



---

## Introduction

In one dramatic scene in Beethoven's opera *Fidelio*, the tyrant Don Pizarro suddenly appears in the dungeon cell of the imprisoned rebel Florestan. At the sight of Don Pizarro, Florestan spontaneously exclaims, "A murderer stands before me!" Exalted through Beethoven's music, this prisoner shows reckless courage in the face of evil. Placed into a cultural context, the moment epitomizes a German version of a wider mythic ideal: the hero flouting the despot. Florestan's bold act is a model for what stirs people's hearts. It may come to mind in studying later episodes in German history. There is an almost uncanny resemblance, for example, between Florestan and the defendants before the Nazi People's Court after the failed attempt to assassinate Hitler on July 20, 1944. The photos of those men, bowing their heads in forced deference while maintaining their dignity in spirit, are inspiring. Students of Nazi Germany almost invariably seek out scenes of heroes defying the regime.

If this book had a hero, he would be Ernst Fraenkel – a Jewish, Social Democratic lawyer, born in 1898, who courageously defied Nazi oppression for five and a half years from early 1933, when the Nazi regime took power, until September 1938, when he fled. The story is about deeds, some legal and in open view, others illegal and hidden from sight, all in the face of constant danger. He publicly represented political defendants in court. He secretly engaged in subversion by writing underground essays. And he ultimately authored his classic book, *The Dual State*, which both developed one of the first contemporaneous critiques of the Nazi legal system and set forth a legal justification for opposing the regime. But telling Fraenkel's story includes a problem: how to keep heroism out of it. As one journalist explained soon after she had left Nazi Germany in 1939, "Rash or heroic activities are no longer attempted in underground work."<sup>1</sup> Heroism is not a particularly helpful category for historical analysis anyway. It diverts attention from other issues. It easily succumbs to sentimentality. And it lends itself to myth-making. However hard to fathom in our present age of incessant self-promotion, Fraenkel never thought of himself as a hero.

The theme of this book is not heroism but resistance. The most well-known resistance against the Nazi regime appeared during its second half in the midst of war. Outside Germany proper, in Nazi occupied Europe, independence fighters struggled against Nazi domination. Within Germany, a handful of military officers and members of aristocratic and bourgeois elites plotted to topple the regime – culminating in the famous failed attempt to assassinate Hitler on July 20, 1944. But during the regime’s first half, when those elites were still backing the Nazis – for this reason or that, with one excuse or another, sometimes with a precious distancing and often with inner enthusiasm – others resisted. These early resisters usually emerged from the reserves of Nazism’s first victims: leftists, workers, and Jews. They operated with little institutional support, from positions of weakness, subject to humiliations, in isolation, at personal risk, under stress, and often in desperation. But they acted. These resisters included Fraenkel, some of his contacts, and many of his clients.

As historians have learned more and more about the many responses to Nazi oppression, they have explored definitions of resistance. These explorations have prompted both historical inquiry and moral debate. They have raised a series of hard questions. To deserve the name of resistance, must the opponents have targeted the very existence of the regime; must they at least have tried to undermine its law, ideology, and politics; or could they have limited their focus to particular policies, specific practices, or discrete actions? Must the method of the opponents have been violent, organized, and planned; could the method have been disruptive, isolated, and spontaneous; or could it simply have consisted of noncompliance, nonconformity, or even disapproving thoughts? What was the significance of rescue and hiding, assistance and flight, and suicide? What was the difference between resistance and treason? Or was resistance simply whatever the Nazi regime itself saw as treasonous?<sup>2</sup> I have looked at the acts of Fraenkel and those around him by thinking of resistance in light of these types of questions. If pushed for a definition, my rough and ready one would be that resistance consisted of the concrete steps that people took – usually incurring risk to their safety, liberty, and life – in subverting Nazi polices, trying to weaken the regime’s power, and providing encouragement and support to other like-minded opponents.<sup>3</sup> I have also looked at Fraenkel’s resistance in terms of everyday life in Nazi Germany – the role that he played as a practicing lawyer and the beliefs that he tried to realize as a Social Democrat and a Jew. This perspective considers Fraenkel’s actions as part of, in one historian’s apt phrase, “the nonheroic tradition of quotidian resistance.”<sup>4</sup>

