

Law and Morality under Evil Conditions: The SS Judge Konrad Morgen

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1. INTRODUCTION

The main test for the dispute between legal positivists and natural law theorists¹ has been the existence of wicked legal systems—first and foremost, the striking case of the Nazi legal system. In Anglo-American legal theory the issue of Nazi law has to a large extent been seen in light of the exchange between HLA Hart and Lon L Fuller

* Research for this paper was funded by the ERC Advanced Research Grant ‘Distortions of Normativity’. I owe thanks to several colleagues for their interest in the project and their most valuable feedback. For extensive discussions on the case of the SS judge Konrad Morgen and helpful comments on an earlier version of this paper I would like to thank J David Velleman, who also provided the archive material from the US National Archives. Thanks also to Joan C Tronto for comments on an earlier draft of this paper. Parts of this paper were presented at a conference on ‘Authority, Legality, and Legitimacy’ funded by the ERC project ‘Distortions of Normativity’ at the University of Vienna in May 2011. I would like to thank the participants of this conference, especially Julian Fink, Klaus Günther, Thomas Mertens, Liam Murphy, Fabienne Peter, Joseph Raz and Kristen Rundle for helpful responses and discussion. I also thank David Dyzenhaus, Veli Mitova, Carolyn Benson, Alexandra Couto and Christoph Hanisch for valuable discussions on the issue of Nazi law. Thanks to Philip Pettit for a suggestion as to how to revise the original title of the paper. For historical information and discussions on the SS jurisdiction, and for help with the archive materials, I owe thanks to Christopher Theel. Thanks to Werner Konitzer and Raphael Gross from the Fritz-Bauer-Institut in Frankfurt am Main for motivating my interest in the case of Konrad Morgen and for supporting the search for archive documents on Morgen.

¹ Legal positivism is famous for denying any internal connection between law and morality. Positivists consider law and morality to be distinct normative spheres; the failure of a legal system to meet standards of morality does not amount to a reason to deny it being called ‘law’. This claim finds most vivid expression in Hart’s *separability thesis*, which maintains that it ‘is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so’. HLA Hart, *The Concept of Law*, with a Postscript edited by Penelope A Bulloch and Joseph Raz (Oxford University Press, 2nd edn 1994) 185, 186. Natural law theorists, on the other hand, argue that legal systems which violate basic demands of justice or morality cannot qualify as genuine law. They are, as Finnis puts it, ‘peripheral’ and ‘watered-down versions’ of the central cases of law. John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2011 [1980]) 11. Legal positivism has been repeatedly accused of failing to provide the resources for rebuking bad and evil law. The separability thesis, so the critique goes, does not help us to reach a more substantial judgement than merely declaring that

in the 1958 issue of the *Harvard Law Review*.² That discussion centred on a particular problem that arose in the aftermath of the Nazi regime, namely, under which statutes could conduct that seemed legal in the Third Reich but grossly immoral under post-war rule-of-law conditions be tried by post-war courts. The famous Grudge Informer Case³ raised the question of how denunciation for malicious personal motives should be tried by post-war German courts. Hart argued that there was no other solution than solving the case on the basis of retroactive legislation, while Fuller suggested that the issue should be handled on the premise that Nazi legal statutes like the one applied in denunciation cases, the 1934 'Law Against Malicious Attacks on the State and the Party and for the Protection of the Party Uniform', were not law in any meaningful normative sense.⁴

The purpose of this article is not to take sides on the Grudge Informer Case. What is relevant for this paper is the framework in which the debate was situated and the implications it had for the perception of the problem posed by Nazi law. Given the obvious difficulty of rejecting Nazi legal regulations while granting 'validity' to any legal system whatsoever, the Grudge Informer Case was taken by many philosophers of law to show that the proper reaction to the distortions of the Nazi legal system was to tighten the connection between law and morality and declare Nazi laws not to be proper law. The upshot was that the issue of Nazi law was perceived mainly as a moral problem, less a legal problem.

Morality remains the decisive standard in Ronald Dworkin's way of coping with the case of Nazi law. Dworkin takes a slightly different line in the controversy between legal positivists and natural lawyers: an account of adjudication offers, he claims, a more promising way to decide the dispute than trying to answer the abstract metaphysical question 'what is law?'. Adjudication is also key to his treatment of Nazi law.

Adjudication for Dworkin depends not only on legal rules but also on general principles⁵ derived from and supported by moral considerations. In difficult cases

wicked legal systems, though morally deficient, are still legally valid. Natural law theory, on the other hand, faces the objection that, by holding morality to be constitutive of legal validity, it cannot account for the authority and force wicked legal systems still have vis-à-vis their subjects. Though evil, those systems still direct legal norms to persons, demanding compliance by means of state power.

2 See HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71(4) *Harvard Law Review* 593; Lon L Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71(4) *Harvard Law Review* 630.

3 The story of the case runs thus: In 1944 a woman who wanted to get rid of her husband denounced him to the German authorities for making derogatory remarks about Hitler and the Nazi regime. The husband was arrested and sentenced to death, but then sent to the Eastern front. In 1949 the woman was tried by a West German court. The woman pleaded innocence since she had merely reported her husband's violation of Nazi statutes which were legally valid at the time. The court of appeal found the woman guilty. For a recent detailed discussion of the case see David Dyzenhaus, 'The Grudge Informer Case Revisited' (2008) 83 *New York University Law Review* 1000. Dyzenhaus argues that Hart fails to depict the complexity of the Grudge Informer Case.

4 See Hart (n 2) 618–21; Fuller (n 2) 652–61. Though Fuller argued that certain branches of Nazi law are 'so oblivious to the (inner) morality of law that [they are] not entitled to be called law', he actually conceded that with respect to the Grudge Informer Case retroactive legislation was probably the best means to indicate a sharp break with a past evil legal system. *Ibid*, 661.

5 One example of such a general principle is the principle that no-one should profit from his or her own wrongs. See Ronald Dworkin, *Law's Empire* (Hart Publishing, 1998 [1986]) 20.

where legal rules do not clearly settle a criminal case, a judge does best when he tries to come to a verdict in light of principles that provide the best moral interpretation and justification of the precedents, regulations and statutes relevant to the case. Judges have to assess what would be the best moral justification of an existing body of law and then formulate the principles on which the justification rests and apply them in settling a given case. As Dworkin describes his constructive interpretation of law:

Law as integrity asks judges to assume, so far as this is possible, that the law is structured by a coherent set of principles about justice and fairness and procedural due process, and it asks them to enforce these in the fresh cases that come before them, so that each person's situation is fair and just according to the same standards.⁶

What about evil legal systems? How would 'law as integrity' work under the conditions of the Nazi system? In analogy to the ideal 'Judge Hercules', who presents the model for how best to handle the method of constructive interpretation under rule-of-law conditions, Dworkin invents 'Judge Siegfried' who aims to keep to the standards of integrity and justice within the distorted legal background of Nazi Germany. But how, we might ask, can Judge Siegfried develop a sound moral understanding of the existing body of law? How can he ever come to principles providing the basis of an interpretation of the existing body of law which amounts to its best moral justification?

There is, Dworkin concedes, no way for Siegfried to interpret the legal system in the best moral light, since Nazi law 'is too wicked to be justified in any overall interpretation'.⁷ So Dworkin recommends that 'Siegfried should simply ignore legislation and precedent altogether, if he can get away with it, or otherwise do the best he can to limit injustice through whatever means available to him'.⁸ In deciding a case, Siegfried ought to reason directly from moral principles. Dworkin presents the following example: Given a case involving a contract between an Aryan plaintiff and a Jewish defendant, Judge Siegfried, reasoning in light of justice and fairness, would have to correct the overall injustice of the Nazi system by doing 'all in his power—even lie about the law if this could help—to dismiss the claim' though the facts indeed supported 'a *weak* right in the plaintiff to win'.⁹

Again, I am not concerned with assessing Dworkin's legal theory as such. What is of interest to this paper is the primary and decisive role morality plays in Dworkin's account. Since adjudication depends not only on legal rules but on principles that draw on moral considerations, judges must have a sound sense of morality and justice. In Dworkin's framework, as Andrei Marmor points out, 'the legal validity of principles partly, but necessarily depends on some truths about morality; it is partly a matter of moral truths that some norms are legally valid and form part of the law'.¹⁰

⁶ Dworkin, *ibid*, 243.

⁷ *Ibid*, 106. In such a case, where no justification for state coercion can be provided, there exists according to Dworkin only law in 'the preinterpretive sense'. *Ibid*, 105.

⁸ *Ibid*, 105.

⁹ *Ibid*, 106.

¹⁰ Andrei Marmor, *Philosophy of Law* (Princeton University Press, 2011) 85.

The direct impact of morality on adjudication thus becomes especially apparent in the case of wicked legal systems. In deplorable circumstances like the National Socialist state, judges must, according to Dworkin, ignore the existing body of law and look to morality for guidance. The implicit prerequisite here is that morality has the resources for providing the correct answer and, furthermore, that judges know the ‘true morality’ which, in turn, presupposes that morality is a self-evident guideline. Many philosophers would of course consider these underlying premises to be obvious and agree with Marmor’s assessment of the main supposition of Dworkin’s theory: ‘To complete the argument, one would have to assume that morality does not run out. But that would not be a question-begging argument.’¹¹

My aim in this paper is to cast doubt on the assumption that morality is the proper ground to cope with the distortions of Nazi law. While the assumption that morality does not run out seems so evidently true, I argue that under conditions like the Third Reich morality becomes contested ground since moral ideals and principles are deeply involved in ideological moralising. By discussing the case of the SS judge Konrad Morgen I try to show that in wicked legal systems, morality—at least in the sense of abstract *a priori* principles—does not present as secure a guideline as some legal theorists assume.

