state as political unity" ("*Staat als politische Einheit*") and "the state as technical apparatus" ("*Staat als technische[r] Apparat*").[56] These formulations were the precursors for Fraenkel's twin neologisms: the "*Massnahmen-Staat*" (for which he subsequently adopted the spelling "*Massnahmenstaat*" and eventually that of "*Maßnahmenstaat*" and rendered as "prerogative state" in the English translation that he would authorize in 1940) and the "*Normen-Staat*" (later spelled *Normenstaat* and translated as "normative state").[57]

Fraenkel traced the remote origins of the institutional bifurcation of the Nazi state back to the transition from "the bureaucratization of politics" ("*Bürokratisierung der Politik*") in Wilhelmine Germany to "the politicization of the bureaucracy" ("*Politisierung der Bürokratie*")

[52] Ibid., 504–19. [53] Ibid., 505. [54] Ibid., 505. [55] Ibid., 505.
[56] Ibid., 505. [57] For the original spelling, see ibid., 509, 512, 514.

in Weimar Germany.[58] The legacies of these countervailing developments in the late nineteenth and early twentieth centuries, he maintained, threw up a governance challenge that none of the preceding regimes in Germany had solved. The solution that the new authoritarian regime devised, according to Fraenkel, was to create an institutional dispensation in which political and technical logics of governance co-existed, albeit in an unequal fashion. The duality of the Nazi state was imbalanced, characterized as it was by the "primacy" ("*Primat*") of the political over the technical apparatus of the state.[59] As Fraenkel put it, "Germany today lives by dual law" ("*Deutschland lebt heute nach doppeltem Recht*").[60] But, as he hastened to add, it was not just a question of governance by two *types* of law; it also gave rise to governance by different *principles* of law.

What Fraenkel meant was that legal governance in the technical apparatus of state was structured by an elaborate and systematic set of established legal norms, rules, codes, and procedures. By contrast, legal governance in the "political state" ("*politischen Staat*") was not systematic, but wanton and senseless. In Fraenkel's reading, the few legal provisions that were explicitly crafted for the political state, and which, in theory at least, structured its operation, were "without exception so shallow in substantive terms that they amount to no more than the appearance of a legal norm" ("*ausnahmslos inhaltlich so farblos, daß sie lediglich den Schein einer Rechtsnorm darstellen*").[61] Another way of putting this is that the technical state (that is, the normative state) abided by the rule *of* law, whereas the political state (that is, the prerogative state) embodied rule *by* law. The former was governed by formal rationality, the latter by substantive rationality.[62] The primacy of the prerogative over the normative state, argued Fraenkel, was evidenced by the fact that the validity of the pre-Nazi legal norms, rules, codes, and procedures of the normative state was contingent; it was contingent on non-abrogation and non-suspension by the prerogative state.

The question arises why the Nazi regime did not do away with the remnants of the *Rechtsstaat* entirely. After all, as Fraenkel pointed out, the Nazis ridiculed any state that was "merely *Rechtsstaat*" ("*nichts als Rechtsstaat*"), this uniquely German variant of the rule-of-law

[58] Ibid., 507. [59] Ibid., 508. [60] Ibid., 509. [61] Ibid., 509.
[62] Ibid., 510. See also my discussion of Weber's typology of law below.

state.[63] He reminded his readers that Ernst Forsthoff, one of the regime's young constitutional lawyers, had not long ago declared the pure *Rechtsstaat* to be a state lacking in "honor and dignity" ("*Ehre und Würde*").[64] But if the Nazis regarded the legacies of Weimar law as "law without value" ("*Recht ohne Wert*"), and if they were further convinced that the NSDAP's political manifesto was the instrument for injecting value into the (literally) meaningless legal order, why did the normative state of old survive? Indeed, why did this (in Nazi eyes) substantively hollow, formally rational state not only survive but occupy "a significant place" ("*einen bedeutenden Platz*") in the institutional architecture of the Nazi regime, as Fraenkel claimed it did?[65]

In this first stab at providing an answer, Fraenkel turned to orthodoxy. He believed that a dictator would not embrace a normative state for the sake of principle. It would always be a strategic choice. One of the most immediate challenges the Nazis faced was how to ensure that the country would thrive economically in the midst of a social and racial revolution.[66] Upon seizing power, Hitler and his newly incumbent government continued on, and heavily fortified, the well-worn path toward state interventionism into the economy that governing elites in Weimar Republic had established. But, as Adam Tooze has pointed out, "though it is important to do justice to the shift in power relations between state and business that undoubtedly occurred in the early 1930s, we must be careful to avoid falling into the trap of viewing German business merely as the passive object of the regime's draconian new system of regulation."[67] This brings us back to Fraenkel, who, in 1937, proffered a Marxist interpretation of the origins and logic of Nazi Germany's dual state.

It is worth reconstructing this interpretation in some detail because it all but disappeared, for reasons to be explained below, from the 1941 edition of *The Dual State*. In 1937, Fraenkel started with the assumption that capitalism had grown "economically and ideologically impotent."[68] He asserted that Germany's "high capitalism" of the 1920s was

[63] Ibid., 510.

[64] Ernst Forsthoff, *Der totale Staat* (Hamburg: Hanseatische Verlagsanstalt, 1933), 30.

[65] Fraenkel, "Das Dritte Reich als Doppelstaat" [1937], 512.

[66] Generally, see Dan Silverman, *Hitler's Economy: Nazi Work Creation Programs, 1933–1936* (Cambridge: Harvard University Press, 1998).

[67] Adam Tooze, *The Wages of Destruction: The Making and Breaking of the Nazi Economy* (London: Penguin, 2008), 114.

[68] Fraenkel, "Das Dritte Reich als Doppelstaat" [1937], 517.

doomed to extinction unless revived by a strategic alliance with a racial state whose ambition to rearm the nation would inject the ailing economy with the funds necessary to secure its survival. With both the Nazi regime and the weakened "capitalist order," as Fraenkel called it, having an immediate interest in preserving the foundations of economic activity in Germany, it followed that the march of the prerogative state had to be slowed down. The temporary retention of the normative state served as the necessary break on the consolidation of totalitarianism in Nazi Germany. Here is how Fraenkel put it in 1937:

> If capitalism wants to remain capitalism, it requires at home a state apparatus that recognizes the rules of formal rationality, for without a predictability of opportunities, without legal certainty ("*Rechtssicherheit*"), capitalist planning is impossible. Capitalism today demands of the state a double ("*ein Doppeltes*"): Because capitalism is capitalism, it demands, first, the formally rational order of a technically intact state. Because capitalism is impotent, it demands, furthermore, a state that provides the political supports ("*politischen Stützen*") necessary to ensure its continued existence; a state with enemies against which capitalism is allowed to arm … [69]

The consequences of this capitalist alignment with the Nazi dictatorship produced positive externalities for political and economic elites alike: "What Hitler's regime positively enabled German business to do was to recover from the disastrous recession, to accumulate capital and to engage in high-pressure development of certain key technologies: the technologies necessary to achieve the regime's twin objectives of increased self-sufficiency (autarchy) and rearmament."[70] Fraenkel was convinced that Germany's capitalists sacrificed the well-being of the Nazis' real and imagined enemies on the altar of economic accumulation. As he put it, borrowing Marxist terminology, "the dual state is the ideological superstructure (*Überbau*) of a capitalism that thrives on politics because it is unable to exist any longer without politics."[71]

The root cause for this malaise Fraenkel detected in the changing character of politics, which he believed had been partially brought about by a radical transformation of the "concept of the political" ("*Begriff des Politischen*") in interwar Germany.[72] For him, the rise of

[69] Ibid., 518. [70] Tooze, *The Wages of Destruction*, 114.
[71] Fraenkel, "Das Dritte Reich als Doppelstaat" [1937], 518.
[72] Ibid., 514.

the "political leadership state" ("*politische[r] Führer-Staat*"), the institutional antecedent of the full-blown prerogative state, was causally related to the intellectual redrawing of the boundaries of politics and of the political by members of what became known as the *Konservative Revolution*, a loosely connected movement of conservatives and reactionaries that was intent on interrupting their country's quickening march to modernity.[73] He wrote with concern about the "depoliticization of the state," a gradual process that he believed was hastened when the country's highest court, the *Reichsgericht*, the federal high court for civil and criminal matters, in a decision in which one of its chambers adjudicated the question of whether a member of the SA was, legally speaking, a civil servant. Its finding that the individual in question could not be considered a civil servant because his activities were of a political nature, and that only members of the normative state were bureaucrats, properly understood, Fraenkel found unpersuasive. He rejected the artificial distinction between Nazi state and Nazi party that underpinned the *Reichsgericht*'s reasoning. By relying on an impossibly narrow concept of the state (that is, the state as the technical apparatus of the normative state), the judges legitimated the Nazis' campaign to depoliticize the state. Their decision embodied the infamous Hitlerian injunction that the state did not govern the NSDAP, but the NSDAP the state.[74] This, said Fraenkel, was the institutional realization of a new concept of the political—that of Carl Schmitt.[75]

[73] Ibid., 507. On the anatomy of the so-called "Conservative Revolution" in Weimar Germany, see, most important, Fritz Stern, *The Politics of Cultural Despair: A Study in the Rise of the Germanic Ideology* (Berkeley: University of California Press, [1961] 1992); Jeffrey Herf, *Reactionary Modernism: Technology, Culture, and Politics in Weimar and the Third Reich* (Cambridge University Press, 1984); Stefan Breuer, *Anatomie der Konservativen Revolution* (Darmstadt: Wissenschaftliche Buchgesellschaft, 1993); Rolf Peter Sieferle, *Die Konservative Revolution: Fünf biographische Skizzen* (Frankfurt: Fischer, 1995); and Martin Travers, *Critics of Modernity: The Literature of the Conservative Revolution in Germany, 1890-1933* (New York: Peter Lang, 2001). For a sympathetic chronicle of the *Konservative Revolution* by the scholar who, in 1949, invented the term, see Armin Mohler, *Die Konservative Revolution in Deutschland 1918–1932: Ein Handbuch*, second, enlarged edition (Darmstadt: Wissenschaftliche Buchgesellschaft, 1972). On anti-democratic thought in interwar Germany more generally, see Kurt Sontheimer, *Antidemokratisches Denken in der Weimarer Republik* (Munich: Deutscher Taschenbuch Verlag, [1962] 1978).

[74] Ibid., 514.

[75] On Carl Schmitt, see, most recently, the contributions to Jens Meierhenrich and Oliver Simons, eds., *The Oxford Handbook of Carl Schmitt* (Oxford: Oxford University Press, 2016).

In his first exposition of the dual-state argument, Fraenkel described Schmitt as "the most prominent figure in the neo-German state theory" ("*der prominenteste Kopf der neudeutschen Staatsrechtslehre*").[76] He singled him out for opprobrium, holding the famous jurist to account for having paved the way, especially with the publication of *Die geistesgeschichtliche Lage des heutigen Parlamentarismus* (*The Crisis of Parliamentary Democracy*) in 1923, for the rise of the "National-Socialist counter-state" ("*nationalsozialistische Gegenstaat*"). In addition to this failing, Fraenkel held Schmitt to task for having deliberately obscured the nature and meaning of political activity. As Fraenkel wrote, "It is not at all the case that the substance of politics ("*der Inhalt dessen, was Politik ist*") is explained by the concept of the political."[77] This is what Fraenkel called the "political function" ("*politische Funktion*") of Schmitt's concept of the political.[78] He warned that an insistence on the friend–enemy distinction as the defining attribute of the concept of the political enabled and legitimated "activity for activity's sake" ("*Aktivität um der Aktivität willen*") in the pursuit of contentious politics.[79] If politics is no longer about substantive issues, but only existential enemies, the road via the prerogative state looks less like a detour and more like a straight path to a more meaningful politics. Fraenkel paraphrased Schmitt: "It is of secondary importance who the enemy is. Key is that an enemy exists at all. Without an enemy, there is no politics …."[80] If we believe Fraenkel, what Schmitt concealed from his readers was that capitalism itself was dependent on a categorization of "the other," of a division of the world into friends and enemies: "Without a potential enemy, one against whom [the country] can be mobilized and armed, capitalism will cease to exist in Germany."[81]

Fraenkel was prescient about the political economy of dictatorship. He warned of the predictable consequences of collusion between big

[76] Fraenkel, "Das Dritte Reich als Doppelstaat" [1937], 506. Carl Schmitt, *The Crisis of Parliamentary Democracy*, translated by Ellen Kennedy (Cambridge: MIT Press, [1923] 1988).