Thus this book poses the question of what type of resistance Fraenkel, other lawyers, and other anti-Nazis could, and did, undertake during the first half of the Nazi dictatorship, from 1933 through 1938. How could those who believed in the rule of law, legal equality, and social justice play the cards that life had dealt them to oppose tyranny? Fraenkel struggled with these types of questions, and tackled these types of challenges, as a lawyer who worked through the courts, as a Social Democrat who believed in the rule of law and social justice, and as a Jew who faced discrimination. While Fraenkel carved out his own zigzagging path (typically acting with judicious restraint and never with operatic flare), he did not fight in isolation. He worked with colleagues, for clients, and alongside co-conspirators. With a shifting array of contacts, he tried resisting a new dictatorship through whatever remaining pockets of countervailing power he could find. Those pockets of power, although limited, could make some difference for a few people for a short time. But ultimately they could not disrupt, match, or survive the aggressively expanding power of the Nazi regime. Fraenkel's attempts – on some occasions with small hope, on others with none – exemplify ways of subverting a repressive regime through the labyrinth of a modern state's institutions, or at least for contending with such a regime. His strategies show approaches for translating legal principles into action. And his choices raise questions about when to act through a legal system, whether to violate laws, and how to justify seditious crimes based on higher legal principles. Ultimately, Fraenkel's resistance illustrates one concrete example of fighting, both legally and illegally, for freedom and against oppression.

Resisters against a regime like Nazism will act variously as events unfold – at times tactfully, cautiously, carelessly, recklessly, or in fright, and at times courageously. The recurrence of acts of courage, and the almost irresistible urge to find them, just as irresistibly reawakens the notion of heroism. The notion maintains an almost unshakeable hold on our imaginations. Maybe it simply cannot be repressed. If it must persist, we should, at least, be vigilant to avoid its pitfalls – to keep it from blindsiding us, dominating the narrative, and interfering with other perspectives for understanding. When we do address heroism, we might place it within the wider context of how individuals managed their fear when challenging a cruel state. In the case of Fraenkel, the notion points to one of the knotty questions in his story, which this book tries to address: How did he defy the regime so persistently and still survive? The answer to that question also encompasses the answer to a related one: What possibilities

existed for resistance within Nazi Germany, even by a Jewish Social Democrat?

In resisting the Nazi regime, Fraenkel did not appear out of nowhere. He could draw on experience. During the Weimar Republic, he worked as a lawyer representing both the Metal Workers Union and others in the Social Democratic labor movement. He also actively participated in theoretical debates about the place of workers under the Weimar Republic's constitution and hoped to bring socialists and liberals closer together through pragmatic compromises based on notions of equal rights and social justice. Similarly, once he had fled Nazi Germany, Fraenkel did not disappear. He remained an impassioned and vibrant thinker. After World War II, he helped invent the field of political science in West Germany and advanced an influential theory of pluralistic democracy. Other scholars have extensively studied Fraenkel in the pre-Nazi and post-Nazi eras.<sup>5</sup> But, with the exception of the second volume of Fraenkel's *Collected Writings*, a chapter in Simone Ladwig-Winters's biography of Fraenkel, and the political scientist Jens Meierhenrich's recent analysis of Fraenkel's dual-state theory, the scholarship thins out for the Nazi era itself. One consequence is a tendency to refer to the Nazi era in passing and to make assumptions about Fraenkel's views then based on what he had conceived beforehand or elaborated on afterward. But the circumstances of living, working, and writing under the Nazi regime were bound to – and did – make a difference. While Meierhenrich explores Fraenkel's theories within the context of intellectual and jurisprudential history, the present book aims to show Fraenkel's immediate circumstances and their influence on his actions and thinking. While on occasion dipping back into the Weimar Republic or stretching forward into post-World War II Germany, this book focuses on the Nazi years themselves.

Fraenkel resisted not just any tyranny but one that acted, in the telling phrase that he coined, as a “dual state.” For immediate orientation, his theory is this: the legal political system of Nazi Germany consisted of the prerogative state, on the one hand, and the normative state, on the other. The prerogative state was the realm of arbitrary power and official violence, against which citizens enjoyed no legal protection. The Gestapo, SA (the paramilitary Storm Troopers), and SS (the elite Security Service) embodied the prerogative state. The normative state was the legal order itself, embodied in the traditional judiciary. But the normative state did not represent the rule of law. Rather, it carried out both traditional law and newly enacted Nazi law and, under both rubrics, did so in an increasingly

Nazified way. While different from each other, the prerogative and normative states were hardly polar opposites. They coexisted – at times in tension, at times in productive competition, at times in cooperative partnership.