The paper is structured in the following way. In section 2 I show that the Nazi legal theorists argued for seeing law and morality as a unity. After outlining the framework of the SS jurisdiction in section 3, I discuss in section 4 the SS judge Konrad Morgen and the moral ambiguities apparent in his self-understanding and ‘legal activities’. My conclusion is that a non-moralising account of legality is needed to cope with the distorted legal background of the Nazi system.

2. THE UNIFICATION OF LAW AND ‘MORALITY’ IN THE NAZI LEGAL SYSTEM

Starting with Gustav Radbruch’s famous accusation that legal positivism had rendered the jurists helpless towards the Nazi regime, the predominant post-war reaction was to consider the separation of law and morality as the prime cause of the perversions of law under the Nazis. A look at the texts of legal thinkers sympathetic to the regime shows, however, that the mere fusion of law and morality as such is not a remedy to the distortions of the legal system in the Third Reich.

The program of the Nazi lawyers was to call for the unification of law and morality (*Sittlichkeit*)¹²—a requirement which post-war anti-positivists favour as well. Leading political and legal theorists like Reinhard Höhn, Otto Koellreutter, Karl Larenz and Ernst Forsthoff considered eliminating the distinction between law and

¹¹ *Ibid*, 88 fn 5.

¹² Nazi legal theorists usually use the term *Sittlichkeit* for ‘morality’, which was common at the time. *Sittlichkeit* is not necessarily reduced to Hegel’s understanding of the concept, contrasting it with (Kantian) morality.

morality as crucial for attaining a National Socialist form of law.¹³ The idea was that an appropriate conception of law should in addition to positive legal norms also embrace a 'higher law' (*höhere Rechtsidee*) reflecting the idea of 'the right and the just'. Ethical principles should be embedded in law.

Considerations of justice must, as Höhn demands, 'find immediate expression in the legal norm'¹⁴; they are not merely relevant in the case of discretionary decisions of the judge. 'Justice', Höhn claims, 'does not stand outside law.'¹⁵ Whereas positivism implies that 'the idea of justice cannot be incorporated into positive law',¹⁶ the dichotomy between the idea of justice and statutory law should now be overcome, because '[I]law is lived morality'.¹⁷ Law amounts, in Höhn's words, not merely to a simple technique for applying independent ethical principles; 'law can only mean the lived ethics of a people'.¹⁸ Thereby 'the sharp separation of law and morality loses its meaning'.¹⁹

The *volks-community* (*Volksgemeinschaft*), Höhn states, 'is according to the new German conception of law not only a social fact, but also a principle of law (justice)'.²⁰ The ethical values that are constitutive of the National Socialist conception of community, such as honour, loyalty and race, are now also part of law.²¹ Only from the perspective of an individualist system of law would such concepts, as Höhn maintains, seem to be 'foreign in their essence and "non-juridical"'.²² Due to the reassessment of the *volks-community* as a legal notion, the principles of racial sameness and species sameness are also constitutive of law.²³

Karl Larenz equally emphasises the unity of law and morality. Law is, Larenz writes,

not a matter of arbitrary discretion, it is also not a matter of external expediency and utility, but a live order closely connected with the moral and religious life of the community, which confronts the individual with its own claim to validity and internally binds the individual.²⁴

13 Reinhard Höhn, 'Volk, Staat und Recht' in Reinhard Höhn, Theodor Maunz and Ernst Swoboda, *Grundfragen der Rechtsauffassung* (Duncker & Humblot, 1938) 1–27; Reinhard Höhn, *Rechtsgemeinschaft und Volksgemeinschaft* (Hanseatische Verlagsanstalt, 1935) 49–83; Otto Koellreutter, *Deutsches Verfassungsrecht* (Junker & Dünnhaupt, 3rd edn 1938); Karl Larenz, *Deutsche Rechtserneuerung und Rechtsphilosophie* (Mohr, 1934); Karl Larenz, *Rechts- und Staatsphilosophie der Gegenwart* (Junker & Dünnhaupt, 2nd edn 1935); Ernst Forsthoff, *Der totale Staat* (Hanseatische Verlagsanstalt, 1933). Forsthoff claims that the liberal state is not able to distinguish between "true—not true, just—unjust, good—evil, ethical—unethical" since liberalism lacks the substance for making such distinctions'. Forsthoff, *Der totale Staat*, p 4. All citations of the German original texts are translated by Herlinde Pauer-Studer.

14 Höhn, 'Volk, Staat und Recht' (n 13) 13.

15 *Ibid.*, emphasis in original.

16 *Ibid.*

17 *Ibid.*, emphasis in original.

18 *Ibid.*

19 *Ibid.*, emphasis in original.

20 *Ibid.*, 9, emphasis in original

21 *Ibid.*

22 *Ibid.*

23 *Ibid.*, 8.

24 Larenz, *Deutsche Rechtserneuerung und Rechtsphilosophie* (n 13) 5.

Law must, Larenz claims, be connected with understanding of morality not to be 'a matter of the individual person, but a life form of the community: in Hegel's words, "the true spirit of a family and a people"'.²⁵

Remarks such as these are especially directed against Kelsen's demand that morality and law be treated as two distinct normative spheres.²⁶ As Larenz argues, legal positivism strips law 'of its natural connection with national mores and morality'.²⁷ The meaning and end of law is according to Larenz located in the 'substance and promotion' of the *volks*-community which is end and value in itself. Positive legal norms must be in line with the 'ethical consciousness, the mores of the *volk*'.²⁸

The Nazi program of a unification of law and morality entails that in National Socialism, as the Nazi jurist Walter Hamel writes, 'a distinction between moral duty and legal duty ... cannot be made any more'.²⁹ Since the moralisation of law eliminates the distinction between legal and ethical obligations, honourable, decent and loyal behaviour can now be legally required. Because law and morality form a unity, the law also binds the members of the community ethically.

Of course the Nazi legal theorists had a deeply perverted conception of justice and morality. The community-oriented sentiments of the members of the *volks*-community constitute their sense of justice. The standards of justice include, in Koellreutter's words, those norms and principles that are 'tasked with protecting and developing the national life order in its existence'.³⁰ Höhn also ascribes to the members of the Aryan *volks*-community the decisive epistemic competence in legal and evaluative questions: their judgement determines what counts as just and unjust. How misguided this conception is becomes especially clear when Höhn cites approvingly Alfred Rosenberg's statement: '*Law (justice) is that which aryan persons consider to be right, and injustice is what they dismiss*'.³¹ The standards of justice and correctness are according to that definition so dependent on the acceptance of the Nazi worldview that Koellreutter, for example, has no reservations about the presumptuous claim: 'Therefore the National Socialist rule-of-law state is a just state as well as an order-based state.'³²

²⁵ *Ibid*, 6.

²⁶ Nazi theorists claim that legal positivism, due to its strict separation of law and morality, was responsible for the 'ethical disorientation' of the Weimar Republic.

²⁷ Larenz, *Deutsche Rechtserneuerung und Rechtsphilosophie* (n 13) 12, emphasis in original. Karl Larenz, for example, considers Kelsen's *Reine Rechtslehre* to be a document of 'foreign intellectual infiltration'. Larenz, *ibid*, 11. Larenz adds that it was the achievement of Carl Schmitt to revive the 'essence of the political' and 'the simple reality of political life' against the 'artificial abstractions of the Vienna school'. Larenz, *ibid*, 18.

²⁸ Larenz, *ibid*, 9.

²⁹ Walter Hamel, 'Wesen und Rechtsgrundlagen der Polizei im nationalsozialistischen Staate' in Hans Frank (ed), *Deutsches Verwaltungsrecht* (Zentralverlag der NSDAP Eher, 1937) 381–8, esp 384. Equally, Koellreutter (n 13) 12 emphasises the connection between ethics, law and community. Cf also Ulrich Scheuner, 'Die Rechtstellung der Persönlichkeit in der Gemeinschaft' in Frank, *Deutsches Verwaltungsrecht*, 82–98.

³⁰ Koellreutter (n 13) 11. According to Koellreutter the Nazi racial laws belong to the constitution of the Third Reich.

³¹ Höhn, 'Volk, Staat und Recht' (n 13) 8 (emphasis in original).

³² Koellreutter (n 13) 56.

The unification of law and morality serves the Nazi jurists as a welcome means of extending the authority and power of the state to the control of personal convictions. Larenz's writings are an illuminating example. On the one hand, Larenz claims to follow Kant's philosophy of law, especially Kant's way of defining the authority and dignity of law independently from interest-based considerations of utility. He argues, for example, that Kant 'rightfully removes not only from the sphere of ethics, but also from the philosophy of law', a 'form of utilitarianism which claims that law exists for the interests of the individual human beings and is created by them'.³³ The *volks*-community that is constituted by the interest-independent ethical obligation of its members thus amounts to a value in itself.

On the other hand, Larenz clearly gives up the basic principle of Kant's political philosophy, namely that the force of the state merely extends to regulations in the sphere of external freedom.³⁴ The state is not, Kant argued, permitted to interfere in the sphere of internal freedom. The authority and power of the state must not extend to the control of our personal convictions, including our ethical attitudes and convictions. With regard to law, the consequence of this Kantian restriction is that the state is entitled to enforce its subjects' compliance with legal norms, but is not authorised to require that compliance to rest on specific moral or ethical motives.³⁵ According to Larenz, however, subjects' internal ethical commitment to law and legal norms is crucial for the National Socialist conception of law.³⁶ The state has the authority to require the ethical commitment to legal norms.

