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REVIEW ESSAY

Recalling and/or Repressing German Marxism? The Case of Ernst Fraenkel

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Ernst Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship*, ed. Jens Meierhenrich (Oxford: Oxford University Press, 2017; first published 1941)

Douglas G. Morris, *Legal Sabotage: Ernst Fraenkel in Hitler's Germany* (Cambridge: Cambridge University Press, 2020)

Jens Meierhenrich, *The Remnants of the Rechtsstaat: An Ethnography of Nazi Law* (Oxford: Oxford University Press, 2018)

I spent a few unseasonably hot summer days in 1996 digging around in the German Federal Archives in Koblenz for what later became a lengthy essay on Ernst Fraenkel (1898–1975), the neglected German socialist political and legal thinker.[1] I still recall struggling to justify my efforts not simply as an historian of ideas but also as a political theorist who, at least in principle, was expected to make systematic contributions to contemporary debates. The problem was that Fraenkel had focused his acumen on investigating liberal democratic instability and German fascism, matters that did not seem directly pertinent to a political and intellectual constellation in which political scientists were celebrating democracy's "third wave." With Tony Blair and Bill Clinton touting Third Way politics, and many former dictatorships seemingly on a secure path to liberal democracy, Fraenkel's preoccupations seemed dated. Even though Judith Shklar had noted, as late as 1989, that "anyone who thinks that fascism in one guise or another is dead and gone ought to think again," political pundits and scholars in the mid-1990s typically assumed that capitalist liberal democracy's future was secure.[2] When I returned to the US and described my research to colleagues, they responded, unsurprisingly, politely but without much enthusiasm.

Fraenkel's writings centered around three endeavors, none of which meshed well with 1990s neoliberal discourse. First, during Weimar democracy's final years, as a

[1]William E. Scheuerman, "Social Democracy and the Rule of Law: The Legacy of Ernst Fraenkel," in Peter C. Caldwell and William E. Scheuerman, eds., *From Liberal Democracy to Fascism: Legal and Political Thought in the Weimar Republic* (Boston, 2000), 74–105.

[2]Judith Shklar, "The Liberalism of Fear," in Stanley Hoffmann, ed., *Political Thought and Political Thinkers* (Chicago, 1998; first published 1989), 4.

labor lawyer and socialist intellectual, Fraenkel formulated an incisive diagnosis of capitalist-based liberal democratic fragility and, ultimately, Weimar's demise. Synthesizing Karl Marx, Max Weber, and many now unfairly slighted intellectual figures from the mid-century left (e.g. the Austro-Marxist Karl Renner), Fraenkel systematically analyzed Weimar's frailties while working tirelessly to suggest ways in which it nonetheless might still be preserved. Formulating a reformist yet radical theory of welfare-state "collective democracy," and regularly providing astute critical responses to Carl Schmitt (Weimar's most impressive right-wing critic), Fraenkel's fascinating writings from pre-Nazi Germany remain, embarrassingly, untranslated.[3]

Second, following the Nazi takeover, as a World War I veteran Fraenkel was initially exempted from anti-Semitic measures purging the legal profession of Jews. He continued practicing law and remained in Germany until 1938. During this period, he secretly researched and penned *The Dual State: A Contribution to the Theory of Dictatorship*, his creative Marxist dissection of Nazi law, which he published in 1941 as a refugee in the US but which soon went out of print. Third, as a prominent political scientist in the postwar German Federal Republic, Fraenkel—chastened by Nazism, the Holocaust (and also his direct exposure to communism in South Korea while a US advisoer from 1945 to 1950)—distanced himself from his more radical youthful views. Aiming to buttress the fledgling Bundesrepublik, Fraenkel outlined a democratic theory that sought to explain how pluralism, when properly conceived and practiced, could stabilize and not undermine democracy. In a context in which right-wing theorists such as Schmitt—one of Fraenkel's main targets throughout his career—had consistently pilloried pluralism as a threat to political order, this was a vital contribution.[4] Nonetheless, it soon made Fraenkel susceptible to a new generation of critics on the German New Left, who rejected his mainstream SPD (Social Democratic Party) views, and deemed his postwar work politically apologetic and insufficiently critical.

