

## Complicity and Conditions of Agency

---

HERLINDE PAUER-STUDER

**ABSTRACT** *In his ground-breaking study Complicity, Christopher Kutz introduces the notion of 'participatory intentions' (individual intentions whose content is collective) to explain an agent's complicity with groups or organisations. According to Kutz, participatory intentions allow us to hold individuals morally accountable for collective wrongs independent of their causal contribution to the wrong and its ensuing harm. This article offers an alternative account of complicity. Its central claim is that an agent's complicity might be due to the dependence of his professional role on the normative principles that make up the organisation or institution in whose practices he partakes. In other words, there might arise a constitutive failure in an agent's attempt to ascribe to himself a non-complicit professional identity. I use the case of SS-Judge Konrad Morgen in order to illustrate this understanding of complicity.*

The phenomenon of complicity is commonly conceived and discussed in individualistic categories. There are two individuals, P and A; P is the principal agent and A, the accomplice, is somehow involved in what P does. In criminal law, this is spelled out as follows: P is the principal perpetrator of a crime and A, the accomplice, is complicit in the crime either by being an accessory before or after the fact, or by aiding and abetting P's criminal act.<sup>1</sup>

In the moral sphere, complicity is defined as an agent's participation in the morally wrongful activity of another person. A's complicity consists in his or her encouraging or enhancing actions of P that violate basic moral standards and norms.<sup>2</sup>

In most cases, complicity requires an agent's intentional involvement. In order for A to be accused of a crime committed by P, A must wilfully partake in P's crime in one of the ways mentioned above. Likewise, complicity in moral wrongdoing presupposes A's intentional support of P's moral transgressions. Complicity is thus tied to a specific mental attitude of one person towards the actions of another.<sup>3</sup>

The objection has been raised that the individualistic framework unduly restricts the scope of complicity.<sup>4</sup> Complicity often takes the form of an agent's affiliation with groups and corporate group agents. What, then, determines our understanding of complicity in the case of agents belonging to organisations or institutions, particularly organisations and institutions that are engaged in corrupt and harmful practices? How should we define complicity in these cases? To what extent can and should intentional attitudes be the main determinants of complicity given that complex institutional structures often make it hard to trace and ascertain such a subjective mental element?

This article seeks to develop an alternative to a primarily intention-based account of complicity.<sup>5</sup> Its central thesis is that an agent's complicity might result from the

dependence of his professional identity on the normative principles that make up the organisation or institution in whose practices he partakes. A yardstick for complicity is whether or not an agent's depiction of his activities as harmless, or even morally proper, can be coherently upheld given the normative preconditions of the institutional practices in which she is involved. In other words, an agent's claim to a self-conception that exonerates him from complicity might fail because the commitments, activities and ends of the institution or organisation to which he belongs undermine the constitutive conditions and standards which would have to be in place to make such a claim intelligible and coherent in the first place. While this approach tries to work around the notoriously difficult, and often contested, ascription of intentional directness to a collective harm, it does not directly rule out such a mindset. In other words, from an agent's involvement in group activities we might well draw conclusions about his or her intentions. However, the analysis offered here does not make intentions the primary criteria for an imputation of complicity.

The article proceeds as follows. Section 1 outlines Christopher Kutz's account of complicity in terms of participatory intentions and discusses some problems which it encounters. I try to show how certain aspects of Kutz's analysis in fact support my own line of explaining complicity in terms of the intelligibility and coherence of an agent's depiction of his or her activities. Section 2 develops this account of complicity, arguing that complicity with a group agent might accrue from being committed to the constitutive standards of the collective body qua one's professional role. I then formulate three principles that spell out this idea in more detail. In Section 3, I present the case of the SS-Judge Konrad Morgen, in an effort to apply the results of Section 2 to this striking example of complicity. Section 4 draws some general conclusions.

## 1. Complicity in Terms of Participatory Intentions

In a ground-breaking study,<sup>6</sup> Christopher Kutz introduces the notion of 'participatory intentions' to address the phenomenon of an agent's complicity in the activities of a group agent. He defines participatory intentions as individual intentions whose content is collective, which is to say that they are directed at achieving a collective end.<sup>7</sup> Kutz assumes that 'all forms of collective action share a common element in the form of overlapping, individual participatory intentions'.<sup>8</sup>

According to Kutz, participatory intentions enable us to adopt and deliberate from a first-person plural standpoint.<sup>9</sup> Moreover, they offer a basis for holding individuals morally accountable for collective wrongs and harms, apart from their direct causal contribution. This finds expression in the following principle, which is central to Kutz's account:

The Complicity Principle: (Basis) I am accountable for what others do when I intentionally participate in the wrong they do or harm they cause. (Object) I am accountable for the harm or wrong we do together, independently of the actual difference I make.<sup>10</sup>

For Kutz, the Complicity Principle is part of a relational understanding of moral agency and accountability. It is thus in conflict with two other principles he considers

to be crucial for a first-person understanding of moral agency, namely, the Individual Difference Principle, which holds that I am only accountable for a harm if something I did made a difference to its occurrence, and the Control Principle according to which I am only accountable for events over which I have control.

In order to highlight the difference between a person's accountability for her own acts and for the actions of a group agent to whom she belongs, Kutz introduces the distinction between 'exclusive' and 'inclusive authorship', which he explains as follows:

I am the *exclusive author* of the actions I perform myself, as well as of the events caused by those actions. My authorship is exclusive because I and only I can say of an action or event 'I did it', or 'I caused it to be done'. By contrast, I am an *inclusive author* of the actions of the group in which I participate, inclusive because I am one among those who can say 'We did it'.<sup>11</sup>

Kutz maintains that exclusive authorship involves a causal relation between intention and outcome. Inclusive authorship, on the other hand, relies on a teleological relation between an individual's participatory intention and the joint outcome.