The blurring of the distinction between law and morality, between external freedom and internal freedom, strengthens the dictatorial power of the Nazi regime. An attitude of inner loyalty and commitment towards law is much more conducive to the ends of the Nazi state than mere compliance with orders and legal regulations in response to state force. The 'ethical recognition' of the Führer's orders by officials and judges was, as historians have pointed out, crucial for the inner stability of the Nazi state in the pre-war years.³⁷

Instead of endorsing legal positivism, the Nazi jurists approve the unification of law and morality in a way that corresponds, at least formally, to a requirement that the anti-positivists favour. Morality thus turns into one of the most effective tools of the Nazi regime to realise its political goals. Of course, as I have argued, the Nazi conception of morality is deeply distorted and permeated by ideology. As such, a mere

³³ Larenz, *Deutsche Rechtserneuerung und Rechtsphilosophie* (n 13) 5, 6. By 'utilitarianism' Larenz obviously means a self-interest based theory of morality.

³⁴ Immanuel Kant, 'Metaphysical First Principles of the Doctrine of Right' in *The Metaphysics of Morals*, Mary Gregor (ed) (Cambridge University Press, 1991) 31, 6:239.

³⁵ According to Kant, it is of ethical value if citizens recognise the norms of the state and feel committed to *ethical juridical duties*, but it is not something the state can require citizens to do. This does not mean that Kant excludes all intentional and internal elements of morality from the sphere of law. A good discussion of the point can be found in Allen D Rosen, *Kant's Theory of Justice* (Cornell University Press, 1993) 85 f.

³⁶ Larenz, *Rechts- und Staatsphilosophie der Gegenwart* (n 13) 157, 158.

³⁷ See eg Hans Mommsen, *Beamtenum im Dritten Reich. Mit ausgewählten Quellen zur nationalsozialistischen Beamtenpolitik* (Deutsche Verlagsanstalt, 1966).

call to bring law and morality together will not be the way to remedy the perversions inherent in the Nazi legal system.

Let us turn to a part of the Nazi jurisdiction where the appeal to an ethos higher than positive law was crucial.

3. THE SS JURISDICTION

The SS and police court system was a special judicial system within the SS, set up by a decree of the Council of the Ministry for the Defense of the Reich on 17 October 1939, to try criminal offences committed by members of the Waffen-SS, members of the SS, and police task forces and police units serving in war.³⁸ Plans to introduce a special court system for SS members had already existed before 1939, but the outbreak of the war gave Himmler a decisive reason to realise those ideas.³⁹ The immediate rationale for setting up the SS jurisdiction was to prevent members of the Waffen-SS and especially the SS task forces from being tried by the military courts of the *Wehrmacht* for war crimes committed in Poland. But Himmler's reasons for erecting a judicial system within the SS cannot be reduced to preventing SS members from being prosecuted for war crimes and atrocities. Himmler's intentions were broader. He was eager to use the instrument of law to expand his power and to introduce the specific ideology and worldview of the SS into the power structure of the Third Reich. The SS should be the backbone of the new state order—which in Himmler's vision reached beyond the war.

Several SS courts, located at the office of the Higher SS and Police Leaders, were erected in the major cities of the Third Reich and the annexed territories.⁴⁰ The SS

³⁸ The introduction of the SS jurisdiction was officially announced in the *Reichsgesetzblatt, RGBI* 1939 I, pp 2107 f. In addition, two executive orders for the special SS jurisdiction were issued: the first one was announced on 1 November 1939 (*RGBI* 1939 I, pp 2293–96), and the second on 17 April 1940 (*RGBI* 1940 I, p 659 f). The announcement of the special SS court system in the *RGBI* and the two executive orders are reprinted in Bianca Vieregge, *Die Gerichtsbarkeit einer 'Elite'. Nationalsozialistische Rechtsprechung am Beispiel der SS- und Polizeigerichtsbarkeit* (Nomos, 2002) 247–54. Before the implementation of the special SS jurisdiction, SS members serving in combat were subject to the military criminal law, and members of the General SS were subject to the German Penal Code of 1871 (*Deutsches Strafgesetzbuch 1871*).

³⁹ As early as June 1939 Hitler had approved the establishment of a special criminal system for SS members. See Lothar Gruchmann, *Justiz im Dritten Reich 1933–1940. Anpassung und Unterwerfung in der Ära Gürtner* (R Oldenbourg, 1988) 654; see also Vieregge (n 38) 14; Bernd Wegner, *Hitlers Politische Soldaten: Die Waffen-SS 1933–1945* (Schöningh, 5th edn 1997) 321. In the early years of the Nazi regime civil courts had prosecuted SS men for criminal offences against concentration camp inmates. The introduction of the SS and police court system gave Himmler the opportunity to reduce the competences of the general criminal courts and to expand the competence of the SS.

⁴⁰ In 1944 there existed 29 SS and police courts. See Hans Buchheim, 'The SS—Instrument of Domination' in Helmut Krausnick, Hans Buchheim, Martin Broszat and Hans Adolf Jacobsen, *Anatomy of the SS-State* (Walker and Co, 1968) 252. The organisational centre and central authority of the SS and police judicial system was the Head Office SS Court in Munich, which consisted of several administrative units responsible for legal politics, management of personal and disciplinary matters of the judges, enforcement and execution of sentences, and a unit for the surveillance of the entire SS jurisdiction system. At the Head Office in Munich a Supreme SS and Police Court was also erected, which consisted of five judges: two main judges and three laymen. The main court authorities, usually the Higher SS and Police Leaders, could initiate inquiries and then set up courts to prosecute offences.

courts consisted of a judge and two assisting lay judges. Verdicts were reached by majority vote.⁴¹ The judges in the SS courts were nominated by Hitler himself; they were members of the Waffen-SS and were subordinate to Himmler.⁴²

Himmler could not directly intervene in court sentences: judicial independence was still a principle of the SS jurisdiction. But he could re-order a trial if he thought a sentence too harsh or too mild. In the majority of cases Himmler transferred the authority to reconsider sentences to the heads of the SS main offices and the Higher SS and Police Leaders, but in crucial cases he made use of his superior authority to uphold or dismiss a verdict.⁴³

What were the legal foundations of the SS jurisdiction? There existed nothing like a specific SS penal code.⁴⁴ Formally, the SS jurisdiction was modelled on the military court system and claimed to be a special part of the military jurisdiction which adhered to the military law statutes, the military penal code, and the military criminal court order. Materially, however, the SS jurisdiction was heavily influenced by the values prevailing in the SS.

Himmler set the standards for the SS legal system by cultivating the idea of the SS as a specific elite bound by a code of 'honour and decency'. Members of the SS lost their status and could be excluded from the SS if they violated this code. Loyalty and honour were interpreted as unconditional obedience and 'ethical acceptance' of the orders of the authorities. The SS ethos rested on voluntary 'ethical fulfilment' of duties.⁴⁵

The SS worldview also drew on the notion of building and protecting a racially pure *volks*-community. Thus the SS jurisdiction had reason to intervene if the members of the SS defied their duties towards the Aryan community. A violation of the racial laws, for example, amounted to a major criminal offence.⁴⁶ Respect for the

41 Vieregge (n 38) 47.

42 Formally Hitler himself was the highest court authority, but he had delegated the authority to Himmler. See Buchheim (n 40) 252, 253; Vieregge (n 38) 37–40. Since the indictments of the SS jurisdiction were not publicised, Himmler could control and uphold the public image of the SS.

43 A striking case is that of Max Täubner. See Yehoshua Robert Büchler, "'Unworthy Behavior": The Case of SS Officer Max Täubner' (2003) 17(3) *Holocaust and Genocide Studies* 409.

44 Though there existed plans for a specific codification of SS law, this was never realised. See Vieregge (n 38) 84. Hitler in particular had reservations about any codification of law. For example, in 1939 he stopped the criminal law reform on which Nazi legal theorists had worked for several years.

45 In an article on the education of young SS men published in the regular memoranda of the SS Court Head Office, it is emphasised that education within the SS has to be 'tackled from the ethical side'. The text states: 'The SS man must not be educated in such a manner that he follows orders merely out of fear of punishment, but in such a way that he gradually comes to the point of fulfilling his duties out of a voluntary commitment resting on a deep conviction.' See *Zur Erziehung und Belehrung von SS-Rekruten* Mitteilungen des Hauptamts SS-Gericht 1942, Band II, Heft 3, 85 (Published Memoranda of the SS Court Head Office, US National Archives, Record Group 242, Microfilm T175A, Roll 3).

46 Often SS members were tried by the special SS jurisdiction for violations of racial laws. See James J Weingartner, 'Law and Justice in the Nazi SS' (1983) XVI *Central European History* 280. Several passages in the Nuremberg interrogations of Konrad Morgen also confirm how central the racial law regulations were to the SS ethos and the SS jurisdiction. Morgen himself considered accusations against SS members for sexual intercourse with non-German women as simply 'crazy'. See MIS Nuremberg Interrogation of Konrad Morgen, 15 October 1947, pp 327, 328, in MIS *Main Interrogation Series*, Interrogation Records Prepared for War Crimes Proceedings at Nuremberg 1945–1947 (US National Archives, Record Group 238, Microfilm 1019, Roll 47).