These attacks took a toll on Fraenkel, who did not respond well to younger scholars deploying Marxism against him or the Bonn Republic.[5] One of the sad ironies of the story is that Fraenkel's early Marxism had arguably been more nuanced than that of many of his 1960s and 1970s leftist critics, some of whom seemed to take liberal democracy for granted and perhaps could not appreciate why the elderly Fraenkel was so preoccupied with defending it, warts and all.

This all seemed at most indirectly relevant to scholarly debates in the 1990s: capitalist instability and right-wing authoritarianism still appeared marginal to the so-called "advanced" democracies. However, as the saying goes, "that was then, but this is now." With authoritarian right-wing movements on the rise, and the 2008 global capitalist crisis (and "Euro-crisis") providing dramatic reminders of contemporary capitalism's instabilities, Fraenkel becomes relevant to current debates about democratic instability, its relation to capitalism, and the rise of the authoritarian right. Even his politically more cautious postwar theory makes for

[3]Ernst Fraenkel, *Zur Soziologie der Klassenjustiz und Aufsätze zur Verfassungskrise, 1931–1932* (Darmstadt, 1968); Fraenkel, *Reformismus und Pluralismus* (Hamburg, 1973).

[4]Ernst Fraenkel, *Deutschland und die westlichen Demokratien* (Frankfurt, 1991).

[5]Simone Ladwig-Winters, *Ernst Fraenkel: Ein politisches Leben* (Frankfurt, 2009).

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arresting reading for those, including this writer, who believe that liberal democracy can no longer simply be taken for granted, and that Donald Trump and his ilk do indeed (do indeed?) pose an existential threat.

The political context in which many of us now find ourselves makes the recent revival of interest among anglophone scholars in Fraenkel a welcome development.[6] Of course, Fraenkel has long been a household name to German scholars;[7] he is familiar, via extensive translations, to many in Italy as well. Though *The Dual State* received positive reviews when first published in 1941 and quickly became a standard reference work for specialists on Nazi law, Fraenkel's writings have generally been overlooked in the US and the UK, notwithstanding the dramatic revival of interest in Weimar political thought. One reason, I suspect, is simply that he was unable to gain a secure university position in the US, instead ultimately landing a job working for US military forces in occupied Korea. Germany. As a legal adviser and then a member of the US–Soviet Joint Commission that administered the country, there he watched as the US regularly missed opportunities to spearhead overdue social reform—missed chances soon disastrously exploited by communists. When he and his wife Hannah fled Korea at the outbreak of hostilities in 1950, they left behind a number of left-wing but noncommunist Korean friends and trade unionists, including some soon summarily executed by invading communist forces.[8] Though initially reluctant to return to postwar Germany, by 1950 Fraenkel clearly was ready for a career change: when a position at the new Free University of Berlin opened up, he took it.

One perverse consequence of Fraenkel's neglect is that the authoritarian Schmitt, Fraenkel's principal nemesis, is now universally recognized among anglophone political and legal scholars, while Fraenkel—who fought valiantly to defend Weimar, and then was forced to flee his homeland because of the anti-Semitic purging of German jurisprudence that Schmitt enthusiastically defended—remains unknown. This disproportion is unsettling in part because it shadows the decline of social democracy and the rise of the authoritarian right now commonplace in liberal democracy.

The books under review here take significant strides towards correcting this injustice. By convincing Oxford University Press to reissue *The Dual State*, and then writing a lengthy monograph devoted to Fraenkel, the political scientist Jens Meierhenrich has almost single-handedly brought Fraenkel back into contemporary anglophone debates. A scholar of authoritarian legalism (and the author of a study on legal development in South Africa),[9] he views *The Dual State* not only as a major contribution to long-standing debates about Nazi law, but also as an exemplar for analyzing law more generally within authoritarian regimes. Douglas G. Morris also focuses on Fraenkel's activities as a lawyer in Nazi Germany and

[6]Fraenkel is also an important figure in Udi Greenberg, *The Weimar Century: German Émigrés and the Ideological Foundations of the Cold War* (Princeton, 2016), 76–119; Noah Benezra Strote, *Lions and Lambs: Conflict in Weimar and the Creation of Post-Nazi Germany* (New Haven, 2017).