[77] Fraenkel, "Das Dritte Reich als Doppelstaat" [1937], 515.

[78] Ibid., 515.

[79] Fraenkel here invoked a formulation that Hermann Heller had used in *Europa und der Fascismus* (Berlin: De Gruyter, [1929] 2014), the phrase apparently a fascist's response to the question of what characterized the nature of fascism. Fraenkel, "Das Dritte Reich als Doppelstaat" [1937], 515.

[80] Fraenkel, "Das Dritte Reich als Doppelstaat" [1937], 517.

[81] Ibid., 517.

business and the racial state. The 1937 article ended on a rhetorically powerful note. Fraenkel declared that embedded in the "substantive rationality of National Socialism" was a desire for the destruction of the world. National Socialism was only "alive," he opined, because "it was readying itself to kill" *("[der Nationalsozialismus] nur dadurch zu leben vermag, daß er sich zum Töten vorbereitet*").[82]

The *Urdoppelstaat* (1938)

Fraenkel's first foray in the *Sozialistische Warte* quickly developed into a draft, clandestine manuscript, entitled *Der Doppelstaat: Ein Beitrag zur Staatslehre der deutschen Diktatur* (*The Dual State: A Contribution to the State Theory of the German Dictatorship*; hereinafter *Urdoppelstaat*).[83] The book-length treatment retained the unique blend of reason and emotion—of, on the one hand, dispassionate analysis that embodied the Weberian ideal of value neutrality, and, on the other, vociferous advocacy in opposition to the Nazi destruction of the *Rechtsstaat*. Given its explosive nature, one of Fraenkel's clients, Wilhelm Urban, a coal merchant active in the anti-Nazi resistance, temporarily hid the sensitive draft.[84] The book manuscript, written in German and only ever intended for an audience in his fatherland, found its way to the United States via France by way of a French embassy official. One of Fraenkel's most trusted colleagues in this period—Fritz Eberhardt (the pseudonym of Hellmut von Rauschenplat)—was not only critical to the beginnings of the *Urdoppelstaat* but also to its survival.[85] As Fraenkel recalled in his preface to the 1974 German edition:

> This book could not have been completed without the encouragement and continuous support of the *Internationaler Sozialistischer Kampfbund*, which was very active and exemplarily disciplined in

[82] Ibid., 519.

[83] Ernst Fraenkel, *Der Urdoppelstaat* [1938], in *Gesammelte Schriften*, vol. 2, 267–473.

[84] Ernst Fraenkel, "Erklärung über die Tätigkeit des Herrn Wilhelm Urban in den Jahren 1933 bis 1938 vom 22. Oktober 1953," BArch N 1274 (Fraenkel, Ernst)/11, reprinted in Fraenkel, *Gesammelte Schriften*, vol. 2, 625.

[85] Note that uncertainty surrounds the spelling of von Rauschenplat's pseudonym. Fraenkel himself, in the 1974 German edition, rendered it as "Eberhardt," which I have adopted. The editors of the 2012 German edition of *The Dual State* have done the same. However, both Fraenkel's biographer and the editors of his collected works have opted for "Eberhard" instead.

> the illegal underground movement. For years, I worked very closely with their Head of Domestic Affairs ("*Inlandsleiter*") Dr. Hellmut von Rauschenplat (Dr. Fritz Eberhardt), who was responsible for coordinating the movement's local resistance groups as well as for liaising with the Emigration Directorate ("*Emigrationsleitung*"), which was based in Paris. During long walks, we exchanged ideas about the meaning and purpose of illegal work ("*illegaler Arbeit*") and sought to gain greater clarity about the phenomenon of National Socialism. In the wake of such exchanges, I repeatedly dictated the conclusions we had reached in the form of short essays to Fritz Eberhardt who took stenographic notes ("*in das Stenogramm diktiert*"). They were intended for publication in the ISK journal *Sozialistische Warte*, which was published in Paris and subsequently distributed in Germany in the form of illegal flyers ("*illegale Flugblätter*")…. One of these articles contains the original version ("*Urfassung*") of *The Dual State*.[86]

Throughout his life, Fraenkel stated that the beginnings of the dual state concept lay in his personal encounters with the Hitler regime—as a lawyer, a social democrat, and a Jew. While allowed to practice law as a veteran of World War I, Fraenkel was simultaneously subjected to official and unofficial discrimination and intimidation. This schizophrenic experience prompted the idea of the dual state as a metaphor and concept—a state consisting of two halves, with conflicting imperatives. Fraenkel described the origins of his clandestine manuscript most eloquently (and comprehensively) in the preface to the 1974 German edition of *The Dual State*, which appears in this volume for the first time in English translation:

> The book is the result of internal emigration ("*innere Emigration*"). Its first version, which is also the foundation for this German edition, was written in an atmosphere of lawlessness and terror. It was based on sources that I collected in National Socialist Berlin, and on impressions that were forced upon me day in, day out ("*die sich mir tagtäglich aufgedrängt haben*"). It was conceived out of the need to make sense of these experiences theoretically in order to be able to cope with them. They stem mostly, though not exclusively, from my work as a practicing lawyer in Berlin in the years 1933–1938. Despite being Jewish, I was permitted, due to my military service during the [First World] War, to practice at the bar even after 1933. The ambivalence of my bourgeois existence caused me to be particularly attuned to the contradictoriness ("*Widersprüchlichkeit*") of the Hitler regime. Though, legally speaking,

[86] Fraenkel, "Preface to the 1974 German Edition," xviii.

> an equal member of the Bar, wherever I went, I was nonetheless subject to harassments, discriminations, and humiliations that emanated exclusively from the *staatstragende Partei* [literally: state-sustaining political party, i.e., the ruling Nazi party]. Anyone who did not shut his or her eyes to the reality of the Hitler dictatorship's administrative and judicial practices, must have been affected by the frivolous cynicism with which the state and the [Nazi] party called into question, for entire spheres of life, the validity of the legal order while, at the same time, applying, with bureaucratic exactness ("*mit bürokratischer Exaktheit*"), exactly the same legal provisions in situations that were said to be different ("*anders bewerteten Situationen*").[87]

In methodological terms, *The Dual State* exemplifies the practice of "extracting new ideas at close range."[88] Participant observation aside, much of the research for the *Urdoppelstaat* was based on secondary sources as well as court cases. Fraenkel undertook it in Berlin's famous *Staatsbibliothek*, at the time the largest library in the German-speaking world. It is important to fully appreciate Fraenkel's scholarly achievement: He managed to research and write—from inside Nazi Germany—a sophisticated analysis of the institutional formation, transformation, and deformation of both law and the state in the country of his birth, and he did so by relying exclusively on participant observation and sources acceptable to the Nazis.[89] And with little regard for his safety. When he recounted, years later, his days of researching materials for the *Urdoppelstaat*, Fraenkel recalled that he tried to confuse and ditch Nazi spies in the *Staatsbibliothek* by ordering a slew of unrelated titles about every topic under the sun.

Despite the fact that Fraenkel's insurgent scholarship was taking up a great deal of his time, he continued to practice law in the courts of the "Third Reich." He was wont to describe his role in the transition from authoritarianism to totalitarianism in Nazi Germany to friends as that of a "switchman" ("*Weichensteller*"):

> That is, I regarded it an essential part of my efforts to ensure that a given case was dealt with under the auspices of the "normative state," and

[87] Ibid., xv.

[88] David Collier, "Data, Field Work, and Extracting New Ideas at Close Range," *APSA-CP: Newsletter of the Organized Section in Comparative Politics of the American Political Science Association*, no. 10 (1999), 1–6.

[89] Ernst Fraenkel, "Preface" [1939], New York Public Library, Manuscripts and Archives Division, American Committee for the Guidance of Professional Personnel records, Box 2, Fraenkel, Ernst, "The Dual State."

> not end up in the "prerogative state." Colleagues with whom I was on friendly terms confirmed that they, too, had repeatedly worked toward making sure that their clients were punished in a court of law ("*daß ihre Mandanten gerichtlich bestraft würden*") [rather than risking their arbitrary punishment in the prerogative state].[90]

Eventually, the prerogative state turned on Fraenkel himself. When, in 1935, his name appeared on a Gestapo list of thirteen lawyers whose representation of SPD defendants had rankled the Nazi authorities, Fraenkel and his wife decided to seek refuge abroad. They left Germany on September 20, 1938, a mere six weeks before the first systematic violent anti-Jewish pogrom—known by the euphemism "*Kristallnacht*"—in the course of which 267 synagogues were destroyed, an estimated 7,500 Jewish commercial establishments vandalized or looted or both, and 30,000 Jewish males rounded up and transferred to concentration camps.[91]

After a brief stay in London, to where Fraenkel's fellow lawyer friends Otto Kahn-Freund and Franz Neumann had previously emigrated, the Fraenkels fled to New York. Family connections meant that entry to the United States was assured and a visa easily obtained. Fraenkel's most important cargo—what he referred to as the *Urdoppelstaat*—made the journey by way of a French embassy official in Berlin. The brave diplomat, whom Eberhardt had drafted into the cause, hid the book manuscript in his diplomatic luggage and smuggled it to Paris—thus securing the work's survival.[92] We now know that a carbon copy was buried for safekeeping in the garden of Otto and Susanne Suhr, but it was the well-travelled copy of the *Urdoppelstaat* that would serve as the foundation for the revision in exile.[93] This first draft ("*die erste Fassung*") was the nucleus of *The Dual State*.[94]

[90] Fraenkel, "Preface to the 1974 German Edition," xix.

[91] Nikolaus Wachsmann, *KL: A History of the Nazi Concentration Camps* (New York: Little, Brown, 2015), 181.

[92] Fraenkel, for example, used the term "*Ur-Doppelstaat*" (nowadays usually rendered as *Urdoppelstaat*) in his preface to the first German edition of *The Dual State*, published in 1974. See his "Preface to the 1974 German Edition," TBA. At the time, this original German version was thought lost. It resurfaced only years later.

[93] Fraenkel, "Preface to the 1974 German Edition," xiii. The source for the anecdote about the carbon copy is Wolfgang Müller. He made this claim on September 29, 2009, as quoted in Ladwig-Winters, *Ernst Fraenkel*, 357, fn. 148. Otto Suhr, a Social Democrat, was a lifelong friend of Fraenkel's. Between 1955 and his death in 1957, Suhr was mayor of West Berlin. In 1920, Suhr had founded the *Deutsche Hochschule für Politik*, in effect the country's first department of political science.

[94] Fraenkel, "Preface to the 1974 German Edition," xiii.

Alexander v. Brünneck, the editor of Fraenkel's collected writings from and about the Nazi period, has detected "significant differences" between the *Urdoppelstaat* (completed in 1938) and *The Dual State* (completed in 1940). Fraenkel himself downplayed any such differences, suggesting they were about semantics rather than substance.[95] But v. Brünneck, a long-standing scholar and former student of Fraenkel, is undeniably correct. Four major differences stand out.

