

# The Remnants of the Rechtsstaat

*An Ethnography of Nazi Law*

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## *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<sup>1</sup>

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<sup>2</sup>

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."<sup>3</sup> It appears irreconcilable views provoked vociferous arguments. "The intensity and vehemence of the discussions at the Cumberland Lodge conference struck me forcibly," Kershaw recalled.<sup>4</sup> "These were heated, uncompromising and sharply

<sup>1</sup> The Remnants of the Rechtsstaat: An Ethnography of Nazi Law. Jens Meierhenrich. © Jens Meierhenrich, 2018. Published 2018 by Oxford University Press.

polarized exchanges which went to the heart of attempts to understand the Nazi regime."<sup>5</sup>

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.<sup>6</sup>

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.<sup>7</sup>

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.<sup>8</sup> 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*.<sup>9</sup> 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.<sup>10</sup>

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.”<sup>11</sup>

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.”<sup>12</sup>

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.<sup>13</sup> 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*.<sup>14</sup>

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.<sup>15</sup> 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."<sup>16</sup>

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.<sup>17</sup>

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?<sup>18</sup>

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.<sup>19</sup> 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.<sup>20</sup> Their major difference is ontological: rational-choice theorists are beholden to methodological individualism, critical theorists like Neumann are wedded to methodological structuralism.<sup>21</sup> 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."<sup>22</sup> 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.<sup>23</sup> He identified the monopolization of business and the cartelization of politics as the twin social mechanisms that gave birth to the Nazi behemoth.<sup>24</sup> 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.'"<sup>25</sup> 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.<sup>26</sup> What has been referred to as "[a] sort of institutional Darwinism" governed the operation of this "cartel."<sup>27</sup> "[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."<sup>28</sup> Unsurprisingly, given his premise, Neumann found it "difficult to give the name state to four groups entering into a bargain."<sup>29</sup>

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."<sup>30</sup> Jürgen Bast has proposed the apt term "totalitarian pluralism" to describe the theoretical model presented in *Behemoth*.<sup>31</sup>

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."<sup>32</sup> 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."<sup>33</sup>

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."<sup>34</sup> 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."<sup>35</sup> 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."<sup>36</sup>

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."<sup>37</sup> As he put it in *Behemoth*, "Entrepreneurial initiative is not dead; it is as vital as ever before and perhaps even more so."<sup>38</sup> 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.<sup>39</sup>

Neumann made a distinctive and still influential contribution to the political economy of dictatorship.<sup>40</sup> 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.<sup>41</sup>

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."<sup>42</sup> 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."<sup>43</sup> 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."<sup>44</sup> He applauded the "tremendously clear x-ray image" ("*ungemein klare Röntgenaufnahme*") of the dictatorship that his

friend had supposedly produced.<sup>45</sup> 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.<sup>46</sup> Fraenkel also criticized Neumann's inattention to what some today would call the dynamics of contention in the Third Reich.<sup>47</sup> In particular, he wanted to know more about the normalization ("*Veralltäglicung*") of Hitler rule, the mechanisms and processes by which it became embedded in the fabric of everyday life.<sup>48</sup> 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?<sup>49</sup> 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."<sup>50</sup> Or, as Duncan Kelly phrased it, Neumann "wished to radicalize the *Rechtsstaat*."<sup>51</sup>

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.<sup>52</sup> 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*.<sup>53</sup> 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 *arcantum* for the maintenance of power."<sup>54</sup> He was convinced that Carl Schmitt's theory of decisionism (which Schmitt abandoned in 1934) amounted to an accurate portrayal of Nazi legal practice.<sup>55</sup> 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."<sup>56</sup> 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.<sup>57</sup> 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

dictatorship, that the law (as well as the state in which it was applied) was alive and in reasonably good condition, all things considered, despite the Nazi onslaught on the *Rechtsstaat*.<sup>58</sup> It would not have occurred to him to conclude, as Neumann did, and much later also Hannah Arendt, that a non-state was governing the dictatorship and that law had ceased to exist. Neumann's was a world of certainty, one he felt compelled to capture in binaries—not unlike Carl Schmitt whose work he both admired and reviled.<sup>59</sup> Unlike his friend, Fraenkel allowed for ambiguity and the existence of institutional hybridity.

Out of necessity, *Behemoth* was the result of desk research. What Neumann took to be the state of law in the Third Reich was a figment of his imagination. Neumann's ideologically derived assumptions about what made the world hang together in the 1930s blinded him to the reality of authoritarian rule—in economics and in law. His progressive fervor undermined the empirical validity of his argument. Because *The Dual State* grew out of participant observation, Fraenkel was more attuned than Neumann to the many different and contradictory roles that law played in the transition from democracy to authoritarianism and from authoritarianism to totalitarianism in interwar Germany.

It is ironic that Neumann, the consummate lawyer, should be remembered for getting the law wrong.<sup>60</sup> And yet I am not the first scholar to cast doubt on his empirical understanding of the law of the Third Reich as well as on the concept of law that underpinned Neumann's sweeping analysis. Joachim Perels, for example, has faulted Neumann for equating the concept of law with statutory law. He derides Neumann's twin assumptions that the institution of the "general statute" ("*allgemeines Gesetz*") represented the "fundamental form of law" ("*Grundform des Rechts*"), and that the generality of law was a reliable indicator of law's rationality.<sup>61</sup> Neither assumption is borne out by historical evidence. Both are also "theoretically wrong" ("*theoretisch falsch*"), according to Perels.<sup>62</sup> He makes the important point—self-evident to law-and-society scholars the world over—that law's intended function is not always the function that law *actually* serves in politics and society.<sup>63</sup> A preconceived, simplistic, and "rather artificial" understanding of law, one that mostly ignored legal practice, blinded Neumann.<sup>64</sup> Perels has therefore rightly cautioned against an uncritical reception of Neumann's oeuvre. He considers much if it is to be a model for "moralizing commentary" rather than for analytically sophisticated socio-legal scholarship.