[7]See, for example, Alexander von Brünneck and Hubertus Buchstein, eds., *Vom Sozialismus zum Pluralismus: Beiträge zu Werk und Person Ernst Fraenkels* (Baden-Baden, 2000).

[8]Ladwig-Winters, *Ernst Fraenkel*, 210–38.

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

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on *The Dual State*. Not unlike Fraenkel, Morris—a New York-based criminal defense attorney for indigent clients—has devoted himself to the legal cause of the underdog. In part because of his lawyer's perspective, Morris sheds fresh light on Fraenkel's Nazi-era activities, as he fought both legally and extralegally to defend trade unionists and leftists, despite the obvious perils of doing so. According to Morris, we can only properly understand *The Dual State* by situating it in the context of Fraenkel's own experiences as a lawyer in Nazi Germany.

Both Meierhenrich and Morris can teach us a great deal about Fraenkel; both deserve our gratitude. Unfortunately, both authors' attempts to salvage Fraenkel suffer from a certain tendency to downplay his Marxism, a crucial feature of *The Dual State*, without which we cannot make sense of Fraenkel's legacy and may not be able to grasp its contemporary relevance. Because Fraenkel's again timely Weimar-era publications about democratic decline fall outside the main purview of both volumes, they receive only passing notice; we will have to await another day for their translation and the attention they deserve. While the resurgence of right-wing authoritarianism makes Fraenkel and his leftist interlocutors newly meaningful, we cannot do justice to their legacy if we, too conveniently perhaps, elide its Marxist traits. Nor perhaps can we successfully update that legacy by sanitizing it of some now decidedly unfashionable elements.

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Fraenkel's *The Dual State* took seriously Max Weber's claim that modern capitalism requires a calculable legal system providing a measure of formal rationality. Writing before full wartime mobilization, and cognizant that the German economy had taken on monopolistic traits and been subjected to far-reaching state intervention, Fraenkel argued that private property, free contracts, and entrepreneurial liberty remained basically sacrosanct (75–78). From Fraenkel's socialist standpoint, this was hardly accidental: the Nazis had gained the consent of privileged economic interests by upholding capitalism's institutional pillars and smashing the labor and socialist movements. Even before the outbreak of World War II, Fraenkel predicted that rabid Nazi nationalism and imperialism would prove crucial to this alliance (184). Though he rejected crude leftist views of Nazism as big capital's handmaiden, Fraenkel envisioned "favors given to the more monopolistic sectors of the German economy" as vital to its operations. Conceding that the question whether such favors were more "a by-product of National Socialist policy" than "deliberate policy" remained unanswered, he observed that "the National Socialists have consistently acted *as if* the protection of monopolistic interests" was "the most important objectives of their economic policy" (184, original emphasis). This was a view, as we will see, shared by some of Fraenkel's most important interlocutors, his former law partner and friend, Franz L. Neumann, as well as Otto Kirchheimer, another former Weimar socialist lawyer who, like Neumann, had managed to make his way to the United States.

The system's capitalist contours meant, as Weber would have predicted, that the Nazi legal order relied partly on "certain definite rules" and thus a "normative state," defined by Fraenkel as "an administrative body endowed with elaborate powers for safeguarding the legal order as expressed in statutes, decisions of the

courts, and activities of the administrative agencies" (xxiii, xxv). To be sure, state intervention in monopolistic capitalism had "brought with it a corresponding enlargement of the area of [legal] discretion" (70). Yet elements of rule-based legal calculability nonetheless had been preserved. Unfortunately, Fraenkel's terminology occasionally generated unnecessary confusion when, for example, he dubbed the normative state a "qualified Rule of Law" (185). Yet he relentlessly attacked the thesis that the Nazis had upheld the *Rechtsstaat*: the rule of law entailed control by the courts of the executive branch "in the interest of legality," yet such controls were nonexistent in Nazi Germany (40). Even if some legal protections essential to private property survived, the normative state was "hardly identical with a state in which the 'Rule of Law' prevails," in part because the latter entailed far-reaching legal checks on power holders (71). Nor was the loaded term "total state" useful in capturing Nazism's dynamics: property remained basically private and thus still entailed a measure of economic decentralization requiring "a stable yet flexible framework" of calculable legal rules (186).

