

Privacy,
Race,
and
The Exceptional Category

Abi Hassen - 2025

Who am I?

- Organizing
- Protest / Jail Support
- Digital Security
- Criminal Defense
- Political Phil.
- ??????



**Short Introduction to
Ernst Fraenkel's
Dual State Theory**

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....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.”

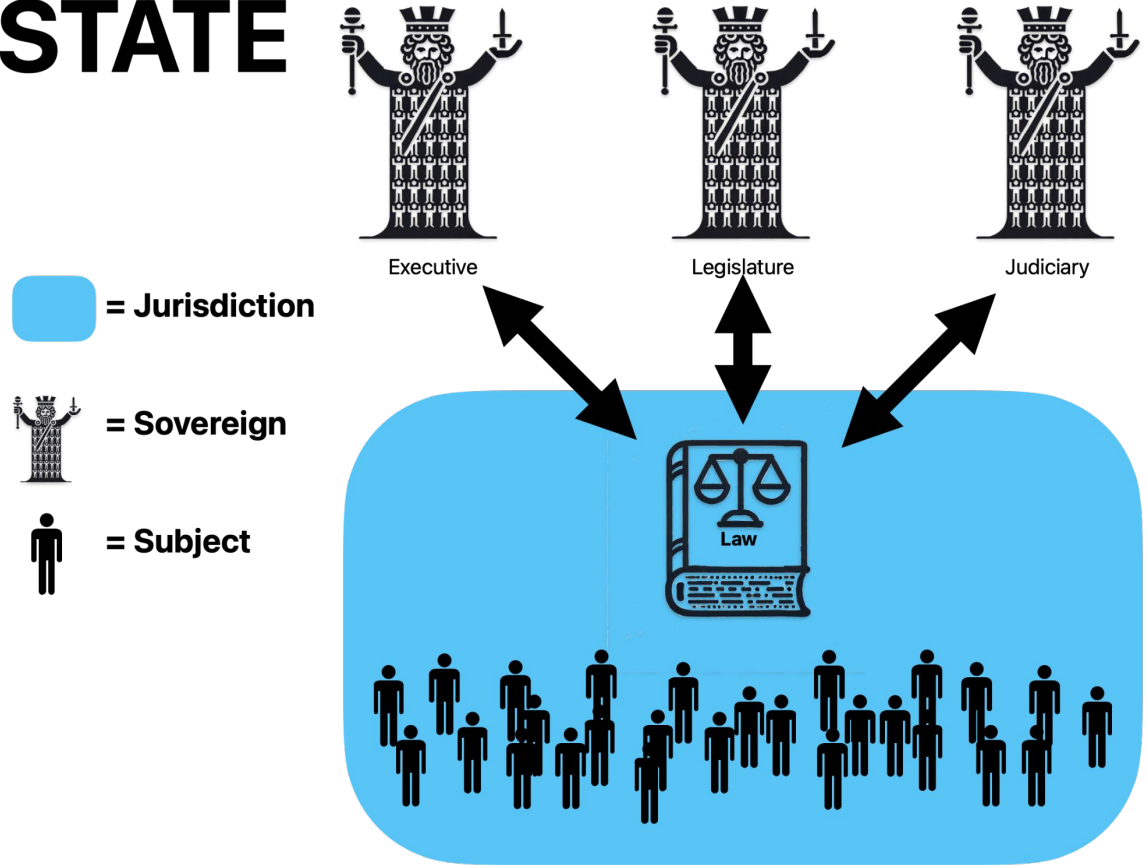
- Morris, Douglas G. *Legal Sabotage: Ernst Fraenkel in Hitler's Germany*. Cambridge Studies in Constitutional Law. (2020).