First, the *Urdoppelstaat* was shorter than *The Dual State*. By Fraenkel's own estimation, the *Urdoppelstaat* accounted for no more than 60 percent of the manuscript for *The Dual State*.[96] If we compare the length of both versions as they appear (in German) in the collected works, it is obvious that Fraenkel's estimation was off the mark.[97] Although it is true that the published (German) version of 1974 was longer than the *Urdoppelstaat*, the difference was less substantial than Fraenkel thought. Whereas the 1999 reprint in the collected works of the 1974 German translation (a retranslation of the 1941 OUP edition) comes in at 226 pages, the reprint of the *Urdoppelstaat* is 206 pages long. If the latter had comprised the 60 percent of *The Dual State* that Fraenkel thought it did, its reprint in the collected works should not have amounted to more than 136 pages.[98] In other words, the *Urdoppelstaat* was shorter than *The Dual State*, but only slightly so, not significantly, as Fraenkel maintained.

These unexpected similarities in length aside, certain sections in *The Dual State* are more elaborate, others less so, than in the *Urdoppelstaat*. See Table 1. For the publication of *The Dual State*, Fraenkel substantially condensed Chapter 2 in Part II, which analyzed the Nazi onslaught on natural law in Germany. The revised analysis is five print pages shorter. Gone is the separate excursus on Hegel's influence on Nazi legal theory. Aspects of this account Fraenkel folded into the now extended analysis of what in 1941 he called "secular natural law" ("*das weltliche Naturrecht*")—and which he distinguished from "Christian

[95] Ibid., xiii–xiv.

[96] Ernst Fraenkel, Letter to Alexander v. Brünneck, April 23, 1970, BArch N 1274 (Fraenkel, Ernst)/98. See also v. Brünneck, "Vorwort zu diesem Band" [vol. 2], 17.

[97] Compare Fraenkel, *Der Urdoppelstaat*; and Ernst Fraenkel, *Der Doppelstaat* [1974], in *Gesammelte Schriften,* vol. 2, 33–266.

[98] Ernst Fraenkel, *Der Doppelstaat* [1974], in Fraenkel, *Gesammelte Schriften*, vol. 2, 33–259 (excluding three appendices that were neither parts of the *Urdoppelstaat* nor the 1941 English edition); Ernst Fraenkel, *Der Urdoppelstaat* [1938], in Fraenkel, *Gesammelte Schriften*, vol. 2, 267–473. By way of comparison, the published English edition of 1941 was 248 pages long, including end matter.

Table 1 A Comparison of the *Urdoppelstaat* (1938) and *the Dual State* (1941): Structure, Organization, and Length

The *Urdoppelstaat* (1938)	*The Dual State* (1941)
Part I: *Die Rechtsordnung des Doppelstaates* (97 pages)	Part I: *Die Rechtsordnung des Doppelstaates* (103 pages)
Chapter 1: *Der Maßnahmenstaat* (52 pages)	Chapter 1: *Der Maßnahmenstaat* (57 pages)
Chapter 2: *Die Grenzen des Maßnahmenstaates* (8 pages)	Chapter 2: *Die Grenzen des Maßnahmenstaates* (6 pages)
Chapter 3: *Der Normenstaat* (33 pages)	Chapter 3: *Der Normenstaat* (36 pages)
Part II: *Die Rechtslehre des Doppelstaates* (49 pages)	Part II: *Die Rechtslehre des Doppelstaates* (45 pages)
Chapter 1: *Die Negation des rationalen Naturrechts durch den Nationalsozialismus* (6 pages)	Chapter 1: *Die Ablehnung des rationalen Naturrechts durch den Nationalsozialismus* (7 pages)
Chapter 2: *Der Nationalsozialismus im Kampf gegen die Restbestände des rationalen Naturrechts* (22 pages)	Chapter 2: *Der Nationalsozialismus im Kampf gegen das Naturrecht* (17 pages)
Chapter 3: *Nationalsozialismus und gemeinschaftliches Naturrecht* (17 pages)	Chapter 3: *Nationalsozialismus und gemeinschaftliches Naturrecht* (17 pages)
Part III: *Die Rechtswirklichkeit des Doppelstaates* (54 pages)	Part III: *Die Rechtswirklichkeit des Doppelstaates* (56 pages)
Chapter 1: *Die Rechtsgeschichte des Doppelstaates* (18 pages)	Chapter 1: *Die Rechtsgeschichte des Doppelstaates* (17 pages)
Chapter 2: *Die Oekonomie des Doppelstaates* (8 pages)	Chapter 2: *Die ökonomischen Grundlagen des Doppelstaates* (16 pages)
Chapter 3: *Die Soziologie des Doppelstaates* (24 pages)	Chapter 3: *Die Soziologie des Doppelstaates* (19 pages)

Note: For the sake of accuracy, the comparison is based on the 1999 German editions of both books as they appear in Ernst Fraenkel's collected works. See Fraenkel, *Der Urdoppelstaat* [1938], in *Gesammelte Schriften,* vol. 2, 267–473; and Fraenkel, *Der Doppelstaat* [1974], in *Gesammelte Schriften,* vol. 2, 33–266. For the purpose of this exercise, I leave aside for the moment the editorial and substantive differences between the 1941 English edition and the 1974 German edition. The latter was the product of a slightly modified retranslation of the former.

natural law" ("*das christliche Naturrecht*").[99] More significant differences are noticeable in Part III. There, Fraenkel expanded his analysis of the political economy of the dual state. In the *Urdoppelstaat*, he had devoted eight pages to the topic, three years later the analysis was twice as long. This is interesting because of a second, substantive difference between the *Urdoppelstaat* and *The Dual State*.

There is diminished evidence in *The Dual State* of the functionalist, class-based analysis of law and society that characterized parts of the *Urdoppelstaat* as well as the 1937 article that had preceded it. The theoretical position of the original argument most certainly owed to Fraenkel's left-leaning socialization as well as to the ever-widening social inequality in interwar Germany that he was witnessing year in, year out. The turn to class as a conceptual variable came easily, but Fraenkel was more circumspect in his channeling of the materialist theory of history than some his contemporaries, including Neumann.[100] For example, in a section of the *Urdoppelsaat* that did not make it into the 1914 book, Fraenkel explicitly distanced himself from mainstream, communist interpretations:

> We are far away from claiming that big agriculture ("*Großagrarier*") and heavy industry raised the Hitler movement as their vassal ("*Hausknecht*"), so to speak. The course of world history cannot be explained in such simple terms, nor can the materialist conception of history ("*die materialistische Geschichtsauffassung*") be applied in such a crude fashion.[101]

Fraenkel's take was more nuanced. He, too, believed that the peculiar logic of capitalism in Germany had played a role in the rise of the Nazis. However, his causal logic was less reductionist than that of Germany's communists. It was social-democratic in origin, infused with socialist ideas, not communist ones. For their elaboration, Fraenkel relied, among others, on the Austrian-born American economist Joseph Schumpeter, who would go on to publish, in 1942, *Capitalism,*

[99] Fraenkel, *Der Doppelstaat* [1941], 173–84; Fraenkel, *Der Urdoppelstaat* [1938], 384–400.

[100] See, for example, Franz Neumann's glowing review of Harold Laski's 1935 *The State in Theory and Practice*, which he praised for coming to "a real Marxist conclusion." See idem., "On the Marxist Theory of the State" [1935], in Keith Tribe, ed., *Social Democracy and the Rule of Law: Otto Kirchheimer and Franz Neumann* (London: Allen and Unwin, 1987), 76.

[101] Fraenkel, *Der Urdoppelstaat* [1938], 441.

Socialism, and Democracy.[102] In the *Urdoppelstaat*, Fraenkel invoked Schumpeter's article "The Sociology of Imperialisms."[103] In the 1918 essay, Schumpeter, while not unsympathetic, cast doubt on the explanatory power of "neo-Marxist theory" to account for the phenomenon of imperialist expansion.[104] With the help of a comparative historical analysis of empirical instances of imperialism, Schumpeter pierced the universalizing ambition of the materialist conception of history. Fraenkel applied the essence of Schumpeter's argument to the case of Nazism. Reasoning by analogy, he argued that National Socialism was not a product of capitalism; rather National Socialism (like nationalism and militarism in Schumpeter's case) was "capitalized," with the effect that National Socialism was recruiting its best personnel ("*beste Kräfte*") from the capitalist ranks.[105] Like Schumpeter, Fraenkel was influenced by Marxist thought. But neither man swallowed the theoretical framework whole. The relationship between capitalism and National Socialism, according to Fraenkel, was mutually constitutive: The former draws in the latter and thereby sustains it; the latter, in turn, gradually transforms the nature of the former.

Remnants of this interpretation can be found in the draft English translation (hereinafter the NYPL draft after the New York Public Library where it is held). In one part of the typed manuscript, for example, Fraenkel argued as follows:

> The legal order of the Third Reich is thoroughly rationalized in a functional sense with reference to the regulation of production and exchange in accordance with capitalistic methods. But late capitalistic economic activity is not substantially rational. For this reason it has had recourse to political methods, while giving to these methods the contentlessness [*sic*] of irrational activity. Capitalism at its high point was a system of substantial rationality which, relying on the prestabilised [*sic*] harmony which guided its destinies, exerted itself to remove irrational obstacles. When the belief in the substantial rationality of capitalism disappeared its functionally rationalized organizations still remained. What is the character of the tension which arises in consequence of this

[102] Joseph A. Schumpeter, *Capitalism, Socialism, and Democracy* (New York: Harper, 1942).

[103] Joseph A. Schumpeter, "The Sociology of Imperialisms" [1918], in Joseph A. Schumpeter, *The Economics and Sociology of Capitalism*, edited by Richard Swedberg (Princeton: Princeton University Press, 1991), 141–219.

[104] Schumpeter, "The Sociology of Imperialisms" [1918], 144.

[105] Fraenkel, *Der Urdoppelstaat* [1938], 441.

> juxtaposition of a substantial rationality in a process of disappearance and maximally developed functional rationality?[106]

This section channeled both Marx and Weber. The approach was Marxist, the argumentation Weberian. But Fraenkel also made recourse to Karl Mannheim's recent work on the nature of rationality (which I discuss in more detail below), notably in his argument about the economic origins of dictatorship in the case of Nazi Germany.

Fraenkel toned down this functional interpretation of Nazi dictatorship in the transition from *Urdoppelstaat* to *The Dual State*. Fraenkel, likely on the basis of conversations with mentors and colleagues, decided that the American audience he hoped to reach with the publication of an English edition might not appreciate an overtly Marxist interpretation of German history. This brings us to a third major difference between the *Urdoppelstaat* and *The Dual State*: the tone. The *Urdoppelstaat* was considerably more passionate than *The Dual State*. Large chunks of it had more in common with Fraenkel's essayistic interventions on behalf of the ISK in the 1920s and 1930s than with the detached analysis for which *The Dual State* is deservedly known. The change in tone was a consequence of the change in target audience. Whereas Fraenkel drafted the *Urdoppelstaat* with German readers in mind, he conceived *The Dual State* for a much broader readership. To this end, the language, terminology, empirical references, and even the argument needed to be rethought and tweaked. But the efforts were worth it. In the transition from *Urdoppelstaat* to *The Dual State*, an act of resistance turned into a contribution to scholarship.

Fourth, Fraenkel's translators, presumably in extensive conversation with the author himself, translated his concept of *Maßnahmenstaat* (literally: state of measures) as "prerogative state." In order to motivate this conceptual innovation and to avoid misunderstanding, Fraenkel included in the 1941 English edition a two-page discussion of John Locke's concept of the prerogative, with which his notion of the prerogative state must not be confused.[107] As Fraenkel wrote, "[A] connection might be presumed to exist between the neo-German

[106] New York Public Library, Manuscripts and Archives Division, American Committee for the Guidance of Professional Personnel records, Box 2, Fraenkel, Ernst "The Dual State." Here and in subsequent references to the NYPL draft, I silently incorporated all of Fraenkel's handwritten corrections into the excerpted section.

