

The Janus of Nations

THE DUAL STATE: A Contribution to the Theory of Dictatorship. By Ernst Fraenkel. New York: Oxford University Press. 1941. 208 pp., with index. \$3.

Reviewed by MAX LERNER

THIS remarkable book will not be easy reading for the layman. But it is important reading for the lawyer, the political thinker, the student of Nazi Germany as a phenomenon and of Nazi thought and institutions. Mr. Fraenkel was a practising attorney in Germany before Hitler's advent to power, and represented some of the large trade-unions which formed the foundation of German Social Democracy. He somehow managed to stay on until 1938, and during that period was close to the workings of the German legal and political machines. He had access to the decrees of the government, the speeches made by officials, the discussions in learned and party journals.

It would be interesting to know how he got his manuscript out of Germany. Not that it is outwardly sensational. It is not an expose, not a "now it can be told" book, not a dramatic recital of hairbreadth escapes. It is written in the most cumbersome language of political and legal theory and sociology, barbarous alike whether in German or English. But it is a cold and dispassionate analysis of the implications of the Nazi political regime which may—if our world survives long enough to digest such implications—prove more withering in the long run than many of the outright indictments.

The main thesis of the book is that Nazi Germany has two political systems rather than one, and is therefore

a "dual state." One system is the "normative state," which is roughly the administrative system and the law courts of Nazi Germany, consisting of a bureaucracy which, while it often has broad discretionary powers, operates within a defined jurisdiction—business, labor, contracts, economic control, the performance of the everyday functions of government. The second system is the "prerogative state," which is concerned not with administrative or legal matters but with matters of political power and policy. Unlike the normative state, its jurisdiction cannot be clearly defined, and it can enter any situation and impose its will for reasons of political policy. Its chief organs are the Gestapo and the Nazi Party. The normative state is not what we have become accustomed to think of as the rule of law, or what German constitutional liberals once thought of as the *Rechtsstaat*: it is merely that realm of the state in which the Nazi rulers find it convenient to have decisions regularized. But at any time and at any point this regularity can be replaced by arbitrary power on the part of the party officials or the secret police.

One may ask, "Is not such a contradiction a fatal weakness in the Nazi state, and how is it resolved if at all?" To this Dr. Fraenkel gives a clear answer. He distinguishes between the dual state and the dualistic state. The dualistic state, like that of the English monarchy, is one in which two forces (e.g., king and people) strive for dominance and achieve some equilibrium. The dual state, on the other hand, does not in any sense represent any division in ultimate power. Both its parts are under the direct and absolute control of Hitler and are made

to conform to National Socialist ideology—i.e., to the directives of the small group ruling Nazi Germany today.

There are a host of other questions that the book raises, for it is as rich in marginal suggestiveness as it is complex and subtle in its analysis. Harold Laski, in his remarkable chapter on the Nazi system in "Where Do We Go From Here?", makes two interesting suggestions. One is that the Nazi regime is a lawless regime, a regime of gangsterism; and that it must be a lawless regime because Hitler and his ruling group cannot possibly subject themselves to the laws of their own nation without having their power limited at some point and without therefore risking restriction and downfall. Fraenkel's analysis bears this out with a wealth of detail. And it explains why, in essence, the Nazi leaders must not only reject the constitutional doctrine of a government which is a government of laws and not of men, but also the centuries-old doctrine of natural law which provides some fixed criteria for the actual legal decisions of the state.

There is another suggestion that Laski makes that is not born out by Fraenkel's analysis. Laski insists that the efforts of scholars to seek the intellectual roots of the Nazi ideology in the German and European history of ideas in past centuries is futile and unwise; that the Nazi game has been to capture power first and then adopt an ideology after the fact, and that for us to seek in intellectual history for the beginnings of Nazi ideas is to play into their hands. I do not agree, and I am fortified in my viewpoint by Fraenkel's study. For his book is rich with references to Machiavelli, Hegel, Sorel, and a whole host of lesser and more recent thinkers in whom the beginnings of the theory of the dual state may already be detected. And he points out also the striking differences between nineteenth-century legal institutions and those of England in respect to the rule of law.

If one reader may draw from this book his own conclusions for his own fighting faith, they would be that the struggle against Nazism is a struggle for the very foundations of social order, whether they be considered from a liberal or Marxian standpoint; that the Nazi state, despite its contradictions, will not fall of its own weight but must be overthrown; and that the democratic state of the future, whatever its economic or social constitution, must provide viable forms for a continuation of the rule of law, for a strong state which does not take over a monopoly of conscience and which, for all its strength, protects the meanest citizen against the arbitrary power of its officials.



This uncaptioned cartoon by Low was drawn and published four years ago.

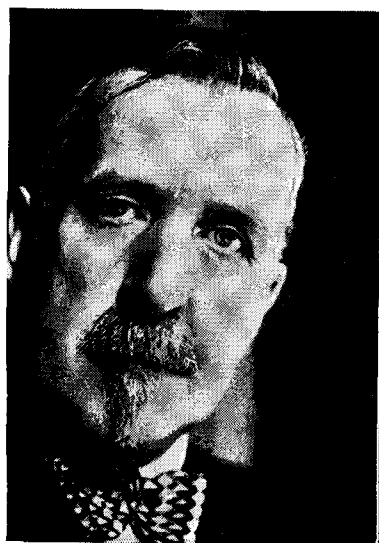
BEARDS AND AUTHORS

HERE are some authors and their beards, constituting random evidence of a not-unnoticed trend in contemporary literary history. With one exception, they fit into various hirsutian categories, beginning with the photograph immediately below at the left and continuing in a numbered progression to the bottom of the page. The one exception is Christopher Morley, at right, who is in a class by himself.

Some of these beards are new; that is, new in the sense that they have entered the world of dimension. Others have been in evidence for some time, although a few have undergone some slight revisions. In publishing these photographs, the editors hereby absolve themselves of any responsibility for last-minute trims or changes. Another note: the fact that a beardless face was good enough for George Washington is not of course to be construed as any reflection upon the persons or arborescences on this page.



No category this. Christopher Morley deserves a classification all his own. (So would most authors if they could have a reserved settee with Ginger Rogers.) Chris, whose beard is part rust and part sunset, meets Miss Rogers, the Kitty Foyle of the motion picture.



No. 1. Heinrich Mann's distinguished and disciplined lip beard is the smallest a beard can be and still be a beard. This hirsutian decoration can be worn by brachy- and dolicho-cephalics.



No. 2. Whit Burnett demonstrates the second category, where the beard carefully moves out to each side, but not beyond the chin itself. The trick here is to keep the beard from separating or merging into a point.



No. 3. The beard begins to come into its own with Ernest Boyd, who gives it just enough free play so that it will not require too much attention. This beard however, is still in the above-the-collar category.



No. 4. The problem of separating or pointing has been solved by John Vandercook, who chooses to separate. In this category, the beard establishes contact with the sideburns.

No. 5. This picture represents the first phase of the cover-the-collar category. Elliot Paul keeps it fairly full and wide, but not too long. This beard is popular with mystery-story writers and baritones.



No. 6. Rex Stout's beard has long been a thing of beauty and a joy forever. Stout, however, occasionally has it taken in so that it does not really represent its maximum potential.



No. 7. Here, finally, the progression comes to a full and fitting finish with T. H. White, with whom a beard is not a minor composition but a complete Brillo-ian symphony. The bird is a bald-headed eagle.