Interestingly, Neumann and Fraenkel at one point had a very similar understanding of the logic of authoritarian legalism. But divergent trajectories in the two friends' biographies account for what Alfred Söllner has described as Neumann's rapid theoretical radicalization after 1933.<sup>65</sup>



A sense of impending doom appears to have persuaded Neumann to fundamentally rethink the nature and function of law in society. He gave "Weber's views on legal development a radical gloss."<sup>66</sup> This widened considerably the intellectual distance between him and Fraenkel.<sup>67</sup> For Fraenkel remained beholden to Weber's concept and theory of law, which is why, according to William Scheuerman,

Neumann harshly criticizes Ernst Fraenkel's [*The Dual State*, which anticipates many features of Neumann's own study but insists on a dualistic face of Nazi law [. . .]. But like Weber, Fraenkel believes that capitalism presupposes a high degree of legal regularity and, hence, some features of the liberal rule of law. Insofar as German fascism remains capitalist, Fraenkel concludes, it preserves certain minimal characteristics of modern legal rational authority that can be identified in the sphere of private law. In contrast, Neumann traces the disintegration of rational law to the socioeconomic sphere itself. Consequently, Neumann must embrace a more radical and disturbing picture of the Nazi legal order than his friend and colleague.<sup>68</sup>

### Marx to Fuller

To the extent that Fraenkel wrote like a Weberian, Neumann's style resembled that of a Marxist. Fraenkel compared the Third Reich to an ideal type, Neumann to an ideal. Because the reality of Nazi rule did not correspond to his preferred idea of state, Neumann drew the only conclusion that seemed logical to him: he denied that the racial polity was a state at all. "[I]t is difficult to give the name state to four groups entering into a bargain."<sup>69</sup> Neumann reasoned in analogous fashion when it came to the concept of law: "If general law is the basic form of right, if law is not only *voluntas* but also *ratio*, then we must deny the existence of law in the fascist state. Law, as distinct from the political command of the sovereign, is conceivable only if it is manifest in general law, but true generality is not possible in a society that cannot dispense with power."<sup>70</sup> In some respects, Neumann's position anticipates Radbruch's formula, which I critiqued in the previous chapter. Like Radbruch, Neumann was only concerned with the general thrust of law, not its particulars.<sup>71</sup> Neumann and Radbruch were meta-theoretical thinkers not overly concerned with the empirical validity of their far-reaching claims. Whereas most anthropologists of law would operate with a broad conception of what law is, and what it is not, Neumann began and ended with a preconceived, reductionist notion of this complicated phenomenon. To be deserving of the name, a *Rechtsstaat*, for Neumann, had to be a progressive *Rechtsstaat*.<sup>72</sup> He enumerated its defining attributes in a key essay, "Types of Natural Law," published in 1939: "the generality of law, the equality of

men, the prohibition of individual legislative decisions, the impossibility of retroactive legislation, especially in penal law, and an independent judiciary."<sup>73</sup> The list is reminiscent of an influential postwar perspective on the relationship between law and morals: Lon Fuller's argument about the inner or internal morality of law.

In his 1965 book *The Morality of Law*, Fuller, a professor of law at Harvard Law School, introduced a procedural concept of law founded on a secular version of natural law theory. It revolved around eight "principles of legality," which, Fuller wrote, embodied the moral essence of the rule of law. They demanded, *inter alia*, that legal rules be sufficiently general, publicly promulgated, prospective, minimally clear, relatively constant, and administered in a predictable fashion.<sup>74</sup> Fuller's philosophical inquiry, directly inspired by Radbruch's formula and the case of the Third Reich, cast doubt on the legal quality—the "lawness"—of Nazi law. But not everyone was convinced that the issue was an important one to explore. Ronald Dworkin was among them: "[Fuller] asserts that to the extent to which lawmaking is subject to internal immorality of the sort common under tyrannies like Nazi Germany, it fails, and its product is to this extent less law. Fuller has toiled in this vineyard before. He shares with many an obsessive ambition to lessen the horror of tyranny by arguing it into anarchy, or at least partial anarchy."<sup>75</sup> Neumann is guilty of precisely this ambition. His radical legalism paved the way for Radbruch and Fuller who followed in his wake.

All three theorists proved more comfortable with the purity of philosophy than the reality of history—to the detriment of empirical understanding. "There is no available shortcut of the sort Fuller assumes," Dworkin pointed out: "[A]lthough we should certainly agree that some political outrages involving secret legislation, or retroactivity, or whatever, are also cases in which an attempt to produce or apply law must be said to abort, it would not follow that every such outrage, or even most such outrages, have some effect on legality. Nor would it follow that there is any connection between the gravity of the moral wrong and the extent of the legal impairment involved."<sup>76</sup> This echoes the observation by Hans Kelsen with which I opened this book: "The claim that no legal order exists under despotism, that the ruler's arbitrary will governs, is utterly nonsensical."<sup>77</sup> But unlike Kelsen, who penned his remark in 1925, Dworkin addressed explicitly the case of Nazi Germany, calling into question not only Fuller's—and thus Neumann's—conclusions about the law of the Third Reich but also their approach to it:

An apparatus of government dressed in legal forms and vocabulary may so far fail to meet Fuller's [principles of legality] that it falls below the threshold

of our concept of law. Perhaps the Nazi governmental system is a case in point; perhaps it was not only immoral, but also not quite law. One cannot prove this by showing that it differed from our own in the dimensions these [principles of legality] present. To prove it one would have to refine and to some extent calibrate the concept of law formed by the [principles] and then document the application of this concept to Nazi history. I doubt that the game would be worth the candle, or that this calculation serves any important purpose. I regard most arguments as to whether the Nazi system was "law" as having little point. But the conclusion that it was *less* law than ours, on the basis of Fuller's argument that because it had more retroactivity it must have been, is in addition illogical.<sup>78</sup>

Fraenkel's litigation experience in the Third Reich illustrates the power of Dworkin's theoretical argument. Douglas Morris recently surveyed half a dozen of Fraenkel's Nazi-era cases. He finds that "[i]n representing political defendants, Fraenkel assumed a hard but not hopeless task. Political prosecutions usually yielded convictions, but not always."<sup>79</sup> Although his court cases informed Fraenkel's argument in *The Dual State*, he did not rely explicitly on any of them in support of his argument.<sup>80</sup> They nonetheless provide evidence for his theoretical claim that law and lawlessness existed side by side—albeit to different degrees and in changing permutations—during the span of the dictatorship. As Morris writes, "Using their skills as legal technicians, lawyers on occasion could turn [courtroom] procedures [...] to their clients' advantage."<sup>81</sup> On occasion they were even able to "challenge in court not only National-Socialist brutality but also National-Socialist deceit."<sup>82</sup> Sebastian Haffner's recollections from the early years of the Nazi dictatorship, during which he was a legal trainee in Berlin, bear out this finding:

In the *Kammergericht*, the highest court in Prussia, where I worked as a *Referendar* at that time, the process of law was not changed at all by the fact that the interior minister enacted ridiculous edicts. The newspapers might report that the constitution was in ruins. Here every paragraph of the Civil Code was still valid and was mulled over and analysed as carefully as ever. Which was the true reality? The Chancellor could daily utter the vilest abuse against the Jews; there was none the less still a Jewish *Kammergerichtsrat* (*Kammergericht* judge) and member of our senate who continued to give his astute and careful judgements, and these judgements had the full weight of the law and could set the entire apparatus of the state in motion for their enforcement—even if the highest office-holder of that state daily called their author a "parasite", a "subhuman" or a "plague". [...] I must admit that I was inclined to view the undisturbed functioning of the law, and indeed the continued normal course of daily life, as a triumph over the Nazis.<sup>83</sup>

What Haffner, who left Nazi Germany for Britain in 1938, the same year as Fraenkel, described was nothing other than a bifurcated state, a dual state. The glimpses into the workings of the *Kammergericht* that he provided are suggestive of more institutional continuity than Neumann's non-state model allows. Though he did not use Fraenkel's terminology, Haffner's sketches of everyday law point to the co-existence of a prerogative state and a normative state, at least at the outset of the dictatorship.<sup>84</sup>

An inductive thinker, Fraenkel was the methodological opposite of Neumann. He quickly developed a knack for ideographic reasoning—in spite of his professional training as a lawyer. Although he took concepts very seriously, Fraenkel was less hung up than Neumann on permanently fixing the meaning of terms. Ever the careful student of Weber, Fraenkel put the still relatively new ideal type method to use, albeit implicitly. In *The Dual State*, he used the conventional, positivist understanding of law that was dominant in his time as an analytical standard against which to measure the everyday life of Nazi law. Instead of thinking in binaries, as Neumann was wont to, Fraenkel embraced a non-dichotomous approach to the meaning of law. This intellectual flexibility meant that he was well equipped to theorize innovatively about institutional hybridity and liminal states when it mattered, an ability that Neumann lacked.

In Neumann's view, law had "concealing functions" and was thus epiphenomenal: "Law is now a technical means for the achievement of specific political aims. It is merely the command of the sovereign. To this extent, the juristic theory of the fascist state is decisionism. Law is merely an *arcantum dominationis*, a means for the stabilization of power."<sup>85</sup> Neumann was not wrong, of course. Fraenkel had already made a similar point the previous year. It did not follow, however, that all law was repressive: "Fraenkel showed not that some core of the normative state was impervious to the prerogative state but rather that the normative and prerogative states interacted dynamically with each other within a dictatorial regime. He made clear that the dual state, taken as a whole, that is the combination of the normative and prerogative states, had replaced the rule of law, and that this National-Socialist dual state had been conceived in-unlawfulness."<sup>86</sup> This is why I speak of the remnants of the *Rechtsstaat*. I find the phrase useful to convey my argument that although in Nazi Germany the reign of the *Rechtsstaat* as such was over, some of the norms and institutions associated with it survived, if in heavily circumscribed form. They continued to matter, structuring politics and society on the margins of dictatorship. Sometimes the legal system had the institutional effects that its Nazi guardians intended, at other times it produced unintended consequences, including some that undermined the dictatorship.

This brings us back to Fuller who believed that law existed on a continuum and thus was always a matter of degree. Neumann, by contrast, was a far more categorical thinker. Where even Fuller was willing to see gray, or degrees of *Rechtsstaatlichkeit*, for Neumann the question of the law of the Third Reich was a black-and-white issue. Thinking about remnants of the *Rechtsstaat* was anathema to Neumann, which explains his vehement critique of *The Dual State*: either law was both formally and substantively rational, or it did not qualify as law at all. Even a cursory look at Fraenkel's experience as a cause lawyer in the 1930s suggests that Neumann missed the trees for the forest when it came to Nazi law. Fraenkel's court appearances alone lend credence to the notion that in the early years of the dictatorship "defendants could still counter National-Socialist arguments in some courtrooms."<sup>87</sup> As Morris writes, "At least for a while, the normative state provided a place where National-Socialist opponents could speak, even if they could not launch a counter-attack."<sup>88</sup>

This anecdotal evidence, in conjunction with more comprehensive data on the law of the Third Reich now available, indicates that Neumann overstated his case when he claimed "[t]here is complete agreement in the literature that the law is nothing more than the command of the Leader."<sup>89</sup> No such agreement existed. But not only *The Dual State*, even some of the empirical data in *Behemoth* itself contradicted Neumann's assertion. Consider the following example. Immediately after stating, not incorrectly, that "[t]he main function of National Socialist law is to preserve racial existence," Neumann conceded that the regime's instrumental use of law was not absolute. Even at the time of his writing, in 1941, Neumann held that the Nazi machinery of law had "not yet fully developed" its principles and practices: "The law is still in a state of flux, the judiciary not yet fully synchronized. The trends are unmistakable, however, and during the war, the law reached its full development as an instrument of violence."<sup>90</sup> This interpretation is nearly identical to Fraenkel's, whose account Neumann dismissed so cavalierly.<sup>91</sup>

But Neumann was out of step with the majority of practicing lawyers, not just with Fraenkel. Weimar-era lawyers were not convinced by Neumann's claim that the existence of "calculable and predictable rules" of law as well as of legal "competences, jurisdictions, regularities" did not constitute prima facie evidence of the continued operation of remnants of the *Rechtsstaat*.<sup>92</sup> The vast majority of them worked with a more conservative, procedural concept of law than Neumann. To conceive of the *Rechtsstaat* in procedural rather than substantive terms was the norm in the early twentieth century. Inasmuch as the negation and destruction of some of these procedures persuaded Neumann to deny the existence of

law—to extol the end of the *Rechtsstaat tout court*—not everyone agreed that the deformation of law was akin to its destruction. As one contemporary of Neumann's wondered at the time: "Must we really say that a bottle is empty when the labels at our disposal cannot properly describe its contents?"<sup>93</sup> Neumann answered in the affirmative, Fraenkel in the negative. With *Behemoth* and *The Dual State* the two friends wrote competing titles, arriving at diametrically opposed answers to the question of whether the law of the Third Reich mattered.

