

LEGAL SABOTAGE

The Jewish leftist lawyer Ernst Fraenkel was one of twentieth-century Germany's great intellectuals. During the Weimar Republic, he was a shrewd constitutional theorist for the Social Democrats, and in post-World War II Germany, he was a respected political scientist who worked to secure West Germany's new democracy. This book homes in on the most dramatic years of Fraenkel's life, when he worked within Nazi Germany actively resisting the regime, both publicly and secretly. As a lawyer, he represented political defendants in court. As a dissident, he worked in the underground. As an intellectual, he wrote his most famous work, *The Dual State* – a classic account of Nazi law and politics. This first detailed account of Fraenkel's career in Nazi Germany opens up a new view on anti-Nazi resistance – its nature, possibilities, and limits. With grit, daring, and imagination, Fraenkel fought for freedom against an increasingly repressive regime.

DOUGLAS G. MORRIS is both a legal historian and a criminal defense attorney for indigent clients in New York City. He has published widely on twentieth-century German legal history and was a recipient of the 1998 Thurgood Marshall Award from the Association of the Bar of the City of New York for serving “as pro bono counsel to a human being under a sentence of death.”

CAMBRIDGE STUDIES IN CONSTITUTIONAL LAW

The aim of this series is to produce leading monographs in constitutional law. All areas of constitutional law and public law fall within the ambit of the series, including human rights and civil liberties law, administrative law, as well as constitutional theory and the history of constitutional law. A wide variety of scholarly approaches is encouraged, with the governing criterion being simply that the work is of interest to an international audience. Thus, works concerned with only one jurisdiction will be included in the series as appropriate, while, at the same time, the series will include works which are explicitly comparative or theoretical – or both. The series editor likewise welcomes proposals that work at the intersection of constitutional and international law, or that seek to bridge the gaps between civil law systems, the US, and the common law jurisdictions of the Commonwealth.

Series Editors

David Dyzenhaus

Professor of Law and Philosophy, University of Toronto, Canada

Thomas Poole

Professor of Law, London School of Economics and Political Science

Editorial Advisory Board

T.R.S. Allan, Cambridge, UK

Damian Chalmers, LSE, UK

Sujit Choudhry, Berkeley, USA

Monica Claes, Maastricht, Netherlands

David Cole, Georgetown, USA

K.D. Ewing, King's College London, UK

David Feldman, Cambridge, UK

Cora Hoexter, Witwatersrand, South Africa

Christoph Moellers, Humboldt, Germany

Adrienne Stone, Melbourne, Australia

Adam Tomkins, Glasgow, UK

Adrian Vermeule, Harvard, USA

*Books in the Series**Legal Sabotage: Ernst Fraenkel in Hitler's Germany* Douglas G. Morris*Proportionality in Action: Comparative and Empirical Perspectives on the Judicial Practice* Edited by Mordechai Kremnitzer, Tayla Steiner and Andrej Lang*Constitutional Dialogue: Democracy, Rights, Institutions* Edited by Geoffrey Sigalet, Grégoire Webber and Rosalind Dixon*The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems* Anne Twomey

Vigilance and Restraint in the Common Law of Judicial Review
Dean Knight

The Alchemists: Questioning Our Faith in Courts as Democracy-Builders
Tom Gerald Daly

Australia's Constitution after Whitlam Brendan Lim

Building the Constitution: The Practice of Constitutional Interpretation in Post-Apartheid South Africa James Fowkes

Dimensions of Dignity: The Theory and Practice of Modern Constitutional Law Jacob Weinrib

Reason of State: Law, Prerogative, Empire Thomas Poole

Bills of Rights in the Common Law Robert Leckey

The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law Translated by Lars Vinx, with an introduction and notes by Lars Vinx

Parliamentary Bills of Rights: The Experiences of New Zealand and the United Kingdom Experiences Janet L. Hiebert and James B. Kelly

Lawyering for the Rule of Law: Government Lawyers and the Rise of Judicial Power in Israel Yoav Dotan

Balancing Constitutional Rights: The Origins and Meanings of Postwar Legal Discourse Jacco Bomhoff

Judges on Trial: The Independence and Accountability of the English Judiciary Shimon Shetreet and Sophie Turenne

Proportionality and Constitutional Culture Moshe Cohen-Eliya and Iddo Porat

The Politics of Principle: The First South African Constitutional Court, 1995–2005 Theunis Roux

The New Commonwealth Model of Constitutionalism: Theory and Practice Stephen Gardbaum

Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere Janet McLean

Judging Social Rights Jeff King

Proportionality: Constitutional Rights and their Limitations Aharon Barak

Parliamentary Sovereignty: Contemporary Debates Jeffrey Goldsworthy

Cambridge University Press
978-1-108-83500-8 — Legal Sabotage
Douglas Morris
Frontmatter
[More Information](#)

LEGAL SABOTAGE

Ernst Fraenkel in Hitler's Germany

DOUGLAS G. MORRIS

Federal Defenders of New York



CAMBRIDGE
UNIVERSITY PRESS

Cambridge University Press
978-1-108-83500-8 — Legal Sabotage
Douglas Morris
Frontmatter
[More Information](#)

CAMBRIDGE
UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom
One Liberty Plaza, 20th Floor, New York, NY 10006, USA
477 Williamstown Road, Port Melbourne, VIC 3207, Australia
314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre,
New Delhi – 110025, India
79 Anson Road, #06–04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org

Information on this title: www.cambridge.org/9781108835008

DOI: 10.1017/9781108872324

© Douglas G. Morris 2020

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2020

Printed in the United Kingdom by TJ International Ltd, Padstow Cornwall

A catalogue record for this publication is available from the British Library.

Library of Congress Cataloging-in-Publication Data

Names: Morris, Douglas G., 1954– author.

Title: Legal sabotage : Ernst Fraenkel in Hitler's Germany / Douglas Morris, Federal Defenders of New York

Description: New York : Cambridge University Press, 2020. | Series: Cambridge studies in constitutional law | Includes bibliographical references and index.

Identifiers: LCCN 2019058652 (print) | LCCN 2019058653 (ebook) | ISBN 9781108835008 (hardback) | ISBN 9781108872324 (ebook)

Subjects: LCSH: Fraenkel, Ernst, 1898–1975. | Lawyers – Germany – Biography. | Germany – Politics and government – 1933–1945.

Classification: LCC KK185.F725 M67 2020 (print) | LCC KK185.F725 (ebook) | DDC 340.092 [B]–dc23

LC record available at <https://lcn.loc.gov/2019058652>

LC ebook record available at <https://lcn.loc.gov/2019058653>

ISBN 978-1-108-83500-8 Hardback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

Cambridge University Press
978-1-108-83500-8 — Legal Sabotage
Douglas Morris
Frontmatter
[More Information](#)

To my grandchildren Sam and Sara

Cambridge University Press
978-1-108-83500-8 — Legal Sabotage
Douglas Morris
Frontmatter
[More Information](#)

CONTENTS

<i>List of Plates</i>	page xi
<i>Acknowledgments</i>	xii
<i>List of Abbreviations</i>	xv

Introduction 1

1 Setting the Scene of a Jewish Lawyer, Like Fraenkel, in Nazi Germany	10
Jewish Lawyers Encountering Nazi Oppression	10
Fraenkel Peering into the Darkness in the Winter of 1933	38
2 Fraenkel as a Social Democrat Practicing Law in Nazi Germany	43
Cultivating Contacts in a Frightening Time	43
Subverting Nazi Rule	47
Advising Political Defendants	52
Fighting for Defendants on Trial	65
Tackling the Problem of Communist Defendants	75
Coping with a Declining Legal Practice	88
Understanding the Dual State as a Political Lawyer	93
3 Fraenkel as an Essayist Supporting the Illegal Underground	105
Writing Five Essays against Nazism	105
Opposing the Nazi Revolution in Criminal Justice	106

Promoting Illegal Work	109
Analyzing Nazi and Socialist Notions of Freedom	113
Exploring Politics through the Plight of Workers and Jews	118
4 Fraenkel as a Scholar Condemning the Nazi Regime's Dual State	124
Finding a Legal Justification for a United Resistance	124
Justifying Resistance on the Grounds of Rational Natural Law	127
Solving the Problems Posed by Natural Law	131
Relying on Natural Law as a Political Matter	135
Writing a Book as a Form of Political Resistance	143
Escaping Nazi Germany	146
5 Thinking about the Legal Justifications for Sabotaging a Tyrannical Regime	152
Comparing Fraenkel with Associates Who Tried to Justify Resistance	152
Stumbling in Efforts to Organize and Inspire Other Resisters: Hermann Brill	153
Failing to Develop a Theory of Resistance: Martin Gauger	157
Defying the Nazi Regime from Exile: Franz Neumann	173
Conclusion: The Ernst Fraenkel Dilemma	199
<i>Notes</i>	211
<i>Bibliography</i>	247
<i>Index</i>	272

The plate section can be found between pp. 172 and 173.