How, exactly, should we understand this? Collective actions exceed the individual causal contributions. Kutz's example: the goal of having a picnic, which is more than the two causally relevant actions 'I bought the wine' and 'you bought the cheese', offers a non-causal explanation of why each of us performed her part. And the non-causal part of the relation between my action (buying wine) and the joint outcome (having a picnic) is then expressed in teleological terms. The teleological bond between the shared goal and my causal contribution (the latter is intentionally directed at the former) reveals an important aspect about my agency, namely, that I am committed to the joint outcome and willing to play my part in bringing it about. As Kutz writes:

We are properly held accountable for the actions of groups (and of individual group members) in which we participate, because these actions represent our own conception of our agency and our projects. [...] If a set of agents' participatory intentions overlap, then the will of each is represented in what each other does qua group member, as well as what they do together. The logical overlap permits us to say they manifest their attitudes through one another's actions. [...] [M]y will is manifested as a matter of logic in your actions. My inclusive accountability for those actions is therefore independent of the difference I make or control I have.<sup>12</sup>

By appealing to participatory intentions, Kutz tackles the problem of complicity and ensuing moral accountability foremost within an intentionalist framework. Such an approach raises the issue of proper action description. Actions, as we know, can be intentional under some descriptions, and non-intentional under others.<sup>13</sup>

Now, we can hardly leave it to the individual agent to decide which action description is apt when it comes to complicity. Obviously, those who are vulnerable to blame and accusation tend to come up with a favourable action description. And this avoidance strategy is particularly tempting when an agent's immersion in potentially harmful group activities is at stake: complex organisational structures may well facilitate agents in minimising their role in contributing to collective goals. In the context of

Kutz's intention-centred perspective on joint action, on which grounds we can call into question an agent's depiction of her mental attitude towards particular collective goals becomes a pressing issue.

A further challenge confronting an intention-based paradigm is how to dispute an agent's claim to detachment from the collective goal. The worse things get, the more inclined agents are to deny the extent of intentional involvement. Often, such a disavowal finds expression in minimising one's role, i.e. an agent's diminishment of his part in a joint venture to a mere partial task or, even, passive presence. This also holds for involvement in joint activities qua professional role, i.e. the part played by an agent as a company employee or as a professionally active member of an organisation.

Kutz, to be fair, is fully aware of both issues. He acknowledges that often joint actions come under a 'vague description' which, in turn, 'sustains a compartmentalized attitude towards one's own participation'.<sup>14</sup> Employees, he notes, tend to maintain that, due to their modest and peripheral role, they lack information concerning the larger projects and ends of their company. This defence might take the form of either disputing any participatory intention, or arguing that one's participatory intention is only directed at a subsidiary goal of the company.

Kutz illustrates how to counter the former kind of disavowal through the example of an engineer who designs control modules for a large company. The engineer has reason to believe that the modules are not only being used for ordinary consumer products, but also for manufacturing land mines that are delivered and sold to Third World countries. Although the engineer might be sceptical about the ends of the company, he is, according to Kutz, still complicit through his constant interaction with it. This agential role is sufficient for ascribing to him a participatory intention, and, accordingly, for holding him accountable.<sup>15</sup>

In order to rebut the second version of the defence (that one's participatory intention is limited to a subsidiary goal of the company), Kutz discusses the case of Miriam, who, her pacifist leanings notwithstanding, does research in a university lab funded by the Defense Department on a technology that is likely to be used for military weapons. For Kutz, Miriam's attempt to limit her professional part to cooperating with other researchers in the lab while ignoring the use made of the research is untenable. Her disclaimer 'I only work in the lab' only makes sense, he argues, in light of her engagement in the larger project. Kutz's point is that Miriam's activities are not 'functionally intelligible' without ascribing to her an intention whose object is the goal of the funding institution, i.e. the Defense Department. A compartmentalised role interpretation is, Kutz argues, 'not plausibly sustainable psychologically, given what she (Miriam) in fact does'.<sup>16</sup> He adds that 'the best psychological explanation of her disclaimer arises from her prior acceptance of her implication'.<sup>17</sup> Kutz sums up his conclusions about these attempts to deny complicity and accountability thus: 'Any employee may disavow responsibility for the company's actions. But such disavowals are betrayed by the employee's own, functionally characterizable, conception of his or her own agency.'<sup>18</sup>

In these passages, Kutz comes close to offering an account of complicity that rests upon the coherence between an agent's professional self-conception and his or her participation in a company's activities. But Kutz's approach seems, in my view, severely restricted by his emphasis on *functional* intelligibility. Functionalism, he makes

clear in his book, amounts to a philosophical-psychological account that defines mental states such as intentions ‘by their role in a causal theory that maps agents’ psychological inputs (perceptions, intentions, beliefs, and desires) onto their outputs (actions, subsidiary intentions, further beliefs and desires)’.<sup>19</sup> Accordingly, Kutz spells out ‘functional intelligibility’ in psychological terms, something highlighted by his comments on the Miriam case (‘not sustainable psychologically,’ ‘the best psychological explanation of her disclaimer’). In Kutz’s framework, the non-sustainability of an agent’s disavowal of complicitous involvement takes the form of psychological incoherence. However, reliance on psychological coherence is simply too contingent. Indeed, some people might face no psychological difficulty in coping with the tension between their compartmentalised description of their professional role and their actual professional activities. Their capacities for rationalisation, or even, self-deception, might be so robust that they are psychologically able to uphold a self-conception that is belied by their involvement. We thus need a more compelling way of articulating the incoherence between the denial of complicitous involvement and an agent’s actual activities.

Interestingly, Kutz agrees.<sup>20</sup> His aim is exactly to provide an argument that, an agent’s possible self-deception and rationalisation notwithstanding, establishes her or his complicity. The attribution of a participatory intention in the collective goal must, he writes, ‘dominate not only the assessments of third-party observers, but also Miriam’s own first-personal assessment’.<sup>21</sup> Yet, such an argument that closes the avenues of self-deceptive and rationalising depictions of one’s activities, and which is, as we might say, neither reasonably rejectable from a first-personal nor third-personal point of view, must move beyond the psychological level of agency.

There is an additional problem here. Functionalism covers the mechanical-causal part of agency. The relevant relation between intentions and actions is hence the causal one (see Kutz’s definition of functionalism). But when it comes to complicity, Kutz seeks to provide an account that exceeds a purely causal kind of involvement. His whole point in introducing participatory intentions is to extend complicity to cases where an agent’s causal contribution does not make a difference, but we still hold the individual agent accountable for being part of a group agent. Recall his remarks on inclusive authorship, by which he means to establish complicity in terms of a teleological relationship between the will of the individual agent and the activities of the group (‘the accountability link is teleological, rather than causal’). Hence, Kutz’s notion of ‘functional intelligibility’ seems inapt to capturing what he himself wants to achieve in his analysis of complicity.

Persuasively countering an agent’s attempt to evade the burdens of complicity by way of a rationalising depiction of his professional role and activities requires consideration of the normative and justificatory dimensions of agency. We need to be able to show that an agent’s self-depiction as blameless fails in normative terms.<sup>22</sup>

## 2. Complicity and Constitutive Conditions of Agency

Kutz’s reflections on complicity yield important insights. First, an agent’s self-understanding cannot be separated from the practices in which she is involved. Second, an agent’s engagement in the practices of an organisation restrains her claims of being



detached from the organisation's goals. Third, in order to reject charges of complicity persuasively, an agent must be able to provide a coherent and intelligible description of her professional activities.