'holiness of property' also had special standing within the SS code of decency.⁴⁷

The transformations in the general legal background of the Third Reich had an impact on the SS jurisdiction. In particular, the call of Nazi jurists for a unification of law and morality strengthened the ideological components in the SS jurisdiction. The SS ethos of 'honour and decency' defined the higher vocation of law. The assumption of a 'higher law' (*höhere Rechtsidee*) expressing 'the right and the just' served as a handy means to re-interpret military law statutes on the basis of the specific values and principles of SS ideology. Equally, criminal offences were defined in light of the special way of drawing the line between legality and criminality in the SS.⁴⁸

As the war progressed, the SS jurisdiction retreated considerably from the model of military jurisdiction. Take, for example, § 92 of the military penal code, which regulated the offence of military disobedience.⁴⁹ The SS judges turned § 92 into an instrument for enforcing the SS standards of honour and decency. The *corpus delicti* of military disobedience was interpreted so broadly within the SS jurisdiction that practically every violation of any of Himmler's orders could be classified as a violation of military discipline.⁵⁰ Thereby the SS jurisdiction entered juridically new territory, as Bianca Vieregge calls it, by allowing SS judges to create new law.⁵¹

Section 92 of the military penal code was a major means of converting violations of the honorary order of the SS into criminal offences. Himmler's order of *völkisch* self-respect, which was issued on 19 April 1939, prohibited, for example, all intimate relations between SS members and women of other races. What started as an 'ethical order' of honour within the SS soon had the status of a legal requirement. On the basis of an extended understanding of § 92, the ethical misdemeanour constituted military disobedience and thus a criminal act. Similarly, homosexuality, adultery and misuse of alcohol eventually all counted as cases of military disobedience. Such a classification of criminal acts shows clearly the decisive role played by the values of the SS.

Section 92 was of course also applied within the SS jurisdiction in line with the classical notion of military disobedience, namely in the sense of violating military orders and thus endangering the effective working of the military hierarchy. When

⁴⁷ This is confirmed by Himmler's notorious Posen speech in 1943.

⁴⁸ The appeal to an idea of law beyond positive law contributed to a radicalisation of the SS jurisdiction. Several violations, such as racial law offences, were sentenced within the SS in a harsher way than in the ordinary jurisdiction. See Vieregge (n 38) 94. See also the testimony of Günther Reinecke, at text to n 55 of this essay.

⁴⁹ § 92 of the military penal code (§ 92 MStGB) states: '(1) Whoever does not follow an order and who thereby intentionally or by negligence causes either a considerable disadvantage, or a danger to human life, or a significant danger to the property of others, or a danger to the security of the Reich or the vigour of the military troops, will be punished by severe detention or imprisonment of up to ten years. (2) If the deed is committed in military combat or constitutes an especially grave case, it can be punished by either the death penalty or lifelong arrest' (translation by Herlinde Pauer-Studer). For the German original see Vieregge (n 38) 96 fn 162.

⁵⁰ Since 1931 there existed specific regulations concerning the marriage of SS men. SS men had to apply for permission to marry; the future wife had to qualify as 'racially pure and sane'. With the introduction of the SS jurisdiction violations of those regulations were classified as criminal deeds.

⁵¹ Vieregge (n 38) 68, 95.

members of the Waffen-SS and members of police units, for example, acted on their own initiative without higher orders, they could not simply justify themselves by an appeal to the general worldview principles of the SS; they were often tried for military disobedience.

Thus, the 'legal standards' on which the SS judge could rely amounted to a complicated mixture of partially conflicting normative requirements. On the one hand, the SS judge was asked to conform to the specific SS ethos with its perverted notions of honour and decency, which granted the judge a high degree of discretion. On the other hand, the SS judge still had to be a representative of a judicial system and should display a sense of justice and the 'rule of law' by not completely transgressing traditional and still existing legal regulations such as major military law statutes. The tension between a commitment to legal statutes and the commitment to the SS ethos was considerable.

Himmler certainly considered political thinking and ideological firmness to be more important for SS judges than traditional legal reasoning. Himmler was, as confirmed by historians, a perverted moralist and consequently defined the foundations and self-understanding of the SS in a deeply moralising way. Accordingly, the SS judges were expected to rule in conformity with the 'SS ethos', which, as many of the articles in the regularly published memoranda of the SS Head Office show, the SS jurisdiction was eager to determine and fix in guidelines.

In line with Himmler's directions, the chief of the SS Head Office in Munich, Franz Breithaupt, himself not a jurist, declared: 'SS judges are no "jurists", but SS leaders familiar with law.'⁵² The SS jurisdiction should be in the hands of 'young, fresh SS leaders' and not 'overaged and senile jurists'.⁵³ According to this ideological line of defining the role of an SS judge, the SS judge was, as the historian James Weingartner puts it, 'expected to conduct himself in a manner fundamentally different from that of the traditional judge. No slave to the letter of the law, he was, ideally, a political fighter and educator to whom principle took precedence over paragraph.'⁵⁴

The extent to which some SS judges were influenced by the idea of a special SS ethos is evidenced by the testimony of Günther Reinecke, a former Chief Judge of the Supreme SS and Police Court, in his witness testimony on behalf of the SS at the International Military Tribunal trial in Nuremberg:

Training in the SS was systematically directed to decency, justice, and morality. Institutions existed which guaranteed that this training was carried out in full. Not only was the law, including international law, taught in the Junker schools of the SS but legal proceedings

⁵² Franz Breithaupt, 'An die Führer der SS und Polizei', *Mitteilungen Hauptamt SS-Gericht*, Band II, Heft 3, 1942 (US National Archives Microfilm). Franz Breithaupt was Chief of the SS Head Office from 1942 to 1945. According to a directive from Himmler dated 1 August 1942, the chief of the main office of the SS court system who was also proxy to Himmler had to be a military person, not a jurist. *Mitteilungen Hauptamt SS-Gericht*, Band II, Heft 5, 1942, 138. See also Vieregge (n 38) 41 ff; Wegner (n 39) 324.

⁵³ *Bericht über die Dienstbesprechung der Chefs der SS- und Polizeigerichte am 7. Mai 1943 in München* (Bundesarchiv Berlin-Lichterfelde, formerly Berlin Document Center, NS 7/13, Blatt 13–21).

⁵⁴ Weingartner (n 46) 280.

were held openly before the entire units. The head office 'SS Courts' as the central department of the legal system, issued its own literature to insure that these principles of decency and justice became firmly established among all members of the SS ... Special principles of selection prevailed in the SS. The SS was bound by so-called fundamental laws to observe a particularly moral conduct. Offenders in the SS who infringed on a law incurred heavier guilt and therefore deserved severer punishment.⁵⁵

De facto, however, most SS judges were jurists who had worked in the legal profession as public prosecutors or lawyers before the war.⁵⁶ This explains why there was considerable tension within the SS with regard to the tasks of the SS jurisdiction. Some judges were torn between their ideological mission and their self-understanding as lawyers. The judges who had undertaken formal legal training were not always mere instruments of the Nazi system; they were also driven in part by their traditional conceptions of law and legality.

4. THE CASE OF SS JUDGE KONRAD MORGEN

Konrad Morgen (1909–82) studied law at the Universities of Frankfurt, Rome, Berlin, The Hague and Kiel. In May 1933, his last semester as a student, he joined the NSDAP and also became an SS member.⁵⁷ Between 1934 and 1938 he undertook legal training within the German judiciary system. In 1936 he published his dissertation on 'War Propaganda and War Prevention'.⁵⁸ In 1938 he took the second state exam, qualifying him to occupy the position of a judge. For a brief period Morgen served as a civil judge at the County Court in Stettin. He was dismissed as a judge by

⁵⁵ Günther Reinecke, Witness Testimony, IMT International Military Tribunal Trial against Major War Criminals in Nuremberg, 6–7 August 1946, 'Blue Series', Volume XX, pp 415–82, here: p 429 (original is in English). Note that Reinecke gave this testimony with a straight face at a time when historical evidence had clearly debunked the SS ethos as utter ideological illusion. Reinecke even claimed: 'The SS, from the beginning of its formation, fought against crime on principle and at all costs, and it had a perfectly orderly administration of justice.' Günther Reinecke, Witness Testimony, International Military Tribunal Trial, 6 August 1946, p 427. This orderly administration of justice in the SS was guaranteed according to Reinecke by the so-called disciplinary law, which forced members who committed punishable acts to leave the SS. *Ibid*, 428.

⁵⁶ This was confirmed by Günther Reinecke in his witness testimony at the International Military Tribunal Trial in Nuremberg. Reinecke stated: 'Neither I nor the other SS judges had special training at special schools. The SS judges came from positions in the legal profession and were before the war high-ranking legal personalities, public prosecutors or lawyers, or some of them were transferred from the courts of the Wehrmacht to courts of the SS.' Günther Reinecke, Witness Testimony, International Military Tribunal Trial, 6 August 1946, p 416.

⁵⁷ The primary reason for his entering the NSDAP seems to have been to promote his career. In the interrogations after the war Morgen claimed that his parents, particularly his mother, urged him to join the Nazi party. See MIS Interrogation of Konrad Morgen, Nuremberg, 30 August 1946, p 1, MIS, Main Interrogations Series. 'Interrogation Records Prepared for War Crimes Proceedings at Nuremberg 1945–1947' (US National Archives, Record Group 238, Microfilm 1019, Roll 47). The MIS Nuremberg interrogations of Konrad Morgen are (with one exception) in German; Morgen's quotes are translated into English by Herlinde Pauer-Studer.