PLATES

- Photo 1 The young Ernst Fraenkel, probably when he was a student in the early 1920s.
- Photo 2 Hanna Fraenkel, an unidentified man, and Ernst Fraenkel in 1937, probably in Lugano, Switzerland.
- Photo 3 Hanna and Ernst Fraenkel in New York in 1942.
- Photo 4 Ernst Fraenkel, probably after World War II.

ACKNOWLEDGMENTS

As I draw my work on this book to a close, I look back fondly on the many people who have helped. With generosity, they have provided thoughtful critiques; and with kindness, they have shown genuine friendship. I feel humbled by their assistance and wish to express my sincerest thanks.

Volker Berghahn stands out as the one person who read the manuscript in full – twice. Need I say more? Among the best of historians, for years he has shown me the generosity of a philanthropist, the kindness of a Mr. Rogers, and the incisive analysis of a high-priced lawyer.

One reward for studying Ernst Fraenkel has been befriending a lead editor of his collected works, Hubertus Buchstein. For those seeking animated conversations about Fraenkel, he is your man. After having read my manuscript in full, Hubertus wrote comments that offered crucial information, important cautions, and enlightening suggestions. In both conversation and written feedback, he has the winning gift of combining passion, imagination, and enthusiastic encouragement.

I have a warm spot for Jon Bush, whom I first met in elementary school and I remember as a twelve-year-old excitedly recounting highlights from William Shirer's tome *The Rise and Fall of the Third Reich*. Having built on that foundation, Jon has brought to bear his unending insights on legal history in reading portions of my manuscript. One example might give a sense of his helpfulness: when I emailed him a short question, he responded with a five-page answer.

Jon's emails met their match only in David Kettler's. Whenever I received one, I immediately printed it out for careful study since it would always prove informative, provocative, and challenging. In personal conversations, he gave me tutorials on the trade union background of Fraenkel and his cohort. I repeat here the thanks that I have already expressed to him personally – by email.

Many others have given their time, thoughts, and feedback, and for me they make up an honor roll: David Abraham, Steven Aschheim, Brandon Bloch, Renate Bridenthal, Iris Freyer-Nachum, Amy Hackett, Benjamin

Hett, Jack Jacobs, Tillmann Krach, Jan Lambertz, Kenneth Ledford, Frank Mecklenburg, Jane-Anne Murray, Devin Pendas, Warren Rosenblum, and Noah Strote. For her amazingly careful and thoughtful read for errors in the manuscript, I am deeply indebted to Louisa McMurray.

Early on, I benefited from the astute responses of participants in seminars devoted to my project at the University of Miami School of Law; the Summer Research Workshop for Scholars at the Center for Advanced Holocaust Studies at the United States Holocaust Memorial Museum, Washington, DC; and the Human Rights Seminar at Columbia University. Since then, I have learned from probing audience questions at talks that I have given related to parts of the book, whether at academic conferences or at events sponsored by bar associations, Jewish organizations, universities, law schools, or courts. And two anonymous reviewers selflessly devoted their time to read my work and prepare illuminating comments. I thank them wholeheartedly.

As a researcher, I am as excited about sitting down in archives as others might be in touring an ancient city, and I am as thrilled about receiving an archival document in the mail as others might be on winning free concert tickets. I mention that point to emphasize the depth of my gratitude to the staffs of archives that I visited or wrote to: the August Bebel Institut, Berlin; Archiv der sozialen Demokratie der Friedrich-Ebert-Stiftung, Bonn; Archiv des Zentrums für Antisemitismusforschung, Berlin; Bundesarchiv, Berlin; Bundesarchiv Koblenz; Bundesamt für zentrale Dienste und offener Vermögensfragen, Finanzamt Berlin Moabit-West; Brandenburgisches Landeshauptarchiv; Freie Universität, Archiv, Berlin; Geheimes Staatsarchiv Preussischer Kulturbesitz, Berlin; Hauptstaatsarchiv Düsseldorf; Landesarchiv Berlin; Landesamt für Bürger- und Ordnungsangelegenheiten, Abteilung I, Entschädigungsbehörde, Berlin; the Leo Baeck Institute Archives, New York; the New York Public Library, Manuscripts and Archives Division; Universitätsbibliothek Heidelberg; US Citizenship and Immigration Services, National Records Center, US Department of Homeland Security, Lee's Summit, Missouri; and the US Holocaust Memorial Museum, Washington, DC. I am especially thankful to the New York Public Library, which gave me the opportunity to research and write in its Allen Room and Wertheim Study – oases of quiet in a noisy city.