I will now sketch an account of complicity that expands upon these ideas. However, instead of relying directly and exclusively on participatory intentions, the suggested account reflects on the constitutive normative conditions of what an agent is doing. The central thesis of my proposal is that certain denials of complicitous involvement entail that an agent's depiction of his professional occupation and self-understanding is no longer coherent.

Let me start with some remarks about the normative dimension of agency. Agents are, apart from their functional capacity of processing mental states into action, reflective beings who are able to respond to reasons in a deliberate and critical way. What interests us most about agents are the specific norms, principles, values, and group affiliations that constitute their normative identity<sup>23</sup>, and, in turn, how their normative self-understanding influences their interaction with others. To a considerable degree, an agent's normative self-understanding is shaped by the social practices in which he/she engages. In the context of group-affiliated complicity, focusing on social practices seems particularly relevant.

In assessing agents, the normative standards and principles at the core of an agent's self-understanding and his or her decision-making are crucial. Besides the particular normative commitments of an individual agent, there are general requirements such as consistency, coherence, and intelligibility that allow us to judge agents from a normative standpoint.<sup>24</sup> In what follows, I use these standards in an effort to explain complicity. The question, in short, concerns whether an agent's self-understanding or self-depiction is tenable, i.e. coherent and intelligible, given the professional practices in which he or she partakes. That is to say, I will examine the relationship between the professional identity of agents and the constitutive standards of the practices in which they are engaged.

Practices are usually explained in terms of constitutive rules and regulative rules. Constitutive rules define and make up a practice. Regulative rules tell those who partake in the practice what to do. Their function is to guide. One can distinguish between these two kinds of rules by the degree of error they allow. A constitutive rule cannot be outright dismissed. Rejecting the constitutive rules of a practice means losing one's status as an agent who is engaged in that practice. A violation of the regulative rules of a practice, however, amounts merely to a deviation from the rule; the rule as such is not called into question.<sup>25</sup>

Games illustrate the workings of constitutive and regulative rules. The very rules that make up the game equally guide the players. And there is a clear line with respect to the violation of the rules. If, for example, a basketball player goes wild and ignores the rules, the referee will eventually eject him. In terms of professional status or identity, this point can be expressed thus: a basketball player may in some instances violate the regulative rules of the game; but he cannot challenge the constitutive rules of the practice without losing his professional identity and status as a basketball player. The player's professional identity depends on his in-principle acceptance of the rules.

Applied to the issue of agency, we get the following result: an agent cannot outright reject the constitutive rules of the practice without eventually putting his particular

professional identity at risk. The analogy with games requires us to examine the constitutive rules of a practice before trying to explain the individual's professional identity in terms of partaking in the practice. Moreover, practices are tied to a constitutive standard that determines what constitutes successful action-performance within the practice.<sup>26</sup>

The overall standard of assessment for players is successful participation in the game, which, in addition to compliance with the constitutive and regulative rules, involves action aimed at winning. The constitutive and regulative rules are defined in accordance with the constitutive aim (or standard of success) of the game, which in this case is spelled out as a specific way to win the game.<sup>27</sup>

Things are more complicated in the case of professional practices that adhere to institutional group agents. Unlike games, professional practices typically have other constitutive aims than a simple orientation towards winning. Moreover, the constitution of a group agent consists not merely in the rules of the corresponding practices, but also in its legal and organisational structure. The constitutive and regulative rules of a professional practice depend on the kind of associated institutional group agent, whether the group agent is, for example, a commercial company, a political party, a military organisation, or a specific kind of jurisdiction and court system. The specific normative identity of an institutional group agent is shaped by its 'constitution,' i.e. its legal form, organisational structure, and specific institutional goals, and it finds expression in particular decision procedures and practices for which specific constitutive aims or standards are decisive. These include, for example, economic success in the case of commercial enterprises, and exerting justice in the form of impartial and just verdicts when it comes to jurisdictions.

The constitutive aim or standard of a practice is a criterion for assessing action-performances within the practice. The practice of jurisdiction, for example, simply cannot be defined without referring to its constitutive aim or standard, namely justice. However, not each action within the practice *de facto* aims at justice.

The analogy with games shows that an agent's professional identity depends on compliance with the practice-rules.<sup>28</sup> Thus, partaking in a specific practice not only shapes one's professional role and self-understanding, it also links an agent to the institution or organisation in which the practice is embedded. The agent, qua his professional role and role-performance, shares the constitutive principles of the organisation. Although an agent might, on critical reflection, not endorse all the constitutive aims and constitutive standards of the organisation, he is tied to the organisation as long as he partakes successfully in its activities and practices.

Sometimes partaking in a practice challenges the coherence of an agent's normative identity. What he is doing professionally might not make sense given the principles the agent considers essential for his self-understanding. However, given his professional activities, an agent might encounter an impasse in another respect: certain denials of being complicitously involved in an institution or organisation, while remaining in post, can render an agent's claim to a specific practical identity incoherent.

The gist of those admittedly cursory remarks on practices and their constitutive standards in relation to the professional identity of agents can be summarised by the following principles:

Principle 1: With respect to professional identity:

If you claim to be A (qua professional role), and if being A commits you to accept and hence to comply with the rules of practice X, then you cannot outright reject the rules of practice X (which is to say that you cannot challenge the practice rules on the constitutive level without losing your specific professional identity).

Principle 2: With respect to a professional identity that involves participation in a practice for which a specific constitutive standard is relevant:

If you claim to be A, and if being A requires you to accept and hence comply with the rules of practice X, and C is the constitutive standard in light of which successful participation in practice X is defined, then you cannot outright reject C (i.e. you cannot deny the relevance of C for assessing your professional role).

Principle 3: With respect to the coherence of an agent's professional identity:

If you claim to be A, and if being A commits you to accept and hence to comply with the practice rules of practice X, and if C is the constitutive standard for practice X, and if you are qua professional role part of institution D, and institution D makes C impossible, then you face incoherence in still holding that you are A (you have to recognise that D undermines the constitutive standard of the very rules whose acceptance is constitutive for claiming to be A; i.e. D entails non-C, but being A requires C).

