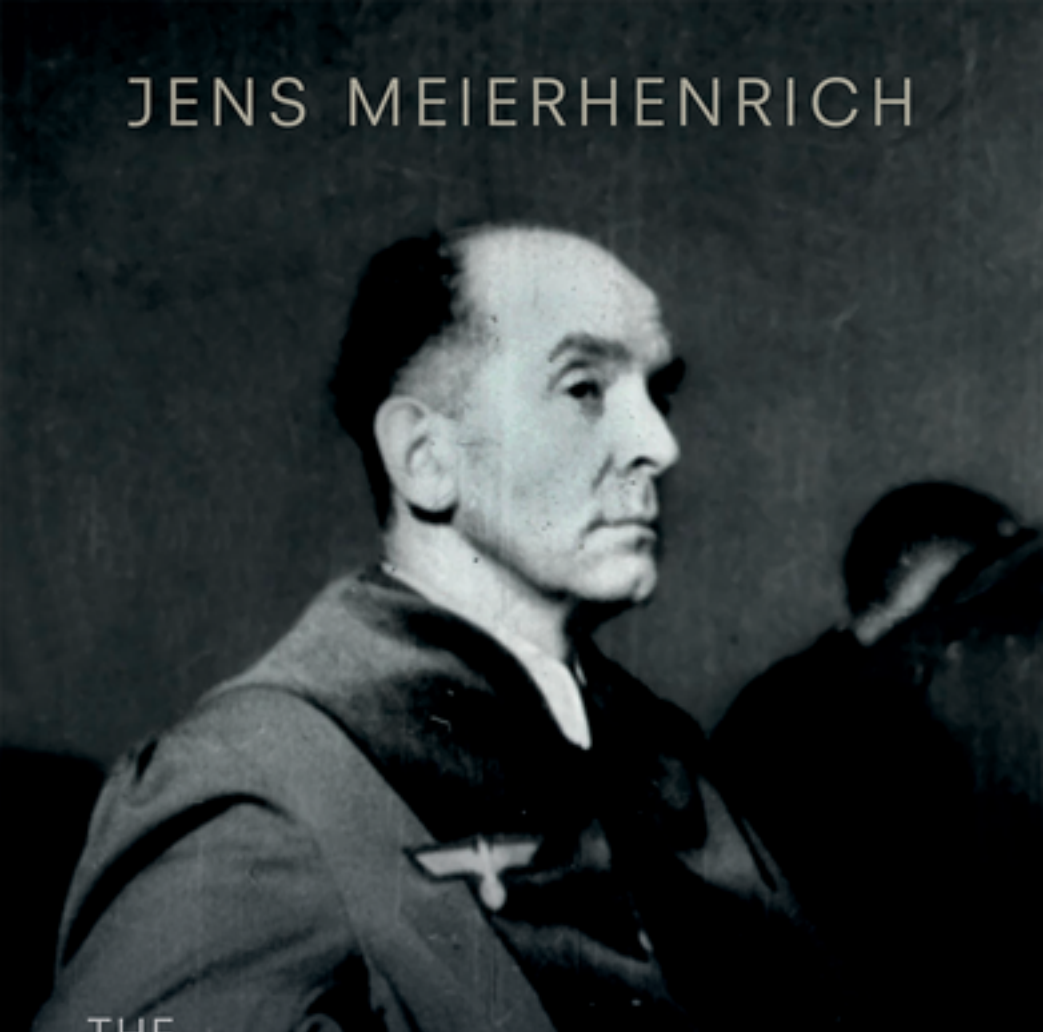
JENS MEIERHENRICH



THE REMNANTS OF THE RECHTSSTAAT

AN ETHNOGRAPHY OF NAZI LAW

OXFORD

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For Shan

Preface

This book was a pleasure to write. The research for it was by turns sobering and awe-inspiring. The book's key protagonist was a courageous man in dark times. Ernst Fraenkel is his name. On September 20, 1938, this otherwise ordinary man fled the Third Reich. From the safety of his exile in the United States, he published *The Dual State*, an English-language edition of his remarkable account about the legal origins of dictatorship. Fraenkel, a German labor lawyer and social democrat of lapsed Jewish faith, had secretly drafted the original manuscript between 1936 and 1938, the only such account written inside the Hitler state. Due to the book's clandestine origins, some consider *The Dual State* the ultimate piece of intellectual resistance to the Nazi regime. Ernst Fraenkel is the name of its author. The name is worth introducing twice, for it is all but forgotten.

What follows is a book of legal theory and intellectual history. It revolves centrally around Fraenkel's life and *magnum opus*, but I also travel farther afield, to chart the changing character of law in the transition from Weimar democracy to Nazi dictatorship. Through the lens of what I call Fraenkel's ethnography of law, I reflect on the historiography of the Third Reich, as well as on the study of the authoritarian rule of law in the twenty-first century. With a bit of luck, readers will come away sharing my admiration for Ernst Fraenkel's extraordinary achievement, and be convinced by my argument about its contemporary relevance.

I am glad to have an opportunity to express my appreciation to those who helped me to bring *The Dual State* back in. At Oxford University Press, Merel Alstein responded enthusiastically to my proposal for preparing a new edition of Fraenkel's classic. OUP had published the first edition in 1941. The second edition was released in 2017, and I am grateful to Anthony Hinton and Emma Endean-Mills who oversaw that volume's publication, and the three anonymous reviewers who encouraged it. More recently, Jamie Berezin, also of OUP's law team, was receptive to turning my excavation of Fraenkel's ethnography of law into a book. I am grateful to him for believing in the project from the get-go, for responding to any and all queries with speed and kindness, and for finding three anonymous reviewers whose comments were thoughtful and important. Eve Ryle-Hodges assisted reliably with the book's production. For facilitating access to primary documents, I especially thank the staff in the

Manuscripts and Archives Division of New York Public Library and in Archives and Special Collections at the London School of Economics and Political Science.

It is a particular pleasure to acknowledge my debt to colleagues who commented on parts of the manuscript and thereby improved it. David Dyzenhaus, Martin Krygier, and Martin Loughlin provided useful feedback on Chapter 9. Horst Dreier, William Scheuerman, Michael Stolleis, Dan Stone, and Jakob Zollmann all read earlier versions of Chapters 3, 6, and 7. I am grateful to them all for taking time out of their busy schedules to help me hone my argument and analysis. Kenneth Ledford is owed thanks for trawling through the entire draft of the penultimate manuscript. To my relief, he came up with no major errors. His kind words and encouragement meant a great deal as the book was about to go to print. The most substantial contribution to my revision came from Douglas Morris, who deserves special mention. A legal historian whose insightful articles about Fraenkel in recent years have done their share to draw attention to this important cause lawyer-turned-legal ethnographer, Morris went beyond the call of collegiality. His close scrutiny of the completed manuscript produced invaluable commentary: He shared with me no less than twenty-one single-spaced pages of questions and suggestions for revision. These nearly 10,000 words of feedback were so carefully (and sensitively) phrased and so extraordinarily useful that I have serious doubt about whether I will ever be able to repay the debt I incurred.

Interrupted by illness, my research and writing were delayed by a few years. I am grateful to Christopher Hughes in the Department of International Relations at the LSE for his care and support during this difficult time. I will not forget it. Nor will I forget the loyal friends who saw me through my own darkness: the late Heather Adams in Boston, Ben and Jodie Elley in Wendover, Alex Krämer and Malte Stellmann in Berlin, Dirk Moses in Florence and Sydney, Angelo Pacillo and Anke Rose in Cologne, Oliver Simons and Michelle Tihal in New York, and Roz Ghosh, Stephen Richards, John Sidel, and Dan Stone in London. I am lucky to have them in my life. Equally deserving of gratitude are my parents, Friedel and Christa Meierhenrich, who made it all possible, as well as my parents-in-law, Shiu Cho and Woon Hing Lam. The latter contributed immeasurably to my happiness by allowing me to marry their daughter, Shan Lam. To her go my deepest thanks. She is one of the most delightful, fun, and thoughtful people you will ever meet, and Shan's support these last few years has been generous and unwavering, which is why this book is dedicated to her.

Contents

1

The Idea of Lawlessness

> The claim that no legal order exists under despotism,
> that the ruler's arbitrary will governs,
> is utterly nonsensical.
>
> Hans Kelsen[1]

One can be forgiven for thinking that the man whose portrait adorns this book's cover was a loyal servant of the *Rechtsstaat*, the German variant of the rule of law. The man's enigmatic gaze as well as his robe suggest that he took seriously legal norms and institutions, that he had faith in the authority of law. Upon closer inspection of the photograph one notices the insignia pinned to the jurist's cloth: a *Reichsadler*, or Reich Eagle, crouched on a swastika enveloped by an oak wreath—the emblem of Nazi dictatorship.[2]

The man on the cover has one of the most iconic faces of the Third Reich. He is Roland Freisler, from 1942 until 1945 the president of Nazi Germany's *Volksgerichtshof*, its notorious "people's court." One of the earliest members of the *Nationalsozialistische Deutsche Arbeiterpartei* (NSDAP), the National Socialist German Workers' Party, Freisler eagerly helped to hollow out the *Rechtsstaat* in Nazi Germany, first in his roles as a bureaucrat in the Reich Ministry of Justice and a scholarly protagonist of racial law (notably in the realm of criminal law), later, and most infamously, during his tenure at the helm of the *Volksgerichtshof*.[3] Consider the following statistic: whereas the extraordinary tribunal handed down 191 death sentences in the period 1939–1941, the number rose exponentially under Freisler's stewardship. Between 1942 and 1944, the court's jurisprudence turned considerably more violent, as a large number of the proceedings before the *Volksgerichtshof* ended with the imposition of one or more death penalties. Out of 10,289 defendants who stood trial in this period, 4,951 were sentenced to death.[4] Freisler was an ardent

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advocate of what Max Weber, the Germany lawyer and sociologist, a few decades earlier had termed "substantively irrational law."[5] Freisler's ideological fervor and blatant careerism earned him the nickname "racing Roland" ("*rasender Roland*").[6] Given his disdain for "formally rational law," another of Weber's ideal types, why does Freisler's ignoble persona illustrate a book about the remnants of the *Rechtsstaat*? This begs further questions: What was Nazi law? What authority—if any—did it have in the Third Reich? Which functions did it serve, what effects did it have, whose lives did it alter?