Rule of Law

- Equality Before the Law
- Checks and Balances
- Popular Sovereignty

CONSTITUTIONAL STATE




Rule of Law


- Equality Before the Law
- Checks and Balances
- Popular Sovereignty

DUAL STATE

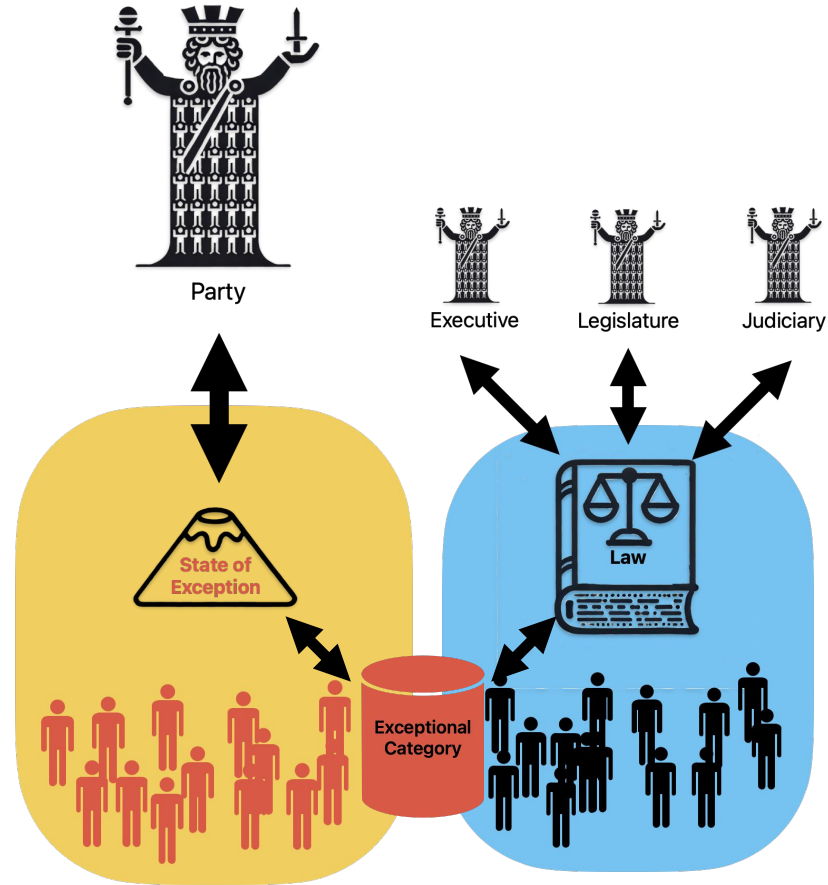
 = Prerogative Jurisdiction

 = Normative Jurisdiction

 = Sovereign

 = Subject

 = Categorized Subject




Rule of Law

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DUAL CONSTITUTIONAL STATE

 = Prerogative Jurisdiction

 = Normative Jurisdiction

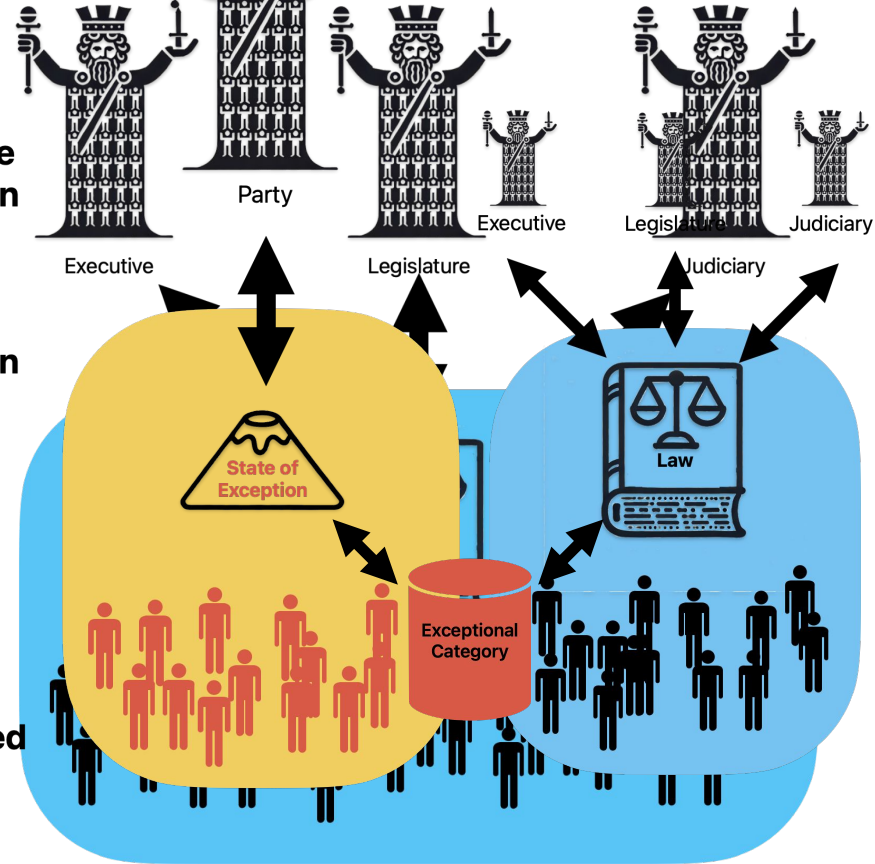
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“The constitutional charter of the Third Reich is the Emergency Decree of February 28, 1933.”