Two critical moments mark the development of the prerogative state and serve as guideposts for following the course of Fraenkel's Nazi-era career. First, the prerogative state made its presence known on February 28, 1933, with the Reichstag fire emergency decree. That decree empowered the new regime to suppress dissent lawlessly and even violently. Second, a turning point occurred somewhat over three years later, on June 17, 1936, which requires a bit more elaboration. On that date, the prerogative state tightened its grip with a decree, issued under the signatures of Hitler and the Reich Minister of the Interior Wilhelm Frick, that made Heinrich Himmler the chief of all German police. Since Himmler was already the head of the SS, that step handed all police power over to the Nazis – away from the traditional bureaucracies of the provinces and into the hands of a nationally centralized Nazi leadership. Freed from legal constraints and subject to arbitrary orders, the entire police force, including the Gestapo, had become an instrument for carrying out the regime's political purposes.<sup>6</sup> Before this second moment, Fraenkel had devoted his time to providing political representation and writing underground essays. As a result of a memorable court appearance just a month after the June 1936 decree, Fraenkel came up with his dual-state hypothesis. With the Gestapo in the midst of smashing much of the already disunified and scattered resistance and prosecutions increasingly shifting into new Nazi tribunals – the special courts and People's Court, where he could not tread – Fraenkel turned his attention to developing his theory and writing his book. While he continued to be involved in political representation and to maintain underground contacts, he spent more time theorizing and he also modified his thinking about the nature of resistance.

The present book uses two vantage points for viewing Fraenkel's theory of the dual state. First, biographically it explains how and why he developed the theory. Second, historically it uses the theory to understand the Nazi legal system. The second vantage point does not inevitably follow from the first. There is no inherent reason why a work on Fraenkel need interpret the Nazi regime according to his conceptualization any more than a biography of Hobbes, for example, need interpret his political surroundings through a Hobbesian lens. Nonetheless, in my opinion the dual-state theory is itself critical for understanding the Nazi legal and

political system in which Fraenkel was operating. But the present book uses the thesis in large part, not in full. It uses the part involving the interplay between law and politics, not the one interpreting Nazi Germany as a manifestation of late stage capitalism. The reason is that this book addresses legal and political issues more than economic ones. Furthermore, while using the dual-state thesis, this book does not attempt a larger theoretical defense of its merits taken as a whole. Rather, hopefully its account of events shows that Fraenkel's insights really do help illuminate the history, nature, and functioning of Nazi Germany's legal system.

This book focuses on Fraenkel for five and a half critical years during the Nazi regime – as a resister, a lawyer, a thinker, a Social Democrat, and a Jew. But what role did his personal life play? Unfortunately, the sources are too few for drawing many conclusions, whether about the formation of his character during his childhood and adolescence until the end of World War I; about his maturation into a young adult during his student days and early career in the Weimar Republic; or about his private interactions with friends in Nazi Germany. As to his childhood, this much is clear: Fraenkel was raised in Cologne in an assimilated German Jewish family that valued education. His sister Marta, two years his senior, later became a medical doctor who pursued social justice in public health care. While the available data for the early years is bare bones, what sticks out are events that must have been traumatic. In the spring and summer of 1909, when the young Ernst was ten, his older brother and then his father died in quick succession. Six years later, in 1915, when Ernst was sixteen, his mother died. Of the original nuclear family, only he and Marta remained. They moved to Frankfurt to live with their uncle Joseph Epstein. Having volunteered for the military in late 1916, Fraenkel began fighting on the western front a year later and in April 1918 was severely injured by a hand grenade.<sup>7</sup>

How did this series of traumas affect Fraenkel after the war as he moved into early adulthood? They hardly restrained vibrant social engagement, which revolved around his academic life as a student in Frankfurt, his political activism there as a young Social Democrat, and after he moved to Berlin in 1927, his clients as a rising lawyer. In these realms, he seemed in his element.<sup>8</sup> As to romantic involvements, there is no evidence until he married in December 1932 when he was thirty-four. He had met the non-Jewish Hanna Pickel at a school for workers in Bad Dürrenberg, near Leipzig, where he often taught and she worked as a secretary.<sup>9</sup> For the rest of their lives, she shared Fraenkel's political commitment and provided him with unwavering emotional support. But

the very sparsity of information on the couple's relationship also reflects the nature of Fraenkel's personality: he was temperamentally reserved and kept private matters to himself. Ultimately the best way to understand his personal life during the Nazi era may be through what we can learn about his career then – as a resister, thinker, and Social Democratic Jewish lawyer.

While the core of this book describes and analyzes Fraenkel's career in Nazi Germany – his representing political defendants, writing for the underground, and offering a legal justification for resistance – historians must decide how to bookend their works. Here I have begun with an account of the plight of Jewish lawyers in Nazi Germany, with little direct mention of Fraenkel himself. The reason is that the practical problems facing Jewish lawyers, in both their careers and legal practices, are necessary for understanding the choices that Fraenkel made, the writings that he produced, and the nature of his resistance. There are sensible reasons for an introduction focusing on Jewish lawyers rather than plausible alternatives, such as Social Democratic lawyers or the Weimar intellectual background. First, while ideas about social democracy motivated Fraenkel much more than any about Judaism, as a matter of formal law the Nazi regime discriminated against Jewish lawyers, not Social Democratic ones (that is, not against lawyers on the grounds that they once had belonged to the Social Democratic Party, which was outlawed in June 1933). Furthermore, my account of the plight of Jewish lawyers does not neglect issues related to Social Democrats but incorporates them. Second, the introductory description of the plight of Jewish lawyers does not imply that the Weimar intellectual background was unimportant or even less important. But Fraenkel's most immediate predicament involved the limitations on Jewish lawyers, those circumstances are less well known than Weimar intellectual history, and intellectual influences originating in the Weimar Republic are more easily incorporated into the later narrative.