⁵⁸ Konrad Morgen, *Kriegspropaganda und Kriegsverhütung* (Universitätsverlag von Robert Noske, 1936). Morgen's dissertation displays an interest in International Law and supports the possibility of promoting peace through transnational agreements and contracts.

an official decision of the Reich's Ministry of Justice, because he refused to consent to a tendentious verdict complying with the Nazi party line.⁵⁹

Following a year of military service as a trooper in the Waffen-SS, Morgen applied in 1939/40 to the Head Office of the SS Court in Munich to become an SS judge, and after brief schooling he was transferred on 1 January 1941 to the SS and Police Court in Cracow. During his time in the Generalgouvernement (GG) Morgen indicted several SS members for corruption and some were sentenced to death.⁶⁰

In May 1942 Morgen was demoted and dismissed as an SS judge by an order of Himmler, on the grounds that Morgen had acquitted a defendant accused of a racial law violation (*Rassenschande*) even though the defendant had confessed the violation. The real reason was that Morgen's investigations had aroused the anger of senior SS officers with personal connections to Himmler.⁶¹ In December 1942 Morgen was sent to the Eastern front. In May 1943 Himmler ordered Morgen to be recalled from the Eastern front. He was assigned as an SS judge to the Reich's Main Criminal Office in Berlin.⁶²

Due to a request from the SS and Police Court in Kassel, Morgen was ordered in July 1943 to investigate a corruption case in the Buchenwald concentration

⁵⁹ During one of the interrogations in Nuremberg, Morgen described the details of the case. The defendant was a schoolteacher who was accused of illegal excessive corporal punishment. During the trial, in which Morgen was one of the assisting judges, he gained the impression that all evidence in favour of the defendant had been dismissed by the presiding judge. Morgen suspected that the defendant was being treated unfairly because he was not a member of the Nazi party and that the Hitler Youth had somehow initiated the proceedings. Morgen refused to consent to the verdict, causing a scandal and his removal as a judge. MIS Nuremberg Interrogation of Konrad Morgen, Nuremberg, 30 August 1946, p 3. Morgen then worked as legal advisor to the German Labour Force (*Deutsche Arbeitsfront*), an organisation representing labourers in court proceedings with respect to salary and vacation disputes.

⁶⁰ A prominent case was that of Georg V Sauberzweig, who was sentenced to death following Morgen's investigations of grand-scale corruption in the Generalgouvernement. Morgen issued a warrant of arrest (*Haftbefehl*) against Sauberzweig on 22 March 1941 for plundering. On 18 August 1941 Sauberzweig was sentenced to death by a court in Cracow for plundering and embezzlement. Morgen was the prosecuting judge (*Anklagevertreter*). The death sentence was confirmed by Hitler on 9 March 1942, and Sauberzweig was executed on the same day in Cracow. All relevant documents are part of the SS officer file, Georg V Sauberzweig (Bundesarchiv Berlin-Lichterfelde SSO/SS/Sauberzweig, Georg V, VBS 286 Nr 64 000 38 174). The documents confirm what Morgen reported about the Sauberzweig case in his post-war interrogations by the Americans.

⁶¹ Especially strained were relations between Morgen and the chief of the Reich's Main Economic and Administrative Office (WVHA), Oswald Pohl. Pohl, who was himself involved in corruption, was eager to protect SS members against Morgen's investigations. See MIS Nuremberg Interrogation of Konrad Morgen, 30 August 1946, pp 7, 8, 9, 11, 12; see also MIS Nuremberg Interrogation of Konrad Morgen, 4 September 1946, p 47. In one of his Nuremberg interrogations Morgen claimed that he learned from the Head Office of the SS Court in Munich that there existed a secret order issued by Himmler to send him to a concentration camp for 2–3 years. Due to interventions by the judges of the SS Court Head Office, who claimed that in this way the independence of a judge would be violated, Himmler decided that Morgen should be sent to the Eastern front. See MIS Nuremberg Interrogation of Konrad Morgen, 30 August 1946, p 19.

⁶² See MIS Nuremberg Interrogation of Konrad Morgen, 4 September 1946, p 5. Morgen now held a double position: he was still an SS judge, but he was also a member of the Criminal police, enabling him to investigate civilians as well as members of the Waffen-SS and police. The reason for Morgen's rehabilitation was that Himmler intended to fight the enormous corruption in the concentration camps.

camp. After two months in Buchenwald, Morgen claimed to have detected traces of 'illegal killings'. On 24 August 1943, due to Morgen's investigations, the former commandant of Buchenwald, Karl Otto Koch, and the camp physician Dr Waldemar Hoven were arrested on the grounds of embezzlement and illegal killings.⁶³

In November 1943 a special SS and police court tasked with prosecuting corruption in concentration camps was set up in Kassel, with Morgen acting as investigating judge. Besides Buchenwald, Morgen investigated in the Lublin, Oranienburg, Sachsenhausen, Herzogenbosch, Auschwitz, Cracow-Plaszow and Dachau camps. He detected traces of mass extermination of Jews in Lublin and Auschwitz in the autumn of 1943.⁶⁴ Morgen first sent a commission to Auschwitz and then visited Auschwitz himself, thereby learning directly about the methods of mass extermination of Jews. Morgen also had first-hand knowledge of mass shootings of Jews in the Lublin district.⁶⁵

In the spring of 1944 the special court was transferred from Kassel to the Head Office of the SS and Police Courts in Munich. Morgen, as the investigating judge, was also transferred to Munich. In the autumn of 1944 Morgen was again sent to the SS and Police Court in Cracow. In the middle of January 1945 the Cracow court was relocated to Breslau, where, due to the Russian invasion, Morgen's activities came to an end.⁶⁶

Morgen was in American custody from 1945 to 1948 and was interrogated in connection with the International Military Tribunal trial (IMT trial) against the major war criminals and several of the following American Military Tribunal trials in Nuremberg.⁶⁷ After his de-nazification in 1950 Morgen became a lawyer in Frankfurt am Main.

Morgen definitely went much further than other SS judges in fighting corruption and crimes. His investigations caused disquietude in the SS and provoked his

⁶³ See Affidavit SS-64, made by SS judge Werner Paulmann to the IMT, 11 July 1946 (quote translated into English by Herlinde Pauer-Studer). Document SS-64, 'Blue Series', Volume XLII, pp 543–50. Paulmann claimed that he as the chief judge of the SS Court in Kassel arrested Koch. See Affidavit SS-64, p 545. Koch's wife Ilse and the SS camp guard Sommers were also arrested. The accusations against Koch's wife were profiting from her husband's embezzlements and cruelty against concentration camp prisoners. Sommers was accused of illegal killings.

⁶⁴ Morgen claimed in the Interrogations in Nuremberg that at the turn of 1943/4 or in the spring of 1944 he learned about the mass extermination of Jews. MIS Nuremberg Interrogation of Konrad Morgen, 4 September 1946, p 29.

⁶⁵ On 3 and 4 November 1943, 42,000 Jews were shot in the Lublin camp and the nearby Poniatowa camp.

⁶⁶ See MIS Nuremberg Interrogation of Konrad Morgen, 30 August 1946; see also Interrogation of Konrad Morgen, Nuremberg, 16 September 1946. Morgen claimed that he was imprisoned by Czechs and that he had to hand over all court documents (except the copy of the bill of indictment against Koch) to the Czechs. He managed to escape and return to Frankfurt am Main.

⁶⁷ Morgen testified on behalf of the SS at the International Military Tribunal Trial against the Major War Criminals in Nuremberg (IMT trial). His testimony was on the question whether the SS should be indicted as a criminal organisation. He was also interrogated in connection with several of the American Military Tribunal trials. Morgen was a witness in the trial of Pohl, chief of the Main Economic and Administrative Office, and that of Waldeck, the Higher SS and Police Leader in Kassel. Morgen was a prominent witness—this time for the prosecution—in the Auschwitz trial in Frankfurt am Main, which took place between December 1963 and August 1965.

superiors. In the post-war interrogations Morgen maintained that altogether, as an SS judge, he had investigated more than 800 cases, with 200 cases brought to trial. He stated that five concentration camp commandants were arrested by him personally and that two were shot after being tried.⁶⁸

Morgen was far from endangering or bringing down the system. Already in April 1944 Himmler had ordered that no further investigations in concentration camps would take place. Only the pending cases should be pursued. The main result of Morgen's investigations was that a trial against Koch and Hoven was held in Weimar in September 1944 on the basis of Morgen's bill of indictment.⁶⁹ But Himmler more or less intended the trial against Koch to be a show-trial to warn other concentration camp commandants and SS officers that corruption would be prosecuted. Koch and Hoven were sentenced to death. Koch was executed in the beginning of April 1945, and Hoven was released from prison in March 1945. At the trial against Koch and Hoven in Weimar, Morgen was, as he reported in one of the post-war interrogations in Nuremberg, so severely attacked by legal advisors of the SS and superior SS officers for his prosecution of Koch and Hoven that he was basically considered a 'dead man'.⁷⁰ A trial against Maximilian Grabner, the commandant of the Political Department in Auschwitz, whom Morgen had arrested on a charge of 2,000 illegal killings, obviously came to nothing.