Neumann and Fraenkel occupied different positions on the analytical spectrum of their time. Whereas Neumann looked for macrofoundations of the Nazi dictatorship, Fraenkel appreciated that mesofoundations as well as microfoundations also had to be factored into any explanatory account of Nazi rule. While not entirely innocent of a reductionist reading of reality, especially of the economics of dictatorship, Fraenkel and large avoided the crude holism and functionalism that characterized Neumann's argument in *Behemoth*.<sup>94</sup> Instead of singling out supra-individual entities and aggregate evolutionary patterns as the sole drivers of authoritarianism, Fraenkel was attuned to what political scientists call structured contingency, that is, situations in which agents act voluntaristically but within the limitations imposed by structural constraints.<sup>95</sup> It is a less deterministic version of Marx's adage in *The Eighteenth Brumaire of Louis Bonaparte*, where he famously proclaimed that

Men make their own history, but not of their own free will; not under circumstances they themselves have chosen but under the given and inherited circumstances with which they are directly confronted. The tradition of the dead generations weighs like a nightmare on the minds of the living.<sup>96</sup>

Speaking of Marx, the difference between Neumann and Fraenkel is not dissimilar to that between the author of *The Eighteenth Brumaire of Louis Bonaparte* and Alexis de Tocqueville.<sup>97</sup> Whereas Neumann, inspired by Marx, was beholden to historical materialism, Fraenkel, like de Tocqueville, was a historical institutionalist *avant la lettre*. Initially united by Sinzheimer's faith in the liberating potential of progressive legalism, Fraenkel and Neumann came to stand for two opposing tendencies in the intellectual resistance to Nazi dictatorship: Neumann's was marked by radicalization, Fraenkel underwent a deradicalization. The former embraced radical legalism, the latter a reformist variant thereof.<sup>98</sup> Their mutual disenchantment with each others' responses to the challenge of Hitler rule is remarkable considering that at one point the two of them saw eye to eye on the Third Reich. Both emphasized the economic origins of dictatorship, and—more important—both believed its law to be bifurcated.

One of the most remarkable aspects of *Behemoth* is the fact that much of it betrayed Neumann's long-standing thinking about the nature of the Third Reich. To some extent, in *Behemoth*, Neumann repudiated ideas that he himself developed. In other words, a noticeable tension runs through Neumann's treatment of law. Or, as one reviewer put it, "Dr. Neumann seems at times not too convinced of his own thesis."<sup>99</sup> This tension tells us a great deal about intellectual affinities between him and Fraenkel—common points of view that their famous books at first glance conceal.<sup>100</sup> For it turns out that the principal conceit in *The Dual State*—the idea of institutional hybridity—has intellectual antecedents in Neumann's pre-war work, and even resurfaces in *Behemoth*. Like Fraenkel, Neumann saw a dual state at work in the Third Reich. He, too, believed that the Nazi state was a schizophrenic institutional creature—a hybrid comprised of independent but mutually constitutive halves. Here is Neumann himself:

Two notions of law must be distinguished, a political and a rational notion. In a political sense, law is every measure of a sovereign power, regardless of its form or content. Declarations of war and peace, tax laws, civil laws, police measures and court attachments, court decisions and legal norms applied in the decisions, all these are law simply because they are expressions of sovereignty. Law is then will and nothing else. The rational concept of law, on the other hand, is determined by its form and content, not by its origin. Not every act of the sovereign is law. Law in this sense is a norm, comprehensible by reason, open to theoretical understanding, and containing an ethical postulate, primarily that of equality. Law is reason and will.<sup>101</sup>

In the section immediately preceding this theoretical discussion, Neumann, although refusing to call the transactions by their name, acknowledged that a legal way of doing things nonetheless existed in Nazi Germany:

The average lawyer [...] will point out that hundreds of thousands, perhaps millions, of transactions in Germany are handled according to calculable and predictable rules. That is true. Any society based on a division of labor will necessarily produce competences, jurisdictions, regularities, which give the appearance of a functioning legal system. Traffic must move to the right or the left; houses are to be painted green or white; groups and chambers may raise this or that fee. These and thousands of other questions are dealt with rationally, even in the so-called "prerogative" state—the S.S., the S.A. and the Gestapo. But they are, in the words of my late teacher Max E. Mayer, "culturally indifferent rules" of a predominantly technical character.<sup>102</sup>

The discussion is telling. For Neumann, "culturally indifferent rules" of a predominantly technical character were not law, did not qualify as law. But even he conceded that "the average lawyer" would disagree with his

understanding of law. Fraenkel was one such lawyer. He had no illusions about the morality of Nazi law, but he was cognizant that law remains a medium of, and stage for, social interaction even when it is honored in the breach or flooded with inhumane content, as was the case in the period 1933–1945.

Neumann was a thought-provoking theorist, but not much of a social scientist. He was model-driven, not too curious about the real world. His "England problem" illustrates the point.<sup>103</sup> Roger Cotterrell has shown that Neumann, like Weber before him, relied on "unrecognisable descriptions of actual judicial practice" in order to sustain empirically, in the context of the common law, his theoretical argument about the generality of law that he had developed based on his personal experience in the civil law tradition.<sup>104</sup> The target of Cotterrell's critique is the publication in English of Neumann's 1936 doctoral dissertation, "The Governance of the Rule of Law," which the émigré scholar completed at the London School of Economics and Political Science under the supervision (and demonstrable influence) of Harold Laski.<sup>105</sup> In it, Neumann developed his quintessential argument about the function of law in society, one that "ascribed a historically transcendent ethical function to general law," regardless of empirical context.<sup>106</sup>