Earlier versions of some portions of the book were published elsewhere: (1) “Discrimination, Degradation, Defiance: Jewish Lawyers in Nazi Germany,” in Alan Steinweis and Robert D. Rachlin, eds., *The Law in Nazi Germany: Ideology, Opportunism, and the Perversion of Justice*

(New York: Berghahn Books, 2013), 105–35; (2) “The Dual State Reframed: Ernst Fraenkel’s Political Clients and His Theory of the Nazi Legal System,” *Leo Baeck Institute Yearbook* 58 (2013), 5–21; (3) “Write and Resist: Ernst Fraenkel and Franz Neumann on the Role of Natural Law in Fighting Nazi Tyranny,” *New German Critique* 126 (November 2015), 197–230, with a translated and abridged version, “Schreiben und Widerstehen: Ernst Fraenkel und Franz Neuman zur Rolle des Naturrechts im Kampf gegen die NS-Gewaltherrschaft,” in Bettina Bannasch, Helga Schreckenberger, and Alan Steinweis, eds., *Shoah und Exile: Jahrbuch für Exilforschung* (2016), with thanks to its rights holders for their permission to use this material; and (4) “Politics, Ethics and Natural Law in Early Twentieth Century Germany, 1900–1950,” in John Michalczyk, ed., *Nazi Law: From Nuremberg to Nuremberg* (London: Bloomsbury House, 2018), 11–21, with thanks to Bloomsbury Academic, an imprint of Bloomsbury Publishing, for permission to use this material.

Near the end of writing, I had the good fortune of meeting David Dyzenhaus. In hearing him speak about his own work, I was impressed by his combination of scholarly acumen and gentle demeanor. For his taking interest in my work, I have been moved by his combination of good will and genuine magnanimity. I owe him a large debt of gratitude as the person largely responsible for bringing this book to Cambridge University Press.

I follow a well-trodden but worthy acknowledgments tradition in closing with thanks to my family – my children Joshua and Ruth, my son-in-law Ira, and my mother Frances. Their love, affection, and support sustains me. More than anyone, I thank my wife, Marion Kaplan. As a historian, she has often talked with me about Fraenkel, always with insight. As my best friend, she has made sure that we have lived full, balanced, and socially conscious lives. For her support, companionship, and love, I am one lucky person.

I have never discussed this book with our two young grandchildren, Sam and Sara – founts of spontaneity, enthusiasm, and delight. I dedicate the book to them in the hope that, if and when they need one, they will have another model for resistance.

ABBREVIATIONS

DHP	Deutsche Hochschule für Politik (German Academy for Politics)
GS	<i>Gesammelte Schriften</i> (Collected Works)
GStAn	Generalstaatsanwalt (prosecutor at the regional court)
IML	Institut für Marxismus und Leninismus (Institute for Marxism and Leninism)
INS	Immigration and Naturalization Service
ISK	Der Internationale Sozialistische Kampfbund (International Socialist Combat League)
ITS	International Tracing Service, USHMM
JM	Justice Minister or Justice Ministry
KG	Kammergericht (Prussian High Court)
KPO	Kommunistische Partei Deutschlands – Opposition (Communist Party Germany – Opposition)
LG	Landgericht or Landesgericht (district court)
NL	Nachlass (a scholar's estate for academic preservation of manuscripts, correspondence, notes, etc.)
ObRA	Oberreichsanwalt (chief or senior federal prosecutor)
OLG	Oberlandesgericht (higher regional court, court of appeals)
OSS	Office of Strategic Services
PA	Personalakte (personal file)
RAn	Reichsanwalt (federal prosecutor)
RAG	Reichsarbeitsgericht (federal Labor Court)
RG	Reichsgericht (federal Supreme Court)
RGBL	Reichsgesetzblatt (federal Legal Gazette)
RJM	Reichsjustizministerium (federal Ministry of Justice)
RM	Reichsmark (German Mark, the currency in Germany from 1924 to 1948)
SAJ	Sozialistische Arbeiterjugend (Young Socialist Workers)
SAP	Sozialistische Arbeiterpartei (Socialist Workers Party)
SPD	Sozialistische Partei Deutschlands (German Social Democratic Party)
UDS	<i>Der Urdoppelstaat</i> (by Ernst Fraenkel)
VGH	Volksgerichtshof (the People's Court)

Cambridge University Press
978-1-108-83500-8 — Legal Sabotage
Douglas Morris
Frontmatter
[More Information](#)