The main reason why Nazi Germany's normative state should not be confused with the rule of law was that it was ultimately subject to a rival "prerogative state," a discretionary and directly political sphere characterized

> by a vacuum as far as law is concerned. Of course it contains a certain element of factual order and predictability but only in so far as there is a certain regularity and predictability in the behavior of officials. There is, however, no legal regulation of the official bodies. The political sphere in the Third Reich is governed neither by objective nor subjective law, neither by legal guarantees nor jurisdictional qualifications. (3)

Characterized by potentially "unlimited arbitrariness and violence," the prerogative trumped the normative state whenever, for example, identifiably political issues were at stake, e.g. in cases involving Jewish-owned businesses or marriages between Jews and non-Jews (xxiii). In principle, there were no limits on the prerogative state. Political instances reserved the right to intervene legally whenever and wherever they pleased: "politics is that which [ruling] political authorities choose to define as political" (91). To the extent that Nazism accepted private capitalism, it engaged in a measure of auto-limitation, yet one that could be immediately rescinded when key players deemed it appropriate. One of *The Dual State*'s achievements was that Fraenkel successfully documented this ambitious theoretical claim with extensive evidence drawn from real-life Nazi legal practice.

Fraenkel's emphasis on the apparent autonomy of the political or prerogative state initially seems more Weberian than Marxist. However, the prerogative state's autonomy was only *relative*. Moreover, Nazism's dual state could be explained only on the basis of a critical analysis of German *capitalism*. It remained fundamentally a *class state* that had tamed subordinate classes and provided extensive material benefits to monopoly capital (154). Though paying careful attention to anti-Semitism, Fraenkel viewed the dual state, first and foremost, as a retrograde phase of capitalism having both universal and specifically German traits (171). Providing a Marxist gloss on Karl Mannheim's distinction between functional and substantial rationality, he described the dual state as possessing a

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(formally) "rational core within an irrational shell"; that is, as containing elements of legal rationality and formal economic rationality within a substantially irrational political and social order (206).[10] Under contemporary conditions—most importantly, mass democracy and the rise of an organized working class—capitalism's defense required political and legal forms (i.e. the prerogative state) that, in Mannheim's terms, were substantially irrational. German capitalism's union with a reactionary and imperialistic dictatorship possessed a distinctive inner logic: capitalism's latest retrograde phase was "so closely interwoven with the Dual State that neither could be possible … without the other" (171).

Fraenkel's position immediately generated a forceful response from Neumann, another socialist refugee, as well as his former Weimar-era law partner, whose *Behemoth: The Structure and Practice of National Socialism, 1942–1944* pointedly rejected the idea of a "dual state." As Neumann declared in *Behemoth*'s concluding pages, "we believe that there is no realm of law in Germany, although there are thousands of technical rules that are calculable. We believe that the monopolists in dealing with nonmonopolists rely on individual measures and in their relations with the state and with competitors, on compromises which are determined by expedience and not by law."[11] Meierhenrich, as we will see, makes a great deal of this dissonance between Fraenkel and Neumann. To be sure, Neumann sometimes embraced a more mechanistic reading of the relationship between monopoly capitalism and the law, arguing that discretionary, non-general modes of law *directly* "serve the monopolist … Not only is rational law unnecessary for him, it is often a fetter upon the full development of productive forces … The monopolist can dispense with the help of the courts since his power to command is a satisfactory substitute."[12] Monopoly capitalism requires, and also immediately benefits from, discretionary law.

Yet it would be wrong to exaggerate these disagreements. The thesis that monopoly capitalism invites individual measures and vague discretionary legal standards had also been regularly defended by Fraenkel, and even *The Dual State* attributed discretionary legal trends partly to monopolistic economic sources (70).[13] More generally, not just Fraenkel, but also Neumann and Kirchheimer, synthesized Weber and Marx while defending the rule of law against its destruction by what they viewed as an aggressively capitalist German fascism. They also

[10]See Karl Mannheim, *Man and Society in an Age of Reconstruction* (New York, 1940).