With respect to our approach to complicity, the last principle is particularly relevant, as it suggests an indirect way of regarding someone as being complicit: the agent cannot uphold a conception of himself that would exonerate him or her from complicity.<sup>29</sup>

Principle 3 sheds light on why a familiar strategy to evade complicity charges collapses.<sup>30</sup> When agents are reproached for being complicit, they (aside from minimising their role and contribution) often try to justify what they are doing by a standard that is external to the practice in which they are involved. For example, the mayor, accused of cooperating with the criminal gangs in his town, might appeal to the overall welfare and good of the town's inhabitants in order to justify his actions. John Rawls has identified what is going wrong here thus: as long as one is tied to a certain practice, one can only justify what one is doing by appealing to the practice rules. The basketball player, asked why he stopped instead of going forward, will find the proper way to silence the questioner by pointing to the rules of the game. However, the aforementioned mayor cannot justify himself by quoting the practice rules. This is why he looks for an external standard. His attempt to explain himself by referring to the overall well-being of his citizens fails because this very standard is external to the practice of cooperating with criminals. The mayor's leniency towards the gangs, which in all likelihood enhances their local power, undermines the very standard that is constitutive for the professional role of being a decent and upstanding mayor. Following Tamar Schapiro, we can say that the futile attempt to invoke a constitutive aim or standard, which is undermined by the very practice rules one is engaged in, explains why those practices turn into 'a sham'.<sup>31</sup>



Let me add a clarification. Why not, one might object, take the direct line and devise a simple complicity principle in the following form:

An agent, who qua professional role partakes in a practice that is constitutively shaped by an organisation (the practice rules and the constitutive standard of the practice are set by the organisation), is complicit with the organisation and thus morally accountable for its actions.

The reason is that this principle is too strong. People who are part of an organisation qua professional role might not only distance themselves from the organisation, but try to subvert the organisation if they discover that it is involved in harmful, perhaps even criminal activities. Nevertheless, although they are not directly causally involved in morally odious activities of the organisation to which they belong, their moral integrity (in terms of non-complicity) might still be questionable because of their remaining in post. Thus, in order to establish complicity, we have to look at the relation between an agent's self-conception and professional identity on the one hand, and his engagement in an organisation or institution on the other.

The following section attempts to apply the outlined principles of complicity to a striking case of complicitous involvement.

### 3. The Complicity of SS-Judge Konrad Morgen<sup>32</sup>

Konrad Morgen (1909–1982) was a judge in the SS judiciary, a special judicial system set up by SS Reich Leader (*Reichsführer*) Heinrich Himmler in October 1939 for the purpose of prosecuting violations of military law by Waffen-SS members.<sup>33</sup> The highest court of the SS judiciary was its Main Office in Munich. Himmler was the highest judicial authority. Formally, the SS judiciary was similar to the military court system of the Wehrmacht: the legal standards were the German military law, the military penal code, but also the extant German penal code from 1871. Materially, however, the SS jurisdiction was heavily influenced by SS ideology.<sup>34</sup> SS judges were not only jurists with a university education in law, but they had to be members of the SS. The principle of judicial independence was formally upheld within the SS judiciary.

Morgen had initially planned to be a judge in the regular jurisdiction of the state, but serious conflicts with superiors on his first court session as assistant judge made it impossible for him to pursue a successful career in the Reich's court system.<sup>35</sup> This is why Morgen applied for a position as a judge in the SS jurisdiction in the first place. His career as an SS judge can be divided into two main periods: his service at the SS court in Cracow (January 1941 to May 1942) where, in addition to prosecuting mundane violations of military law, he tried to indict high-ranking SS officers for financial corruption; and, from June 1943 to the end of war, his investigation of embezzlement and 'illegal killings' (i.e. killings outside of administrative orders) in the concentration camps.<sup>36</sup> In the course of those latter investigations, Morgen detected the so-called 'Final Solution' – the mass extermination of Europe's Jews.<sup>37</sup>

While Morgen realised that he was powerless to prosecute the instigators of the extermination program, Hitler and Himmler, he sought to use the means of his professional role to indict lower level perpetrators for secondary crimes. After an inspection of Auschwitz in the fall of 1943, Morgen arrested the Auschwitz Gestapo Chief,

Maximilian Grabner, for 2000 cases of murder (for killing prisoners outside of administrative orders).<sup>38</sup> Morgen even persuaded the SS court in Berlin to issue an arrest warrant against Adolf Eichmann, accusing him of misappropriation of diamonds.<sup>39</sup> In the fall of 1944, Morgen's prosecutions resulted in an SS trial in Weimar against a former commandant of Buchenwald, Karl Otto Koch, the camp physician of Buchenwald, Waldemar Hoven, and the arrested Auschwitz Gestapo Chief Grabner. In the end, however, Morgen's judicial activities came to nothing. He never came close to endangering the Nazi killing machinery.

Nonetheless, Konrad Morgen took considerable personal risk by prosecuting criminal offenses within the SS that exceeded his brief. Morgen repeatedly tested the limits of his authority as an SS judge, and he took steps to enlarge his legal possibilities for prosecuting crimes in the camps, including the killing of Jews.<sup>40</sup> His investigations provoked his superiors. Morgen eventually realised that Himmler had ordered the worst of those crimes. His zealous judicial activities against high-ranking SS officers notwithstanding, Morgen's professional status as an SS judge tied him closely to the organisation.

Yet, on which grounds can we hold Morgen complicit with the SS? His case shows that participatory intentions might not be a viable basis for ascribing complicity, particularly when it comes to complex and ideologically distorted normative contexts. Morgen had anything but participatory intentions for notorious SS crimes. He was deeply committed to his professional mission, namely cleansing the SS of corruption and crime.

Morgen's attitudes toward the SS were highly ambivalent. On the one hand, he was attracted by its value system (a code of perverted 'decency, honor, manly uprightness, and honesty').<sup>41</sup> Yet at the same time, Morgen was not merely disillusioned by the SS's criminal side, he was deeply shocked when confronted with direct evidence of the mass extermination of Jews. His mindset was constantly changing: sometimes he endorsed the SS-code of 'decency and honor', while at other times he expressed disapproval and even disdain of this code, contemptuously referring to 'SS ideology'. Considering these shifting stances towards SS norms, which led Morgen to waver between accommodation and defiance, participatory intentions, even in derivative form, do not constitute a reliable parameter for assessing his complicity.

A more fruitful means of making such an assessment would be to focus on the normative commitments and corresponding practices of Morgen's professional role. Recall that we suggested complicity could be assessed by examining whether a denial of complicitous involvement allows for a coherent and intelligible interpretation of one's professional activities and self-understanding. Is Morgen's description of his professional activities in line with the available constitutive standards of the practice in which he is engaged? Already, a brief glance at some of Morgen's personal statements about his role as SS judge show that he faces a considerable problem in producing a depiction of what he was doing that matches with the actual juridical practice in which he was involved.