—Ernst Fraenkel, *The Dual State* (1941).

Verordnung des Reichspräsidenten zum Schutz von Volk und Staat

Auf Grund des Artikels 48 Abs. 2 der Reichsverfassung wird zur Abwehr kommunistischer staatsgefährdender Gewaltakte folgendes verordnet:

- § 1. Die Artikel 114, 115, 117, 118, 123, 124 und 153 der Verfassung des Deutschen Reichs werden bis auf weiteres außer Kraft gesetzt. Es sind daher Beschränkungen der persönlichen Freiheit, des Rechts der freien Meinungsäußerung, einschließlich der Pressefreiheit, des Vereins- und Versammlungsrechts, Eingriffe in das Brief-, Post-, Telegraphen- und Fernsprechegeheimnis, Anordnungen von Haussuchungen und von Beschlagnahmen sowie Beschränkungen des Eigentums auch außerhalb der sonst hierfür bestimmten gesetzlichen Grenzen zulässig.

Order of the Reich President for the Protection of People and State

On the basis of [Article 48](#) paragraph 2 of the Constitution of the German Reich, the following is ordered in defense against Communist state-endangering acts of violence:

- § 1. Articles [114](#), [115](#), [117](#), [118](#), [123](#), [124](#) and [153](#) of the Constitution of the German Reich are suspended until further notice. It is therefore permissible to restrict the rights of personal freedom [[habeas corpus](#)], freedom of (opinion) expression, including the freedom of the press, the freedom to organize and assemble, the privacy of postal, telegraphic and telephonic communications. Warrants for House searches, orders for confiscations as well as restrictions on property, are also permissible beyond the legal limits otherwise prescribed.

Rudolf's Dual State


- Equality before the law
- (Practically)
- Balance of power
- Popular sovereignty
- Sovereignty
- Exception