[107] Fraenkel, *The Dual State*, 66–67. On Locke's concept of the prerogative, see, for example, Pasquale Pasquino, "Locke on King's Prerogative," *Political Theory*, vol. 26 (1998), 198–208. More generally, see Clement Fatovic, "The Political Theology

constitutional doctrine [of the prerogative] and Locke's theory. Such a hypothesis would, however, be incorrect."[108] Fraenkel goes on to show how Locke's theory failed to make an impression on leading countries (England, France, United States) and leading thinkers (Thomas Jefferson, Montesquieu) alike. In *The Dual State*, Fraenkel quoted a passage from §158 in the Second Treatise of *Two Treatises of Civil Government* to capture Locke's definition of the concept: "Prerogative is nothing but the power of doing public good without a rule."[109] The bearer of the prerogative, in Locke's conception, governs "without the prescription of Law … and sometimes even against it".[110]

Despite conceptual similarities between Fraenkel's notion of the prerogative and Locke's, Fraenkel was adamant that he was not channeling Locke's doctrine of the separation of powers. And he was right to, for Locke's extra-legal power was not an arbitrary one.[111] Locke's understanding of the prerogative was imbued with values of paternity. Although the bearer of the prerogative decided the exception, it was a *benign* power. Fraenkel (and his translators) took a key Lockean term out of context, thereby turning the bearer of the prerogative into an utterly *malign* power—a power "tending to evil."[112]

The Dual State (1941)

In the United States, Fraenkel rewrote the *Urdoppelstaat* for American and English readers. His pathbreaking analysis would have aged considerably less well—and likely not be in need of republication in the twenty-first century—had Fraenkel not extensively revised it in exile. In the preface of the 1974 German edition, which appears in this 2017 edition of *The Dual State* in translation for the first time, he described the transition from *Urdoppelstaat* to OUP manuscript thus:

> In the drafting of the manuscript and its translation into English, special emphasis was placed on explaining the Third Reich's system of rule ("*Herrschaftsstruktur*") in academic categories that would be familiar to

of Prerogative: The Jurisprudential Miracle in Liberal Constitutional Thought," *Perspectives on Politics*, vol. 6 (2008), 487–501.

[108] Fraenkel, *The Dual State*, 67.

[109] Ibid., 66. See John Locke, *Two Treatises of Government*, edited by Peter Laslett (Cambridge: Cambridge University Press, [1690], 1988), 373, §158.

[110] Locke, *Two Treatises of Government*, 375, §159.

[111] Pasquino, "Locke on King's Prerogative," 205.

[112] "Tending to evil" is the translation of the Latin term "*malignus*."

> the social-scientifically trained American reader—paraphrasing them, if necessary, to render them comprehensible. I need only point to such foundational terms as "*Ausnahmezustand*" [which most accurately translates as state of exception] and "Martial Law." A translation of the German text into English made sense only if it also involved a transposition ("*Transponierung*") of concepts from the National Socialist into the American system of government ("*Regierungssystem*").[113]

The resulting manuscript, translated into English by Edward A. Shils, a sociologist at the University of Chicago who later worked with Talcott Parsons, in collaboration with Edith Löwenstein (incorrectly spelled Lowenstein on the frontispiece) and Klaus Knorr, combined in a compelling way an astute analysis of ethnographic (and other qualitative) data with a penchant for theoretical reasoning. It was a powerful analytic narrative of its time. After months of overhauling the *Urdoppelstaat*, Fraenkel secured a contract with Oxford University Press for its publication. Several organizations, institutions, and individuals provided subventions to aid the book's completion and production, including the American Guild for German Cultural Freedom, the Graduate Faculty at the New School for Social Research, and the International Institute of Social Research, the latter being the famous, exiled *Institut für Sozialforschung*, previously based in Frankfurt, Germany, and since mid-1934 housed at Columbia University.[114]

One would have thought that the large number of emigré scholars from Germany who had found refuge in New York City made for a stimulating intellectual environment in which to turn the *Urdoppelstaat* into *The Dual State*. After all, Fraenkel's had been a household name in Germany, and his Weimar-era publications are said to have reached more than 100,000 readers.[115] This was not to be. Fraenkel was in for a rude awakening. There was no interest on the part of the refugee community's leading intellectuals in a study of the legal origins of dictatorship. No one seemed to think that a publication for the English-language market was a necessity. Max Horkheimer's positive, yet tepid response illustrates the general

[113] Fraenkel, "Preface to the 1974 German Edition," xiii–xiv.

[114] Fraenkel, *The Dual State*, v; Martin Jay, *The Dialectical Imagination: A History of the Frankfurt School and the Institute of Social Research 1923–1950*, second edition (Berkeley: University of California Press, 1996), 39.

[115] The figure stems from Ladwig-Winters, *Ernst Fraenkel*, 140.

mood. In early 1939, Fraenkel had shared one of the versions of the book manuscript with Horkheimer. The latter replied on February 9:

> But the work is not only important because it offers the first analysis of jurisprudence and scholarship. It also processes a wealth of empirical details ("*Fülle der Einzelheiten*") from a theoretical perspective that, in my opinion, is of decisive relevance ("*entscheidener Bedeutung*") not only for the production of knowledge ("*Erkenntnis*") but also for a critique of National Socialist viewpoints.[116]

Horkheimer did not support the publication of *The Dual State*. Fraenkel was largely alone in thinking that an in-depth scholarly analysis of the transition *to* Nazi dictatorship was required, indeed essential, for planning for a transition *from* Nazi dictatorship. Notwithstanding the general indifference that had greeted him and his work in the United States, Fraenkel persevered. Several scholars commented on the manuscript-in-progress, including Max Rheinstein, Franz Neumann, and, perhaps most significantly, Carl J. Friedrich, Professor of Government at Harvard University and one of the most influential political scientists in the mid-twentieth century. Friedrich's involvement with, and endorsement of, Fraenkel's project will not have hurt in OUP's deliberations about whether to publish *The Dual State*.

The New York Public Library holds a typescript of the manuscript for what eventually became the OUP book.[117] The typescript consists of a preface, a table of contents, and some chapters, with a large number of handwritten corrections.[118] The preface is dated November 2, 1939, with Chicago listed as the city where it was written. In terms of organization and substance, the typescript differs in minor rather than major ways from the published version. Inasmuch as the hundreds of additions, deletions, insertions, tweaks, and corrections altered the manuscript, mostly improving it, they did not fundamentally change the architecture and argument, save perhaps in Part III, Chapter 2 which in the manuscript of November 1939 was still entitled "The

[116] Max Horkheimer, Letter to Ernst Fraenkel, February 9, 1939, as quoted in Ladwig-Winters, *Ernst Fraenkel*, 148.

[117] New York Public Library, Manuscripts and Archives Division, American Committee for the Guidance of Professional Personnel records, Box 2, Fraenkel, Ernst "The Dual State."

[118] The corrections were done in different handwriting styles, one of which was likely Fraenkel's.

Economics of the Dual State," as it had been in the *Urdoppelstaat* ("*Die Oekonomie des Doppelstaates*").[119] In the 1941 published version, the chapter title was changed to "The Economic Background of the Dual State," a formulation that was changed to "The Economic Foundations of the Dual State" ("*Die ökonomischen Grundlagen des Doppelstaates*") in the retranslation for the 1974 German edition.[120] See also Table 1. Both changes could be seen as editorial. Alternatively, the first tweak can be interpreted as a deliberate, *substantive* shift in emphasis with the intended effect of toning down, especially for American audiences, Fraenkel's economic interpretation of the rise and consequences of the dual state phenomenon in Nazi Germany. Support for this interpretation can be gleaned from a closer reading of the corrected typescript.

There, in several paragraphs crossed out by hand, we see Fraenkel soften the language of the original. Unlike in the *Urdoppelstaat*, the question of whether Nazism represented a form of capitalism was no longer at the forefront of the analysis in Part III, Chapter 2.[121] Fraenkel instead examined the economic determinants of the dual state in a less orthodox manner. It was a structuralist perspective still, but less overtly Marxist in conception. Accordingly, "the economic *structure* of the dual state" became "the economic *policy* of the dual state," a semantic change retained in the published book.[122] The shift in tone and perspective—which, to be sure, was one of substance, not cosmetics—resulted in a nuanced analysis of economic developments in interwar Germany that was twice as long as it had been in the *Urdoppelstaat*. It was a sign of Fraenkel's intellectual development, very likely in response to the conversations and exchanges he was having in the United States, especially in Chicago. In the preface to the 1941 typescript and book, for example, Fraenkel acknowledged Gerhard Meyer of the University of Chicago for having provided him with an "unpublished manuscript on the economic system of the

[119] New York Public Library, Manuscripts and Archives Division, American Committee for the Guidance of Professional Personnel records, Box 2, Fraenkel, Ernst "The Dual State"; Fraenkel, *Der Urdoppelstaat* [1938], 270, 440.

[120] Fraenkel, *The Dual State*, xi, 171; Fraenkel, *Der Doppelstaat*, 36, 223.

[121] Ladwig-Winters, *Ernst Fraenkel*, 144.

[122] Cf. New York Public Library, Manuscripts and Archives Division, American Committee for the Guidance of Professional Personnel records, Box 2, Fraenkel, Ernst "The Dual State"; Fraenkel, *The Dual State*, 172. Emphases added.

Third Reich," a recognition that is worded even more profusely in the published acknowledgements.[123]

But there is another plausible explanation for the switch from "Economics of the Dual State" to "The Economic Background of the Dual State" as the title for Chapter 2 in Part III. The clue lays in an excised opening paragraph that was marked for deletion in the typescript. It read as follows: "The following sketchy remarks do not pretend to provide final answers. Rather they are intende[d] to give a perspective to our chief results by way of presenting a series of questions and preliminary answers."[124] It was a weak opening paragraph and OUP's copyeditor would have eventually got rid of the signposting. But it is equally plausible to assume that Fraenkel changed the chapter title because of the caveats expressed in the deleted opening sentences. If he indeed thought of his analysis as only tentative ("sketchy remarks"; "preliminary answers"), a punchy title like "The Economics of the Dual State" would have raised expectations on the part of his readers of analytical depth and breadth that Fraenkel may have been afraid of not meeting. A more prosaic chapter title like "The Economic Background of the Dual State," on the other hand, has the opposite effect: it reduces expectations.

THE ARGUMENT OF *THE DUAL STATE*

Fraenkel's principal argument had three parts.[125] The first part comprised several counterintuitive propositions about the nature of the

[123] New York Public Library, Manuscripts and Archives Division, American Committee for the Guidance of Professional Personnel records, Box 2, Fraenkel, Ernst "The Dual State"; Fraenkel, *The Dual State*, vi. In an aside, it is perhaps worth noting that Fraenkel's time at the University of Chicago overlapped with that of Friedrich Hayek, who was there completing the book that would make him a household name, *The Road to Serfdom* (London: Routledge, 1944).

[124] New York Public Library, Manuscripts and Archives Division, American Committee for the Guidance of Professional Personnel records, Box 2, Fraenkel, Ernst "The Dual State."

[125] I will not dwell in this chapter on Fraenkel's lengthy—and idiosyncratic—ruminations in *The Dual State* about the theory and history of the natural law tradition. See Fraenkel, *The Dual State*, 107–149. For a recent, comparative analysis, see Douglas G. Morris, "Write and Resist: Ernst Fraenkel and Franz Neumann on the Role of Natural Law in Fighting Nazi Tyranny," *New German Critique*, vol. 126 (2015), 197–230. See also William E. Scheuerman, "Social Democracy and the Rule of Law: The

institutional design of the Nazi political order. Fraenkel argued that this structure consisted of two interacting states: a prerogative and a normative state. The second part of his argument revolved around the *institutional effects* of this bifurcated state. Fraenkel claimed that it facilitated not only violent domination but *also* allowed for an orderly transition to and consolidation of authoritarian rule, notably by reducing incentives for exit from the Nazi polity on the part of so-called constructive forces, that is, societal groups and sectors, such as big business, that did not constitute or harbor real or imagined enemies of state. The third part of Fraenkel's argument concerned the *institutional origins* of the dual state. He was convinced that "[t]he root of the evil" had to be sought in the "community ideology" and "militant capitalism" that were holding sway in Nazi Germany.[126] I will elaborate each of these arguments in turn.