IN THE IMAGE OF JANUS

The choice of cover illustration was deliberate. I selected the little-known image of Freisler because it signifies dissonance. It is suggestive of conflicting imperatives—of a schizophrenic identity—at the heart of one of the Nazi state's major institutions: the law. As we shall see, Freisler, one of the major representatives of the authoritarian and later totalitarian administration of justice, was himself at first of two minds about the nature of Nazi law and how best to advance it. Unlike other fervent supporters of racial supremacy, Freisler for a while even clung to the language of the *Rechtsstaat*.[7] He continued to do so even when the term had long been jettisoned, replaced in Nazi discourse by that of the "*völkischer Führerstaat*," the concept of Hitler's racial state. For reasons to be explained in this book, Freisler, this loyal servant of the Nazi state, for a while showed a grudging respect for a truncated idea of the *Rechtsstaat*. Inasmuch as his donning of the judicial robe was a façade, a superficial remnant of the *Rechtsstaat*, the pride Freisler so evidently felt when he performed the role of the guardian of Nazi law for the photographer in the cover image is suggestive of something deeper, something rooted in the cultural foundations of law.[8] Freisler's persona—like his portrait—was Janus-faced.[9]

According to Cicero, Ovid, and other ancient sources, Janus was the Roman god of transitions (*eundo*). Myth has it that his double-head served a purpose. In his role as guardian of the heavenly gates (*caelestis ianitor aulae*), Janus was said to simultaneously keep watch over both the eastern and western gates of heaven. As a god of motion, he is also believed to have presided over all beginnings and transformations, whether abstract or concrete, sacred or profane.[10] Among other states of flux, Janus, who is sometimes referred to as the "god of gods" ("*diuom deo*"), was seen as holding the middle ground between civilization and barbarism. The image of the two-headed Janus—looking in two

directions at once—is a useful metaphor for thinking about the nature of the state in the Third Reich.

I argue in this book that the Nazi state was inherently bifurcated—and that it remained so for much longer than previously thought. It housed, notably in the pre-war years, two subsidiary states with conflicting imperatives. The dispensation's inherent doubleness gave rise to two contending practices of Nazi rule: a *legal* way of doing things and a *violent* way of doings things. This "dual state," as a brave contemporary observer dubbed it, occupied a liminal position in the transition from authoritarianism to totalitarianism in the late 1930s. Comprised of a "normative state" and a "prerogative state," it presided over a critical juncture in the making of Nazi dictatorship.[11] It both hastened *and* retarded the country's brownshirt revolution. Although agents of the prerogative state helped to gradually dismantle the normative state, remnants of the latter continued to have a structuring effect on social outcomes in the Third Reich, especially at the level of everyday law. I suggest that this diminished, rudimentary *Rechtsstaat* was crucial in the creation and maintenance of Nazi dictatorship. The legal norms and institutions that it comprised sustained the regime not only in peacetime, but in wartime as well. The idea of "Nazi law," then, is not an oxymoron but was a fact of everyday life—a claim at odds with a prominent supposition in legal philosophy.

RADBRUCH'S FORMULA

It is sometimes said that the law of the Third Reich was not law, properly understood. This view has its roots in an influential jurisprudential argument from 1946, formulated by the legal philosopher Gustav Radbruch, about the relationship between law and morals in times of injustice.[12] The article in which he first developed this claim has been hailed as "one of the most important texts in 20th century legal philosophy."[13] Aside from decisively influencing the jurisprudence of postwar Germany's two highest courts, that of the *Bundesgerichtshof* (Federal Supreme Court) and the *Bundesverfassungsgericht* (Federal Constitutional Court), it gave rise to one of the most important debates in legal philosophy, the so-called Hart-Fuller debate, which played out in the pages of the *Harvard Law Review* and has been revisited in a plethora of publications since.[14] Entitled "Gesetzliches Unrecht und übergesetzliches Recht" ("Statutory Lawlessness and Supra-Statutory Law"), Radbruch's article set out what has since become known as "Radbruch's formula" ("*Radbruch'sche*

Formel"), an idea that has shaped legal theory and practice in highly significant ways.[15] It can be summarized as follows:

> Where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely "flawed law", it lacks completely the very nature of law. For law, including positive law, cannot be otherwise defined than as a system and an institution whose very meaning is to serve justice. Measured by this standard, whole portions of National Socialist law never attained the dignity of valid law.[16]

Radbruch's was a normative intervention that sought to overcome the legacies of Nazi dictatorship by strengthening the philosophical foundations of the rule of law, in postwar Germany and elsewhere: "In the face of the statutory lawlessness of the past twelve years, we must seek now to meet the requirement of justice with the smallest sacrifice of legal certainty."[17] Radbruch had no doubts about what needed to be done in the wake of war and genocide: "[W]e must build a *Rechtsstaat*, a government of law that serves as well as possible the ideas of both justice and legal certainty."[18] The prescription was reasonable, laudable even, considering that many of Radbruch's fellow citizens were not at all enamored with the new, democratizing order imposed on a defeated Germany from the outside. But the simplifying language of morality sits uneasily with the complex nature of reality. An abundance of microhistorical evidence contradicts Radbruch's macrotheoretical argument about the nature of Nazi law. Available data about everyday law in Nazi Germany cast doubt on the utility of Radbruch's famous formula as "a test for the validity of statutory enactments."[19] It has even been suggested that his philosophical intervention has not helped but hindered analyses of his country's legal development in the period 1933–1945, and, as a concomitant consequence, also undermined postwar efforts at coming to terms with the contribution of lawyers to dictatorship.[20]

The trouble with Radbruch's formula is that it linked two questions that should not be conflated: the question of law's nature and the question of law's practice. The former is a philosophical question, the latter an empirical one. The former demands an abstract answer, the latter a concrete one. Because Radbruch was put on a pedestal in the transition from Nazi dictatorship, his voice was amplified: "After World War II, Radbruch's reputation and good will endowed his reflections with gravitas. Contemporaries and later scholars have admired a revived spirit who, despite years of quiescence and physical debility, energetically engaged a dawning era."[21] By contrast, the voices of contemporaries who had been forced into exile such as Hans Kelsen and Franz Neumann—both

of whom shared Radbruch's social-democratic leanings but were more circumspect about his faith in natural law—were drowned out. Because Radbruch's formula paved the way for the kinds of reductionist representations of Nazi law at which I take aim in this book, it deserves a closer look.[22]

Radbruch theorized "lawlessness" as a pervasive feature of Nazi law. His argument comprised two sub-theses, sometimes described in the literature as the "causal thesis" and the "exoneration thesis." According to the causal thesis, legal positivism was responsible for the damage done to Weimar Germany's *Rechtsstaat*, and its eventual destruction in Nazi Germany. The exoneration thesis followed from the causal thesis. It held that the power of legal positivism in the Third Reich left the regime's judges normatively defenseless against the immoral content of Nazi legislation. Their professional socialization under the influence of the theory of legal positivism, so the argument goes, left them no choice but to apply statutory law. As Radbruch explained in 1947, "The proponents of this theory were compelled to recognize even the most unjust statute as law. [. . .] [And it is] precisely because of his positivistic legal training that the judge is not to be held personally responsible for the injustice of a sentence based on an unjust statute."[23]

We now know that Radbruch's categorical statements about the nature of law in the Third Reich were empirically ill-informed, his pronouncements "far off the mark."[24] Stanley Paulson and others have persuasively shown that it was not judges' adherence to statutory law that was a causal factor in the gradual destruction of the *Rechtsstaat* in the mid-1930s but their departure from it: "Statutory law that had been valid before 1933 remained for the most part on the books. Rather than waiting for the introduction of new statutory law, judges and other officials in Nazi Germany simply departed from the language of existing law whenever and wherever that was called for."[25] Paulson supports this argument with an instructive example:

> The principle *nulla poena sine lege*, found in section 2 of the German Penal Code of 1871, had been interpreted in Wilhelminian [*sic*] Germany as including certain more determinate principles, including the prohibition of ex post facto law and of applications of criminal law by analogy. These time-honored guarantees of the rule of law or *Rechtsstaat* were eliminated in one full swoop—not legislatively, but rather in the judicial practice of the new regime.[26]

It will come as no surprise that Carl Schmitt applauded the regime's boldness, declaring in 1933 "the fiction of a normative commitment of the judge to a statute has, for substantial areas of legal life (*Rechtsleben*),

become theoretically and practically untenable."[27] The institution of the statute, he claimed, could no longer guarantee the predictability ("*Berechenbarkeit*") and security ("*Sicherheit*") of law in the country's *Rechtsstaat*.[28] This brings us back to Roland Freisler.

Echoing justice minister Otto Georg Thierack's pronouncement in one of his *Richterbriefe*, letters addressed to Nazi judges to guide their jurisprudence, that statutes represented unnecessary "crutches," Freisler jumped on the post-positivist bandwagon, insisting in 1935 that the commitment of judges to statutory criminal law had been foreign to German jurisprudence prior to the Enlightenment, and, as such, deserved to be excised from it because it unduly "binds" ("*fesselt*") the regime's judges.[29] Unsurprisingly, given these intellectual foundations, judges, in the everyday operation of Nazi law, tended to dispose of criminal cases, especially if they had a political dimension, "by appeal to the precepts of the Nazi regime—the '*Führerprinzip*', the program of the Nazi Party, the '*Geist* of National Socialism', the 'moral sentiments' of the people, and the like."[30] And yet court decisions were not always substantively irrational, for reasons to be explained. In one of its most important judgments, postwar Germany's Federal Constitutional Court found that *even* legally invalid norms had created social facts in the period 1933–1945. This judicial observation is highly relevant to the issue at hand because it speaks to the relationship between facts and norms in the practice of Nazi law.[31]

In the case in question, a seven-judge panel in 1980 declared invalid the Eleventh Decree (*Verordnung*) relating to the 1935 Reich Citizenship Law (*Reichsbürgergesetz*), dated November 25, 1941, which had led to the expulsion of the plaintiff, identified in the court documents only as "Herr Karl St."[32] The judgment reaffirmed key tenets of the court's longstanding jurisprudence on the validity of Nazi law, that is, to declare invalid, drawing on Radbruch's formula, those "National Socialist 'legal' provisions" that "so evidently contradict fundamental principles of justice that a judge who tried to apply them, or to acknowledge their legal effects, would declare lawlessness instead of law (*Unrecht statt Recht*)."[33] More interesting for our purposes is the judges' finding that the organs of the postwar German state were "incapable of undoing *the facts* that the Nazis' lawless practices created."[34] As the judges opined: "The 'expatriation' of Jews pursuant to National Socialist legislation remains a *historical fact*, which, this being the case, cannot retrospectively be expunged [from the empirical record]."[35] By highlighting and explicitly recognizing not once but repeatedly the facticity of this statutory lawlessness ("*faktische[s] gesetzliche[s] Unrecht*"), the *Bundesverfassungsgericht* honored Radbruch's formula while simultaneously transcending it. Let me explain, as the point is significant for what is to come.