"Neumann is forced to claim," Cotterrell points out, "that despite all doctrinal differences there are no significant functional differences between the common law and the continental code systems, insofar as both correspond to the political, economic and social order of the competitive society."<sup>107</sup> It followed from this that "both kinds of legal order have to be seen as rational in the sense demanded by the rule of law."<sup>108</sup> The problem, however, is this: the historical record does not support Neumann's claim. His idiosyncratic interpretations of institutions such as the doctrine of *stare decisis* bespoke an incomplete grasp of the history and practice of the English rule of law, which Neumann erroneously conflated, like so many others, with that of the German *Rechtsstaat*.<sup>109</sup> In Weber's typology of law, which informed Neumann's classificatory scheme, the common law of England "is 'irrational' rather than formally rational—based in empirical law-finding rather than the systematic elaboration of formal concepts."<sup>110</sup> Despite admiration for Neumann's oeuvre, Cotterrell is blunt in his assessment: "[H]is discussion of English law in terms of the thesis of *The Rule of Law* is ultimately confused and unsatisfactory."<sup>111</sup> If Cotterrell is to be believed, Neumann's concept of law does not easily travel. He points out that even though Neumann declared open-ended legal standards (called *Generalklauseln* in German) "in the Weimar context as antithetical to the rule of law," such open-ended legal standards had the opposite effect in England where they contributed to



the advancement of the rule of law.<sup>112</sup> But let us return from England to Germany, where Neumann's argument about general law has also been challenged. According to Ulrich Preuß, detailed and empirical studies have shown the institution of the statute—defined as an abstract and general norm—never enjoyed the kind of standing that Neumann attributed to it. Preuß has disputed that a strong, let alone widespread, theoretical or empirical commitment to general law ever existed in nineteenth century Germany. He concludes that Neumann mistook “the loud, liberal propaganda of pre-constitutional times for [...] social reality.”<sup>113</sup>

My larger point is this: Had Neumann had the opportunity to delve into the thorny thicket of Nazi law, the chance to experience for years on end the everyday life of dictatorship, he would have found incontrovertible evidence that aspects of the law, regardless of its fractured appearance, mattered in the Third Reich. It enjoyed facticity; it had an empirical presence and produced innumerable institutional effects, intended and otherwise, as postwar Germany's Federal Constitutional Court confirmed.<sup>114</sup> The law of the Third Reich structured politics and society, not all of politics and society, but a significant chunk of both. It did so prior to the war but also in diminished form throughout. By writing law out of existence as a structural parameter to choice, Neumann did a disservice to scholarship about the nature of Nazi rule. He retarded the production of knowledge about the transition to, and consolidation of, the Third Reich by clinging to an ideologically charged way of seeing the world.<sup>115</sup>

If the institution of Nazi law was as inconsequential as Neumann claimed, why did a group of courageous Germans, fully aware of the ongoing destruction of the *Rechtsstaat* around them, seize opportunities to resist the rise and expansion of the prerogative state in the courtrooms of the Third Reich? Though their number was shamefully small, these “fearless jurists,” as a 2017 study conducted under the auspices of Germany's Ministry of Justice christened them, risked their careers, some their lives, to fight the Nazi dictatorship by legal means.<sup>116</sup> Highly accomplished and reflective, these jurists were no fools. If the state of lawlessness had been as pervasive as Neumann claimed, the pursuit of legal resistance as futile from as early as 1933 as he implied, would these attorneys and judges have chosen to engage in kamikaze legalism? The most principled ones would likely have done: out of human decency or a commitment to their vocation. But is it reasonable to assume that the majority would have been willing to become martyrs for an impossible mission? Judging by the archival evidence, most of Germany's resisting jurists acted strategically, not wantonly. They pursued a strategy of lawfare.<sup>117</sup> It was not naïveté but a clear-eyed assessment of the promise—and limits—of legal

resistance in the evolving dictatorship that persuaded them to become lawyers with a cause.

### SLAYING BEHEMOTH

At the dawn of his life the Holocaust historian Raul Hilberg had a complaint: “[O]ne can pick up a work of even a thousand pages with two thousand footnotes, presenting a complete assessment of Nazi Germany, and not find Neumann in any footnote.”<sup>118</sup> These were the grateful words of Neumann's star student. As a Ph.D. candidate at Columbia University in the late 1940s, Hilberg fell under the spell of his charismatic supervisor.<sup>119</sup> It was there that Hilberg laid the foundations for what would turn into the first institutionalist interpretation of the Holocaust—the three-volume *The Destruction of the European Jews*.<sup>120</sup> The publication inaugurated a functionalist (or structuralist) approach to the study of Nazi Germany, one that influenced historians from Hans Mommsen to Christopher Browning.<sup>121</sup> However, *pace* Hilberg, *Behemoth* is not at all underrepresented in scholarship on the Third Reich and never was. Quite the opposite: Neumann's *Behemoth* has always enjoyed a prominent place in that literature—arguably too prominent a place: “Neumann was so overwhelmingly successful in his attempt [to lay bare the character of the Nazi dictatorship] that *Behemoth* is recognized, even today, as the first comprehensive interpretation of National Socialism, a work which has served several generations of researchers in contemporary history as the benchmark for their own work.”<sup>122</sup>

The extraordinary reception of *Behemoth* has cast a long shadow over that era's other, better study of Nazi dictatorship—*The Dual State*. To the detriment of scholarship, it has distracted from key parts of the anatomy of this scariest of bodies politic.<sup>123</sup> Hyperbolic assessments like Hilberg's ensured that it did. They came quick and fast in the wake of the book's publication. A gander at these reviews helps us understand why *Behemoth* rose, despite the long list of shortcomings that I have identified, to the rank of a classic.