The Institutional Design of the Nazi State

With *The Dual State* Fraenkel intervened into an ongoing debate about the nature of the Nazi state—and one that is continuing to this day.[127] It was his mission to correct what he believed were major misconceptions in this debate. He highlighted the most serious of these misconceptions in his introduction to the 1941 edition of *The Dual State*: "A superficial view of the German dictatorship might be impressed either by its arbitrariness or by its efficiency based on order. It is the thesis of this book that the National-Socialist dictatorship is characterized by a combination of these two elements."[128] Fraenkel's lasting contribution to the debate was the ideal typical construction of the dual state as a conceptual variable.[129] What he produced was a theoretically compelling—and empirically verifiable—account of institutional hybridity.

Legacy of Ernst Fraenkel," in Peter C. Caldwell and William E. Scheuerman, eds., *From Liberal Democracy to Fascism* (Boston: Humanities Press, 2000), 76–85.

[126] Fraenkel, *The Dual State*, 153.

[127] For an overview of this debate, see Ian Kershaw, *The Nazi Dictatorship: Problems and Perspectives of Interpretation* (London: Bloomsbury, 2016), esp. 23–54. For a more comprehensive treatment, see Meierhenrich, *The Remnants of the* Rechtsstaat, Chapter 2.

[128] Fraenkel, *The Dual State*, xvi.

[129] Jens Meierhenrich, "Bringing the 'Dual State' Back In," Paper presented at the American Political Science Association Meeting, San Francisco, August 30–September 2, 2001.

The concept of the dual state is, at first glance, simple and straightforward. In his preface to the 1974 German edition, Fraenkel explained how it came about: "Based on the insights into the functioning of the Hitler regime that I gleaned from my legal practice, I believed to have found a key to understanding the National Socialist system of rule ("*der nationalsozialistischen Herrschaftsordnung*") in the duality or concurrent existence ("*Nebeneinander*") of a "normative state" ("*Normenstaat*") that generally respects its own laws, and a "prerogative state" ("*Maßnahmenstaat*") that violates the very same laws."[130] Fraenkel maintained that the early Nazi state was not a unitary state—as most of his contemporaries assumed—but, rather, two "simultaneous states."[131] Although a "line of division" kept these institutional loci apart, he argued that they were simultaneously tied to one another and "in constant friction."[132] As we have seen, he invented the memorable neologism of the "dual state" to name this mutually constitutive relationship between the prerogative and normative halves of the state. It has been remarked, rather unkindly, that "the most accomplished" ("*das Gelungenste*") aspect of *The Dual State* was its title.[133] Spun more positively, we can think of the term as analytical shorthand ("*eine Art Chiffre*") for the institutional logic of a particular *kind* of rule, Nazi and otherwise.[134] Fraenkel made sense of this logic, which he thought of as transitory not permanent in nature, by adopting a perspective from methodological structuralism.

The hallmark of the prerogative state is arbitrary rule. Fraenkel argued that the phenomenon of the prerogative state derived from the institution of martial law and suggested that we think of it as "a continuous siege."[135] As a "governmental system," he wrote, the prerogative state exercised "unlimited arbitrariness and violence unchecked by any legal guarantees."[136] Its acts, or "measures" ("*Maßnahmen*") as Fraenkel called them, are self-legitimating, and thus self-enforcing: "The political sphere in the Third Reich is governed neither by objective nor by subjective law, neither by legal guarantees nor jurisdictional qualifications."[137] In other words, the prerogative state, as an idea, amounts to institutionalized lawlessness. The absence of

[130] Fraenkel, "Preface to the German edition (1974)," xv.
[131] Fraenkel, *The Dual State*, xiii. [132] Ibid., xiii.
[133] Helmut Ridder, "Der Doppelstaat: Die Ehe von Kapitalismus und NS-Diktatur," *Die Zeit*, June 12, 1970.
[134] Dreier, "Nachwort," 300; Meierhenrich, *The Legacies of Law*, esp. 3–5, 76–9.
[135] Fraenkel, *The Dual State*, 24. [136] Ibid., xiii. [137] Ibid., 3.

boundaries is the essence of its nature. The prerogative state is what rulers make of it. To illustrate the pervasiveness of the phenomenon in Nazi Germany, Fraenkel analyzed briefly (and rather perfunctorily) several agents of the prerogative state, what he called "instruments," and some of their practices. He singled out as key agents of the prerogative state the *Gestapo* (Secret State Police) and the NSDAP.[138] Notable practices, which Fraenkel exemplified with ample references to Nazi case law, ranged from the abolition of constitutional restraints to the abolition of restraints on the powers of the police, and from the abolition of judicial review to the negation of formal rationality.[139] In his argument, "[n]o sphere of social or economic life is immune from the inroads of the Prerogative State."[140]

Horst Dreier recently dissected what he termed the "phenomenology of the prerogative state."[141] He has introduced greater clarity into a conceptual analysis that, in *The Dual State*, occasionally left something to be desired. To sharpen the contours of the prerogative state as a conceptual variable, Dreier distinguished three different manifestations of the formally irrational half of the dual state (see also Figure 1 below). I base the following discussion on Dreier's useful analysis but elaborate on his observations and substitute my own categories for his. I differentiate three ideal types: (1) the prerogative state as a transgressive force; (2) the prerogative state as a restrictive force; and (3) the prerogative state as a constitutive force. What I call the prerogative state as a *transgressive force* refers to instances in which this boundless half of the dual state either undermines or overturns the operation or activities of the normative state. Fraenkel wrote passionately about this peculiar logic of domination in his 1937 article on the dual state: "Germany is a country in which thousands can be incarcerated for years without being convicted in a court of law, possessions can be seized without judicial authorization, and lives can be destroyed without recourse to law."[142]

The second subtype—the prerogative state as a *restrictive force*—by contrast, operates less overtly and in a less violent fashion. This variant of the prerogative state is less outcome-oriented, though as arbitrary in its *raison d'état*. Its operational logic revolves around long-term interventions into the affairs of the *Volk*. What Dreier, on

[138] Ibid., 9, 23, 33–7. [139] Ibid., 14–33, 46–9. [140] Ibid., 44.
[141] Dreier, "Nachwort," 282–95.
[142] Fraenkel, "Das Dritte Reich als Doppelstaat" [1937], 513–14.

whose discussion I draw, has in mind are instances in which agents and organizations of the Nazi state, especially from its normative half, respond with anticipatory obedience (what Germans call *vorauseilendem Gehorsam*) to presumed imperatives of what Carl Schmitt in the late 1920s had famously theorized as "the political."[143] Consider the following example: ordinary courts' voluntary abdication of their powers of judicial review. Fraenkel focused especially on a case that the *Kammergericht*, the regional court of appeal for Prussia, had decided on May 31, 1935.[144] The judgment in the case concerned the legality of the executive decree (*Durchführungsverordnung*) required to implement in Prussia the notorious Decree of the Reich President for the Protection of *Volk* and State (*Verordnung des Reichspräsidenten zum Schutz von Volk und Staat*) of March 28, 1933. Fraenkel could not understand why the *Kammergericht* thought it necessary, at this very early stage of Nazi dictatorship, to rule in its judgment that the so-called Reichstag Fire Decree ("*Reichstagsbrandverordnung*"), as the national decree came to be known, "removes all federal and state restraints on the power of the police to whatever extent is required for the execution of the aims promulgated in the decree."[145] In addition to issuing a blank check to the powers at the helm of the prerogative state, the judges placed an arbitrary and immovable limitation on judicial review: "The question of appropriateness and necessity is not subject to appeal."[146] Fraenkel noted that other courts in the country were considerably more circumspect in their adoption of what he referred to as "[t]he constitutional charter of the Third Reich."[147]

The case before the *Kammergericht* was a flagrant example of what Dreier has discussed for the judiciary under the moniker of "self

[143] Dreier, "Nachwort," 284–5; Carl Schmitt, *The Concept of the Political*, expanded edition, translated with an introduction and notes by George Schwab (Chicago: University of Chicago Press, [1932] 2007). For key treatments of Schmitt's infamous concept, see Duncan Kelly, *The State of the Political: Conceptions of Politics and the State in the Thought of Max Weber, Carl Schmitt and Franz Neumann* (Oxford: Oxford University Press, 2003), Chapter 4; and Reinhard Mehring, ed., *Carl Schmitt, Der Begriff des Politischen: Ein kooperativer Kommentar* (Berlin: Akademie Verlag, 2003). Most recently, see also Jens Meierhenrich and Oliver Simons, "'A Fanatic of Order in an Epoch of Confusing Turmoil': The Political, Legal, and Cultural Thought of Carl Schmitt," in Meierhenrich and Simons, eds., *The Oxford Handbook of Carl Schmitt*, esp. 21–5.

[144] Kammergericht, May 31, 1935. As quoted in Fraenkel, *The Dual State*, 16. The case was reported in *Deutsche Richter-Zeitung*, vol. 27 (1935), 624.

[145] Kammergericht, May 31, 1935. [146] Ibid.

[147] Fraenkel, *The Dual State*, 3.

restriction" ("*Selbstrestriktion*," which he distinguishes from "restriction by another," or "*Fremdrestriktion*").[148] The first behavioral mode refers to judicial practices, interpretive or otherwise, that result in voluntary self-binding. Writes Dreier: "The possibility of judicial review gives way to judicial non-review."[149] By reducing from within the authority and jurisdiction of the judiciary, the power and reach of the prerogative state are also enhanced. Exemplary of the normative state's restriction from without, "by another," is a case concerning the institution of the *Gestapo*. On February 10, 1936, the Nazi regime passed the "Law Concerning the Gestapo" (*Gesetz über die Geheime Staatspolizei*). This important piece of legislation vastly restricted the powers of administrative review, *de jure* shielding the *Gestapo* from almost any form of judicial oversight. Prussia's regional court of appeal for administrative matters (*Oberverwaltungericht*) weighed in on the matter in a case concerning the legality of the expulsion of a missionary from a certain district in Germany. The facts of the case need not concern us here.[150] What matters is that Prussia's highest administrative court seized the occasion of the particular, localized dispute to pronounce on the *general* conditions under which *Gestapo* orders are subject to judicial review.[151] The panel held that very few such conditions existed. The organization of the prerogative state, it ruled, would *only* be subject to review in the event that acts of ordinary police (acting as auxiliary forces for the Nazi Secret Police) went above and beyond the orders they received from the *Gestapo*. Fraenkel described the institutional effect: "The significance of the decision cited above lies in the acknowledgment of the Gestapo's power to transfer entire spheres of life from the jurisdiction of the Normative State to the Prerogative State."[152] The Berlin proceeding highlights the power of the prerogative state as a restrictive force.