In the proceeding before us, BVerfGE 54, 53 (the so-called *Ausbürgerung II* Case), the Constitutional Court revisited its earlier jurisprudence, notably BverfGE 23, 98 (its *Ausbürgerung I* Case) of February 14, 1968 and BVerfGE 3, 58 (the *Beamtenverhältnisse* Case) of December 17, 1953. The latter case centered on the legality of Nazi Germany's civil service law (*Beamtenrecht*), but the details need not concern us here. The judgment is significant for our purposes because the chamber introduced a distinction between a normative (what it called "philosophical") and a factual (what it termed "sociological") approach to Nazi law—and tried to do justice to both. It is worth quoting from the judgment verbatim, not least because key portions of it resurfaced decades later as *obiter dicta* in *Ausbürgerung II*:

> It may be the case, in this instance, as in other areas, that the law created by National Socialism, amounts, in a higher philosophical sense, to "lawlessness." But it would be unrealistic ("*unrealistisch*") in the highest degree to develop this idea, in a legal positivistic manner, such that the (formal) law [of Nazi Germany] would *ex post facto* be regarded as null and void [. . .]. Such a perspective would overlook that a "sociological" validity of legal norms exists, which only ceases to be meaningful where such provisions stand in so evident a contradiction ("*in so evidentem Widerspruch*") to the principles of justice which govern formal law, that the judge who wanted to apply them or acknowledge their legal effects, would render lawlessness instead of law.[36]

I am suggesting that BVerfGE 3, 58 was a judicial attempt at *précising* Radbruch's formula, at making it *practically* usable for adjudicating between the conflicting imperatives of morality and reality. In the case at hand, the judges found that Nazi Germany's civil service law had, in fact, constituted valid law, as defined by Radbruch, in the Third Reich. They gave three reasons for their finding: first, the constitutional foundations of the *Beamtenrecht* had been adopted in a procedurally correct manner in Nazi Germany; second, the beneficiaries of the law had accepted its authority; and, third, its rules and procedures had been in force for years and not met opposition, let alone resistance. Taken together, the chamber reasoned, these "legally relevant facts" ("*rechtserheblichen Tatsachen*") had created legal expectations on the part of the population that the Constitutional Court could not disappoint without simultaneously violating the norm of legal certainty (*Rechtssicherheit*). That norm had gained in importance a few years earlier when it was folded into the *Rechtsstaatsprinzip*, the new and fundamental constitutional principle set out in Article 20(3) of the *Grundgesetz*, or Basic Law, postwar Germany's interim democratic constitution of 1949.

A few years later the court reiterated its idea of the "sociological validity" ("*soziologische Geltungskraft*") of Nazi law in its *Gestapo* Case (BVerfGE 6, 132) of February 19, 1957. In this Gestapo-related ruling, it introduced further nuance into its interpretation of Radbruch's formula, this time distinguishing explicitly between the validity of a specific law and the validity of the legal order as a whole. The judges also pronounced on the applicability of Radbruch's formula, declaring it the "outermost limit" ("*äußerste Geltungsgrenze*") for assessing the validity of Nazi law, thereby effectively casting it as a principle of last resort.[37] By trying to do justice to both facts and norms, the constitutional jurisprudence of postwar Germany took on a schizophrenic quality whenever it was concerned with cases arising from the law of the Third Reich. The *Bundesverfassungsgericht* repeatedly declared portions of Nazi law *normatively invalid*, but, on occasion, it found the same legal norms, rules, or procedures to have nonetheless been *factually valid*—and thus impossible to disregard in its adjudication of Nazi dictatorship.[38] Although this squaring of the circle was "logically untidy," as one commentator put it, it led to an improved understanding of the everyday life of Nazi law.[39] In operationalizing Radbruch's formula, the court tempered the morality of Radbruch's formula with a dose of reality, allowing for the kind of critical legal history of the Nazi dictatorship that eventually emerged in Germany at century's end.

Taking a leaf from the jurisprudence of Germany's *Bundesverfassungsgericht*, I treat Nazi law in this book as an observable social phenomenon. I follow in a long line of scholars, the best known of whom is the legal historian Michael Stolleis. He was one of the first postwar analysts to focus on the day-to-day operation of Nazi law rather than the question of its morality.[40] Convinced that moral outrage contributed little to understanding the legal determinants of Nazi rule, he went archival. For him "National Socialist law" encompassed the following, a yardstick that I also adopt:

> (1) in the narrow sense, the law that was strongly influenced by National Socialist ideology (racial laws, marriage and family laws, the Hereditary Farm Law, labor law); (2) all the statutory and case law that was newly created under National Socialist rule and superseded the older legal order; (3) the entire legal order that was in force, practiced, and taught between 1933 and 1945.[41]

To be sure, Stolleis, like Radbruch, *was* morally outraged by Nazi dictatorship, war, and genocide, as am I. He felt "a sense of shared responsibility for that period and its crimes" even though he was born only in 1941.[42] But he also wanted to *understand*, in the Weberian sense, the

law of the swastika, and therefore warned, rightly in my view, of falling prey to "limits of perception" ("*Schranken der Wahrnehmung*").[43] Cognizant of this danger, he implored scholars to

> take into account the inner make-up of the actors, and, above all, avoid reading the texts of the period as though their authors knew or foresaw what is easy to know today. […] Analytical understanding does not exclude the question of morality, in fact it can deepen it, for example by making clear how closely related writing and doing can be. […] The conditions of this dictatorship provide an especially good model for studying how traditional legal doctrine was distorted and devalued by a result-oriented vulgar jurisprudence, how […] scholarly networks were transformed, and how the individual processing of reality was deformed by external and internal pressure.[44]

Stolleis was interested in historical analysis, not philosophical judgment. Horst Dreier joined him in the quest for an empirical approach to the study of Nazi law. Dreier in turn cautioned scholars not to be misled by outcome knowledge: "One must not interpret everything that was written in Weimar and in the early years of the Third Reich from the knowing vantage point of those who were born later (*Nachgeborenen*), and thus from the perspective of the evil end (*bösen Ende*). Instead one must be cognizant of the contingency of the historical situation (*der Offenheit der historischen Situation bewußt bleiben*) in which, and in response to which, [historical actors] thought, spoke, wrote, and acted."[45]

The historical study quickly superseded the philosophical study of Nazi law. Stolleis, Dreier, and other progressive historians in the 1980s advanced the kind of critical legal history of Nazi law for which Dieter Simon had been calling in the 1970s.[46] Seeing that my training is not just in law but also in the social sciences, my analytical interest is different from that of Stolleis; it has a theoretical dimension. It is rooted in the so-called new institutionalism that emerged in the 1980s and by now has engulfed disciplines from economics to sociology via history and political science. It is surprisingly rewarding, as I hope to show, to think of the law of the Third Reich in *institutional* terms, as understood by new institutionalists. James March and Johan Olsen, who invented the label for the theoretically rigorous study of institutions, have offered this definition of what social scientists have in mind when they talk about institutions:

> An institution is a relatively enduring collection of rules and organized practices, embedded in structures of meaning and resources that are relatively invariant in the face of turnover of individuals and relatively resilient to the idiosyncratic preferences and expectations of individuals and changing external circumstances.[47]

Unlike Radbruch's philosophical take on the institution(s) of Nazi law, this definition, which I adopt in this book, is agnostic on the question of institutional morality.[48] The main concern of all of the various new institutionalisms (rational choice institutionalism, sociological institutionalism, historical institutionalism, discursive institutionalism) is to figure out why institutions matter, how, when, and to whom. If a new institutionalist is historically inclined, she might also want to know where institutions come from and how they evolve over time. One of the core assumptions of this book is that regardless of their moral purpose "institutions create elements of order and predictability. They fashion, enable, and constrain political actors as they act within a logic of appropriate action. Institutions are carriers of identities and roles and they are markers of a polity's character, history, and visions."[49]

With this approach to law in mind, I analyze the institutional foundations of Nazi order, with particular reference to the legal determinants of dictatorship. I conceive of law as a normative idea that comes to life—most notably as practices, rules, institutions, traditions, and cultures—in response to the exigencies of politics and society. My approach is an inductive one; for me law is what actors, individual and collective, make of it. It is "an intrinsically moral idea," for the reasons that Nigel Simmonds elaborates, but one caught up in a given society's webs of significance.[50] The German idea of the *Rechtsstaat* was an attempt to turn a moral idea into a foundational principle of rule, into a tool of institutional regulation and self-binding. We shall see that the appeal of this idea was not lost on the Nazi regime—the remnants of the *Rechtsstaat* also bound it, and even after its leading jurists abandoned the term itself. "[T]he fact that the Nazi government was possessed of unlimited power does not in itself preclude a presumption of legality, nor does it establish a presumption of arbitrariness."[51] H. O. Pappe's observation cuts to the heart of my analysis of the institutional development of the *Rechtsstaat* in Nazi Germany, its uses and abuses in legal theory and practice.