[11]Franz L. Neumann, *Behemoth: The Structure and Practice of National Socialism, 1933–1944* (New York, 1963; first published 1944), 468. Kirchheimer, Neumann's colleague at the Institute for Social Research during the 1930s and early 1940s, shared these reservations. Otto Kircheimer, "Review of Fraenkel, *The Dual State*," *Political Science Quarterly* 56 (1941), 434–36. Like Neumann and Fraenkel, Kirchheimer emphasized Nazism's monopoly-capitalist traits. Neumann and Fraenkel met in Frankfurt in 1919 as students, where they founded (with Leo Löwenthal, of subsequent "Frankfurt school" fame) a socialist student organization. Later both earned their law degrees under the aegis of the left-wing Weimar jurist Hugo Sinzheimer and practiced law together as socialist intellectuals (in the SPD) in Berlin between 1928 and 1933. Because of his involvement in high-profile political cases on behalf of the SPD in 1933, Neumann was immediately forced to flee Germany in 1933. Fraenkel later reported that *The Dual State* was in part motivated by conversations with Neumann.

[12]Neumann, *Behemoth*, 446–7.

[13]See, for example, Ernst Fraenkel, "Die Krise des Rechtsstaats und die Justiz," *Die Gesellschaft* 8/2 (1931), 327–41.

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occasionally succumbed to a socio-theoretically troublesome attempt to explain legal trends on the basis of capitalism's *functional* imperatives. Long-standing friends and colleagues, their disagreements were less pronounced than Neumann's blunt retort in *Benhemoth* suggested. Fraenkel never associated the normative state with the rule of law nor viewed it as "rational" in any but a narrow technical and/or functional manner: the "definite rules" he identified within Nazi Germany seemed, in fact, to constitute little more than what Neumann called "technical rules that are calculable."

To be sure, Neumann was more skeptical about the overall role of universally binding legal rules in Nazi Germany. Yet this dissent can be partly explained because Fraenkel's evidence was drawn exclusively from prewar Nazism, whereas Neumann included wartime trends in his analysis. In fact, the political autonomy of Nazi power holders vis-à-vis key economic players increased dramatically as a consequence of German military mobilization. Even on Fraenkel's analytic terms, a corresponding predominance of the (discretionary) prerogative state would be expected to follow. Indeed, in an illuminating 1960 essay revisiting *The Dual State*, Fraenkel conceded precisely this point: the prerogative state "metastasized" during the war years as Germany's private economy was systematically subjected to massive wartime state economic coordination and steering (*Lenkung*).[14] In effect, Fraenkel seems to acknowledge the overall soundness of Neumann's interpretation of Nazism as increasingly—and perhaps, ultimately, overwhelmingly—lawless.

Not surprisingly, Fraenkel effusively praised Neumann's *Behemoth*, while nonetheless challenging his friend's view of Nazism as lacking a "unified coercive machinery," and thus a modern *state* possessing a legitimate monopoly on coercive force.[15] In contrast, Fraenkel thought it still contained elements of modern stateness.[16] *This* disagreement helps explain why their legal diagnoses sometimes took on different hues. For Neumann, Nazis statelessness went hand-in-hand with the demise of "universally binding" legal norms.[17] Fraenkel instead saw not a "stateless" Behemoth but a complex "dual state." By rejecting the thesis of Nazi statelessness, Fraenkel was perhaps better positioned to recognize the role, however cramped and increasingly imperiled, played by law in generating a measure of calculability, at least prior to World War II.

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[14]Ernst Fraenkel, "Auflösung und Verfall des Rechts im III. Reich" (1960), in Fraenkel, *Reformismus und Pluralismus*, 212. In a 1951 essay, Neumann conceded that German fascism was ultimately characterized by the "domination of politics over economics." Franz L. Neumann, "Economics and Politics in the Twentieth Century," in Neumann, *The Democratic and Authoritarian State* (New York, 1957), 199–228, at 266. In the early 1950s, Fraenkel and Neumann jointly conducted seminars together at the Free University in Berlin. Fritz Stern, *Five Germanys I Have Known* (New York, 2006), 215. Neumann died in a car crash in Switzerland in 1954.

[15]Neumann, *Behemoth*, 468.

[16]Ernst Fraenkel, "Gedenkrede auf Franz L. Neumann" (1955), in Fraenkel, *Reformismus und Pluralismus*, 168–79, at 177.