The image and self-conception that Morgen cultivated after the war was that of an 'upright judge' doing his best even in dark times. Morgen claimed to have been a principle-based adversary of the Nazi system trying to fight its criminality from within. This self-depiction finds its most vivid expression in Morgen's claim in a letter to the Ministry for Political Liberation of Baden-Württemberg, dated 3 January 1950, supporting his application for de-nazification:

⁶⁸ See Konrad Morgen, Witness testimony in the International Military Tribunal Trial, Nuremberg, 7 August 1946, p 489, in Konrad Morgen's IMT Testimony, 7–8 August 1946, 'Blue Series', Volume XX, pp 487–515. Morgen's pretentious claim that he himself ordered that the two concentration camp commandants be shot after being tried is clearly false with respect to Koch. Koch was sentenced to death at the trial in Weimar in September 1944, but he was executed only at the beginning of April 1945, one week before the Americans liberated the Buchenwald concentration camp on 11 April 1945. The order to shoot Koch came from Waldeck, the Higher SS and Police Leader in Kassel who had in recent weeks also gained the authority to manage Buchenwald. At that time Morgen was far away from Buchenwald. Waldeck's motives for ordering Koch to be executed remain open; probably he was attempting to improve his reputation and standing vis-à-vis the Americans.

⁶⁹ On 17 August 1944 Morgen authored a bill of indictment against the former commandant of Buchenwald, Karl Otto Koch, the camp physician, Dr Waldemar Hoven, Koch's wife, Ilse Koch, and the camp guard, Sommers. See Konrad Morgen, Anklageverfügung Koch Prien, 17 August 1944, SS and Polizeigericht z.b.V. Dodd Archive uconn_asc_19994-0065_box288_folder7343-7344. The bill of indictment rested on Morgen's extended summary of his investigations, dated 11 April 1944 (= Koch Ermittlungsergebnis dated 11 April 1944, IMT Document NO 2366, US National Archives. Record Group 238, ARC Identifier 597043/MLR Number NM70 174.) After the war Morgen handed over his personal copy of the detailed summary of the result of his investigations against Koch etc, dated 11 April 1944, to the American authorities.

⁷⁰ MIS Nuremberg Interrogation of Konrad Morgen, 18 January 1947. Morgen claimed that he was told that Himmler intended to send him to a concentration camp. Morgen was severely attacked by Oswald Pohl's legal advisor Schmidt-Klevenow.

If it is correct that the concentration camp system was the core of the terror regime, then I directly attacked this core. My way of acting was then not National Socialist fulfilment of duty, but fulfilment of all those moral and legal norms which National Socialism trampled on.⁷¹

In line with this attempt at moral exoneration, Morgen presented himself as someone involved in a professional activity which remained untouched by the sharp break marked by 1945. In one of his interrogations by American officers in preparation for the American Military Tribunal Trials in Nuremberg, Morgen told the interrogator:

I don't know why I should be in Prison as I was never a criminal but have investigated War Crimes like you are doing now.⁷²

On what basis could Morgen make such a presumptuous claim? Could the legal and institutional context in which Morgen was situated allow him to maintain the identity and integrity which he later claimed had been at the centre of his service as an SS judge? On what moral and legal foundations did Morgen's activities rest? Which standards did he consider to be binding?

Military law, Nazi worldview principles and the SS ethos were, as already mentioned, the main standards by which an SS judge was supposed to be guided. Konrad Morgen was a prime example of how these different normative standards and requirements played into the activities and self-understanding of an SS judge. Appealing to SS decency was one of Morgen's most forceful instruments for pursuing his investigations and prosecutions. As he reported in one of the post-war interrogations:

The resistance that confronted me from the central authorities I answered with SS ideology: 'Don't you want to have absolute purity in the SS?' Etc. Then they were of course always beaten and had to say 'Yes'. I considered that route to be the most effective one, because for me it mattered to help people and not only set a gesture. I wanted to prove that there was a system by pointing to the many single cases.⁷³

When it came to mass extermination, of which Morgen had first-hand knowledge after a visit to Auschwitz in the autumn of 1943, he saw the limits of what he as a judge could do. As is shown by several passages in his interrogations by the Americans after the war and his trial testimonies, Morgen was clearly aware that the orders came from Hitler via Himmler. He considered those killings to be legal in the sense of National Socialist law:

⁷¹ Konrad Morgen, Letter to the Ministry for Political Liberation Württemberg-Baden (Ministerium für politische Befreiung Württemberg-Baden), 3 January 1950 (quote translated into English by Herlinde Pauer-Studer). Personal Documents of Konrad Morgen, Fritz-Bauer-Institut Frankfurt am Main, pp 2, 3.

⁷² MIS Nuremberg Interrogation of Konrad Morgen, 4 April 1947, p 290; the passage is in English in the original. The remark was made during an interrogation in Nuremberg in preparation for the American Tribunal trials at a time when the SS had been indicted as a criminal organisation.

⁷³ MIS Nuremberg Interrogation of Konrad Morgen, 21 October 1946, p 129. All of Morgen's interrogations which are in German are translated here by Herlinde Pauer-Studer.

... I saw that those killings, by being ordered, were legal in the sense of National Socialist law and therefore I could not take any direct action on this sector.⁷⁴

That he saw no legal way to take action is supported by Morgen's account of what *de facto* counted as law in the Third Reich:

Law in the National Socialist state was several things; first it was, like in former times, the sum of legal norms in place, including common law, but then also (it included) the Führer's orders. The Führer in the National Socialist state united all authority in his person. He was not only head of the state, but also highest law giver and supreme judge.⁷⁵

In the IMT trial in Nuremberg against the major war perpetrators, Morgen explained the restrictions on taking legal action in the following way:

The circumstances prevailing in Germany during the war were no longer normal in the sense of State legal guarantees. Besides, the following must be considered, I was not simply a judge, I was a judge of military penal justice. No court-martial in the world could bring the Supreme Commander, let alone head of the State, to court.⁷⁶

In his witness testimony at the AMT trial against Oswald Pohl, Chief of the Main Economic and Administrative Office, Morgen emphasises that he went as far as he could given the circumstances:

I had an order for the arrest to be submitted to ... Kaltenbrunner against ... Eichmann, who is also know[n] to this Tribunal as [t]he Chief of the execution of extermination of the Jews. This form of arrest was not granted me.⁷⁷

Realising that he could not overcome the political and legal resistance of the SS authorities, Morgen looked, as he claimed, for another way to fight the system. His solution was to fall back on pursuing those killings that had not been ordered.

He explained his strategy against the mass exterminations in the following way:

[A]side from taking these necessary steps, I saw a practical way open to me by way of justice; that is, by removing from this system of destruction the leaders and important elements through the means offered by the system itself. I could not do this with regard

⁷⁴ MIS Nuremberg Interrogation of Konrad Morgen, 11 October 1946, p 82. Note that this can be merely a descriptive account of the legal situation in the Third Reich.

⁷⁵ MIS Nuremberg Interrogation of Konrad Morgen, 19 September 1946, pp 73, 74. See also Interrogation of Konrad Morgen, Nuremberg, 11 October 1946, p 82.

⁷⁶ MIS Nuremberg Interrogation of Konrad Morgen, Witness testimony IMT Trial, 8 August 1946, p 506.

⁷⁷ MIS Nuremberg Interrogation of Konrad Morgen, Witness testimony, Trial against Oswald Pohl, 22 August 1947, *USA vs Pohl et al*, NMT Case 4, trial transcript pp 6669–6753, University of Southampton Library MS200/4/13/1–2, pp 6669–6753, here: p 6696. Many years later, during the Auschwitz trial, Morgen repeated the same argument: 'To do something against Himmler or Hitler, the instigators of those crimes, I would have had to apply for a warrant of arrest against them with Hitler himself or with Himmler himself ... this was absolutely impossible.' Konrad Morgen, Witness testimony, Auschwitz Trial, 9 March 1964. The protocol of Morgen's testimony at the Auschwitz trial is documented in written and oral form in *Der Auschwitz Prozess. Tonbandmitschnitte, Protokolle, Dokumente*, edited by the Fritz-Bauer-Institut, Frankfurt am Main and the Staatlichen Museum Auschwitz-Birkenau.

to the killings ordered by the head of the State, but I could do it for killings outside of this order, or against this order, or for other serious crimes. For that reason, I deliberately started proceedings against these men, and this would have led to a shake-up of this system and its final collapse.⁷⁸

Pursuing killings that had not been ordered became the main strategy in advancing the investigations against the former commandant of Buchenwald, Koch, and the camp physician, Hoven. In addition to the charge of embezzlement, the main accusation against Koch in the bill of indictment was that Koch had killed two prisoners without higher orders. Equally Hoven was accused of killings on his own initiative. Morgen classified those killings without higher orders as military disobedience under § 92 of the military law. In addition, Morgen relied on the still existing Penal Code of Germany to raise and justify his charges against Koch and Hoven.⁷⁹ Thus, as investigating judge, Morgen appealed to all legal statutes and orders, including orders of the Führer, to indict Koch and Hoven. As Morgen reported in one of the post-war interrogations:

I relied on the still existing statute against murder [ie the German Penal Code] as well as the administrative orders enacted for the concentration camps by the Reichsfuehrer and the Fuehrer himself. The most important administrative order of the Führer was this: the Fuehrer himself decides about the life of a so-called enemy of the state. Thereby all subordinated instances were eliminated and they also could not claim having any authority to kill prisoners.⁸⁰

5. TORN BETWEEN THE SS CODE AND TRADITIONAL RULE-OF-LAW STANDARDS: AN ASSESSMENT OF KONRAD MORGEN

What are we to make of this case? Something is deeply flawed in Morgen's professional activities, though he certainly took considerable personal risks and displayed personal courage on various occasions. Let us take a closer look.