Coined in the late eighteenth century by conjoining the nouns "*Recht*" ("law") and "*Staat*" ("state"), the idea of the *Rechtsstaat* originally served as a rallying cry in the run-up to the German revolutions of 1848–1849. Although ultimately unsuccessful, the calls by insurgent social movements in post-Napoleonic Germany for parliamentary government, written constitutions, and "a secular, liberal state based on the recognition of fundamental rights like freedom of movement, economic liberty and freedom of the press, constitutional guarantees for the independence of the courts, and trial by jury" found expression in the idea of the *Rechtsstaat*, as first imagined by Robert von Mohl, of whom more in Chapter 4.[52] It was the enlightened ideas of von Mohl and like-minded

reformers that shaped Radbruch's postwar conception of the *Rechtsstaat*, and its antonym: the "*Unrechtsstaat*."[53] However, Radbruch's idea of the *Rechtsstaat* was an invented tradition of—and for—the postwar world. It served as an animating idea for the theory of democracy, and found its expression in Germany's postwar constitution. Few thinkers in late nineteenth and early twentieth century Germany thought a substantive conception of the *Rechtsstaat* like that in Article 20(3) of the *Grundgesetz* was either necessary or appropriate. For them, a *Rechtsstaat* was just that: a state of law, that is, a law-governed state in which public affairs were regulated by rules and regulations with no regard to their content. "The *Rechtsstaat* was, literally, a state that operated within the realm of legality. Historically, the concept of the *Rechtsstaat* was associated as well with an independent judiciary and a neutral and predictable set of procedures for applying the law. But the term is not identical with the English phrase 'rule of law.'"[54]

In the post-revolutionary world, law and morals came (once again) to be seen as ontologically distinct. As Rainer Grote writes, "The end of the nineteenth century [...] witnessed the gradual transformation of the concept of the '*Rechtsstaat*' into a mere principle of legality."[55] This fact is of crucial significance for understanding the transformation of law in the period 1933–1945. That a separation of law and morals was germane to German legal thought no-one expressed more forcefully than Hans Kelsen, who, in 1925, insisted it was "utterly nonsensical" ("*vollends sinnlos*") to claim that authoritarianism and law were incompatible:

> Even a despotically governed state represents a form of social order. [...] This order is a legal order. To deny its legal character is naïveté or an exaggeration owing to natural-law thinking. [...] What is interpreted as wanton rule is merely the authoritarian's legal authority to make all decisions, to determine unconditionally all behavior of subordinate organs, and to rescind or alter existing norms [...] at any time. Such an order is a legal order, even if it is perceived to be disadvantageous.[56]

This book seeks to prove Kelsen right for the case under investigation. When I speak of "the remnants of the *Rechtsstaat*," what I have in mind are legal practices and legal consciousness(es) carried forward from an *ancien régime* that continue to structure the politics of authoritarian rule. In the case of Nazi Germany, the preservation of such remnants of law was sometimes strategic, that is, intended by the country's self-styled revolutionaries; at other times, it was the result of habituation. For some practitioners, they were habits of the heart, the cultural remains of governing by way of rules rather than rifles—a sticky political practice that had become so pervasive in the late nineteenth century that it

amounted to a veritable logic of rule, with long-run consequences for legal development.

By advancing an ideal theory of law, Radbruch obscured the persistence of legal practices in everyday life. This was likely not his intention. He only believed that "whole portions"—not the totality—of Nazi law were devoid of legal validity. Radbruch also did not think that evidence of injustice alone was sufficient to invalidate law. Lest such a determination unnecessarily create legal uncertainty, "[t]he positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless the conflict between statute and justice reaches such an intolerable degree that the statute, as 'flawed law', must yield to justice."[57] Only in these exceptional circumstances, Radbruch argued, would law lose its validity and cease to be law, philosophically defined. In an attempt to salvage and improve Radbruch's formula, Robert Alexy has elaborated on the implication of this threshold condition, sometimes referred to as "the collapse thesis": "Even when a great many individual norms are denied legal character on the grounds of morality, including many that are important to the character of the system, even then the system can continue to exist as a legal system. This presupposes that a minimum complement of norms, the minimum necessary for the existence of a legal system, retain legal character."[58] This raises the question of how one is to measure the justice of a given legal system. Alexy has a solution:

> Take a legal system whose constitution empowers a dictator to issue norms without constraints. Thirty per cent of the norms issued by the dictator on the basis of this empowerment are unjust in the extreme, 20 per cent are unjust but not in the extreme, 20 per cent are neither unjust nor required by justice, and 30 per cent are required by justice. The 30 per cent that are unjust in the extreme are the norms that lend to the rogue system its specific character. The 30 per cent that are required by justice are, say, norms of contract law, tort law, and social security law. According to Radbruch's formula, legal character is to be denied only to that 30 per cent of norms that are unjust in the extreme. The formula does not apply to the remaining 70 per cent. Thus, the existence of the legal system would be endangered only if the 30 per cent of norms that are unjust in the extreme were to have such an effect on the empowering norm that, as a norm of extreme injustice, it forfeited its legal character over its entire range. For then the remaining 70 per cent of the norms of the system would also forfeit the basis of their validity. And then the legal system, as a hierarchically constructed system, would forfeit its existence and in this sense collapse.[59]

It is worth drawing attention to Radbruch's caveat that a substantial subset of Nazi legal practices likely amounted to law. This important

qualification is often overlooked in critiques of his work. Given the prominence, at least in the English-speaking world, of the Hart-Fuller debate—for which Radbruch's formula gave the impetus—a simplified interpretation of Nazi law (and of Radbruch's formula) has seized the legal imagination.[60] Regardless, in everyday life, on the ground, in the cities and countryside, the law of Nazi Germany was a far more dynamic institution than Radbruch's philosophical account allows. Radbruch's failure to come to terms with the complexity of Nazi law reminds us of Neil MacCormick's quip that "the theorist's position is in the sense that of an outsider to any particular practice except that of theorising."[61] Ernst Fraenkel, a German labor lawyer of Jewish background, by contrast, was an insider. He showed us decades before anyone else would that Nazi law was neither stable nor were its institutional effects uniform. In this book, I tell the history of his forgotten theory. With it he brought into view the heterogeneity and changing character of law in the Third Reich. Developed in the mid-1930s, Fraenkel constructed his parsimonious, institutional theory of dictatorship on the foundation of some of the most daring field research ever undertaken.

INSIDE DICTATORSHIP

In the early years of Nazi rule Ernst Fraenkel set out to analyze—clandestinely—the logic of domination in the country of his birth, to make "a contribution," as he put it in *The Dual State* in 1941, "to the theory of dictatorship."[62] And a lasting contribution he did make. He may well have written the single-most important book on the topic to date. Though rarely invoked nowadays, Fraenkel's analytic narrative once was regarded as a canonical work in disciplines ranging from law to history, and from political science to sociology. It is unfortunate that *The Dual State* is largely forgotten these days because Fraenkel achieved the nigh impossible—he crafted a veritable ethnography of Nazi law. His singular achievement is not usually considered in anthropological terms, although it should be and I will.

As a field of study the anthropology of law emerged in the early twentieth century, although one of its earliest (now discredited) publications, by Sir Henry Maine, a former colonial official in Victorian Britain, actually dates back to the mid-nineteenth century.[63] The hallmark of the anthropological study of law remains ethnographic field research. Ethnographers of law pride themselves on understanding law—its agents, norms, customs, rules, procedures, institutions, organizations,

discourses, practices—from the inside out. They "examine law as a social form, along with the assumptions and ideas that give it meaning."[64] The preferred method for this inquiry continues to be participant observation, which involves a researcher's immersion, over an extended period of time, in a legally relevant social setting to understand up close and personally the lifeworlds of the actors who inhabit it and the modes of their interaction. Its purpose is to describe and inscribe socially meaningful legal practices in an effort to convey their significance for the creation and maintenance of social order in a given, particular setting.[65] "Of fundamental importance to the ethnographic imagination," Paul Willis believes, "is comprehending creativities of the everyday as indissolubly connected to, dialectically and intrinsically, wider social structures, structural relations and structurally provided conditions of existence."[66]

Studying law in the field also means separating "the emic" from "the etic," that is, research subjects' own understandings of the world from the ethnographer's theoretical perspective. The legal anthropologist Paul Bohannan was more adamant than most in maintaining that the emic/etic distinction was of utmost methodological relevance to participant observation. As he put it in his most famous work, "the cardinal error of ethnographic and social analysis […] [is] the grossly ethnocentric practice of raising folk-systems like 'the law,' designed for social action in one's own society, to the status of an analytical system, and then trying to organize the raw social data from other societies into its categories."[67] In other words, a scholar of the law of the Third Reich would be well advised not to mistake accounts derived from, say, Radbruch's formula for the reality of Nazi law.

Legal anthropologists are particularly interested in slippage between law's formalities and its realities. Fernanda Pirie, for one, believes that ethnographers of law "need to ask what it is about law that means it can be used to both exercise and resist power; how does it come to be turned back against those who would employ it to dominate and control?"[68] The kinds of answers that legal ethnographers give to these and related questions tend to look different than those produced in other fields, including legal philosophy, where alternative methodologies are preferred. As Pirie writes about her approach: "We are not seeking to perfect a philosophically refined model: we promise less than the legal theorist, but our accounts should be richer, more detailed, and more nuanced."[69] The legal historian Lawrence Friedman, not himself an ethnographer of law, described the analytical value of immersion aptly: "It is a technique of considering, observing, co-living with human beings of some society, or some piece of society. It uses a microscope, not a telescope."[70]

The Dual State sheds light on another cutting edge topic in the study of authoritarianism: the relationship between nondemocratic regimes and the production of knowledge. As Ariel Ahram and Paul Goode write, "authoritarian regimes constrain the selection of research tools and especially the conduct of fieldwork. The agnotological properties of authoritarian regimes generate three major challenges for research, relating to the practical question of access, the methodological question of data validity, and the ethical question of avoiding harm or damage to human sources."[71] Ernst Fraenkel considered, observed, and co-lived with those who regarded him as "the other" almost up until World War II. Like all of Germany's Jews, he was marked for defamation, discrimination, and, ultimately, destruction. Not all Germans wanted to see him dead, but there cannot have been much solace in this. An erstwhile insider, Fraenkel was reimagined as an outsider by almost everyone he met—neighbors, lawyers, strangers. He drafted the first iteration of *The Dual State* when he was at once insider and outsider. In those years he languished on the precipice of otherness, in a liminal state half way between his old identity and his new: allowed to practice law longer than other Jews on account of his military service in World War I, but still subject to the rest of the dehumanizing practices that the racial state had invented to violently torment the country's Jewish population. He was an outsider on the inside of Nazi dictatorship, a barely concealed thorn in its side. From this precarious position he embarked on long-term, focused participant observation of the law of the Third Reich, which makes his intellectual achievement even more remarkable. The analytical payoff was considerable, as I hope to demonstrate in this book. This is not entirely surprising, for as Friedman reminds us,

> One of classic ethnography's greatest contributions to our understanding of human societies was its outsider perspective: a stranger's cool, impassive, sympathetic view of life inside some community or culture. Each culture no doubt guards some secrets from the outside; each has a kind of wordless language that no stranger can ever hope to penetrate. There are, in other words, *limits*, borders, frontiers, that no ethnographer can pass. But there is far more that can and will yield to objective research. The best of the classic anthropologists were very skilled at deciphering the codes of a culture and transmitting their knowledge to the world at large.[72]

Friedman almost certainly did not have Nazi Germany's *Volksgemeinschaft* in mind when he wrote the above lines, but he might as well have, for some of the limits that Fraenkel encountered in the mid-1930s were not dissimilar to those any anthropologist in an unfamiliar culture faces, except that the stakes for Fraenkel were infinitely higher than they are for

most of us studying law in the field. *The Dual State*, then, is not just a major contribution to the theory of dictatorship but also a feat of extraordinary human courage.