[17]Neumann, *Behemoth*, 468.

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Zeroing in on Fraenkel's legal and political activities during 1933–8, Morris's *Legal Sabotage: Ernst Fraenkel in Hitler's Germany* initially seems narrow in scope. Yet Morris's fascinating analysis of that relatively brief but tempestuous moment in Fraenkel's career serves as a sturdy springboard for exploring a broad range of issues.

First, Morris examines Fraenkel's Nazi-era lawyering to explain how he came to formulate the theory of the dual state. Second, Morris uses that theory to understand Nazi law (5). Acknowledging that the normative state "was always cramped and steadily contracting," Morris endorses Fraenkel's interpretive framework, though he seems appropriately cautious about its possible applicability to wartime Nazism (101).

Along the way, Morris offers lucid discussions both of how anti-Semitism systematically circumscribed the space in which Jewish lawyers like Fraenkel could operate, and of how its growing political impact strengthened the hand of the prerogative state. One question posed by Morris's discussion but never fully addressed is whether Fraenkel's Marxism allowed him to get a handle on anti-Semitism: Fraenkel acted first and foremost not as a Jew but as a socialist (141). Still, Morris brilliantly investigates Fraenkel's efforts as an example of what Ken Ledford has called "nonheroic … quotidian resistance" (2). Balanced and sober in his judgments, Morris recounts the dangers that Fraenkel, who also penned anonymous political tracts as part of his illegal activism, faced as he represented labor unionists and political defendants in the courts. What justifiably fascinates Morris is how Fraenkel carved out "his own zigzagging [legal] path (typically acting with judicious restraint and never with operatic flare)" and sometimes outflanked the prerogative state (3).

What we learn is that the idea of the dual state emerged out of Fraenkel's experiences as a lawyer who acted against enormous odds, but occasionally was able to achieve modest positive results for his clients. In the regime's first five or so years, lawyering was not an altogether hopeless task, as long as its practitioners successfully negotiated the "insidious interplay within the dual state between the prerogative and normative states" (73). The main trick, as Fraenkel later noted, was to act like a "switchman," ensuring that clients "landed in the normative state, not the prerogative state; and that they wound up in jail, not in a concentration camp" (100–1). A crucial institutional shift transpired with a 17 June 1936 decree consolidating the police under Himmler, which facilitated the Nazis' preference for stripping ordinary courts of jurisdiction and shuttling cases off to special courts staffed with supporters and ideologues. Morris shows that a mid-1936 labor-law case, involving the seemingly mundane matter of severance pay based on a 1932 collective-bargaining agreement, helped crystallize Fraenkel's thinking. Fraenkel initially seemed to win the case, before learning a few days later that the Gestapo had simply vetoed the court's decision and seized the money owed the dismissed workers. The case jolted Fraenkel into formulating his theory: it demonstrated that whenever dissatisfied with court rulings, political instances (e.g. the Gestapo) could and would simply trump them. Revealingly, when Fraenkel asked at a hearing about possible limits to the Gestapo's power, he was pointedly told that the secret police could even dissolve marriages, if they desired. For Fraenkel, the case illuminated the prerogative state's primacy, and with it the expectation

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that even ordinary courts should actively anticipate "correct" political outcomes before the Gestapo or other political instances intervened (95–6).

Morris offers illuminating discussions of Fraenkel's relationship with Neumann, his former teacher and famous Weimar jurist Hugo Sinzheimer, the socialist resistance figure Hermann Brill, and also Martin Gauger, a leading figure in the conservative Lutheran but dissenting Confessing Church, later murdered by the Nazis at Buchenwald in 1941. Gauger turns out to be a key figure for understanding *The Dual State*'s lengthy discussion and defense of what Fraenkel described as rational natural law, a crucial feature of his quest to preserve what he viewed as the lasting normative achievements of modern Western political thinking. On this view, Marxism's manifest normative gaps had to be filled with a socialist reconstruction of the normative legacy of universalistic Enlightenment natural law. As Morris documents, the Marxist Fraenkel's somewhat surprising call for a "united front" in 1930s Germany between leftists and natural lawyers emerged in part from his conversations with Gauger (157–72).