### Locus Classicus

The publication of *Behemoth* was greeted with fanfare. The *New York Herald Tribune* advertised the book as “a scholarly and brilliant study,” and the reviewer for the *Saturday Review of Literature* was certain that

it represented "by a wide margin the most illuminating and the most learned analysis yet written of Nazi political theory, of Nazi economics, and of the Nazi social order," one that offered "an intellectually exciting experience of the first order."<sup>124</sup> In his estimation, the book was quite simply "dynamite."<sup>125</sup> Learned assessments quickly followed on the heels of the popular reviews. In August 1942, Oscar Jászi credited Neumann in the *American Political Science Review* with having produced

an almost encyclopedic survey of the development and present functioning of Nazi Germany. In the enormous flood of literature now covering the most spectacular dictatorship of our period, there is no treatise which offers such an amount of facts and critical evaluation as does this one. It is not too much to say that there is no single aspect of the German problem to which the author does not contribute some important facts, interesting sidelights, or a new hypothesis.<sup>126</sup>

Harvard University's Paul Sweezy chose equally ebullient prose: "Franz Neumann's *Behemoth* is unquestionably the best work on the subject that has yet appeared, and it sets a very high standard for future writers to live up to. [...] Neumann has given us the first genuinely scientific interpretation of Nazi ideology in terms of the antagonisms and compulsions of the system as a whole."<sup>127</sup> In the *Review of Politics*, Waldemar Gurian was convinced that "No student of political and social trends of our time can afford to let this book go unnoticed," and George Sabine, in the *Philosophical Review*, declared *Behemoth* to be "one of the most thorough and judicious accounts of National Socialism so far produced. [...] The treatment is in all cases as thorough as the space permits and as objective as is possible under present circumstances."<sup>128</sup>

Economists, too, took note. From the University of California at Berkeley, Robert Brady bestowed plaudits in the *American Economic Review*: "The careful reader [...] will be richly paid for the time he invests in *Behemoth*, not only for the grasp it will give him of the [N]azi system as a whole, but also for the profoundly disturbing parallels it suggests to developments in other sections of the world—not excluding many of those at home."<sup>129</sup> For Brady, Neumann's treatise represented "by a large margin the most powerful and masterly exposition of the origin, functions, and outlook of the [N]azi system yet to appear in print."<sup>130</sup> The reviewer for the *Political Science Quarterly*, despite some misgivings, acknowledged that the volume provided "a far better insight into what has been happening during these nine long years of Nazi rule than the surface observations of so-called first-hand reporters arriving from the Reich."<sup>131</sup> But one review stood out for the lavish praise that it heaped upon Neumann's analysis.

C. Wright Mills, the American sociologist, wrote a paean to *Behemoth* in the *Partisan Review*.<sup>132</sup> He saw in Neumann a radical brother-in-arms: "The analysis of *Behemoth* casts light upon capitalism in democracies. To the most important task of political analysis Neumann has contributed: if you read his book thoroughly, you see the harsh outlines of possible futures close around you. With leftwing thought confused and split and dribbling trivialities, he locates the enemy with a 500 watt glare. And Nazi is only one of his names."<sup>133</sup> The tone of Mills's extended review is adulatory throughout, despite minor gripes. He hailed Neumann's book as "a fresh intellectual act" and "a definitive analysis" of Germany's descent into violence. But he appreciated even more its universalizing normative argument, to wit: the moral warning that *Behemoth* contained about the economic origins of dictatorship elsewhere: "Franz Neumann's is not only the most important book to appear about Germany; it is a live contribution to all leftwing thinking today. His book will move all of us into deeper levels of analysis and strategy. It had better. *Behemoth* is everywhere united."<sup>134</sup>

The adulation is not difficult to understand. "[T]he more conjectural frame [of *Behemoth*] fascinated younger political writers, such as C. Wright Mills," who were clamoring for "a fresh, unhackneyed start for [the] leftist diagnosis of trends that were not limited to Germany."<sup>135</sup> *Behemoth* was a highly policy-relevant book, as we shall see in more detail in a moment. What Mills's review makes abundantly clear is that *Behemoth* was also advocacy-relevant. Years later, in his bestselling *The Sociological Imagination*, Mills reiterated his earlier praise and upped the ante when he compared *Behemoth* favorably to another influential mid-century treatise: Talcott Parsons's *The Social System*. Mills was convinced that Parsons had misunderstood the structural determinants of Nazi dictatorship. He therefore urged readers to turn to Neumann's rather than Parsons's *locus classicus*: "[O]ne *Behemoth* is worth, to social science, twenty *Social Systems*."<sup>136</sup> Ironically, given my argument about *Behemoth*'s weak theoretical, empirical, and methodological foundations, Mills presented *Behemoth* as a "truly splendid model of what a structural analysis of an historical society ought to be."<sup>137</sup>

Not a single of the aforementioned book reviews mentioned *The Dual State*, which had appeared in the previous year. Within the span of twelve months, *Behemoth*'s historical materialism had supplanted Fraenkel's historical institutionalism as the modal approach in the theory of dictatorship, with far-reaching consequences for the study of the Third Reich. This does not mean that critical voices could not be heard. They existed but were drowned out by those who, like Mills, heaped praise upon *Behemoth*. Especially circumspect in his assessment was Moritz Julius



Bonn of Hamilton College. Until 1933, Bonn, a leading macroeconomist and influential Weimar politician, had served as rector of Berlin's *Handelshochschule*, a prominent business school where Carl Schmitt, upon Bonn's recommendation, became a professor in 1928.<sup>138</sup> In his 1943 review of the first edition of *Behemoth*, published in the *Journal of Political Economy*, Bonn did not mince his words.

He criticized the simplistic reading on offer and complained that Neumann's inattention to conceptual and empirical nuances had "prevented him from making the useful contribution which his wide reading might have made possible. He nowhere reaches the profound understanding of the dynamic forces at work [in Nazi Germany]."<sup>139</sup> Bonn was especially critical of Neumann's habit to substitute assertion for argumentation: "Many of the author's historical statements are but half-truths. He does not look to history for the raw material from which he might attempt to draw generalizations; it is to him a card index from which he can get references to facts useful for proving preconceived theories."<sup>140</sup>

Others concurred. Writing in the *American Historical Review*, Dwight Lee also thought that Neumann was "not always convincing."<sup>141</sup> He criticized him for attempting "too much by arguments too dependent upon a preconceived thesis."<sup>142</sup> Lee noted that Neumann's "social philosophy often seems too metaphysical and his conclusions too doctrinaire" and wondered whether "that what might be obvious to the naked eye may have escaped him."<sup>143</sup> Frederick Cramer's evaluation of *Behemoth* in the *Journal of Modern History* pushed in the same direction. It panned the "somewhat arbitrary manner in which the materials were selected for use" and, like Lee, concluded "[t]he author's desire for clear-cut conclusions not infrequently goads him into oversimplification."<sup>144</sup> Paul Sweezy, who, as we have seen, was generally fond of *Behemoth*, nonetheless took Neumann to task for the logic of his argument, notably the social mechanisms that were driving it: "Bureaucracy, party, army and industrialists are all, of course, important but the crucial questions are precisely what are the relations among them and what role do they play in the developmental tendencies of National Socialism. To lump them together as coordinate rulers of Germany avoids these questions; it does not answer them."<sup>145</sup> Instead of opening the black box of Nazi dictatorship, Neumann merely repackaged it.