The innovative nature of Fraenkel's endeavor is even more striking, methodologically speaking, if we consider that the anthropology of law had only just been invented (and probably without his realizing) when he opted to become, by necessity more than choice, a participant observer of Nazi legal practices.

Bronislaw Malinowski, widely regarded as the founding father of cultural anthropology, had only just published his landmark studies of the Trobriand Islanders, *Argonauts of the Western Pacific* and *Crime and Custom in Savage Society*, in 1922 and 1926 respectively.[73] The former is widely regarded as the first ever ethnography of any kind, the latter as the first ever ethnography of law.[74] In *Argonauts of the Western Pacific*, Malinowski famously described the essentials of the emergent ethnographic method:

> First of all he [the researcher] has to find out that certain activities, which at first sight may seem incoherent and not correlated, have a meaning. He then has to find out what is constant and relevant in these activities, and what accidental and inessential, that is to find out the laws and rules of all the transactions. […] [T]he Ethnographer has to *construct* the picture of the big institution, very much as the physicist constructs his theory from the experimental data, which always have been within reach of everybody, but needed a consistent interpretation.[75]

Malinowski believed that if scholars studied the "imponderabilia of everyday life," they would acquire a new way of seeing, a tool with which to take the measure of the world more meaningfully—and thus more accurately.

Without realizing it, Fraenkel was following in the footsteps of Malinowski. It was a case of methodological learning by doing. Unwittingly, he advanced legal anthropology. Yet throughout his life, he remained unaware of this contribution. Up until now he has never been credited for it. The first generations of anthropologists of law habitually looked outward—toward "savage" or otherwise ostensibly "primitive" societies—rather than inward, to their own polities.[76] Perhaps this is the reason why there is no mention of Fraenkel in the annals of anthropology. But like the best ethnographers of the twentieth century, he was adept at making the strange familiar, and the familiar strange, in his first, all-important book.

Fraenkel's use of court records as ethnographic data is methodologically innovative even by twenty-first century standards. In addition to "the insights into the functioning of the Hitler regime that I gleaned from my

legal practice," Fraenkel in the 1930s relied on "hard-to-find judgments that had been published in official law reports and learned journals to see whether they offered insights into *societal* ('*gesellschaftliche*') processes in the Third Reich, which, in turn, would allow for the drawing of inferences about the everyday practices of the statist ('*staatlichen*') organs of the National Socialist executive and judiciary" and combined this with his observational data.[77] He thereby made a lasting contribution to legal anthropology, for as Pirie recently complained, "textual laws have rarely been at the heart of anthropological studies" even though they "constitute an important set of resources through which people make sense of their worlds, and for the anthropologist […] provide rich material with which to explore the nature of law."[78] Sally Engle Merry, a few years earlier, had published a similar critique, presenting a methodological case for "doing ethnography in the archives."[79] As she wrote: "Ethnography in the archives means setting the caseloads of the courts in the context of the people who were running them, and those caught in them, as well as within the context of broader economic and political changes."[80] But what exactly does this methodological technique entail, and why is it superior to conventional approaches in legal anthropology? Merry's argument is simple:

> [I]n order to investigate social change, archival research is essential. Historical data provides clear evidence of changes in the kinds of problems in court[s] and links these changes to shifts in the personnel running the courts and the political currents of the time. […] An historical approach is necessary to demonstrate the linkages between court processes and the changing social order. On the other hand, ethnography is necessary to situate these changes in a local place and with a cast of characters. An ethnographic approach to history unveils everyday behavior rather than only dramatic historical events taking place in capital cities. Much as [Michel] Foucault argues for attention to the microphysics of power embedded in the margins and interstices of institutions, ethnography based on archives such as court records […] provides a way of looking at the everyday exercise of power and resistance.[81]

Fraenkel was one of the first-ever legal ethnographers of the archive. Because he studied the imponderabilia of everyday life in *both* the courtroom *and* the archive—he was well ahead of his time. He contextualized Nazi law like none of his contemporaries managed to, and very few—if any—scholars have done since. Numerous examples exist of more comprehensive, more fine-grained, more up-to-date, or more theoretical treatments of Nazi law, but none to date has integrated theory, history, and practice as compellingly as *The Dual State* in 1941. It is for this reason that Fraenkel, not Radbruch, should be our guide through the thicket of Nazi law.

Because Fraenkel's approach was factual, not formulaic, it has largely stood the test of time. Lest I be misunderstood, although I consider Fraenkel's intellectual achievement to be greater (albeit less influential) than Radbruch's, the relationship between legal philosophy and legal anthropology is not zero-sum. Radbruch's formula and Fraenkel's ethnography—the nomothetic and the ideographic—can be profitably *combined* in attempts to make sense of law's role(s) in the Third Reich. Legal anthropologists "produce accounts that are less philosophically tidy, but detailed and nuanced, and these, in turn, enrich the empirical material available to philosophers of law."[82] Fraenkel's ethnography of Nazi law is rich in examples that would undoubtedly lend themselves to a philosophical restatement of Radbruch's famous formula.

I do not with this book propose to make such a contribution, however. My objectives, rather, are these: (1) to craft an intellectual history of Fraenkel's theory of dictatorship; (2) to take seriously the Nazi concept of law and chart its development in theory and practice; (3) to shed light on the formation and deformation of the *Rechtsstaat*, this misunderstood pendant to the idea of the rule of law; (4) to contribute to the literature on nondemocratic regimes in political science by making the concept of the dual state usable for the twenty-first century; and (5) to advance the idea of the authoritarian rule of law.

Fraenkel's closely observed, institutional analysis is not only essential to the long-standing and continuing debate over the legal origins of Nazi dictatorship—which, as I explain in the next chapter, is a part of the larger debate over the nature of the Nazi state—it also has much to offer the study of the rule of law and its promotion, especially given the rise of authoritarian legalism, a topic of growing interest in law-and-society scholarship with obvious policy implications.[83] I therefore develop in this book an argument for bringing the dual state back in, for reconfiguring it as a conceptual variable in the study of nondemocratic regimes. Because transitions to authoritarian rule are once again on the rise in both the industrialized and developing world, the imperative to grasp the institutional logic(s) of nondemocratic regimes is an urgent, policy-relevant one.[84] The historical institutional analysis of legal norms and institutions is particularly relevant given "the revival of the use of law in international politics," especially since the end of the Cold War, a development that is sometimes described as the rise of legalization in the international system.[85] Cognizant of this trend, I have positioned this book at the intersection of law and the social sciences. Cutting across disciplines and sub-fields, and eventually also space and time, I blend legal theory and intellectual history as well as insights from the various new institutionalisms to make a contribution to the study of authoritarian rule—then

and now.[86] If recent scholarship is to be believed, "the new cutting edge" of this literature "is dissecting the authoritarian genus."[87] Fraenkel's ethnography of law speaks uniquely to this agenda. I extrapolate from its theory and findings and develop a new subtype of authoritarianism suitable for comparative historical analysis.

OUTCOME KNOWLEDGE

The Dual State is worth revisiting for many reasons, but one stands out. Like Karl Schleunes's pioneering *The Twisted Road to Auschwitz*, first published in 1970, Fraenkel's erstwhile classic sensitizes us to the problem of outcome knowledge in historical analysis.[88] Investigations that are anchored in outcome knowledge run the risk of distorting the interaction effects in social life among agents, preferences, strategies, and outcomes. Experimental research has shown that subjects tend to overestimate what they would have known without outcome knowledge as well as what others actually did know without outcome knowledge.[89] This hindsight bias has been shown to be responsible not only for misunderstanding the past, but also for drawing inappropriate lessons from a misconstrued past for the future.[90] Whenever outcomes are perceived as having been inevitable, teleological explanations result. What were twisted paths in real life are analytically straightened. Empirical complexity is reduced and contingent outcomes are reframed, and misleadingly so, as deterministic outcomes.

By re-reading Fraenkel, and by comparing his account in *The Dual State* with those published in the wake of war and genocide, it becomes apparent that most of the postwar studies of the transition to authoritarian rule in Weimar Germany—and the concomitant destruction of the *Rechtsstaat*—have been clouded by outcome knowledge. Like the evolution of the Holocaust, the rise and expansion of Nazi dictatorship was neither inevitable nor smooth. A twisted road led not only to Auschwitz, but also to the totalitarian state that made the destruction of the European Jews conceivable in the first place. As the late Hans Mommsen observed, "Not until November 1938 did Hitler decide in favor of a centralized and coordinated procedure in the Jewish question."[91] The year 1938, to which I will return repeatedly in this book, represents a critical juncture in the transition from authoritarianism to totalitarianism in Nazi Germany. This transition was structurally contingent on the institutional reconfiguration of the racialized polity. Its transformation from a dual state into a totalitarian state meant that the institutional determinants of Nazi

behavior were *fundamentally different* in the period 1939–1945 than in the years 1933–1938.

The Dual State continues to make for fascinating reading because it is not clouded by outcome knowledge. At the time of his participant observation in Nazi courtrooms, Fraenkel had no way of knowing that the dictatorship he was studying in secret would turn into what his law partner, Franz Neumann, in 1942, likened to a "behemoth," the mythical beast described in Job 40:15-24.[92] *The Dual State* reminds us that the institutional transformation of the Nazi state was non-linear. It was not at all obvious in the mid-1930s that the authoritarian regime that persecuted the Jews of Germany would turn into a fully-fledged genocidal regime.[93] Historical institutionalists for decades now have insisted that specifying why particular paths were *not* taken is methodologically as important as tracing the actual course of history. Revisiting Mommsen's explanation of democratic breakdown in interwar Germany, the historian Eric Weitz has rightly observed that in his colleague's influential account "the republic appears dreary from the outset, and everyone feels beleaguered. […] One reads *The Rise and Fall of Weimar Democracy* hoping for some evaluation of possibilities, of the roads not taken, yet it never comes."[94] Peter Fritzsche reached a similar conclusion about Mommsen's deterministic account: "[F]or most German historians the plot that holds the story together has been fragile democracy and its demise. 'Weimar' is, as numerous subtitles inform us, the 'history of the first German Democracy,' the site where democracy surrendered or failed. The drama of twentieth-century Germany has largely turned on the failure of the Weimar Republic."[95] With Weitz and Fritzsche, I believe it is essential for scholars not just to assert this failure but to account for it; to reconstruct the road from constitutional to genocidal dictatorship with an acute awareness of the challenges involved in working with outcome knowledge.