Morgen emphasised repeatedly that he was a judge with a university education in law. In a postwar interrogation by the American CIC (Counter Intelligence Corps), he described his bewilderment when, on assignment to the SS-court in Cracow as a jurist who had 'become somewhat familiar with the German civil service tradition', he encountered the effects of the German occupation: 'What one saw there made one's hair stand on end.'<sup>42</sup>

In March 1942, Morgen wrote a letter to the personnel chief of the SS Judiciary Main Office in Munich, requesting transfer from the General Gouvernement (German Occupied Polish Territories) to an area with a 'healthier atmosphere':

The corruption in the General Gouvernement is so great, and the number of capital crimes and noxious offences so high, that I am utterly convinced that any judge would in time become jaded and therefore run the risk of injury to his *natural sense of justice*.<sup>43</sup>

In these passages, Morgen talks and writes as if he were a judge in a rule of law system. A similar self-understanding seems to drive his bill of indictment against former Buchenwald commandant Karl Otto Koch, and the camp physician Waldemar Hoven, which he wrote in August 1944, in preparation for the SS trial in Weimar. Relying on Paragraphs 211 and 212 of the German Penal Code from 1871, Morgen charged both men with murder and manslaughter of camp prisoners.

However, Morgen's attempt at framing his professional identity as if he were an ordinary judge pursuing a moral ideal of justice fails miserably. And he should have realised that his claim to be a kind of rule of law judge could not be upheld, given what he himself had to say about the political and legal framework of Nazi Germany:

Law in the National Socialist State was several things; first it was, as 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 State united all authority in his person. He was not only head of the state, but also highest law giver and supreme judge.<sup>44</sup>

In his witness testimony for the 'International Military Tribunal (IMT) trial against the Major War Criminals' held in Nuremberg in 1945-46, Morgen explained why he could not take legal action against the instigators of the mass extermination:

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, but I was a judge of military penal justice. No court-martial in the world could bring the Supreme Commander, let alone the head of the State, to court.<sup>45</sup>

Thus, Morgen was fully aware of the distorted legal background in Nazi Germany. What he did not recognise was that this context set severe limits on his claim to a morally sound professional self-understanding. Morgen's attempt at cultivating a rule of law identity as a judge was incoherent to say the least. In his operative framework, the constitutive normative standard of a rule of law jurisdiction, namely justice, was not in place.

Legislation in the NS-system, particularly with respect to Jews in Germany, political opponents, handicapped German citizens, and all peoples in occupied territories, dispensed with such criteria of a rule of law system as publicity, reliability, predictability, prospectivity, consistency, and understandability, and it allowed for arbitrariness and arbitrary retroactive legislation.<sup>46</sup> Not only was Nazi Germany a dictatorial system that granted one person unlimited authority and power, it was a political regime that had abolished basic liberties and rights, and that wilfully imprisoned and killed dissidents,

and aimed to eliminate whole groups of people.<sup>47</sup> And the SS was the major instrument of this terror.

Likewise, Morgen's self-portrayal as a 'judge of military penal justice' is untenable. As a military court system, the SS jurisdiction was part of Nazi Germany's military machinery, launching wars of aggression on its neighbouring countries. The main purpose of the SS Judiciary was to take action against violations of military law by soldiers of the *Waffen-SS*, a particularly notorious combat group. To talk as if a form of justice could be enforced in such a system amounts to wilful self-deception.

Recall our principle of coherence for someone's professional identity from the last section:

If you claim to be A, and if being A commits you to accept and hence to comply with the practice rules of practice X, and if C is the constitutive standard for practice X, and if you are qua professional role part of institution D, and institution D makes C impossible, then you face incoherence in still holding that you are A (you have to recognise that D undermines the constitutive standard of the very rules whose acceptance is constitutive for claiming to be A; i.e. D entails non-C, but being A requires C).

This principle shows the incongruity in Morgen's self-depiction. He claimed to have a professional identity (rule of law judge) that is tied to a professional practice that requires the constitutive standard of justice to be in place. In other words, the actions of a rule of law judge have to aim at justice. However, the SS juridical system made it impossible to draw on this standard. There is thus a constitutive failure in Morgen's attempt to describe what he was doing in terms of justice (in the sense of a rule of law system). Tamar Schapiro describes a 'constitutive failure' as an attempt to justify one's actions by a standard that is external to the practice in which one is engaged.<sup>48</sup> In our case, the constitutive failure is even more dramatic: Morgen did not merely help himself to a practice-external standard, but the standard itself was undermined by the institution in which the practice was situated. There is thus an incoherence between his claim to the practical identity of a rule of law judge and the constitutive aims and standards of the SS-jurisdiction.

One should note that Morgen did not outright reject the ideal of justice. He was just unable to see, and unwilling to concede, that for the institutional setting in which he operated justice was not and could not be the constitutive aim and standard. Moreover, he did not always have a clear sense of what justice required – his moral sense was repeatedly tainted by his membership in the SS. For example, neither during the war nor in his depositions at post-war trials against former SS officers nor in his interrogations by the American CIC, did Morgen clearly censure the military attacks of Nazi Germany.<sup>49</sup>

Morgen tried hard to salvage his favourable self-portrayal. Besides describing what he did by a normative parameter beyond his professional practices, he sought to detach his activities from the political and legal background of Nazi Germany. A striking example of the latter strategy occurred during a post-war interrogation when, frustrated by his imprisonment, Morgen addressed the American interrogator thus:

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.<sup>50</sup>

But Morgen pursued crimes within the SS, and his most noticeable achievement, the SS trial in Weimar, just served Himmler: he allowed the trial in order to deter concentration camp commandants from corruption.

In a deposition after the war, Morgen reported that his first thought after detecting the so-called 'Final Solution' during an inspection of Auschwitz-Birkenau in the fall of 1943 was to flee to Switzerland – a plan he gave up for fear of its consequences.

Morgen was complicit with the SS insofar as he could not come up with an interpretation of his activities that transcended the SS context. Nor did he ever cut his ties with the SS – something indispensable for establishing the kind of normative identity Morgen was eager to ascribe to himself after the war.

Note, that the outlined ascription of complicity to Morgen does not rely on mere membership in the SS. Rather, the claim is that by his activities as an SS judge, Morgen (sometimes implicitly, at other times explicitly) endorsed the constitutive standards of the SS jurisdiction; standards which were set in light of the ideological and disastrous mission of the SS. The underlying idea is that by performing actions within a practice one confirms the constitutive standards of the practice.