Agents and their practical identities are formed by the norms defining their professional roles. In Morgen's case these were the rules and norms constituting the practice of 'being an SS judge'. In assessing Morgen's self-understanding and activities it is helpful to draw a distinction between two ways of interpreting the role of an SS judge. The first is to see an SS judge as someone considering himself to be 'a judge' who just finds himself placed within a special juridical system, namely the SS jurisdiction.⁸¹ According to the second reading, 'being an SS judge' means that one's

⁷⁸ MIS Nuremberg Interrogation of Konrad Morgen, Witness testimony, IMT Trial, 8 August 1946, p 507.

⁷⁹ Konrad Morgen, Anklagevefügung Koch Prien, 17 August 1944, pp 2, 4 (US National Archives NO 2366). Morgen accused Koch of murder, relying on § 211 German Penal Code (Reichsstrafgesetzbuch 1871).

⁸⁰ MIS Nuremberg Interrogation of Konrad Morgen, 18 January 1947, p 235.

⁸¹ This idea of Morgen having primarily been a judge who just found himself in a 'special institution' is also apparent in the way Morgen was introduced as a witness for the prosecution at the Auschwitz trial in Frankfurt. The presiding judge addressed Morgen in the following way: 'Doctor Morgen, you

practical identity is formed by endorsing SS norms and rules, including the perverted SS ethos of honour and decency. The difference is that on a first reading the professional self-understanding of the SS judge is defined by the constitutive rules and aims of the practice of being a judge in the ordinary rule-of-law meaning. An SS judge in this sense would be someone pursuing justice, trying to reach just and fair verdicts within the legal framework of the SS jurisdiction. At a legal level, such an SS judge would consider himself to be bound first and foremost by military law, but also by the still existing German Penal Code, including the general prohibition on murder and manslaughter. At a moral level, such a judge, though situated within the SS jurisdiction, would endorse traditional standards of justice and display a sound understanding of moral principles and virtues. The Nazi worldview and the specific restrictions set by the structure of the Nazi state would from this perspective merely amount to external restrictions which the judge as a jurist had to take into account, but which he personally did not endorse.

The second reading of 'being an SS judge' involves the commitment of the judge to the institution of the SS jurisdiction. 'Being an SS judge' in this sense amounts to endorsing the Nazi worldview and the SS ethos from an internal point of view and performing one's juridical tasks within the framework of those commitments. At a legal level, a judge with this self-understanding would comply with the legal norms of the SS jurisdiction such as the extended interpretation of § 92 of the military law. He would acknowledge the Nazi moralisation of law and would therefore accept the transformation of the SS ethos into legal norms and duties. At a moral level, he would approve of the Nazi worldview and the SS code of decency, which first and foremost included honesty and resistance to financial corruption and corruption of character.

What about Konrad Morgen? Which of the two practical identities of 'being an SS judge' corresponds with his self-understanding? Morgen was a deeply ambiguous character, and in large part this ambiguity resulted, I want to suggest, from his moralised self-understanding which played into his switching between the two ways of understanding his professional role as an SS judge outlined above. Sometimes Morgen looks like a judge committed to a rule-of-law way of thinking; sometimes he appears to be the SS judge for whom the norms and rules of the SS ethos have paramount normative standing. Morgen seems able to change standpoints rather easily, one moment—as one of the above citations shows—depicting the SS ethos as mere ideology useful for his prosecutions, while at another moment venerating the alleged principles of SS decency.

On several occasions in his post-war interrogations Morgen emphasised that his legal training from 1934 to 1938, the time he wrote his dissertation and took the sec-

have been mentioned here repeatedly, as a judge at the SS, as an SS judge who undertook various investigations, not only in Auschwitz, but also in other camps ...' 'Being an SS judge' amounted, for the presiding judge, to being 'a judge' with the marker 'SS' simply indicating the particular placement. See Auschwitz Trial, Interrogation of the witness Konrad Morgen, 9 March 1964, 25th day of trial.

ond state exam enabling him to become a judge, was still shaped by the old traditions of rule-of-law thinking.⁸²

A commitment to a non-ideological form of justice is also apparent in a letter Morgen addressed to his superiors in March 1942 requesting a transfer from the Generalgouvernement (GG) to an area less fraught with violence and corruption. In the letter Morgen claimed that the corruption in the GG was so extensive, 'and capital crimes and offences of a revolting nature so numerous ... that any judge, in time, must find himself somewhat dulled, and the danger therefore exists that his natural sense of justice will suffer damage'.⁸³ In addition, Morgen's appeal to § 211 of the German Penal Code in prosecuting Koch and Hoven for murder, as well as his charge that Koch 'administered the respective concentration camps in a manner contrary to orders and incongruous with all moral laws',⁸⁴ shows that Morgen's normative standards reached beyond the SS rules.

The SS norms, on the other hand, often provided implicit standards when it came to Morgen's sense of drawing the line between 'allowed' and 'forbidden', frequently distorting his moral perception. For example, during his service in the GG in 1941–2 Morgen tried to prosecute Oskar Dirlewanger, the commander of an SS brigade that had committed terrible atrocities. In his post-war interrogations Morgen spoke about the crimes committed by Dirlewanger, but at the same time he depicted Dirlewanger's bad character and indecency by pointing out that Dirlewanger had no respect for racial laws and SS standards because he kept a young Jewish girl as his mistress and introduced her to visiting SS officers.⁸⁵ A striking imbalance of judgement is also apparent in Morgen's testimony at the Auschwitz trial in Frankfurt am Main in March 1964, when he reported on his visit to Auschwitz in the autumn of 1943 to prosecute corruption.⁸⁶ After inspecting the extermination machinery in Birkenau, Morgen was interested in the SS personnel who were administering 'this apparatus'. Morgen stated that by looking at the guard room 'he experienced for the first time a real shock'. Instead of 'spartan simplicity' he found in the guardroom an ensemble of couches on which SS personnel were dozing with glassy eyes, having obviously consumed a lot of alcohol during the night. Morgen found it equally revolting that these SS men were served potato pancakes by four or five young Jewish girls who were wearing civilian clothes rather than prison uniforms. What Morgen found most objectionable, indeed unbelievable, was that the SS men and these female prisoners were addressing each other by the familiar 'du' instead of the formal 'Sie'. He made these statements in a testimony showing his clear aware-

⁸² The term 'rule of law' is used in a wide sense here, referring to a legal system which respects human rights, but also lives up to criteria including predictability, publicity, consistency, absence of retroactive legislation, etc.

⁸³ Konrad Morgen, Letter to Hinderfeld, Head Office SS Courts Munich, 27 March 1942 (US National Archives NO 2366).

⁸⁴ Konrad Morgen, Indictment, English version of the Anklageverfügung, Prien 17 August 1944 (US National Archives NO 2366). The passage is cited according to the original in English. Morgen classified the administering of the camps, violating all moral laws, as military disobedience according to § 92 of the military law.

⁸⁵ MIS Nuremberg Interrogation of Konrad Morgen, 30 August 1946, p 22.

⁸⁶ See Auschwitz Trial, Interrogation of the witness Konrad Morgen, 9 March 1964, 25th day of trial.

ness that during the night, while he himself had been travelling to Auschwitz, 'several thousand people, several trains full with people, had been gassed and turned into ashes'.⁸⁷ Twenty years after those horrible events, Morgen seemed still to be under the spell of an SS code of decency.

The important point for the argument in this paper is that morality plays a crucial role in Morgen's ambiguity. Morgen displayed a highly moralised self-understanding, drawing on a seamless web of moral notions, blending justice, virtue, decency of character and a principle-based outlook in such a way that the normative meaning and standing of these moral categories, considered by themselves, becomes blurred. A clear judgement about the correctness and value of the moral standards to which Morgen appealed so abundantly can only be reached by taking into account the legal background and the political context of Morgen's activities.

As mentioned, Morgen's legal undertakings seem, irrespective of his zeal and personal devotion to being 'a fanatic for justice', deeply flawed.⁸⁸ But morality alone is not sufficient to depict the depth of those deficiencies. At the mere level of morality a clear distinction between the two ways of understanding the role of 'being an SS judge' outlined above cannot be drawn. The true problem with an ideologically deformed conception of 'decency and honour' as we find it in the SS jurisdiction is that, considered in isolation and abstracted from the social and legal context, the principles and virtues that constitute the 'code of honour and decency' amount to principles and virtues which are not alien to a sound sense and understanding of morality. Considered in isolation, the overlap between principles constituting a sound understanding of morality, and principles like honesty, decency and resistance to corruption and misappropriation which Morgen valued so highly and on which his moral self-understanding was based, is substantial. In any case, the overlap between 'sound morality' and 'distorted morality' is too great to allow morality alone to function as the demarcation line between a legal system that respects the rule of law and a deficient legal system as we find it in the SS jurisdiction.

When the normative standard defining the constitutive aim of a practice is no longer in place, the practice turns into a sham. Following the practice rules without their normative basis reduces them to a mere imitation of what the practice stood for.⁸⁹ What follows for our case? Morgen, insofar as he acted as an SS judge in the second sense outlined above, namely as someone endorsing the SS ethos and committed to the mission of the SS jurisdiction, was clearly engaged in a practice

⁸⁷ *Ibid.* Similar incongruities in Morgen's moral judgements occur in his summary of his investigations of Koch (11 April 1944) (US National Archives NO 2366).

⁸⁸ Morgen claimed to be a 'fanatic for justice' (*Gerechtigkeitssfanatiker*) in MIS Nuremberg Interrogation of Konrad Morgen, 4 September 1946, p 8.