On September 20, 1938, Fraenkel fled the Nazi dictatorship.[96] Three years later, 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 legalism and authoritarianism 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.[97] An ethnography of law crafted in the most forbidding of circumstances, *The Dual State* was the first comprehensive, institutional analysis of the rise and nature of National Socialism, and it was the only such analysis written from within Germany. Fraenkel's

dispassionate analysis chronicled the long and winding denaturation of the *Rechtsstaat*, which brings me once again to Roland Freisler.

Freisler and Fraenkel represent two very different faces of the Third Reich. Like Fraenkel, Freisler grew up in northern Germany. He, too, served in World War I, was briefly under the spell of Marxism, and the law also became his vocation. But differences in Freisler and Fraenkel's intellectual socialization and professional ambitions catapulted one into the Nazi regime and the other into the intellectual resistance. They travelled along paths that could not have been more divergent: the one hell-bent on racializing the *Rechtsstaat*, the other risking his life to make use of its surviving remnants. By the time Hitler appointed Freisler to the *Volksgerichtshof*, on August 20, 1942, to succeed Otto Georg Thierack—who replaced Franz Schlegelberger as Reich minister of justice—the *Rechtsstaat* was a mere shell of its former self. Key planks had been removed and dismantled. Fraenkel was safe in the United States.

During his march in goose-step through the Nazi institutions, Freisler had quickened his step. He played an ever more visible role in the transition from authoritarianism to totalitarianism in Nazi Germany, as his role in the Wannsee Conference of January 20, 1942, at which he provided expert advice on the legal dimensions of making genocide work, attests.[98] He had arrived where he longed to be. By now a faithful and ardent servant of the prerogative state, for Freisler the judicial robe was no longer symbol but disguise. His arrival at the helm of the *Volksgerichtshof* ushered the country into a veritable age of lawlessness. The "islands of 'injustice'" that some, like Stolleis, saw floating in the early years of Nazi dictatorship "within a system that, on the whole, still functioned as 'law,'" had grown into an archipelago.[99] Yet notwithstanding the supremacy and expansion of the prerogative state in the 1940s, and despite the verbal tirades that made infamous Freisler's performances at the helm of Nazi Germany's most politicized court, the normative state did not entirely disappear. It continued to exercise a modicum of authority and control, also in wartime. Occasionally it even interfered with the all-powerful prerogative state. Why these remnants of the *Rechtsstaat* survived, and how they mattered, is the subject of this book.

OVERVIEW OF THE BOOK

The book is organized into seven substantive chapters on the law of the Third Reich, its logic, antecedents, and aftermath. They are framed by an extended introduction and elaborate conclusion that look farther afield

and situate my undertaking theoretically, relating ethnography to philosophy (this chapter), and the past to the present (Chapter 9). The empirical chapters oscillate between intellectual biography and legal history. The red thread connecting them is Fraenkel's institutional theory of dictatorship, on which I rely to build the microfoundations for the metatheoretical arguments that I critique in this book.

Chapter 2 accounts for the neglect of law in the historiography of the Third Reich, which it traces to the success of Franz Neumann's *Behemoth*, first published in 1942. Through a sustained critique of Neumann's political economy of dictatorship, I show that his argument about the ostensible lawlessness of Hitler's rule gave rise in the 1950s and 1960s to an intellectual trajectory in scholarship on the Third Reich that has done a fair amount to obscure—rather than illuminate—the logic of Nazi dictatorship. Chapter 3 turns from Neumann to Fraenkel. The chapter provides the biographical and historical context necessary for understanding the author of *The Dual State* and his time. I trace Fraenkel's upbringing in a secular household influenced by the *Haskalah*, the so-called Jewish Enlightenment, explain his life-long predilection for social democracy, and reconstruct his education and socialization as a young lawyer. Through a close reading of Fraenkel's most important Weimar-era writings, I reconstruct the intellectual antecedents of *The Dual State*. The analysis provides clues as to why Fraenkel, in the 1930s, turned to what we now call historical institutionalism whereas Neumann gravitated toward historical materialism.

Chapter 4 surveys the long and winding history of the idea of the *Rechtsstaat*, laying additional groundwork for the analysis to come. I trace the evolution of the term from its emergence in the late eighteenth century until 1933. In my intellectual history of the *Rechtsstaat*, I relate the ideas of Immanuel Kant to those of Adam Müller and Carl Theodor Welcker; juxtapose the legal thought of Robert von Mohl and that of Friedrich Julius Stahl and Rudolf Gneist; consider the role of Carl Friedrich von Gerber, Paul Laband, and Georg Jellinek in the legal theory of empire; and introduce readers to Weimar legal thought by comparing and contrasting ideas about the *Rechtsstaat* by some of that era's most glittering thinkers: Hans Kelsen, Hermann Heller, Carl Schmitt, and Rudolf Smend, among others. This sketch of the *Rechtsstaat*'s intellectual foundations and discursive development sets the stage for my analysis in the next chapter of the concept's manipulation by legal theorists in Nazi Germany. Chapter 5 is an account of Nazi legalism. I reconstruct a little known, but telling, debate among Nazi theorists and practitioners of law about the nature and virtues of the *Rechtsstaat*. I find that the debate is indicative of a degree of legal consciousness in the Third Reich, which, in

turn, is useful for explaining why, and, how, remnants of the *Rechtsstaat* mattered in the transition to authoritarian rule.[100]

Relying on primary documents, Chapter 6 reconstructs the gestation of the first, German-language manuscript of *The Dual State*, known as the *Urdoppelstaat* of 1938, and charts the transformation of this unpublished manuscript into the 1941 book. The analysis shows that Neumann and Fraenkel, erstwhile law partners in Berlin, arrived at increasingly divergent interpretations of the Nazi dictatorship. Whereas Neumann radicalized his argument as time went on, Fraenkel toned down his, largely eschewing the moralizing commentary that runs like a red thread through *Behemoth*. Chapter 7 turns from the making of *The Dual State* to the findings of the ethnography of law that it houses. Through a critical engagement with the strengths—and weaknesses—of Fraenkel's pioneering analysis, I prepare the ground for the extensions of (and friendly amendments to) his institutional theory of dictatorship that I offer in my treatment of the authoritarian rule of law (see Chapter 9). Chapter 8 explores the uneven reception of Fraenkel's classic, with particular reference to the book's fortunes in the United States and postwar Germany. I account for the international recognition bestowed on Fraenkel in the early 1940s, and its subsequent status as an obligatory, but rarely noticed footnote—a forgotten classic. In Chapter 9, I consider the theoretical and empirical significance of my analysis by turning from the twentieth century to the twenty-first. In addition to this temporal leap, I make another: from the *Rechtsstaat* to the rule of law. I reconfigure the concept of the dual state and relate it to the idea of the authoritarian rule of law. Through a series of empirical vignettes, I show that Fraenkel's ethnography of Nazi law is relevant beyond borders. What I offer is an in-depth concept analysis of the idea of the authoritarian rule of law. Mine is a tentative effort to make the unwieldy term usable for comparative historical research.

Born of analytical eclecticism, this book, like the concept at its heart, is of a hybrid nature. In part intellectual biography, in part legal history, and grounded in legal and institutional theory, it is the result of my desire to put Ernst Fraenkel on a pedestal. I have felt for a long time that it is a sad irony that Carl Schmitt's oeuvre has been studied ad nauseam, while the work of one of his most learned, Jewish interlocutors is virtually unknown.[101] I have derived some consolation from the fact that Judith Shklar, the eminent theorist of legalism, also deeply admired *The Dual State*, remarking in 1987 that it was "one of the few older studies of the Third Reich that remain valid."[102] By situating Fraenkel's ethnography of law in the historiography of the Third Reich as well as in the new institutionalism in the social sciences, mine is an attempt to resurrect a

theoretically sophisticated, methodologically innovative theory of dictatorship, one with immediate relevance for coming to terms with twenty-first century authoritarianism. But it is not just that. This book is also an effort to stem the tide of forgetting the guardians of the *Rechtsstaat* in the 1930s, these defenders of light in a dark time. Ernst Fraenkel served valiantly in a forlorn army of fearless jurists. For this contribution alone he is deserving of our respect and remembrance.

2

Behemoth and Beyond

> There is no single phenomenon in our time
> so important for us to understand
> as the one which identified itself in Germany
> during the 1920s, 30s and 40s as
> National Socialism.
>
> Karl A. Schleunes[1]

> It is difficult to overstate the appeal
> of a two-dimensional portrait of Nazi power
> based entirely on brute force applied ruthlessly
> against the will of all people.
> This simplified version of the Reich
> is illustrated all around […].
>
> Nathan Stoltzfus[2]

Few issues in the historiography of the Third Reich have provoked as much ire and acrimony in the academy as the debate over the nature of the Nazi state. Sir Ian Kershaw, in his preface to the latest edition of *The Nazi Dictatorship*, revisited an infamous conference at Cumberland Lodge, where, in 1979, leading English and German historians had gathered to compare research findings on what was known as the *Führerstaat*, or Hitler state. Those who had made their way to Windsor Great Park were at loggerheads over the question of how exactly to categorize the supremely violent, institutional entity that Hitler's ambitions had spawned over the course of his twelve-year rule. Agreement was not to be had. Kershaw previously pointed to "chasmic divisions of interpretation among leading historians."[3] It appears irreconcilable views provoked vociferous arguments. "The intensity and vehemence of the discussions at the Cumberland Lodge conference struck me forcibly," Kershaw recalled.[4] "These were heated, uncompromising and sharply

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

polarized exchanges which went to the heart of attempts to understand the Nazi regime."[5]