A final point: one might object that there is an ambiguity in the account of complicity offered here, i.e. that it draws upon a consequentialist argument and thus a third-person perspective on complicity, but fails on a first-person perspective. According to this critical argument, it is merely from a third-person perspective, taking the overall consequences of his activities into account, that Morgen's complicitous involvement becomes apparent. Seen from a third person point of view, Morgen's activities contributed to a more efficient functioning of the SS apparatus. Nevertheless, within his first-person perspective, Morgen could well have seen himself as being committed to justice.<sup>51</sup>

Such a reading would be a misunderstanding. The account of complicity outlined here is not restricted to a third-person perspective. At its centre is a possible incoherence between an agent's self-description and the constitutive standard of the practice in which he is engaged, and such an incoherence holds from a third-person as well as a first-person perspective. The account exactly sidesteps the aforementioned objection by appealing to a tension which is not rejectable from any reasonable vantage point. When I stress the importance of taking the larger political context of Morgen's activities into account, this is to shed light on the kind of practice Morgen was involved in, rather than to turn the account into a consequentialist one which favours a third-person perspective. Konrad Morgen had every reason to realise, also from his first-person point of view, that his claim to have been a determined fighter for a moral ideal of justice (in the rule of law sense) was not tenable. Of course, this does not deny the fact that it is psychologically difficult for an agent to correct his or her self-depiction and concede his or her complicity.

#### **4. Conclusion**

Facing the burdens of complicity and thus moral accountability for the activities of institutions to which agents are professionally related is particularly hard for them. Why, so the usual reaction, should one take responsibility for actions one could not control? Why should one be held accountable for the outcomes of an organisation's



activities that one did not know about? Why should one be held accountable for actions and outcomes one did not intend? This article has tried to show why we might owe others an explanation and a justification for our affiliations with organisations and institutions even if our direct intentional participation was not substantial. We could well be complicit and thus morally accountable since our claims to be disengaged from the institution might constitutively fail.

*Herlinde Pauer-Studer, Department of Philosophy, University of Vienna, Universitätsstraße 7, 1010, Vienna, Austria. herlinde.pauer-studer@univie.ac.at*

### Acknowledgements

For critical comments on an earlier version of the article I thank Christopher Cowley, Christoph Hanisch, Carlos Núñez, Alexander Somek, Franz Altner, and Paul Miller. An initial version of the paper was presented at the Workshop ‘Complicity: Ethical and Legal Issues’ at University College Dublin in June 2017. I thank the participants of the Workshop for their critical responses. For common work and many discussions on the case of Konrad Morgen, I thank J. David Velleman. Research for this article has been funded by the European Union’s Horizon 2020 research and innovation programme under grant agreement No. 740922, ERC Advanced Grant ‘The Normative and Moral Foundations of Group Agency’.

### NOTES

- 1 An accessory before the fact is someone who is not present at the crime scene but participates in a crime by counseling or commanding, or by inciting, encouraging, or assisting the perpetrator. Aiding and abetting involves presence at the crime scene and assisting the perpetrator by encouragement or by indicating one’s willingness to assist (by helping, supplementing, promoting, encouraging, or instigating the crime). Abetting requires, in addition to the crime-relevant conduct, the presence of a criminal state of mind. The defendant need not have detailed, but only general knowledge about the crime the perpetrator will commit. Someone can also be found guilty if the perpetrator whom she aids or abets is committing another crime which was reasonably foreseeable. An accessory after the fact is a person who knows that someone has committed a crime and aids the perpetrator to escape arrest or punishment. In order to be convicted as an accessory after the fact, the person must know that the crime (felony) was committed and that he or she is aiding the person guilty of the crime. These explanations follow the careful discussion in Gregory Mellema, *Complicity and Moral Accountability* (Notre Dame, IN: University of Notre Dame Press, 2016).
- 2 Mellema, for example, identifies nine forms of an agent’s moral complicity: complicity by command, by counsel, by consent, by flattery, by receiving, by participation, by silence, by not preventing, by not denouncing. See Mellema *op. cit.*, p. 19.
- 3 In criminal law, the intention of an agent (or, at least, knowledge of the essential matters of a crime) is considered to be crucial for assessing individual complicity (an agent’s aiding and abetting). There has been debate whether recklessness and negligence should also be included in the relevant *mens rea* requirement of an agent’s complicity (legally considered), but legal theorists have argued that a liberal criminal law (one that seeks to deter, but not to over-deter) should restrict the *mens rea* condition to intention and knowledge, See Dennis J. Baker, ‘Unlawfulness’s doctrinal and normative irrelevance to complicity liability: A reply to Simester’, *The Journal of Criminal Law* 81,5 (2017): 393–416; A.P. Simester, ‘The mental element in complicity’, *Law Quarterly Review* 122 (2006): 578–601. Recklessness and negligence, though often not intentional, are important with respect to the attribution of moral responsibility; someone can be held responsible for being reckless, negligent or simply careless. See e.g. Christopher Cowley, *Moral*

- Responsibility* (Durham: Acumen, 2014), pp. 47–55. However, recklessness and negligence do not seem sufficient for complicity.
- 4 See e.g. Christopher Kutz, *Complicity: Ethics and Law for a Collective Age* (Cambridge: Cambridge University Press, 2000).
- 5 Note that the article focuses on the moral dimension of complicity.
- 6 Kutz op. cit.
- 7 Kutz op. cit., p. 82. Such intentions are marked by two components: an individual act by which an agent seeks to accomplish an individual task that, furthermore, contributes to a collective activity or an outcome that requires the coordinated joint action of several agents.
- 8 Kutz op. cit., p. 75.
- 9 Kutz op. cit., p. 80.
- 10 Kutz op. cit., p. 122. The basis of the complicity principle are participatory intentions; the object is the shared goal of a collective (a group, an institution or organisation); and the joint action is due to an overlap of participatory intentions. The example by which Kutz illustrates the working of the complicity principle is the harm produced by a bomber raid: though the contribution of an individual bomber made no difference, the individual bomber is still morally accountable for the outcome.
- 11 Kutz op. cit., pp. 105–06.
- 12 Kutz op. cit., pp. 140–41. Applied to the case of the bombers: ‘What the bombers do together is the object of the will of any given bomber, and so what the bombers do together is a potential object of inclusive individual accountability.’
- 13 The classical exposition is in G.E.M. Anscombe, *Intention*, 2<sup>nd</sup> edn. (Cambridge, MA: Harvard University Press, 1957), pp. 37–41. Anscombe’s example: A man might be sawing an oak plank; however, when asked ‘Why are you sawing that oak plank?’ he might reply that he wasn’t aware of sawing an oak plank though he wouldn’t deny having sawed a plank. So the action description ‘sawing a plank’ refers to an intentional action of the agent while ‘sawing an oak plank’ does not correspond to an intentional action of the agent (in Anscombe’s term, the agent does not have non-observational knowledge of what he was specifically doing, i.e. sawing an *oak* plank).
- 14 Kutz op. cit., p. 155.
- 15 There are, of course, different degrees of complicitous involvement. As Kutz points out, the engineer is much more involved in the company’s activities than a shipping clerk helping to ship the landmines to other countries. Similarly, the engineer cannot be held complicit and thus accountable in the same way as the vice president of the company who is in charge of the arms sale. Kutz does not want to distinguish between the engineer and the vice president in terms of intention and foreseeability, but rather in terms of executive intentions (in the case of the vice president) and subsidiary intentions to do one’s job (in the case of the engineer and the shipping clerk). However, though the engineer and the shipping clerk have subsidiary intentions to do their jobs, their functional contribution to the company’s ends is still different. Kutz op. cit., pp. 156–58.
- 16 Kutz op. cit., p. 163.
- 17 Kutz op. cit.
- 18 Kutz op. cit., p. 162.
- 19 Kutz op. cit., p. 73.
- 20 I thank an anonymous reviewer for drawing my attention to this point.
- 21 Kutz op. cit., p. 164.
- 22 In some passages, Kutz comes close to taking the normative dimension of agency into account. He notes, for example: ‘This conception, embedded in our participatory action, is thoroughly normative: it expresses what we desire, what we will tolerate, what we believe’ (Kutz op. cit., p. 141). However, he neither fully explores the normative conditions of agency nor draws on them in providing an account of complicity.
- 23 I assume here a constitutive conception of agency. Constitutive accounts of agency have been defended by e.g. Christine Korsgaard, David Velleman, Luca Ferrero, and Paul Katsafanas. See Christine Korsgaard, *Self-Constitution: Agency, Identity, and Integrity* (Oxford: Oxford University Press, 2009); J. David Velleman, *How We Get Along* (Cambridge: Cambridge University Press, 2009); Luca Ferrero, ‘Constitutivism and the inescapability of agency’ in R. Shafer Landau (ed.) *Oxford Studies in Metaethics* Vol 4 (Oxford: Oxford University Press, 2009), pp. 303–333; Paul Katsafanas, *Agency and the Foundations of Ethics: Nietzschean Constitutivism* (Oxford: Oxford University Press, 2013). A detailed discussion of constitutivism is beyond the scope of this article. For a discussion why constitutivism is relevant to group