The other bookend – after the discussion of Fraenkel's political representation, underground writings, and theory of resistance – takes a closer look at the anti-Nazi subversion attempted by Fraenkel in comparison with three fellow anti-Nazis whom he knew: Hermann Brill, Martin Gauger, and Franz Neumann. In varying ways, each of these three men, like Fraenkel, thought that opposing the regime was not only a moral imperative but also an intellectual problem demanding a solution – that is, a coherent justification for resistance. Two of these interlocutors acted and thought from within Nazi Germany. During his last year in Berlin,



Fraenkel had contact with Hermann Brill, a former Social Democratic politician who secretly, obstinately, and vigorously tried to organize against the regime and wrote pamphlets intended to inspire opposition. But his organizational efforts floundered and his inspirational writings were more programmatic than intellectually compelling. For his last two or so years in Germany, Fraenkel had a more surprising contact – namely, Martin Gauger, a religious lawyer for part of the Confessing Church, which tried to maintain independence from a largely Nazified Protestant Church. Fraenkel and Gauger engaged in intense discussions, first about ways of providing legal representation for the Confessing Church, then about the nature of the Nazi state, and finally about justifications for resistance. But Gauger was too tied to the institution of the church and too limited by his religious beliefs to be able to justify resistance once his attempts on behalf of the Confessing Church had failed. While courageous, both Brill and Gauger lacked Fraenkel’s political imagination for justifying resistance. Fraenkel’s achievements become apparent in juxtaposition not only with the limits of these two other fellow anti-Nazis but also with the writings of Franz Neumann, Fraenkel’s former law partner, friend, and intellectual companion, who fled Germany in May 1933. Independently of Fraenkel, Neumann developed surprisingly similar ideas for justifying opposition to tyranny, and the ideas of the two men got closer after Fraenkel, too, fled Nazi Germany in September 1938. Ultimately, these three comparisons show how the immediate experience with the Nazi regime, from within Germany and from exile, generated varied approaches toward resistance and highlight what Fraenkel accomplished in developing a theory of resistance from within Nazi Germany itself.

What are the sources for Fraenkel’s Nazi-era career? Finding them presented its own challenges, although of the kinds that historians welcome in their role as investigator and sleuth, puzzle solver and code breaker. True enough, some information is relatively accessible – most important, in the first two volumes of Fraenkel’s *Collected Writings* and in the Fraenkel collections at the German National Archives in Koblenz and the Archives of the Free University in Berlin. But, for reasons detailed later, the weak spot in both collections is precisely the Nazi era. The challenges thus became how to find relevant information that ultimately was scattered across archives, court records, restitution files, correspondence, and memoirs. One fruitful approach was not to limit searches simply to information directly about Fraenkel but to broaden the inquiries. Who were his allies, his colleagues, his clients (and their families), and his adversaries? Where



were sources on them? The answers to these questions, and the pursuit of the resulting leads, generated an energy of its own. Pieces of seemingly unrelated information often fell into place, and new stories emerged.

One personal caveat may be in order. I have unavoidably brought to bear my own particular background to studying Fraenkel. As any reader of the book jacket will notice, I am a practicing criminal defense lawyer for indigent clients. Is that background a benefit or detriment? All historians invariably draw upon their own experiences in understanding their subjects. But, more important, historians should be on the lookout for their own unwarranted assumptions. I am no different. I hope that my background has alerted me to issues in Fraenkel's legal practice. But I also have tried to avoid importing my assumptions about present-day American legal practice into my understanding of Nazi Germany's judicial system. My goal has been simply to tell the story of Fraenkel's legal and illegal resistance in a way that will stand or fall as a work of history based on solid documentation and sound reasoning.

The opening of this preface implied a similarity between Fraenkel and Beethoven's Florestan. But the comparison has its limits. Unlike Florestan, Fraenkel never endured imprisonment or solitary confinement. He did not brashly condemn haughty officials to their faces. When he escaped Nazi Germany, quietly and by the skin of his teeth, he did not experience a glorious moment of liberation. But if we reach for a high enough level of generalization, there may be one more similarity: both Beethoven's stirring music in telling Florestan's tale and Fraenkel's unwavering commitment to the rule of law in resisting tyranny put on display fundamental principles of freedom, justice, and humanity. To that extent, Beethoven's *Fidelio* and Fraenkel's career in Nazi Germany are two parts of the same story – and struggle.