DUAL STATE

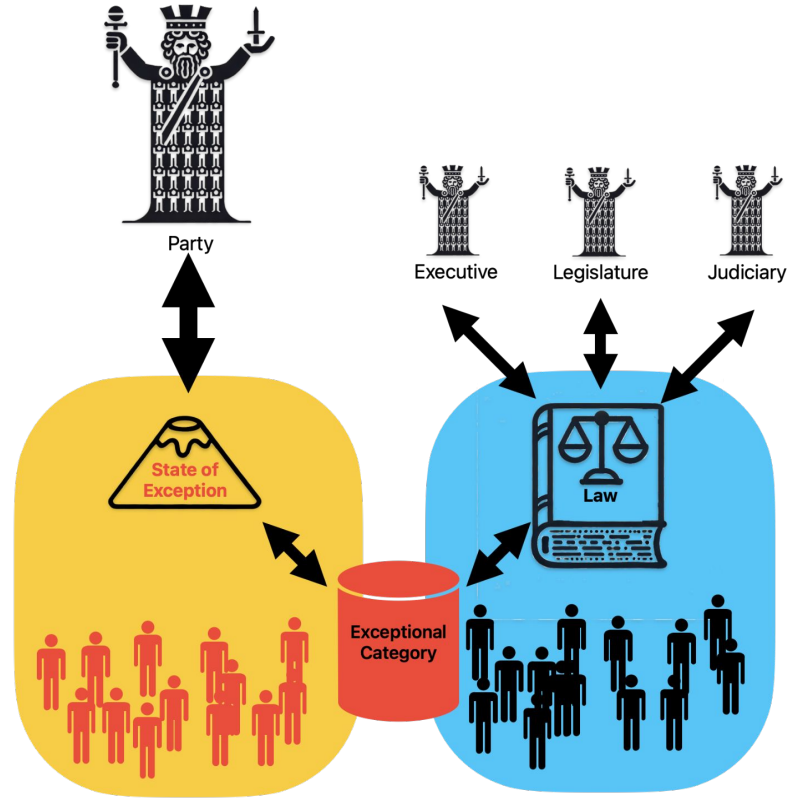
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Fraenkel's Dual State


- Unlimited Jurisdiction (potentially)
- Legitimacy Laundering
- Normalized Exception

DUAL STATE

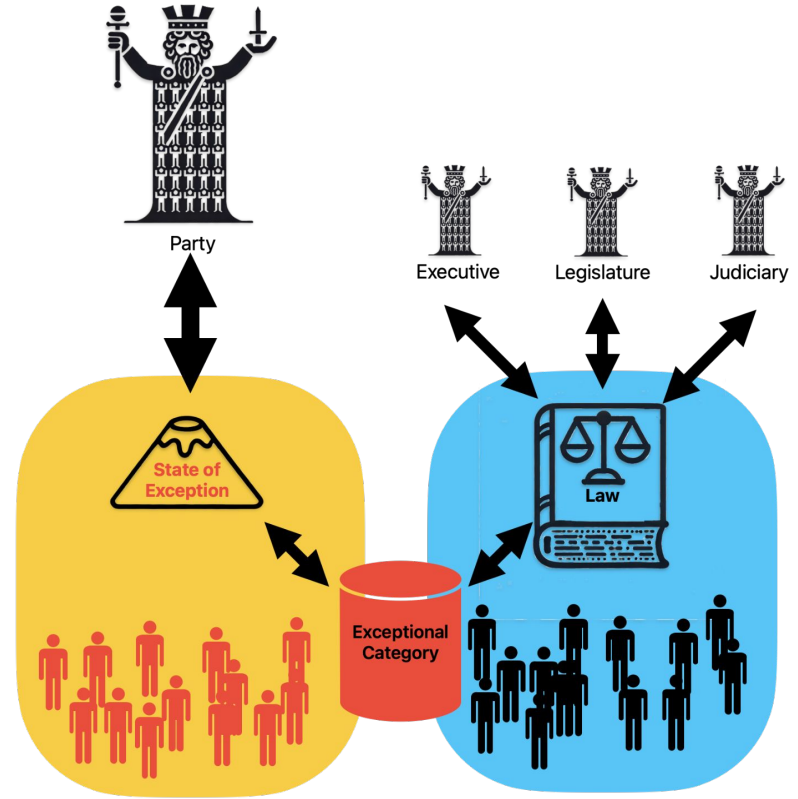
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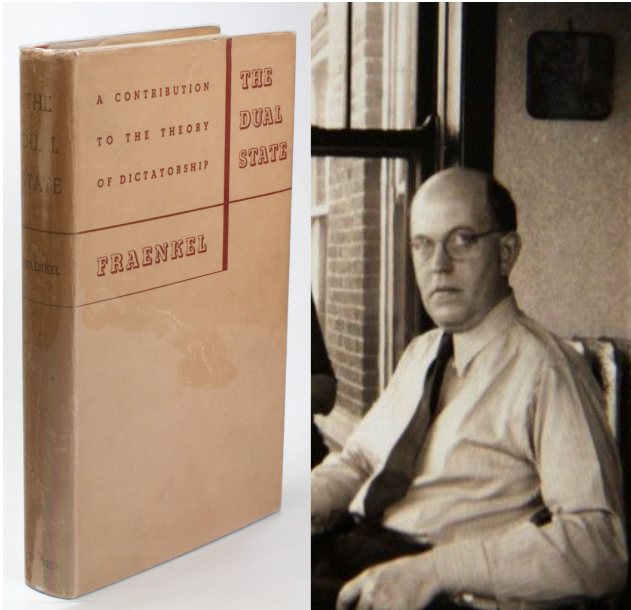
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Ernst Fraenkel