- agency see Herlinde Pauer-Studer, 'A constitutive account of group agency', *Erkenntnis* 79,9 (2014): 1623–1639.
- 24 David Velleman has developed an account of agency that centers on intelligibility. For him, agency involves making intelligible to oneself what one is doing. Just as truth is the constitutive aim of belief, intelligibility is the constitutive aim of acting. See J. David Velleman, *How We Get Along* (Cambridge: Cambridge University Press, 2009), pp. 123–33.
- 25 John Rawls illustrates the point with the following example: 'In a game of baseball if a batter were to ask "Can I have four strikes?" it would be assumed that he was asking what the rule was; and if, when told what the rule was, he were to say that he meant that on this occasion he thought it would be best on the whole for him to have four strikes rather than three, this would be most kindly taken as a joke'. See John Rawls, 'Two concepts of rules' in J. Rawls, *Collected Papers*, ed. S. Freeman (Cambridge, MA: Harvard University Press, 1999), pp. 20–46, at p. 38.
- 26 The constitutive standard functions both as a kind of aim for the practice and as a success condition. See Paul Katsafanas, 'Constitutivism about practical reasons', in D. Star (ed.) *Oxford Handbook of Reasons and Normativity* (Oxford: Oxford University Press, forthcoming).
- 27 David Enoch has raised the objection that such a characterisation of games is false: not all cases of playing chess aim at winning the game. Enoch thinks it possible that 'you somehow find yourself playing chess (or, [...] *seemingly* playing chess), but you do not care about the game and who wins, nor do you have any reason so to care.' And he concludes: '(If a metanormative (or metachess) theorist then comes along, explaining to you that attempting to checkmate your opponent is constitutive of the game of chess, so that unless you engage in such attempts your activity will not be classifiable as chess playing, it seems to me you are perfectly justified in treating this information as normatively irrelevant. After all, what is it to you how your activity is best classified?' See David Enoch, 'Agency, shmagency: Why normativity won't come from what is constitutive of action', *The Philosophical Review* 15,2 (2006): 169–198, at p. 186. There are two aspects of this criticism: the first one is that not all instances of chess-playing aim at winning. This objection does not touch the account of constitutive aims and standards defended here, which interprets constitutive standards (aims) as general standards for judging action-performances; the account does not claim that each single action-performance *de facto* aims at the constitutive standard. For example, you might play chess with your child with the intention of letting the child win the game. The second aspect of Enoch's criticism is simply implausible: the evaluation of one's actions in light of a governing standard of assessment does not depend on whether one personally cares about such evaluations or classifications of one's actions.
- 28 We have to make room for rule-violations that do not amount to a complete rejection of the rules. Thus, acceptance of the practice rules does not require full compliance; however, acceptance of the practice rules requires compliance beyond a certain threshold.
- 29 The proposed account explains the incoherence in Miriam's self-depiction ('I only work in the lab') in the following way: Miriam obviously tries to present herself as a scientist, just doing research within a company. However, the constitutive standard of such an activity (i.e. just undertaking research) is undermined by the company's engagement in producing military weapons. Since the constitutive aim (standard) of decent scientific research is different from the aim of successful production of arms, Miriam, insofar as her professional involvement is concerned, cannot ascribe to herself the professional identity of a researcher.
- 30 This kind of failure has been explored by Tamar Schapiro in a highly illuminating paper which has helped me greatly in developing my views on complicity. See Tamar Schapiro, 'Compliance, complicity, and the nature of non-ideal conditions', *The Journal of Philosophy* 100,7 (2003), pp. 32–55, particularly pp. 336–42. Note that Schapiro's overall aim in this article is to explain when the stringency of moral rules is rightfully mitigated due to non-ideal circumstances.
- 31 See Schapiro *op. cit.*, p. 339. Schapiro gives a slightly different explanation for practices turning into a sham from the account offered here. While my account locates what is going wrong foremost in the missing constitutive standard of the practice, Schapiro tries to locate the failure in terms of how the misconduct of others changes the practice rules such that participation in the practice no longer counts 'as participation in the form of activity that is, ideally, defined by those rules' (Schapiro *op. cit.*).
- 32 For a detailed exposition of Morgen's professional career and activities, see Herlinde Pauer-Studer & J. David Velleman, *Konrad Morgen: The Conscience of a Nazi Judge* (Basingstoke: Palgrave MacMillan, 2015); an extended German edition has appeared under the title "Weil ich nun mal ein Gerechtigkeitsfanatiker bin." *Der Fall des SS-Richters Konrad Morgen*' (Berlin: Suhrkamp, 2017).