He failed to notice or left unexplored the many contradictions and countervailing tendencies associated with the transition from authoritarianism to totalitarianism. For someone who is credited in the historiography of the Third Reich with having laid the theoretical foundations for the postwar concept of polycracy (*Polykratie*), Neumann was remarkably uninterested in the historicity of institutions, by which I mean

institutional variation across space, time, and Nazi organizations.<sup>146</sup> The sociologist C. H. Pegg accordingly was not persuaded by Neumann's "rather obvious attempt to make National Socialism conform to some sort of Marxist pattern," and concluded that *Behemoth* was, as a result, "marred."<sup>147</sup> This critique of Neumann's political economy of dictatorship ushered in the review's most damning line: "It led him to conclusions which are not in line with the facts presented."<sup>148</sup> The more discerning among the book's many reviewers homed in on precisely this weakness. According to Charles Robson, who weighed in for the *Journal of Politics*, "the author frequently makes statements unsupported by his evidence and inconsistent with his own conclusions."<sup>149</sup> Even the Princeton historian Carl Schorske, a colleague at the Office of Strategic Services (OSS), where Neumann was headed, in retrospect remarked rather damningly that *Behemoth* combined evidence-based research and speculation ("*eine Kombination von Quellenstudium und Spekulation*").<sup>150</sup>

Already at an earlier stage of Neumann's career, Hugo Sinzheimer, his mentor, had criticized the "quick, apodictic judgments" ("*rasche, apodiktische Urteile*") for which his student, *Referendar*, and *Assistant* was developing a reputation.<sup>151</sup> It would be uncharitable, but not unreasonable, to think of *Behemoth* as a quick, apodictic judgment in long form. Neumann was an exciting but rigid thinker. The absolute certainty with which he advanced his radical argument is astounding, especially given how much conflicting empirical evidence already existed at the time of his research and writing in New York City and later in Washington, D.C.<sup>152</sup>

The publication of the second, enlarged edition of *Behemoth* in 1944 provoked one of the most damning reviews. Written by Josef Kunz of the University of Toledo, for the *American Political Science Review* no less, it inveighed against the famous book's reductionist argument and in particular its retrospective determinism. Although Kunz acknowledged Neumann's achievement in data collection, he concluded that *Behemoth* left much to be desired: "[T]he facts he gives not only present the most detailed analysis of National Socialism, but are undistorted, true, complete, and reliable. But his interpretation of these facts is open to the most serious doubt and criticism. It is not only that he says little about the reasons why National Socialism rose to power—and this is indispensable to a full understanding—but he suffers from a double prejudice: an over-rationalistic and a Marxist prejudice [...]."<sup>153</sup> Or, as Gurian memorably put it, "Neumann uses the term Monopoly Capitalism as a kind of *passe-partout*, a key opening all doors."<sup>154</sup>

These assessments remind of Fraenkel's review in the *Neue Volkszeitung*. But Gurian and Kunz went further in their critiques than Fraenkel. Gurian called out Neumann for trying "too much to fit concrete

events and theoretical trends into abstract patterns," and opined that "[i]t would have been more simple and more satisfactory to put a stronger emphasis on German traditions than upon economic systems."<sup>155</sup> Critiquing Neumann's penchant for historical materialism, Kunz went as far as stating that "the Marxist 'economic interpretation of history'" he considered to be driving *Behemoth* was "scientifically and philosophically absolutely untenable."<sup>156</sup> Seven decades of research on the Nazi dictatorship have proved both Kunz and Gurian right. Yet the passage of time has done little to tarnish the mythology of *Behemoth*.

### *Behemoth* in Washington, D.C.

Despite its conceptual, theoretical, empirical, and methodological flaws, Neumann's *Behemoth* informed U.S. policy planning for a defeated Germany. The rave reviews of the book (few of the critical ones appear to have at all registered) opened doors for its author in New York City and Washington, D.C.<sup>157</sup> As Scheuerman writes,

Lavishly praised by reviewers when it first appeared in 1941, [*Behemoth*] catapulted Neumann into a position of prominence in comparison with his colleagues at the Institute for Social Research. While they remained obscure figures on the intellectual scene in the United States, it helped him gain a position at prestigious Columbia University. Neumann, and not [Max] Horkheimer or [Theodor] Adorno, was the first of the Frankfurt émigrés to receive such an offer. Soon thereafter, the American government asked Neumann to participate in coordinating the Office of Strategic Services' crucial Research and Analysis Bureau, a division of the federal government given the task of analyzing the political situation in Nazi Germany and providing policy proposals to elected officials and military authorities.<sup>158</sup>

More significant, not to mention disconcerting, than Neumann's entry into government service, is the fact that his *Behemoth* "played a central role in the Research and Analysis Bureau, where the empirical work undertaken by the German émigrés and their American coworkers at times represented little more than an attempt to elaborate on its main theses and make them palatable to government officials otherwise unfamiliar with twentieth-century radical thought, let alone known for their Hegelian-Marxist sympathies."<sup>159</sup> Barry Katz, author of the leading study on the OSS, has come to a similar conclusion: "Neumann's monumental study of the National Socialist 'Behemoth,' completed shortly before he entered the government, informed much of the [OSS's Central European] Section's ongoing research (which in turn filled in many of its omissions and contributed to the extensive appendix to the second edition [of *Behemoth*] that appeared in the summer of 1944)."<sup>160</sup> Aside from

other real-world effects, Neumann's book decisively shaped the Central European Section's preparation for what became the Trial of the Major War Criminals at the International Military Tribunal at Nuremberg: "The structure of their case against the Nazi Behemoth grew out of Neumann's claim that it was a tightly integrated system, a corporate state managed by an interlocking directorate of political, military, and economic leaders."<sup>161</sup> The "émigré socialists" led by Neumann "treated National Socialism as the negative realization of the Marxist eschatology that had permeated their prewar theoretical work: a social totality that transcends the alienation of inner and outer, public and private, civil society and the state."<sup>162</sup> Take Irving Dwork's draft memorandum on the criminal responsibility of German individuals and collectivities for the destruction of the European Jews. It bore "the indelible stamp of Neumann's influence."<sup>163</sup> As Katz writes, "The brief was in fact an elaboration of the so-called spearhead theory of anti-Semitism that Neumann had worked out some two years before and which appears to have served the Section as a feeble beacon against the blackness of fascist irrationalism."<sup>164</sup>