“The Prerogative State does not merely supplement and supersede the Normative State; it also uses it to disguise its political aims under the cloak of the Rule of Law”

-Ernst Fraenkel, *The Dual State* (1941).

“[T]his dualism describes a single state which appears Janus-faced with regard to the application and validity of law.”

-Suntrup, “Between Prerogative Power and Legality - Reading Ernst Fraenkel’s *The Dual State* as an Analytical Tool for Present Authoritarian Rule (2020).”

DUAL STATE

**Dual State Dynamics
in
America's Criminal System**


Dual State Dynamics in America's Criminal System


- Unlimited Jurisdiction (potentially)
- Legitimacy Laundering
- Normalized Exception

INVERTED DUAL STATE

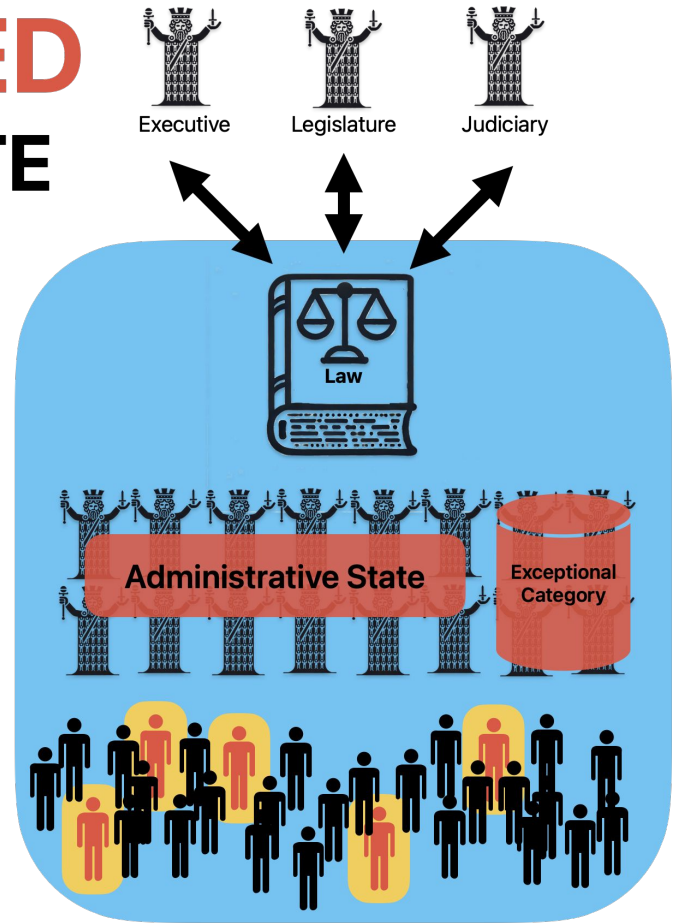
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Dual State Dynamics in America's Criminal System

<ul style="list-style-type: none"> ● Unlimited Jurisdiction (potentially) 	<p>Do the categories evade jurisdictional limitations?</p>
<ul style="list-style-type: none"> ● Legitimacy Laundering 	<p>How do liberal institutions use Exceptional Categories to legitimize authoritarian practices?</p>
<ul style="list-style-type: none"> ● Normalized Exception 	<p>Have past states of exceptions been normalized?</p>