Fraenkel's discussion of modern natural law remains provocative for a number of reasons. First, it constitutes a rare attempt within a basically Marxist framework to defend natural law, provided it was interpreted in a suitably egalitarian fashion. Second, Fraenkel's reflections represent a creative left-wing alternative to the overwhelmingly conservative and nostalgic defense of (often Catholic) natural law that emerged elsewhere in North America and Europe during the late 1930s in response to fascism's rise. Third, it points to some of the sources of Fraenkel's own postwar enthusiasm for natural law.[18] As Morris shows in a particularly nuanced discussion, Fraenkel's stark natural-law sympathies set him apart from his more skeptical friend Neumann, who nonetheless also thought that radical social democracy should preserve modern natural law's egalitarian normative intuitions (176–98).

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Morris acknowledges Fraenkel's Marxism yet highlights "legal and political issues more than economic ones," an odd move given Fraenkel's old-fashioned leftist project of directly relating legal and political phenomena to capitalist political economy (6). The underlying problem, I suspect, is that Morris, understandably, is unsure what to make of Fraenkel's Marxism. The same problem characterizes Meierhenrich's *Remnants of the Rechtstaat: An Ethnography of Nazi Law*, which takes note of Fraenkel's Marxism but seems even more preoccupied with downplaying it. This tendency, unfortunately, detracts from what otherwise constitutes a major scholarly contribution.

Like Morris, Meierhenrich helpfully deploys Fraenkel as a launching pad for discussing a wide range of topics: the history of German ideas about the *Rechtsstaat*, debates within Nazi Germany about law, recent scholarship about authoritarian legalism (or the "authoritarian rule of law"), as well as Fraenkel's theory of the dual state and its relation to Neumann's *Behemoth*. Meierhenrich seems to have digested all of the pertinent scholarship, and his book usually makes for insightful

[18]See, for example, Fraenkel, *Deutschland und die westlichen Demokratien*, 66.

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reading. Unfortunately, his strong identification with his subject leads the author to sideline some of the more controversial elements of Fraenkel's legacy.

This tendency is most striking in Meierhenrich's detailed but polemical discussion of the Fraenkel–Neumann nexus. Neumann is reduced here to a somewhat cartoonish orthodox Marxist with crude ideas about law, whereas Fraenkel becomes a prescient forerunner to present-day neo-Weberian "historical institutionalism," an approach with which Meierhenrich sympathizes. Oddly, Meierhenrich situates Fraenkel's analysis not in the context of mid-century neo-Marxism and its many rich debates, but instead vis-à-vis recent "rationalist" anglophone social scientists such as Douglass North (195–6). Fraenkel, we are told, was a dispassionate scholar committed to value-neutrality; Neumann, in contrast, was an ideologue and popularizer (216). Neumann, it seems, succumbed both to "moralistic" notions of law and legal skepticism, whereas Fraenkel formulated a suitably astringent notion of the rule of law that avoided loading it with unnecessary moral baggage (37, 229–30). Consequently, Fraenkel offers a more useful basis for analyzing law in many other authoritarian contexts. Finally, Fraenkel suffered an injustice because Neumann's *Behemoth* was massively influential and inappropriately overshadowed Fraenkel's superior efforts.

There is nothing wrong, of course, about a contemporary social scientist trying to repackage a neglected thinker for his or her own purposes. Nonetheless, Meierhenrich does so while obscuring key pieces of the puzzle. Most obviously (and as Morris correctly observes), it was Fraenkel who was always indebted to "moralistic" ideas of natural law, whereas Neumann was typically more skeptical about natural law. Both, to be sure, sketched complex views of the rule of law that rejected strictly positivist accounts such as Hans Kelsen's. Conveniently, Meierhenrich says little about Fraenkel's robust natural-law commitments, despite their central role in *The Dual State* and elsewhere.[19] Both Neumann and Fraenkel interpreted Nazi law through a Weberian–Marxist lens. Despite some differences, they offered parallel accounts of Nazi law and its relation to capitalism. In reality, both *Behemoth* and *The Dual State* were soon neglected (and out of print), in part because of their never-very-fashionable Marxism. Though both influenced scholars of Nazism and Nazi law, it is telling that neither volume was available in German until the 1970s—Neumann's *Behemoth* in 1977; *The Dual State* a bit earlier, in 1974.[20] Both *Behemoth* and *Dual State* were intended as scholarly *and* outspoken political tracts aiming to support antifascism and the Allied war effort.