The prerogative state as a *constitutive force* represents the third and final subtype. Although related to the subtype just discussed, here the emphasis is on the manner in which the prerogative state, through its manifest facticity, reconstitutes the remnants of the normative state. The institution of the so-called *Sondergerichte* come to mind as an example, which, though located firmly inside the prerogative state,

[148] Dreier, "Nachwort," 286–90.
[149] Ibid., 290.
[150] For a brief summary, see ibid., 81–3.
[151] Fraenkel, *The Dual State*, 27.
[152] Ibid., 28.

also had a bearing on Germany's culture of legality more generally.[153] The work of legal institutions in one half of the dual state (for example, the *Sondergerichte* in the prerogative state), Fraenkel believed, invariably rubs off on the operation of legal institutions in the other half. We have since learned from the anthropology of law that Fraenkel was right to assume that legal mores (and the cultures to which they combine) do not exist in a vacuum, and, that they, like institutions and organizations, are subject to transformations and deformations in response to external stimuli.[154]

Having said that, not all legal institutions subsumed under the third subtype of the prerogative state were extra-judicial. In many cases the locus of (and scope for) action resided in the normative state itself. Numerous legal proceedings that Fraenkel examined in *The Dual State* drew attention to instances of self-immolation by the normative state. The difference with the second, just discussed subtype lies in the greater scope for discretion that was usually available to legal agents, notably judges, in these cases. The fact that lower-ranking courts in the Nazi judicial system, at least in the early years of dictatorship, regularly came to conclusions that differed in fundamental ways from those of courts of appeal demonstrates that such discretionary scope did indeed exist. This scope was not just a figment of Fraenkel's imagination, a logically conceivable but empirically nonverifiable assumption of his theoretical model. Indeed, in these types of cases, court findings, decisions, and judgments often embodied the ethos of the surviving remnants of the *Rechtsstaat*.[155] Fraenkel gave an example from the jurisprudence of Munich's regional court of appeal (*Oberlandesgericht*) to substantiate his contention that the really existing scope for discretion was often instrumentalized for the purpose of expanding the scope of the prerogative state—an example of what Otto Kirchheimer after the war came to refer to as "political justice," that is, "the utilization of judicial proceedings for political ends."[156]

The proceeding in question concerned the suspension of the principle of *ne bis in idem*, known as the prohibition of double jeopardy

[153] On the nature and function of the *Sondergerichte*, see the discussion below. For a comprehensive analysis of cultures of legality, their study, and path dependent effects, see Meierhenrich, *The Legacies of Law*, 219–64.

[154] *Pars pro toto* of a vast body of increasingly interdisciplinary scholarship, see Fernanda Pirie, *Anthropology of Law* (Oxford: Oxford University Press, 2013).

[155] Dreier, "Nachwort," 291.

[156] Otto Kirchheimer, "Politics and Justice," *Social Research*, vol. 22 (1955), 377.

in the common law. The case revolved around a defendant who had been convicted of (and already served his sentence for) an act of high treason, namely the distribution of illegal propaganda. When it was subsequently discovered that the defendant's conduct had been graver than previously thought, the judges of Munich's *Oberlandesgericht* convicted him a second time, and for the same underlying conduct, thus violating the principle of *ne bis in idem*.[157] Fraenkel used the example to illustrate the expanding reach of the prerogative state, its persistent advances into the province of the normative state. The example slots neatly into the third of the above subtypes—the prerogative state as a constitutive force—because the Bavarian court was neither coerced nor otherwise compelled to rule in the case the way it did. Rather, the judges, as nominal representatives of the normative state, had discretion in reaching their judgment. They used this discretion to continue the general dismantling of the normative state, even introducing from the bench a novel principle of law: "In serious cases of high treason," they held, "an adequate sentence has to be imposed in all circumstances regardless of all legal principles! The protection of state and people is more important than the adherence to formalistic rules of procedure which are senseless if applied without exception."[158] By internalizing the ethos of the prerogative state, the court, according to Fraenkel, "degraded its status to that of an instrument of the Prerogative State."[159] So much for the workings of the prerogative state, what Fraenkel once called the dual state's "irrational shell."[160]

I now turn to the "rational core" that he thought was contained within that irrational shell—the normative state.[161] Fraenkel grounded the concept of the dual state solidly in the theoretical scholarship of his time, drawing extensively on writings in philosophy, law, economics, and religion.[162] He also traced in some detail the historical roots of the dual state in Prussia, from the establishment of absolute monarchy to the prototype of the German *Rechtsstaat*. In thinking about the normative state, Fraenkel was heavily influenced by the history of the authoritarian regime of Frederick the Great (1740–1786), whose enlightened despotism laid the intellectual foundations for the more

[157] Fraenkel, *The Dual State*, 51.

[158] *Oberlandesgericht* Munich, August 12, 1937, as quoted in *The Dual State*, 52. The case was reported in *Deutsche Justiz*, vol. 100 (1938), 724.

[159] Fraenkel, *The Dual State*, 51–2. [160] Ibid., 206. [161] Ibid., 206.

[162] Ibid., Part II, Chapter 3; and Part III, Chapters 1, 2, and 3.

benign half the institutional structure that Fraenkel saw at work in the "Third Reich."[163] Fraenkel was particularly taken with the Prussian *Allgemeine Landrecht*, which, under the influence of Enlightenment precepts, fundamentally recast the nature and purpose of police powers. Revolutionary for its time, this pre-German code of law drastically curtailed the powers of the police. Drawing on doctrines of natural law, the Prussian monarch placed far-reaching and unprecedented limits on his own erstwhile prerogative state.

But it is essential not to misconstrue Fraenkel's idea of the normative state. To be sure, the normative state is *not* akin to a rule-of-law state, what Germans call a *Rechtsstaat*.[164] Fraenkel distinguished very carefully between the concept of the rule-of-law state and that of the dual state. He pointed to the institution of extraordinary courts to drive home the conceptual difference: "The term Special Court [*Sondergericht* in German] sums up the difference between the Rule of Law State (*Rechtsstaat*) and the Dual State: the Rule of Law [State] refers political crimes to a *special* court despite the fact that they are questions of law; the Dual State refers political crimes to a special *court*, despite the fact that they are *political* questions."[165] In other words, the normative state is only ever as strong as the prerogative state permits it to be. In the case of the *Sondergerichte*, the prerogative state turned law from a *regulatory device* that reduced uncertainty into a *destructive device* that annihilated difference. As Nikolaus Wachsmann has shown, "the special courts were hailed as weapons to 'render harmless', 'eradicate' and 'exterminate' the political enemy."[166] As instruments of the prerogative state, the example

[163] Ibid., 159.

[164] For a discussion of the *Rechtsstaat* concept, see, for example, Ernst-Wolfgang Böckenförde, "Entstehung und Wandel des Rechtsstaatsbegriffs" [1969], in idem., *Recht, Staat, Freiheit: Studien zur Rechtsphilosophie, Staatstheorie und Verfassungsgerichtsbarkeit* (Frankfurt: Suhrkamp, 1991), 143–69. On the meaning(s) of the rule of law, see, for example, Allan C. Hutchinson and Patrick Monahan, eds., *The Rule of Law: Ideal or Ideology?* (Toronto: Carswell, 1987).

[165] Fraenkel, *The Dual State*, 50; 71. Pursuant to the "Decree of the Reich President for the Defense against Malicious Attacks against the Government of National Uprising" (*Verordnung des Reichspräsidenten zur Abwehr heimtückischer Angriffe gegen die Regierung der nationalen Erhebung*) of March 21, 1933, a Nazi *Sondergericht* was established in each of Germany's judicial districts. See Nikolaus Wachsmann, *Hitler's Prisons: Legal Terror in Nazi Germany* (New Haven: Yale University Press, 2004), 114. For an overview, see also Hans Wüllenweber, *Sondergerichte im Dritten Reich: Vergessene Verbrechen der Justiz* (Munich: Luchterhand, 1993).

[166] Wachsmann, *Hitler's Prisons*, 114.

of the *Sondergerichte* highlights the unknowable but really existing limits of the normative state. In Fraenkel's conception, the existence of these limits was a defining attribute of the dual state, a necessary condition for its existence: "The Normative State is a necessary complement to the Prerogative State and can be understood only in that light. Since the Prerogative and Normative States constitute an interdependent whole, consideration of the Normative State alone is not permissible."[167]

Fraenkel was at pains to establish this theoretical premise. In his argument, the normative state was at the beck and call of the prerogative state, so to speak. Law may have governed its practice, but it neither constituted nor legitimated it. Fraenkel put it concisely elsewhere in his book: "[S]ince the jurisdiction of the Prerogative State is not legally defined, there is no legal guarantee of the stability of the Normative State. The existence of the Normative State is not dependent on law. It depends on the complete permeation of the state by National-Socialist attitudes and ideas."[168] For this reason, the normative state in Fraenkel's theoretical model had little to do with either the idea of the *Rechtsstaat* in the civil law tradition or the rule-of-law doctrine in the common law tradition.

It is essential to be clear about the nature and purpose of Fraenkel's argument, to grasp fully what he wrote—and what he did not. Because those who invoke *The Dual State* sometimes do so very selectively, even in a manner that outright contradicts Fraenkel's theory of dictatorship.[169] Having laid out Fraenkel's conceptions of the two halves

[167] Fraenkel, *The Dual State*, 71. [168] Ibid., 71.

[169] Horst Dreier, "Nachwort: Was ist doppelt am 'Doppelstaat'?," in Ernst Fraenkel, *Der Doppelstaat*, third edition, edited and introduced by Alexander v. Brünneck, with an afterword by Horst Dreier (Frankfurt: Europäische Verlagsanstalt, 2012), 277; Horst Möller, "Fraenkel—Analytiker von Demokratie und Diktatur," in Thomas Brechenmacher, ed., *Identität und Erinnerung: Schlüsselthemen deutsch-jüdischer Geschichte und Gegenwart* (Munich: Olzog, 2009), 168. One of the most flagrant misinterpretations has come from one of Germany's most respected historians, Karl Dietrich Bracher, who erroneously maintained that Fraenkel's Janus-faced concept referred to an institutional binary—state vs. party—that Fraenkel explicitly and repeatedly insisted was *not* what he had in mind when speaking of the legal reality of the dual state. See Karl Dietrich Bracher, "Zusammenbruch des Versailler Systems und Zweiter Weltkrieg," in Golo Mann and August Nitschke, eds., *Propyläen Weltgeschichte: Eine Universalgeschichte*, vol. 9: *Das zwanzigste Jahrhundert* (Berlin: Propyläen, 1960), 398–9. More recently, Robert O. Paxton also misread *The Dual State*. See his *The Anatomy of Fascism* (London: Penguin, 2005), 119–127. Like Bracher, Paxton misunderstood the essence of Fraenkel's argument, namely that "the line of division" between the prerogative and normative halves of the Nazi dual state is internal to the institutional

of his dual-state concept, what did he have to say about their interrelationship? What, exactly, is the logic of the institutional structure that they co-constitute? The combination of the two notions—the prerogative state and the normative state—in one concept sets up a dynamic tension between these elements. The dual state has built into it what Reinhard Bendix termed "conflicting imperatives."[170] The normative state and the prerogative state, though complementary, stand in tension with one another. The foundational relationship between the halves of the dual state—from which all dynamic interactions between them derive—can be stated thus: "the presumption of jurisdiction rests with the Normative State. The jurisdiction over jurisdiction rests with the Prerogative State."[171]

It was Emil Lederer who first inspired Fraenkel to embrace the idea of institutional hybridity. In 1915, Lederer had described the Imperial state of Wilhelmine Germany as a two-pronged state. Fraenkel credited Lederer as being the first person to "depict the co-existence of the Normative State and the Prerogative State."[172] But the metaphor of a Janus-faced or dual-natured state predates even Lederer's conceptualization. In fact, it was Georg Jellinek who first theorized an institutional binary at the heart of the concept of the state, in his *Allgemeine Staatslehre* at the turn of the twentieth century.[173] Jellinek, a highly influential legal scholar in his time, developed a two-sided theory of the state that distinguished between, on the one hand, the state as a "legal institution" and, on the other, the state as a "social phenomenon." Jellinek argued that a *constitutional* theory of the state (*Staatsrechtslehre*) was required to study the former instantiation of the state, and a *social* theory of the state (*soziale Staatslehre*) to study

structure of the state itself. Fraenkel insisted that "when we speak of the Dual State we do not refer to the co-existence of the state bureaucracy and the party bureaucracy. We do not place great importance on this feature of German constitutional law.… State and party are increasingly becoming identical, the dual organizational form is maintained merely for historical and political reasons." Fraenkel, *The Dual State*, xv. Or, as he put it later in the book, the NSDAP was neither identical *with* nor separate *from*, but rather "an instrument *of* the Prerogative State." Ibid., 33. Emphasis added.