INVERTED DUAL STATE




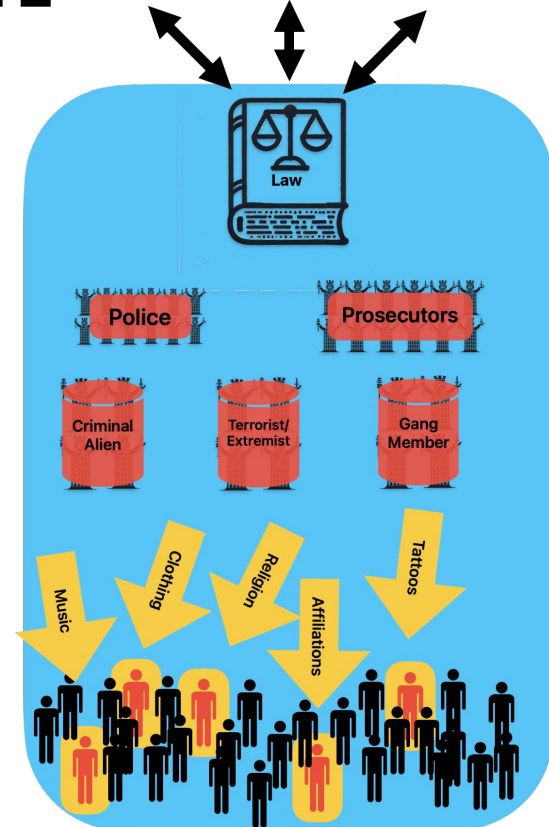
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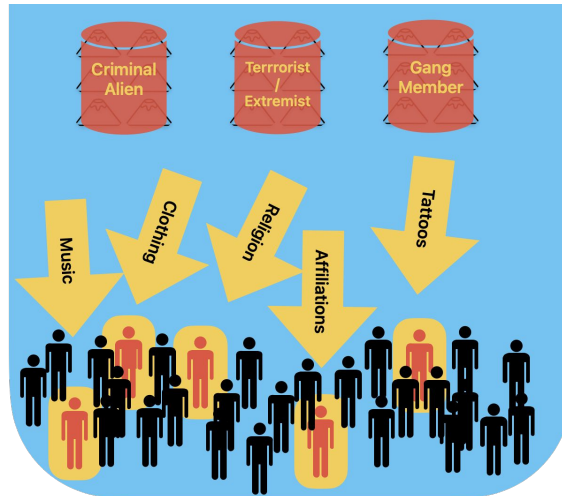
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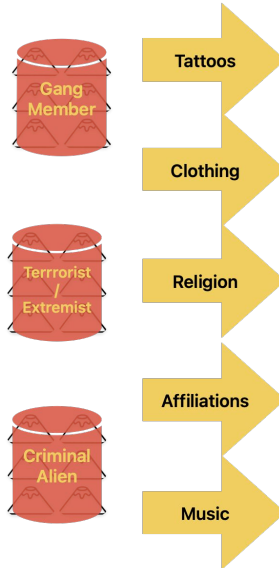
Race, Privacy, and Exceptional Category



Exceptional Category as Racecraft(ing)

Example: GWOT racializes “Muslim”

The category of terrorist is normalized as the racialization of Muslim identity



15 years after 9/11, Sikhs still victims of anti-Muslim hate crimes

By Moni Basu, CNN
9 minute read · Updated 11:22 AM EDT, Thu September 15, 2016



Exceptional Category as Post and “Ante”-racial

The destruction of Privacy And the (Re)Production of Race

“It would have been obvious that prospective jurors might be predisposed to condemn Nieves by association because the specific thing he was associated with had long (and particularly in the months preceding trial) been the persistent **target of an onslaught of local and national media reports** reciting the violent practices of groups like the Trinitarios – much of it stimulated by pronouncements from members of the **very executive branch conducting Nieves’s prosecution** ”

United States of America v. Nieves, No. 21-1901 (2d Cir. 2023)