Why does this matter? As noted, Meierhenrich's main scholarly interest lies in analyzing contemporary authoritarian legalism, e.g. authoritarian regimes (such as Singapore) that seem to instantiate elements of legality. This, of course, is an important endeavor. He believes that Fraenkel's *The Dual State* offers a model for how to go

[19]See his dismissive comment about this feature of Fraenkel's work (333 n. 2).

[20]We now know that Max Horkheimer impeded its translation into German, in part because he was fearful that its Marxist contours would reflect poorly on the postwar Institute for Social Research. More generally, the immediate postwar era, with the Cold War raging, was not a hospitable environment for Marxist scholarship; there is also clear evidence that Fraenkel himself sought to distance himself from his own early Marxist writings. Only with the arrival of the German New Left, and the sizable impact it had on a generation of critical scholars who came of age in the 1970s, was the ground ready for a revival of interest in leftist theories of fascism.

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about doing so. Meierhenrich is not the only contemporary scholar revisiting *The Dual State* in this vein, and there are good reasons for pursuing this project.[21]

However, I see three possible perils to Meierhenrich's reuse of Fraenkel. First, Fraenkel, as we have seen, conceded that the Nazi normative state was dramatically demoted during wartime: Nazism *ultimately* proved radically *anti-legalist*. Whether or not the experience of totalitarian lawlessness can serve as a suitable basis for analyzing more conventional modes of authoritarian legality seems unclear. Second, Fraenkel refused to associate the normative state with any defensible notion of the rule of law, in part because the latter depended on far-reaching natural-law ideals. Precisely this "moralistic" view of the rule of law may render it difficult to analyze "remnants of the rule of law" in authoritarian regimes that make a mockery of the egalitarian moral aspirations that Fraenkel viewed as inextricably linked to it. Fraenkel probably would have worried about the suggestion that the normative state consisted of "remnants" of the *Rechtsstaat*; as we have seen, Fraenkel sharply delineated it from the rule of law.

Third, as a Marxist Fraenkel would have insisted that any updating of the theory of the dual state needs to take capitalist political economy seriously. This is not the place to debate the viability of Marxism; nor would I defend a functionalistic or economically deterministic view of law. But there remain sound reasons for linking recent variants of the "dual state" to contemporary capitalism and its myriad pathologies, as some insightful scholarship demonstrates.[22] In his rush to demote Fraenkel's Marxism, Meierhenrich risks throwing the baby out with the bathwater. Retaining Weber is certainly admirable, but the danger here is that we simply forget that so much of the most provocative contributions within twentieth-century leftist theory, especially in Germany, involved *synthesizing* Weber with Marx. That mix is crucial for understanding the ideas not just of Fraenkel and Neumann, but also of more recent figures such as Jürgen Habermas, the Institute for Social Research's most important second-generation intellectual figure.[23]

To both Meierhenrich's and Morris's credit, anglophone readers now have access not only to one of the great classic socio-theoretically based analyses of Nazi law, but also to two new studies that insightfully discuss Fraenkel's fascinating ideas and legacy. Theirs remains a significant scholarly achievement.

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[21]See, for example, Jan Christoph Suntrup, "Between Prerogative Power and Legality: Reading Ernst Fraenkel's *The Dual State* as an Analytical Tool for Present Authoritarian Rule," *Jurisprudence* 11/3 (2020), 335–59.

[22]Hauke Brunkhorst, "The European Dual State: The Double Structural Transformation of the Public Sphere and the Need for Repoliticization," in Jiri Priban, ed., *Self-Constitution of European Society: Beyond EU Politics, Law and Governance* (London, 2016), 239–73. Going further back, and with the US in mind, see also Alan Wolfe, *The Limits of Legitimacy: Political Contradictions of Contemporary Capitalism* (New York, 1977), 178–9.

[23]Habermas's synthesis of Marx and Weber is essential to his magnum opus, *The Theory of Communicative Action*, 2 vols., trans. Thomas McCarthy (Boston, 1981).

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