[170] See, e.g., Reinhard Bendix, *Nation-Building and Citizenship*, enlarged edition (Berkeley: University of California Press, 1977. Note that Bendix uses varying terms to refer to what he calls conflicting imperatives. More recently, see Andrew C. Gould, "Conflicting Imperatives and Concept Formation," *Review of Politics*, vol. 61 (1999), 439–63.

[171] Fraenkel, *The Dual State*, 57. [172] Ibid., 168.

[173] Georg Jellinek, *Allgemeine Staatslehre* (Berlin: Häring, 1900).

the latter.[174] It bears emphasizing that in Fraenkel's argument, the distinction between the prerogative and normative halves of the dual state is not just a matter of degree, but of kind. For him the institutional differentiation was of a "qualitative" nature.[175] At the same time, he conceived of the phenomenon of the dual state, whether in Nazi Germany or elsewhere, as "merely a transitory phenomenon."[176] This point is key because it implies a response to those who erroneously claim that Fraenkel set out to capture the defining attributes of the Nazi state *as such*. His was never going to be more than a snapshot of a state-in-formation—albeit one taken with enormous skill and from an exceptional point of view.

The Institutional Effects of the Nazi State

The institutional effects of the dual state, as theorized by Fraenkel, were considerable and far-reaching. Some of these effects were direct, others indirect; some were of a short-term nature, others materialized over the long run. Most obviously, the institutionalized arbitrariness of the prerogative state depleted—and destroyed—an inordinate number of lives, Jewish and otherwise.[177] But Fraenkel was more concerned with the less obvious and hidden institutional effects of the dual state, for as he wrote, "we are not considering cases touching on the Jewish problem. To generalize from the treatment of the Jews … would be misleading."[178] For Fraenkel, *their* case was straightforward: "Once Jews had been eliminated from the economic life, it was possible to deprive them of all legal protection without adversely affecting the economic system," which is why the onset of more virulent forms of antisemitism "forced the Jews beyond the outer limits of the Normative State."[179]

Fraenkel had learned from personal experience that the dual state in the early years of Nazi dictatorship facilitated not only violent

[174] For a brief discussion of Jellinek's effect on the social sciences, and his contribution to comparative-historical sociology, see Reinhard Bendix and Guenther Roth, *Scholarship and Partisanship: Essays on Max Weber* (Berkeley, University of California Press, 1970), 260–5.

[175] Fraenkel, *The Dual State*, 69. [176] Fraenkel, *The Dual State*, xiv.

[177] For an account of the entire trajectory of Jewish suffering in particular—from persecution to destruction—at the hands of an ever-expanding prerogative state in Nazi Germany, see, most recently, Christian Gerlach, *The Extermination of the European Jews* (Cambridge: Cambridge University Press, 2016).

[178] Fraenkel, *The Dual State*, 73. [179] Ibid., 90.

domination but also ensured an orderly transition to and consolidation of authoritarian rule, notably by reducing incentives for exit from the polity on the part of "constructive forces" in the Nazi universe, by which the Nazi jurist Werner Best, who coined the phrase, meant societal groups and sectors, such as big business, that did not constitute or harbor so-called enemies of state. Among the most notable institutional effects of the dual state Fraenkel counted (1) that the Nazis upheld "the institution of private property in general and of private ownership in the means of production … in principle and in fact"; and (2) that "income from private property is now, on the whole much safer than it was before."[180]

Fraenkel thought it especially remarkable that "[t]he principle of private ownership was upheld *even* for businesses towards which the National-Socialist program had shown some degree of antipathy, e.g., the department stores and banks."[181] Notwithstanding his comprehensive catalogue of consequential changes that Nazi authorities had made to the structure of the country's economic system and the members of its economic society—including the creation and proliferation of cartels and other monopolies; the steep increase in the rate of public investment financed by credit expansion; the buildout of public investment at the expense of private investment—Fraenkel was sufficiently detached analytically to appreciate that a considerable number of entrepreneurs, despite Nazi interference with the rules of the economic game, "even now … enjoy at least a comparative advantage."[182]

It was Fraenkel's great achievement—and, I suspect, one of the principal reasons for *The Dual State*'s negligible reception during the Cold War years—to have countered, in the substantive parts of his analysis, the scholarly trend of treating the German polity as if it were a totalitarian "black box," to have resisted the moral urge to depict the emergent racial order as a monolithic garrison state that emerged fully formed. What my analysis of Fraenkel's theory of dictatorship hopefully shows is that he reasoned and wrote like the analytically eclectic *social scientist* that he was.[183] He may have started out as a practicing lawyer, become a public intellectual, and briefly agitated

[180] Ibid., 173. [181] Ibid., 173. Emphasis added.

[182] Ibid., 173, 176–82.

[183] On analytical eclecticism as a research stance, see Rudra Sil and Peter J. Katzenstein, "Analytic Eclecticism in the Study of World Politics: Reconfiguring Problems and Mechanisms across Research Traditions," *Perspectives on Politics*, vol. 8 (2010), 411–31.

as a social activist, but by the time he submitted his book manuscript to OUP's New York office, sometime in the summer or fall of 1940, Fraenkel was a different man. He was working with a greater degree of intellectual rigor: he was more analytically astute, theoretically sophisticated, and empirically innovative than he had ever been before—and, according to some, than he ever was again. *The Dual State* is testament to Fraenkel's intellectual feat, begun on a dark continent in the middle of the twentieth century.

William Scheuerman considers Fraenkel's pre-1945 writings "intellectually more creative and politically more provocative than his writings from the 1950s and 1960s."[184] Like Scheuerman, I, too, find Fraenkel's prewar writings more sophisticated and daring than his postwar oeuvre. And none was more creative than *The Dual State*. Fraenkel never bested that book's depth of insight and the breadth of knowledge, both of which he so painstakingly brought to bear on the subject of his life.[185]

To his lasting credit, Fraenkel never assumed that the institutional logic of Nazi dictatorship did or would operate seamlessly and unchanged for the entirety of the "Third Reich."[186] Fraenkel insisted "that the Third Reich cannot be interpreted as a 'totalitarian state' in an uncritical way."[187] Its *changing* character had to be taken as a given. Fraenkel told his readers that he "avoided using the term 'totalitarian state' because of its complex connotations."[188] This observation is related to the topic at hand—the institutional effects of the dual state, to which I now return.

Earlier I distinguished three subtypes of the prerogative state, one of which was the prerogative state as a constitutive force. Its operation sheds light on a causal mechanism that produced a number of

[184] Scheuerman, "Social Democracy and the Rule of Law," 74, Fn. 1. For an insightful discussion of Fraenkel's postwar influence on the theory, practice, and study of democracy in the Federal Republic of Germany, see Alexander v. Brünneck, "Vorwort zu diesem Band," in Ernst Fraenkel, *Gesammelte Schriften*, vol. 5: *Demokratie und Pluralismus*, edited by Alexander v. Brünneck (Baden-Baden: Nomos, 2007), 9–36, esp. 21–5.

[185] Lest my allusion to the formulation's double meaning is lost, my point is this: the theory of dictatorship that Fraenkel developed in *The Dual State* was the *subject* of his life, but it was also the subject of his *life*.

[186] The empirical coverage in *The Dual State* ended with the late 1930s, but Fraenkel's postwar commentary suggests he harbored no illusions about having produced an institutional analysis that was valid for the war years as well.

[187] Fraenkel, *The Dual State*, 59. [188] Ibid., 60.

institutional effects. I call this causal mechanism *institutional mimicking*. Fraenkel explained how it works:

> Since the jurisdiction of the organs of the Prerogative State is unlimited, a certain tendency exists among the agencies of the Normative State to imitate this example and to enlarge the scope of their own discretion. Furthermore, since the Prerogative State has completely stifled all public opinion, resistance against such an encroachment was decisively weakened.[189]

If we believe Fraenkel, one of the most significant institutional effects of the dual state in Nazi Germany was the homogenization of the institutions of rule—and of expectations about their rule. Channeling A. V. Dicey, Fraenkel argued that "the mere existence of governmental arbitrariness, as embodied in the Prerogative State, has dulled the sense of justice to such a degree that the existence of an agency with limited jurisdiction is considered as a legal institution even though the government exercised enormous discretionary power."[190]

A more indirect effect, a consequence of the uneven balance of power between the prerogative and normative halves of the Nazi state—which, as we have seen, is a defining, structural feature of the dual state—was the substitution of efficiency for liberty as the *raison d'état*. "In National-Socialist Germany," Fraenkel observed, "the 'gospel of efficiency' has been substituted for the worship of liberty."[191] A concomitant effect of this substitution was the retention and continued maintenance (with a few notable exceptions to be discussed below) of the existing economic order. As the guardian of the economy, the normative state, in spite of its co-dependent relationship with the violent and overzealous prerogative state, managed to restore a sense of institutional normalcy and predictability in economic affairs, at least for a while. According to Fraenkel, "[i]n spite of the existing legal possibilities for intervention by the Prerogative State where and whenever it desires, the legal foundations of the capitalistic economic order have been maintained."[192] Drawing on an examination of the extant case law at the time, Fraenkel found that "[t]he legal institutions essential to private capitalism … still exist in Germany."[193] To substantiate his finding, he presented empirical evidence in the form

[189] Ibid., 70.

[190] Ibid., 70; A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, eighth edition (London: Macmillan, 1926), 198.

[191] Fraenkel, *The Dual State*, 71. [192] Ibid., 72. [193] Ibid., 73.

of jurisprudence pertaining to freedom of enterprise, the sanctity of contracts, property rights, copyright, and the regulation of unfair competition, among others.[194]

Fraenkel's analysis of institutional effects of the Nazi dual state, notably its normative half, was most comprehensive for the economic realm. Incidentally, this is also the realm most relevant to Fraenkel's third and final argument. It was an argument to answer a deceptively simple question: whence the dual state?

The Institutional Origins of the Nazi State

Part III, the final part of *The Dual State*, contains one of the most controversial chapters of the entire book—Chapter 2. There, Fraenkel attempted to make sense of the economic origins of Nazi dictatorship. Contrary to the *Urdoppelstaat*, where he possessed the courage of his convictions and stated his functionalist argument boldly, he introduced his revised position more gingerly in the opening pages of the 1941 book:

> We shall inquire whether the legal situation characterized as the Dual State is not the necessary consequence of a certain stage of crisis for the directing elements if capitalistic society. Perhaps it can be shown that they have lost confidence in rationality and have taken refuge in irrationality, at a time when it would seem that rationality is needed more than ever as a regulatory force within the capitalistic structure.[195]

This tentative introduction bespeaks Fraenkel's reservations about the materialist view of history. These reservations deepened in exile. As I explained above, Fraenkel substantially revised Part III, Chapter 2 as he moved from *Urdoppelstaat* to *The Dual State*.[196] Here is his argument in a nutshell: Fraenkel believed that the fundamental nature of Germany's economic order had been fundamentally altered in the transition from quasi-democracy to dictatorship. In his argument, the "organized private capitalism" of the Weimar era had been replaced in Nazi Germany with what he called "quasi-monopolistic capitalism."[197] It all started with the Great Depression, when "the power of the government in the economic sphere sharply increased."[198] The democratic

[194] Ibid., 73–82. [195] Ibid., xiv. [196] See the discussion above, xlvii–lx.
[197] Fraenkel, *The Dual State*, 171, 172.
[198] On the economics of the interwar order, see Tooze, *The Wages of Destruction*; and Nicholas Crafts and Peter Fearon, eds., *The Great Depression of the 1930s: Lessons for Today* (Oxford: Oxford University Press, 2013).

state and its institutions behaved like "doctors at the sick-bed of capitalism," Fraenkel quoted a trade unionist as saying.[199] Extensive government interventions propped up ailing or failing economic sectors, notably banking and the steel industry. "The Reich," Fraenkel wrote, "extended its regulatory power to almost all aspects of economic activity, including wage levels."[200] Many of Fraenkel's contemporaries believed (as do economists and economic historians of the present) that state-led economic interventionism was necessary not least because, as Richard Overy has shown, in 1932, the year preceding the Nazi ascent of power, German business activity had been in a "disastrous trough."[201] This institutional transformation, however, had path-dependent consequences for the Nazi state, at least according to Fraenkel: "In many aspects, the economic policy of the Dual State seems a mere continuation, a somewhat more developed phase, of the 'organized capitalism' of the Weimar period."[202] Such was the opening salvo of Fraenkel's analysis. He supported his thesis about institutional and substantive continuities in the economic realm across two radically different political regimes with empirical evidence from various sectors of the economy.