With the retirement or passing of leading members of this first generation of historians of Nazi dictatorship—Karl Dietrich Bracher, Martin Broszat, Saul Friedländer, Tim Mason, Hans Mommsen, Detlev Peukert—many erstwhile "chasmic divisions" have been bridged, or at least narrowed. More recent generations of historians of the Third Reich, among them Christopher Browning, Jane Caplan, Richard Evans, Robert Gellately, Ulrich Herbert, Ian Kershaw, Claudia Koonz, Michael Wildt, and Nikolaus Wachsmann, have approached the subject matter with a greater detachment, an achievement undoubtedly made possible by their biographical remove from the violent conflagration of the 1930s and 1940s.[6]

Although tempers rarely flare anymore when historians of Nazi Germany gather, this does not mean that the debate over the nature of the phenomenon of National Socialism has been settled. Scholars continue to argue over the terms and concepts most—and least—appropriate for capturing the anatomy of Nazi dictatorship. This book contributes to the debate by focusing on one determinant of Nazi dictatorship that was absent entirely from the proceedings at Cumberland Lodge, and which influential analyses by leading historians continue to ignore into the present—the institution of law. Although Broszat in his classic, if controversial, study of the Nazi state devoted an entire chapter to the legal foundations of dictatorship, the large majority of scholars of the Third Reich, with the exception of legal historians such as Lothar Gruchmann, a doctoral student of Fraenkel's, and Martin Stolleis, have paid scant attention to the role of legal norms and institutions in the transition to authoritarianism and eventually to totalitarianism in Germany.[7]

Kershaw's aforementioned textbook, now in its fifth edition, neither addresses the contribution of law to Nazi dictatorship, nor has it made an appearance in Jane Caplan's useful collections, *Reevaluating the Third Reich*, which she co-edited with Thomas Childers, and *Nazi Germany*, a volume in the "Short Oxford Histories" series.[8] But the institution of law is not just missing from introductory volumes. Major works on the Third Reich have also ignored it. It is absent from Peter Fritzsche's *Life and Death in the Third Reich* as well as from Richard J. Evans's *The Third Reich in Power 1933-1939*, and it plays but a minor role in Hans-Ulrich Wehler's *Der Nationalsozialismus* and in Thomas Childers's survey *The Third Reich*. Two of the few books to have addressed the topic in more depth are Robert Gellately's *Backing Hitler* and Claudia Koonz's *The Nazi Conscience*.[9] Yet these scholars' treatments of law are incidental to their respective research designs. The widespread neglect of law in the study of

the Third Reich has to do in part with the tremendous success of Franz Neumann's *Behemoth*, first published in 1942, and in an enlarged edition in 1944.[10]

The rise of *Behemoth* corresponded directly with the decline of *The Dual State* in the final war and early postwar years. I devote an entire chapter to the argument and reception of Neumann's book for two reasons. First, *Behemoth*, which has never gone out of print, exemplifies major shortcomings—theoretical, empirical, methodological—in early studies of Nazi rule. I argue that it gave rise in the 1950s and 1960s to an intellectual trajectory in scholarship on the Third Reich that has done a fair amount to obscure—rather than illuminate—the logic of Nazi dictatorship, including law's role in it. Reductionist perspectives like Neumann's continue to hold sway today, but a less dogmatic approach is called for, especially when it comes to making sense of authoritarian rule at home: "While his dictatorship murdered millions in the name of ideology, Hitler managed his relationship with the Germans of the Reich in ways that place him among those whom scholars now identify as 'soft' dictators, who prefer the tactics of persuasion, enticement, cooptation, and compromise to work their will."[11]

The law was one instrument in Hitler's strategy of conflict. But the reasons why remnants of the *Rechtsstaat* survived, and structured authoritarian politics, have to do not just with means and ends, but also with norms and values. Law was a weapon, but it also was a tradition. I will show in Chapter 5 that some Nazis were more reluctant than others to abandon what they had learned to respect. This does not mean that the nineteenth-century tradition of the *Rechtsstaat* survived the Nazi revolution. It did not. But a subset of its norms and institutions left a mark on the dictatorship for longer than conventional wisdom would have us believe. As Nathan Stoltzfus has shown, "Hitler's willingness to compromise with the people, particularly when the people were drawing upon their traditions, continued up until some point very late in the war when he became convinced that Germany would be forced to surrender unconditionally."[12]

A close reading of *Behemoth* also illuminates the personal relationship and intellectual affinities between Fraenkel and Neumann. Business partners at *Fraenkel & Neumann*, their Berlin-based law firm, until Neumann's sudden and involuntary emigration to London in May 1933, the two close friends for several years fought as comrades-in-arms in the struggle to defend Weimar democracy. My analysis of the gestation of *Behemoth* shows why, how, and when the two friends nonetheless arrived at vastly divergent interpretations of the phenomenon of National Socialism.

THE POLITICAL ECONOMY OF DICTATORSHIP

Fraenkel's *The Dual State*, released by Oxford University Press in 1941, was the first learned and comprehensive analysis of the Nazi state. In the historiography of the Third Reich, Neumann's *Behemoth* soon eclipsed it. The memorable metaphor of the behemoth conjured an image of institutional anarchy in Germany that proved irresistible, especially abroad. Neumann came up with the language of the "non-state" to capture the extent of the lawlessness that he saw.[13] Here is how Neumann explained his book's pithy title:

> In the Jewish eschatology—of Babylonian origin—Behemoth and Leviathan are two monsters, Behemoth ruling the land (the desert), Leviathan the sea, the first male, the second female. […] Both are monsters of the Chaos. […] St. Augustine saw in the Behemoth the Satan. It was [Thomas] Hobbes who made both the Leviathan and the Behemoth popular. His *Leviathan* is the analysis of a state, that is a political system of coercion in which the vestiges of the rule of law and of individual rights are still preserved. His *Behemoth*, or the *Long Parliament*, however, discussing the English civil war of the seventeenth century, depicts a non-state, a chaos, a situation of lawlessness, disorder, and anarchy. Since we believe National Socialism is—or tending to become—a non-state, a chaos, a rule of lawlessness and anarchy, […] we find it apt to call the National Socialist system *The Behemoth*.[14]

Unlike Fraenkel, Neumann denied that law mattered, that it could be analytically relevant for making sense of Nazi dictatorship. It was not a variable worth taking seriously in his view.[15] He claimed it had neither an enabling nor a constraining effect on political outcomes: "It has been maintained that National Socialism is a dual state, that is, in fact, one state within which two systems are operating, one under normative law, the other under individual measures, one rational, the other the realm of prerogative. We do not share this view because we believe that there is no realm of law in Germany, although there are thousands of technical rules that are calculable."[16]

This book seeks to prove Neumann wrong. I show that his account of the structure and practice of "the phenomenon of National Socialism," as Schleunes called it, is deeply flawed. Neumann erected a rickety theoretical argument on a weak empirical foundation. An unreliable structure for interpretation, it distorted for years the truth about the destruction of the *Rechtsstaat* in Nazi Germany—and the impact of its surviving remnants on everyday life. Neumann's failing would be negligible were it not for the fact that his book made a splash, especially in policy circles. It

was the talk of the town in Washington, D.C., where it influenced quite significantly U.S. planning for the military occupation of a defeated Germany. *Behemoth* was "a book that had consequences," is how the historian Peter Hayes has put it:

> In 1943–1945, while Neumann was serving in Washington, D.C., in the Office of Strategic Services, the forerunner of the Central Intelligence Agency, his work strongly influenced the formulation of America's goals for postwar Germany as the "four Ds," each directed at one of the colluding groups he had highlighted: denazification, democratization (including the recruitment and training of civil servants), demilitarization, and decartelization. Immediately after the war, when Neumann was a member of the prosecution staff preparing the Nuremberg Trials of major war criminals, *Behemoth* stamped both the conception of the American case and the organization of its supporting documents.[17]

What, exactly, was Neumann's argument? And what accounts for the tremendous impact of *Behemoth*—and the corresponding decline in the reception of *The Dual State* that, on my argument, it hastened?[18]

In *Behemoth*, Neumann developed a political economy of dictatorship. Unlike more recent approaches to the political economy of dictatorship, almost all of which are based on rational-choice assumptions, Neumann's was indebted to the Marxist understanding of political economy.[19] What positive and normative approaches to political economy have in common is their treatment of economic ideas and behavior not as beliefs and actions to be explained but as independent variables.[20] Their major difference is ontological: rational-choice theorists are beholden to methodological individualism, critical theorists like Neumann are wedded to methodological structuralism.[21] What their 1930s representatives, from Friedrich Pollock and Max Horkheimer to Neumann and Otto Kirchheimer, believed central to accounting for the political and economic malaise of the interwar period was "an epochal transformation of capitalism": "The general analysis by these theorists of contemporary historical changes in the relation of state and society was, in part, consonant with mainstream Marxist thought. The new centralized bureaucratized configuration of polity and society was seen as a necessary historical outcome of liberal capitalism, even if this configuration negated the liberal order that generated it."[22] The principal argument in *Behemoth* reflects this general way of seeing the world.

Neumann argued that the Nazi dictatorship could only be grasped if its economic determinants were foregrounded in any explanatory account. But not just any economic interpretation would do. For Neumann, the Third Reich was the natural and "pragmatic" outgrowth of a particular

variety of capitalism: monopoly capitalism.[23] He identified the monopolization of business and the cartelization of politics as the twin social mechanisms that gave birth to the Nazi behemoth.[24] The interaction of business and politics resulted in a dual economy: "It is a monopolistic economy—*and* a command economy. It is a private capitalistic economy, regimented by the totalitarian state. We suggest as a name best to describe it, 'Totalitarian Monopoly Capitalism.' "[25] What Neumann sketched was a far-reaching structural transformation of the economic sphere, one that gave rise to a self-reinforcing dictatorship. A new kind of enemy, he was certain, was presiding over this dictatorship.