- 33 Already before the war, Himmler had plans to establish a separate jurisdiction for SS members. But the attack on Poland was a major reason for inventing a special military jurisdiction for the SS, the rationale likely being to protect members of the Waffen-SS and SS task forces from prosecution by the military courts of the *Wehrmacht* for war crimes committed in Poland. See Bianca Vieregge, *Die Gerichtsbarkeit einer 'Elite': Nationalsozialistische Rechtsprechung am Beispiel der SS- und Polizei-Gerichtsbarkeit* (Baden-Baden: Nomos Verlag, 2002).
- 34 Franz Breithaupt, general of the Waffen-SS and chief of the Head Office of the SS court system from 1942–45, declared, for example, that 'SS judges are not jurists but SS leaders familiar with law'. Pauer-Studer and Velleman op. cit., p. 19. Himmler decreed that the chief of the Head Office of the SS court system had to be an SS-officer, not a jurist. For Himmler, an SS-judge was a kind of 'political fighter', enacting the principles and goals of the SS, rather than being a jurist. See also James Weingartner, 'Law and justice in the Nazi SS: The case of Konrad Morgen', *Central European History* 16 (1983): 276–94.
- 35 For the details, see Pauer-Studer & Velleman op. cit., pp. 14–16.
- 36 In May 1942, Himmler demoted Morgen to army private over his annoyance at Morgen's investigations of high-ranking SS officers. In December 1942, Morgen was sent to the Eastern front; but in May 1943, Himmler recalled Morgen from the front and ordered him to investigate a corruption case in the concentration camp Buchenwald.
- 37 For the details, see Pauer-Studer & Velleman op. cit., ch. 12.
- 38 Grabner had personally, i.e. outside the administrative chain, ordered the killing of camp inmates (not only Jews). Although Grabner was not directly involved in the mass extermination of Jews in Auschwitz-Birkenau, he supported the terror and the murderous system in Auschwitz in his role as the camp's Gestapo chief.
- 39 For the details, see Pauer-Studer & Velleman op. cit., ch. 15.
- 40 A remarkable step in that direction was that Morgen, in a letter to Himmler dated 13 December 1943, asked to erect a Special court for the prosecution of the 'political crimes' in the concentration camps. Note that 'political crimes' was a code word for the killing of Jews. In a notorious memo from 1942, Himmler had issued a directive permitting killings (shootings) of Jews out of 'political motives'. (Killings out of 'sadistic motives' were forbidden.)
- 41 The ideology was cultivated in regular memoranda to members of the Waffen SS. The terrible interpretation of these ideological principles by Himmler comes to the fore in Himmler's notorious Posen speeches from 4 October 1943 and 6 October 1943. See Harvard Law School Library, *Nuremberg Trials Project: A Digital Document Collection*, HLSL Item No. 3790, HLSL Item No. 3441 (accessible online ><http://nuremberg.law.harvard.edu/><).
- 42 Pauer-Studer & Velleman op. cit., p. 20.
- 43 Pauer-Studer & Velleman op. cit., p. 40, italics by H.P.-St. One might wonder whether Morgen's term 'capital crimes' includes the murder of Jews (note that in March 1942 the extermination camps were starting to be erected). There is some evidence that Morgen also was willing to prosecute the killing of Jews. For example, he sought to prosecute Dirlwanger, a notorious Waffen-SS general who was also suspected of having murdered at least 42 Jews in Lublin. Morgen asked his higher court authority in Cracow to arrest Dirlwanger, but the arrest failed because Dirlwanger was not subject to the SS jurisdiction.
- 44 Interrogation of Konrad Morgen by the American CIC, 19 September 1946, pp. 73, 74; see also Interrogation of Konrad Morgen by the American CIC, 11 October p. 82. See 'Interrogations Konrad Morgen', US National Archives, Record Group 238, Microfilm 1019, Roll 47. Morgen was in American custody from September 1945 up to May 1948.
- 45 Konrad Morgen, 'Testimony at the IMT Trial in Nuremberg', Vol 20, 8 August 1946, p. 506 (accessible online ><http://avalon.law.yale.edu/imt/08-08-46.asp><).
- 46 These are Lon L. Fuller's basic conditions of a rule of law system. See Lon L. Fuller, *The Morality of Law* (New Haven, CT: Yale University Press, 1969), revised edition, pp. 39–41. The mentioned conditions are constitutive for a legal framework that allows judges a rule of law orientation. Christoph Hanisch defends an even more ambitious position: for him, Fuller's criteria are not only constitutive for the identity of legal officials, but amount to external conditions of self-constitution that are essential for the public identity of citizens. See Christoph Hanisch, *Why the Law Matters to You: Citizenship, Agency, and Public Identity* (Berlin: De Gruyter, 2013), ch. 8.
- 47 There never existed a written or publicised order for the so-called 'Final Solution' (the ordered mass extermination of Jews). See Peter Longerich, *The Unwritten Order: Hitler's Role in the Final Solution* (Stroud: Tempus, 2001). And the 'legal' basis for the so-called euthanasia-program (at least 80, 000

victims) was a letter by Hitler dated 1 September 1939 to his personal physician Dr. Karl Brandt and the head of the Führer's Chancellery, Philipp Bouhler, in which Hitler authorised euthanasing terminally ill persons with no hope of recovery. See Nuremberg document 'PS-630', Harvard Law School Library, *Nuremberg Trials Project: A Digital Document Collection*, HLSL Item No. 2493 (accessible online > <http://nuremberg.law.harvard.edu/><).

There were of course also areas (e.g. landlord and tenant law; tax law) in which the NS-state legislation functioned more in line with the mentioned criteria of a rule of law system (however: only as far as it concerned non-Jewish Germans).

48 See Schapiro *op. cit.*, p. 336.

49 He never used the formula 'war of aggression'. Also with respect to the attack on the Soviet Union, which Nazi leaders had planned with the clear intention of ignoring established war conventions, Morgen just said in a court testimony that the war had led to terrible cruelties on both sides.

50 Interrogation of Konrad Morgen by the American CIC, 4 April 1947, *op. cit.*, p. 290.

51 I thank Christoph Hanisch for raising this objection. He thinks that the difference between Morgen's investigations and those of an American officer can only be explained by reflecting on the consequences of the two forms of pursuing war crimes. And such a consequentialist argument favors, he concludes, a third person perspective. Seen from a consequentialist third person point of view, Morgen's investigations of war crimes supported the SS, while the investigations of Nazi war crimes by an American officer were preparing the ground for a democratic political order committed to the rule of law. In my view, the difference between Morgen's investigations and the investigations of the American CIC officer can be explained in terms of the legal-political background and the different constitutive standards and conditions presupposed by these two investigative bodies. And reflection on these presuppositions is possible from a first-person and a third-person perspective.