But Chapter III, Part 2 is also about the *origins* of institutional hybridity because it advances a theoretical argument as to why an authoritarian regime—such as the Nazi dictatorship—would have an interest in institutional self-binding. Fraenkel showed that *despite* the Nazification of economic norms and institutions, and *despite* the comprehensive domination or violent destruction of other spheres of social life, a most remarkable situation existed in early Nazi Germany in which the supposedly constructive forces continued to enjoy the protection of the normative state, of these remnants of the *Rechtsstaat*. But what was "the precise function of the Normative State and what [were] the functions of the Prerogative State in the economic sphere?"[203]

In the governance of the economy, the prerogative state took a backseat to the normative state. Fraenkel hypothesized as follows: "If our analysis of the relations between the world of business and the Normative State is correct, then it follows, that the Prerogative State

[199] Fraenkel, *The Dual State*, 172. [200] Ibid., 172.
[201] Richard Overy, *The Nazi Economic Recovery 1932–1938*, second edition (Cambridge: Cambridge University Press, 1996), 1.
[202] Fraenkel, *The Dual State*, 172. [203] Ibid., 185.

cannot be a direct and positively controlling power, but rather a limiting and indirectly supporting power."[204] But the prerogative state had roles to play nonetheless: inter alia, it protected economic life from political disturbances, by deterring or crushing protests and demonstrations; it held in check the underground trade union movement, thus suppressing open class struggle; and it enforced—through either the threat or application of violence—the more restrictive legal norms devised in the normative state for the regulation of the economy.[205] The normative state played a considerably larger role than the prerogative state in the economic reconstruction and development of Germany under the Nazi dictatorship. I have already discussed many of its functions in the foregoing analysis. According to the causal logic of Fraenkel's argument, the normative state administers and adjudicates the rules of the game for the participation of producers and consumers in the marketplace. It maintains:

> "the legal frame-work [*sic*] for private property, market activities of the individual business units, all other kinds of contractual relations, and for the regulations of the control relations between government and business. Even if the rules of the game are changed by the lawmaker, some are indispensable in order to secure a minimum of predictability of the probably consequences of given economic decisions.[206]

This will be the case, Fraenkel argued, whenever "the necessity of decentralization of certain functions in any large-scale society with advanced technology" arises.[207] It is for this reason that Fraenkel believed that "the field of economics remains the most important domain of the qualified 'Rule of Law' in present-day Germany."[208]

A seminal theoretical analysis of the institutional determinants of economic activity, with which Fraenkel's analysis of the normative state Part III, Chapter 2 of *The Dual State* shares several traits is Douglass North's *Institutions, Institutional Change and Economic Performance*.[209] Consider, for example, the similarity between the just quoted passage from *The Dual State* with this well-known and

[204] Ibid., 186. [205] Ibid., 186–7. [206] Ibid., 185.
[207] Ibid., 185. [208] Ibid., 185.
[209] Douglass C. North, *Institutions, Institutional Change and Economic Performance* (Cambridge: Cambridge University Press, 1990). Whereas Fraenkel's book is a forgotten classic, North's book by the summer of 2016 had a racked up total of 48,038 citations on Google Scholar. See <https://scholar.google.co.uk/citations?view_op=view_citation&hl=en&user=-LcMZqMAAAAJ&citation_for_view=-LcMZqMAAAAJ:u5HHmVD_uO8C>, last accessed on July 24, 2016.

oft-cited argument from North's 1990 book: "Institutions are the rules of the game in a society or, more formally, are the humanly devised constraints that shape human interaction."[210] Fraenkel and North both, independently, referred to the institutional framework governing social life as "rules of the game." This superficial semblance, but even more so the considerable underlying similarities in the theories (and intellectual concerns) of both scholars, has convinced me to count Fraenkel's approach as one that belongs to what social scientists for more than twenty years have been calling the new institutionalism, an approach that North helped to pioneer. More particularly, Fraenkel's way of seeing has a great deal in common with what has become known as "historical institutionalism," a variant of the new institutionalism that emphasizes how institutions emerge from and are embedded in concrete temporal processes.[211] Given its approach to explanation and understanding, and its sophistication in the successful blending of nomothetic and ideographic reasoning, *The Dual State* deserves a place in the canon of historical institutionalism.

In his analysis of the normative state, Fraenkel regularly reminded readers of the prerogative state's power of "jurisdiction over jurisdiction," that is, that organization's awesome ability to play overlord over the normative state, and, if necessary, to put the latter in its subordinate place in the institutional architecture of the Nazi state. At the same time, he was convinced that it would be a grave mistake not to take seriously the nature and effects of an institutional structure—such as the dual state—just because its independence was compromised in the process of its creation, and its members are known to have abused the institutional discretion that a prerogative state may have permitted them to exercise.[212] Scheuerman is correct, and he summarizes the underlying assumption of Fraenkel's theoretical argument pithily: "discretion is not wholesale arbitrariness."[213]

[210] North, *Institutions, Institutional Change and Economic Performance*, 3.

[211] For a solid overview, see Kathleen Thelen, "Historical Institutionalism in Comparative Politics," *Annual Review of Political Science*, vol. 2 (1999), 369–404. For a more recent set of treatments of historical institutionalism as an approach to, inter alia, the study of comparative politics, international relations, American politics, and European politics, see Orfeo Fioretos, Tulia G. Falleti, and Adam Sheingate, eds., *The Oxford Handbook of Historical Institutionalism* (Oxford: Oxford University Press, 2016).

[212] See my discussion above and Fraenkel, *The Dual State*, 57.

[213] Scheuerman, "Social Democracy and the Rule of Law," 90.

This brings us to the second aspect of Fraenkel's argument about "the economic background of the Dual State," specifically the question of why this remnant of the *Rechtsstaat* survived in Nazi Germany. His answer: German capitalism needed "state aid."[214] Fraenkel believed that prior to the onset of Nazi dictatorship, "[t]he defenders of capitalism in post-[World War I] Germany were unable to convince the masses of the German people that it was the best of all economic systems. Capitalism had no chance in a democratic struggle against proletarian socialism, in whose extirpation its salvation lay."[215] Fraenkel hypothesized that violent entrepreneurs were in demand from the agents of capitalism to defeat agitators on the left. The provision of state aid did not exhaust itself with the destruction of the "socialist opponent," however. If we believe Fraenkel, "[c]ontemporary German capitalism" also wanted to be supplied with a new enemy once the old socialist enemy was defeated. It was thus that capitalism was complicit in substituting the Jewish opponent (and others like it, such as purported foreign enemies) for the hurting and soon to be crushed socialist opponent. German capitalism, Fraenkel implied, was indifferent to the identity of its new opponent(s) as long as it would enable the economic sector to "arm itself as a *sine qua non* for its preservation."[216] But it was not just violence that capitalism demanded the sovereign state supply. Another commodity was in demand: law. As Fraenkel put it in *The Dual State*, German capitalism also needed state aid:

> in its role as guarantor of that legal order which is the pre-condition of exact calculability without which capitalist enterprise cannot exist. German capitalism requires for its salvation a dual, not a unitary state, based on arbitrariness in the political sphere and on rational law in the economic sphere.[217]

Ever since Max Weber's theory of law, the attainment of legal predictability, especially in the economic sphere, has been associated with formally rational law. Translated into Weberian terms, Fraenkel's argument about the institutional foundations of the Nazi economy can be restated thus: The remnants of formally rational law that were encased in the normative half of the dual Nazi state proved capable of providing a durable and predictable institutional framework within

[214] Fraenkel, *The Dual State*, 205. [215] Ibid., 203. [216] Ibid., 205.
[217] Ibid., 205–6.

which economic actors felt sufficiently confident about the protection of their private property and associated rights that they contributed, in an informal *quid pro quo* arrangement, to the maintenance and expansion of an inherently violent regime whose substantially irrational ideology they might not otherwise have countenanced.

In contradistinction to the law of the normative state, the law produced by the prerogative state was, in Weberian terms, substantively irrational: it was the result of Nazi officials making arbitrary decisions from case to case without recourse to general rules. But even though this prerogative state was driven by extralegal motivations *and* governed by emotion, and thus potentially detrimental to economic growth and expansions, the appeal of the normative institutional reserves in the "rational core" of an otherwise highly "irrational shell," to use Fraenkel's language, was sufficient to appease the fears of the country's wealthiest barons and bankers. In return, they accepted the Nazis as political bedfellows, "capitalizing" their racial regime.

This interpretation betrays traces of the more mechanistic argument about the political economy of Nazi dictatorship that Fraenkel had made in his 1937 article and the *Urdoppelstaat*. But as Scheuerman has pointed out, it still avoided the shortcomings of Franz Neumann's considerably more reductionist analysis of the economic dimensions of Nazi rule.[218] Fraenkel was careful to distance himself—explicitly—from more radical interpretations of Nazi dictatorship that in the 1930s were en vogue on the left: "There are many people who believe that National-Socialism is, so to speak, nothing but the house-servant of German monopoloy capitalism…. These oversimplified theories tend quite unnecessarily to discredit the economic interpretation of fascism. Such an interpretation should be formulated in terms of far more minute and deeper reaching categories."[219]

Although dated, Fraenkel's argument provides a useful entry point into the ongoing, highly policy-relevant debate about the economic origins of dictatorship and democracy.[220] Not only does it tell us

[218] Scheuerman, "Social Democracy and the Rule of Law," 88. For a comparison of Neumann's *Behemoth* and Fraenkel's *The Dual State*, see Meierhenrich, *The Remnants of the* Rechtsstaat.

[219] Fraenkel, *The Dual State*, 183.

[220] For a seminal, but controversial contribution to this debate, see Daron Acemoglu and James A. Morrison, *Economic Origins of Dictatorship and Democracy* (Cambridge: Cambridge University Press, 2006), a response by two economists to Barrington Moore's social science classic, *Social Origins of Dictatorship and*

something important about the institutional determinants of Nazi economic restructuring and policy, it simultaneously, and perhaps more crucially, sheds light on the larger theoretical question of how such a schizophrenic state can come about in the first place. Here is Fraenkel with a final word about the nature of the state that chased him out of his country:

> This symbiosis of capitalism and National-Socialism finds its institutional form in the Dual State. The conflict within society is expressed in the dual nature of the state. The Dual State is the necessary political outgrowth of a transitional period wrought with tension.[221]

There is ample evidence to suggest that Fraenkel's argument about the nature and logic of institutional dualism, this peculiar form of institutional hybridity, is relevant for understanding not just his time—but ours as well.[222]

Democracy: *Lord and Peasant in the Making of the Modern World* (Boston: Beacon Press, 1966).

[221] Fraenkel, *The Dual State*, 208.

[222] For this argument, see my *The Remnants of the* Rechtsstaat, which also comprises an analysis of the uneven reception of *The Dual State* since its publication in 1941.