Neumann's behemoth was hydra-headed. Four "totalitarian bodies" conspired to dominate "over the ruled classes": the Nazi party, the bureaucracy, the military, and big business.[26] What has been referred to as "[a] sort of institutional Darwinism" governed the operation of this "cartel."[27] "[T]he whole of society is organized in four solid, centralized groups, each operating under the leadership principle, each with a legislative, administrative, and judicial power of its own."[28] Unsurprisingly, given his premise, Neumann found it "difficult to give the name state to four groups entering into a bargain."[29]

What did the monopolists want? For Neumann the answer was obvious. Corporations and companies like Flick, Thyssen, Krupp, Quandt, Mannesmann, Reemtsma, and the like were utility-maximizers. The utility they wanted to maximize was profit. Theirs was a quest for absolute *and* relative gains, which is why, according to Neumann, "big business" as a collective agent of the four-power cartel had no compunction about sacrificing morality for the economy. If we believe Neumann, it was solely the distribution of power among interacting agents in this domestic system that governed politics and society in the "Third Reich." No sovereign reigned supreme: "There is no need for a state standing above all groups; the state may even be a hindrance to the compromises and to domination over the ruled classes. […] It is thus impossible to detect in the framework of the National Socialist political system any organ which monopolizes political power."[30] Jürgen Bast has proposed the apt term "totalitarian pluralism" to describe the theoretical model presented in *Behemoth*.[31]

In Neumann's institutional analysis, Hitler was not the *Führer*, the omnipotent leader, but *primus inter pares*. He was one power broker among four: "The decisions of the Leader are merely the result of the compromises among the four leaderships."[32] For Neumann, as Chris Thornhill has pointed out, the Nazi dictatorship was "not political at all, but a mere sporadic refraction of economic interests. It […] triumphed because of the absence, not the primacy, of the political."[33]

With his argument Neumann challenged conventional wisdom on the left. His principal target was Pollock whose argument at the time was dominating the conversation among the Frankfurt School theorists in American exile. "Whereas Neumann saw National Socialism as a totalitarian form of monopoly capitalism, Pollock thought that it had […] mutated into a state capitalism with the attendant central features of vast state planning buttressed by an all-powerful bureaucracy."[34] Neumann was not convinced that the neologism "state capitalism" at all captured what was going on in Nazi Germany. Moreover, he thought the concept was a contradiction in terms. He believed it was nonsensical to describe in economic categories a political order in which the state was the sole owner of the means of production. In support, he invoked Eberhard Barth, a civil servant in the *Reichswirtschaftsministerium*, the Nazi ministry of economic affairs: "Once the state has become the sole owner of the means of production, it makes it impossible for a capitalist economy to function, it destroys the mechanism which keeps the very processes of economic circulation in active existence."[35] Added Neumann: "Such a state is therefore no longer capitalistic. It may be called a slave state or a managerial dictatorship […], that is, it must be described in political and not in economic categories."[36]

This brings us back to the corporatist element in Neumann's political economy of dictatorship: the institution of the cartel. Neumann, in sharp contrast to Pollock, believed the capitalism of old continued to govern in Nazi Germany, though less unfettered than under "democratic monopoly capitalism."[37] As he put it in *Behemoth*, "Entrepreneurial initiative is not dead; it is as vital as ever before and perhaps even more so."[38] But to what end was the capitalist machinery running? Neumann was convinced that the four members of the cartel that constituted the Nazi behemoth had but one ambition—to wage expansionist war:

> National Socialism has co-ordinated the diversified and contradictory state interferences into one system having but one aim: the preparation for imperialist war. […] With regard to imperialist expansion, National Socialism and big business have identical interests. National Socialism pursues glory and the stabilization of its rule, and industry, the full utilization of its capacity and the conquest of foreign markets. […] National Socialism utilized the daring, the knowledge, the aggressiveness of the industrial leadership, while the industrial leadership utilized the anti-democracy, anti-liberalism and anti-unionism of the National Socialist party, which had fully developed the techniques by which masses can be controlled and dominated.[39]

Neumann made a distinctive and still influential contribution to the political economy of dictatorship.[40] Unfortunately, the validity of his argument has been widely called into question, especially insofar as it

relates to the role of business in the Third Reich. Hayes, who has made major contributions to this line of scholarship, is blunt in his critique of *Behemoth*:

> Neumann was inclined not only to conflate outcomes and causes but also on occasion to misrepresent even the evidence he had. Historians now generally concur that German corporate leaders played little part in bringing Hitler to power except insofar as they helped create and prolong the economic catastrophe from which he profited politically. Specialists also agree that German industry and finance adapted their business strategies to the goals of Hitler's foreign policy, rather than vice versa; the pursuit of living space was his, not their, idea. Thus, though Neumann was no doubt right to emphasize that the productive power of German industry became one of the pillars of the Third Reich, and that the importance of that power gave business a strong bargaining position on some matters of policy, he goes too far when he depicts business as an equal partner of the Nazi state and party.[41]

The gist of extant critiques: Neumann's political economy of dictatorship suffers from structural determinism to such an extent that the thrust of his theoretical argument is all but impossible to sustain empirically. Appropriately, Alfons Söllner has described the period 1933–1942, in which the ideas expressed in *Behemoth* took shape, as Neumann's "materialist decade."[42] The label draws our attention to the book's strong Marxist undercurrents—and to what I analyze in the next section as Neumann's *radical legalism*. They have left indelible blemishes on his political economy of dictatorship. Like Pollock's approach, to which it is often compared, *Behemoth* has "the unintended heuristic value of revealing the problematic character of traditional Marxist presuppositions."[43] It advanced critical theory but contributed little to our knowledge about the Nazi dictatorship. And, as we shall see, Neumann's take on the law of the Third Reich was even more problematic than his account of its economics.

RADICAL LEGALISM

Despite Neumann's dismissal of *The Dual State*, Fraenkel was kind in his public assessment of *Behemoth*. In fact, he was downright effusive in his praise for his former business partner. In a review for the *Neue Volks-Zeitung*, published on May 16, 1942, Fraenkel elevated Neumann's book to the status of an instant classic, declaring it an "encyclopedia of National Socialism."[44] He applauded the "tremendously clear x-ray image" ("*ungemein klare Röntgenaufnahme*") of the dictatorship that his

friend had supposedly produced.[45] But Fraenkel was not shy either about making his reservations publicly known. He chided Neumann for the excessive amount of descriptive material that he felt cluttered *Behemoth*. Fraenkel bemoaned that Neumann had repeatedly given short shrift to essential questions and pursued marginal matters instead. Fraenkel's verdict: Neumann had failed to craft a full account of the dictatorship.

As Fraenkel saw it, Neumann had succeeded in analytical "deconstruction" ("*Zergliederung*") but struggled to paint "a uniform picture" ("*einheitliches Bild*") of how the Nazis ruled.[46] Fraenkel also criticized Neumann's inattention to what some today would call the dynamics of contention in the Third Reich.[47] In particular, he wanted to know more about the normalization ("*Veralltäglichung*") of Hitler rule, the mechanisms and processes by which it became embedded in the fabric of everyday life.[48] How *exactly*, he asked, did the Nazi revolutionaries and the bureaucrats of old come to terms with one another? And by what means *exactly* did the barons of industry and Nazi careerists manage to find common ground?[49] To Fraenkel's frustration, Neumann was silent about all of these matters. There was too much macro-politics, not enough micro-politics, in *Behemoth* for his liking. The picture that Neumann presented of the Third Reich was uniform because he had painted it in broad strokes, with little attention to detail. This lack of nuance is hard to miss in Neumann's analysis of law, in which he caricatured the institution in an unhelpful way. The difference in approach by the onetime business partners requires some unpacking, as it speaks to the larger debate over the relationship between law and morals in the study of the Third Reich.

Neumann and Fraenkel worked with two competing concepts of law. For Neumann, the law of the *Rechtsstaat* was a *discrete variable*: it could only take on two values. This dichotomous approach ran counter to Fraenkel's concept of law. For Fraenkel, the law of the *Rechtsstaat* was a *continuous variable*, that is, an explanatory factor that has an infinite number of possible values. Fraenkel allowed for the conceptual and empirical possibility of *degrees* of *Rechtsstaatlichkeit*. He was interested in really existing varieties of the *Rechtsstaat*. By contrast, Neumann's *Rechtsstaat* was not an analytical but a normative category; it revolved around a substantive definition of law that conjured a legal utopia. It was an effort "to realize the original promises of enlightened liberalism, and to give substance to the formal emancipatory claims of liberal thought."[50] Or, as Duncan Kelly phrased it, Neumann "wished to radicalize the *Rechtsstaat*."[51]

Like all of the Frankfurt School theorists, Neumann felt disdain for the dominance of technical rationality, a type of rationality that, from the vantage point of critical theory, benefitted only the haves, not the

have-nots.[52] This aversion to formal rationality helps explain why he, unlike the ideologically more moderate Fraenkel, saw no value in thinking about the remnants of the *Rechtsstaat*.[53] Neumann took Weber's argument about the dark sides of rationality to its extreme, seeing disenchantment wherever he looked. Given these assumptions, law to him was "nothing but an *arcanum* for the maintenance of power."[54] He was convinced that Carl Schmitt's theory of decisionism (which Schmitt abandoned in 1934) amounted to an accurate portrayal of Nazi legal practice.[55] It is therefore not surprising that the account of the Third Reich in *Behemoth* included a dystopian portrayal of law. Neumann's bleak rendering of law is logically related to his classification of the Nazi polity as a non-state: where there was no state, there presumably could not be meaningful law, as *he* used the term. "The system of coercion under Hitler's rule is instead […] a structure of direct and institutionally fluid compulsion, which lacks both the sovereign authority of universal law and the unified character of a rational state."[56] But not everyone looked at Nazi law the way Neumann did—least of all Fraenkel.

Gray Law

Where Neumann saw uniformity and sameness in the law of the Third Reich, Fraenkel noticed diversity and variation, complexity and contingency. Not content to paint in broad strokes only, he saw the value of applying a finer brush. Unlike Neumann, the émigré, Fraenkel, the practicing lawyer who had stayed behind in Hitler's Berlin, existed for eight years in a "gray zone" of sorts. In Primo Levi's use of the term, which I am mindful to not overstretch, it described a reality so extreme that any victims of Nazism who have not experienced it are said to have no right to judge those that did.[57] If we take the metaphor of the gray zone out of its original context—the concentration camp universe for which Levi had invented it—and apply it to the realm of law, it brings into view a poorly understood aspect of the violence of everyday life under the Nazi dictatorship: that the law of the Third Reich, at least for some its victims, occasionally served as a valuable sword and shield. Fraenkel was one of those victims. To be sure, the law, like the concentration camp, was an inverted moral universe. And yet, despite the dehumanizing racial ideology that served as its principal ideational foundation in the period 1933–1945, outcomes were not always predictable.

Where Neumann and Radbruch saw only black and white—law or lawlessness—Fraenkel noticed shades of gray. He was a quintessential theorist of gray law. He saw for himself, especially in the early years of the