Remembering his OSS days, the political scientist Harold Deutsch recalled, "It did not even take me a day to recognize that Franz Neumann was by far the most significant personality among its members."<sup>165</sup> Others have described the organization as a "permanent historical convention" ("*amerikanischer Historikertag in Permanenz*") dominated by Neumann whose charisma and growing influence in Washington, D.C., ensured that he "influenced an entire generation of future historians" at the OSS.<sup>166</sup> If the Bible's behemoth is a mythical creature, Neumann's *Behemoth* in 1944 attained the status of a nigh mythical book. Faith in Neumann's political economy of dictatorship was so strong that it drowned out dissenting voices. Because he also headed the "chairborne division," as the Research and Analysis Bureau was teasingly known, Neumann's opinion enjoyed greater authority than Fraenkel's.<sup>167</sup> It is an irony of history that Neumann's radical legalism was popular in U.S. foreign policy circles. But the reason for its appeal is not difficult to understand: "[T]he publication of *Behemoth* was an important event from a political standpoint [...] because it analysed the inner structure of National Socialism at a moment when the United States was about to enter the war against the Axis Powers and when everything depended upon revealing in its entirety the aggressive dynamism and the destructive potential of the enemy they had to overcome."<sup>168</sup>

It has been said that Neumann's vantage point as an outsider looking in was the root cause for his simplistic view of the law of the Third Reich.<sup>169</sup> The argument goes that Fraenkel had a more differentiated sense of law's role in Nazi Germany because he was subjected to Nazi

domination for several years longer than Neumann, who had been forced to flee in 1933. Five additional years of limited access to surviving remnants of the *Rechtsstaat* certainly afforded Fraenkel glimpses into the everyday life of Nazi law that Neumann never had. What counts against Neumann is not that he was not privy to this trove of data, but that he apparently had no curiosity in finding out more about it. He was dismissive of his friend's clandestine research when he should have been inquisitive.

### Neumann to Arendt

Notwithstanding the aforementioned shortcomings, mystique surrounds Neumann's *Behemoth* to this day. It has to do in part with the perception that the book was an important forerunner of Hannah Arendt's *The Origins of Totalitarianism*, an equally problematic and even more influential treatise from the middle of the twentieth century.<sup>170</sup> Vicky Iakovou, for one, believes that Neumann's "pathbreaking approach" put him "among those theorists who, very early, recognized the novelty of Nazi domination."<sup>171</sup> This innovation, Iakovou believes, got Arendt's attention and shaped the argument of her most important work: "*Behemoth* proves to be a permanent and privileged—albeit often implicit—reference in *The Origins of Totalitarianism*, as if it contained an analysis touching the nodal points of totalitarianism."<sup>172</sup> In particular, Neumann's concept of the non-state, though, as we have seen, of questionable theoretical and empirical value, left a mark on *The Origins of Totalitarianism*.<sup>173</sup> William Selinger has gone as far as suggesting that *Behemoth* served as "[t]he most important [...] historical account in America when Arendt was composing *Origins*."<sup>174</sup> Selinger, like Hilberg and Iakovou, was either unaware or unperturbed by *Behemoth*'s significant methodological flaws even though a long line of Neumann's contemporaries, as we have seen, had painstakingly enumerated them upon publication in 1942.

Other admirers of *Behemoth* have claimed an even greater impact for the work: "Neumann's assumptions concerning the functions of violence for Nazi Germany have been the basis of *all* historical research on this regime."<sup>175</sup> Many twenty-first century readings of *Behemoth* are similarly hyperbolic. Fueling this tendency toward hagiography was the *Times Literary Supplement*. At the close of the twentieth century, its editors included Neumann's best-known work in the TLS's list of "The Hundred Most Influential Books since the War," a decision that further enhanced the mythology of *Behemoth*. The TLS ranked the book at no. 13 on its list of twenty-one titles from the 1940s. It deemed *Behemoth* more influential than George Orwell's *Nineteen Eighty-Four*, which came in at no. 15 on the TLS list, as well as Karl Popper's *The Open Society and Its Enemies*

(no. 17) and Joseph Schumpeter's, *Capitalism, Socialism, and Democracy* (no. 20).<sup>176</sup>

*Behemoth* has cast a long shadow over the study of the Third Reich. Due to its extraordinary reception in the early 1940s, it has attained the status of an instant classic in scholarship on the Nazi dictatorship. It has left an indelible mark on the way generations of scholars have come to view the nature and determinants of the Hitler regime.<sup>177</sup> It has inspired critical theories of law but also done lasting damage, which is why, to speak metaphorically, *Behemoth* needs slaying.

From the perspective of this book, one of the most troublesome legacies of *Behemoth*'s enormous success has been its contribution to the marginalization of law in the study of the Third Reich. Neumann's flawed argument about the non-state and its supposed logic of anarchy obscured the many different institutional determinants of the Nazi dictatorship. "Abstraction, reification, and oversimplification were the frequent results, particularly when Neumann purported to be providing historical explanations" is how one scholar summarized the value of *Behemoth*.<sup>178</sup> Neumann correctly perceived the fractured nature of power in the Third Reich but failed to identify its most important loci and divisions. His obsession with the economics of dictatorship caused him to give short shrift to the politics of dictatorship. And his faith in functional explanation meant that he was ill equipped to make sense of contingent outcomes.<sup>179</sup> Neumann's firm commitment to structuralism blinded him to the possibility of voluntarism in the Third Reich. Or, as Peter Hayes put it, "Neumann contributed something indispensable, then overreached."<sup>180</sup>