⁸⁹ See Tamar Schapiro, 'Compliance, Complicity, and the Nature of Nonideal Conditions' (2003) C(7) *Journal of Philosophy* 329. As Schapiro points out, there are cases in which 'others' wrongdoing can alter the character of what we ourselves are doing' so that something we are doing in light of certain rules can no longer count 'as an instance of participation in the form of activity defined by the practice rules'. *Ibid.*, 333. According to Schapiro, this is the case when 'conformity with the practice rules is no longer sufficient to [ensure] constitutive success; that is the fact that your action is chosen in accordance with the practice rules is no longer sufficient to make it count as participation in the form of activity that is, ideally, defined by those rules.' *Ibid.*, 339.

reduced to a mere sham. The normative standard defining the constitutive aim and success of an acceptable judicial system, namely being oriented towards fairness and justice, was never in place. The SS ethos could never make up for the inherent deficiencies of the SS jurisdiction. Morgen himself, as one of his post-war statements cited above shows, eventually considered the SS ethos to be a mere means for his prosecutions.

What about the first way of understanding Morgen's professional role, namely acting as a rule-of-law judge pursuing justice within the SS jurisdiction? The same holds here: the normative standard defining the constitutive aim of the practice was not in place. Within the SS jurisdiction Morgen could not act as a judge oriented towards the rule of law, simply because the most basic requirements defining the rule of law—such as stability, predictability and publicity of legal rules—had been violated. Moreover, Morgen moved within a legal system in which the highest court authority, who also happened to be the supreme authority of the state, had by his orders dispensed with the basic normative standard in light of which any search for fairness and justice might be undertaken. When the highest juridical authority orders mass extermination, aiming for the rule of law within that juridical system is not only curtailed but rendered impossible.

Morgen's professional practice was defective in a way which no appeal to morality by itself can dispel. We must take the legal background and political framework of Morgen's activities as an SS judge into account to depict the distortions. Both ways of participating in the practice of SS jurisdiction—either trying to be a rule-of-law judge within the SS or being an SS judge endorsing the SS ethos—are deeply flawed, given what the SS stood for and given the legally and politically corrupt background conditions of the Third Reich. Morgen was serving in the organisation that was at the heart of the crimes, atrocities, terror and horror of the Nazi system. Therefore, not only can Morgen's claims of moral exoneration be challenged; his claim that he was a judge involved in the same practice as the American interrogator, namely investigating war crimes—a contention trying exactly to exclude the legal and political context and background—becomes highly suspect. Morgen's statement rests on the false assumption that there is no difference between the norms constituting the practice of an SS judge, at least as he understood and carried it out, and the norms defining the professional role of an American prosecutor of Nazi crimes.

Despite all his post-war attempts to cleanse the image of the SS, Morgen could not avoid conceding that the way the system of SS jurisdiction worked in light of the orders of the highest court authorities undermined what he had tried to accomplish. In his post-war explanation of his bill of indictment against Karl Otto Koch, Morgen stated:

Koch was too the test case for the SS jurisdiction. I tried to make it easy for her [= the SS jurisdiction] with the formulation of my bill of indictment, which had to rest in accordance with Nazi law, to be a success. But it was only half a success ... [b]ecause none of the others cared or wanted to change the system or acknowledge in this test case that the life of all men is holy.⁹⁰

⁹⁰ Konrad Morgen, Short remarks to the bill of indictment against Standartenführer Koch, part of document file NO 2366, p 3, 10/11/10.

6. CONCLUSION

What follows from our case study? What does the example of the SS jurisdiction reveal about the functioning of wicked legal systems? Are there any insights relevant for legal philosophy to be gained from the case of Konrad Morgen?

As mentioned, a prominent reaction after the war, when the crimes, atrocities and horrors of the Nazi regime became apparent, was to blame the legal profession for aligning itself with the Nazi regime due to a blind acceptance of the principle 'law is law'. Responsibility for this aberration was attributed to the dominant influence that legal positivism and the positivist separation of law and morality had on German jurisprudence already in the pre-Nazi area.⁹¹

The case of Konrad Morgen and the SS jurisdiction system suggest that something more was at stake in generating the perversions of the Nazi legal system than simply the commitment to a conception of law detached from morality. Morgen's case shows that the Nazi system poses a challenge which goes deeper than the problem of a mere 'law is law' attitude. Morgen's endeavours were flawed not so much because of a blind commitment to the orders of the supreme authorities—he sometimes ignored them and sought ways to evade them. The problem is that Morgen's moralised self-conception, drawing on a deeply moralised understanding of law, prevented him from seeing that the political context and perverted normative background of his legal activities undermined their point and meaning. His prosecution of corruption seemed more like a personal obsession than a meaningful legal activity.

To correct such distortions, more is needed than simply doing away with the separation of law and morality. The unification of law and morality was, as I argued, an integral part of the conception of law maintained by Nazi legal theorists.

But why, one might object, should we conclude that the outlined distortions pose a challenge for morality? Why think that morality comes under pressure? Is not morality simply the primary source to deal with the failures of the Nazi system? Isn't it obvious, one might ask, that the ideological misuse of a normative standard does not disprove its validity? Is there not a sharp line between morality and moralisation? Is not Dworkin's advice that a judge in the Nazi system should turn directly to morality the only reasonable one? Are not the distortions of Nazi 'morality' and the flaws in Morgen's moral perception exactly revealed by appealing to the 'true moral principles'?

The problem with the answer suggested by those critical questions is that 'morality' is not forthcoming in the way of a set of abstract truths or a single set of *a priori* principles.⁹² Moral principles need interpretation; their meaning needs to be spelled out in concrete rules and various guidelines on social practices and behaviour.

⁹¹ In his groundbreaking article 'Gesetzliches Unrecht und übergesetzliches Recht' (1946) Radbruch claimed: 'Positivism, with its thesis that "law is law", has indeed rendered the German judiciary defenceless against laws with arbitrary or criminal content.' See Gustav Radbruch, 'Gesetzliches Unrecht und übergesetzliches Recht' in *Süddeutsche Juristen-Zeitung* (1946); reprinted in Radbruch, *Gesetzliches Unrecht und übergesetzliches Recht* (Nomos, 2002) 10 (translated by Herlinde Pauer-Studer).

⁹² See J David Velleman, *How We Get Along* (Cambridge University Press, 2009) 154.

Exactly here, at the level of the social articulation of abstract moral principles, things go wrong in a system like the National Socialist state.⁹³ In a political context such as the Third Reich morality becomes dubious territory since the line between ‘true moral standards’ and ideological moralisation is hard to draw.⁹⁴ The regime comes up with its own understanding and interpretation of abstract moral ideals and moral directives such as ‘be honest’, ‘respect the holiness of property’, ‘cultivate honour, courage and decency’.

I do not, of course, want to deny that basic moral intuitions are the source for identifying the failures of the Nazi system. However, abstract moral ideals have to be translated into appropriate normative requirements to work successfully.

What follows with regard to our understanding of law? My suggestion is that we develop a non-moralising conception of legality by formulating requirements that a legal system has to meet in a way that sidesteps contested moral territory.⁹⁵ In order for legal discourse to avoid getting stuck in moralising controversies, the deepest insights of morality must be translated into normative requirements whose endorsement and justification does not presuppose a synthesis of law and morality. A legal system directed to the rule of law has to satisfy normative requirements such as publicity, reliability, predictability, prospectivity, consistency, understandability, absence of arbitrariness, and no retroactive legislation—standards which the Nazi legal system and the SS jurisdiction in particular were far from meeting. These requirements are just the principles which Lon Fuller considers to constitute the ‘inner morality of law’.⁹⁶ However, instead of the puzzling assumption that morality forms the ‘inner core of law’, which comes close to the idea that morality and law somehow amount to a unity, my approach to the issue is different. My claim is that we should transform moral standards, which we consider to be indispensable and valid, into particular normative-legal requirements constituting a non-moralising notion of legality. Meeting those requirements prevents deterioration and wickedness in a legal system. As historians have pointed out, the Nazi regime, with its deep-seated destructiveness and racial ideology, did not allow for the social stability that comes with coordination and cooperation based on a predictable, consistent and publicly shared normative framework. Konrad Morgen, though deeply entrenched in morality, or what he took for morality, could not make up for those deficiencies in the legal environment in which he was situated.

⁹³ For an exploration of this point see Herlinde Pauer-Studer and J David Velleman, ‘Distortions of Normativity’ (2011) 14(3) *Ethical Theory and Moral Practice* 329.

⁹⁴ This is exactly one of Hannah Arendt’s main points in her Eichmann book and her respective essays on morality in the Third Reich. See *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin, 1994); ‘Some Questions of Moral Philosophy’ in *Responsibility and Judgment*, edited with an introduction by Jerome Kohn (Schocken, 2003) 49–146; ‘Personal Responsibility under Dictatorship’ in *Responsibility and Judgment*, 17–48.

⁹⁵ A theory of legality which follows such a line has recently been suggested by Scott Shapiro: see *Legality* (Belknap Press of Harvard University Press, 2011) 195. Shapiro tries to give a non-moralising account of legality by comparing the design of a legal system with developing a social plan. Law-giving is, Shapiro claims, a form of social planning; laws are plans (*ibid*, 195). Shapiro’s main argument as to why law should not be moralised is that doing so would defeat law’s first and foremost function, namely to settle moral issues. Since law should be a means to solve moral problems, law should appeal only to social facts, not moral facts.

⁹⁶ See Lon L Fuller, *The Morality of Law* (Yale University Press, rev edn 1969) 39–41.