

A Conscience in Hell

By CHARLES FRIED

Review of **KONRAD MORGEN: The Conscience of a Nazi Judge**, by

Herlinde Pauer-Studer and J. David Velleman

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Law speaks the language of obligation. These obligations very often come as the conclusion of sometimes quite complex systems of rules. These systems of rules are part of practices and institutions that make possible human coordination of every degree of intricacy. Our social life through and through is constituted and enabled by legal rules. But do these rules, does the laws- have a moral claim on us? The law says we must or may not do this or that, but *must* we really? We may be legally obligated, but are we morally obligated? The connection between legal and moral obligation is the signature issue of legal philosophy. At one extreme one might say that the two are just two unrelated normative systems that happen to share (some) common vocabulary. At the other extreme one might say that they are isomorphic: to be legally obligated just is for that reason alone to be morally obligated as well. Very few people take up one or the other of these extremes, although the latter comes closer to a common, natural, and

unreflecting point of view. I say it is only closer, because there must be something about the legal system that connects us to it, beyond just the fact that a particular system exists. What student of the system of classical Roman law feels morally bound to its precepts just because it is a system—and an intricately elaborated one at that, indeed one by which centuries ago many millions governed their conduct?

Usually disputes such as these seem abstract and remote from real dilemmas of ordinary life. We may reasonably ignore them and go about our daily lives as if they did not matter. Every once in awhile a concrete set of circumstances makes their resolution vividly urgent. Herlinde Pauer-Studer and J. David Velleman's *Konrad Morgen: The Conscience of a Nazi Judge* is a scrupulous and gripping account by two philosophers—an Austrian and American—of the confrontation of these dilemmas of moral and legal philosophy by an actual person, a person not better or worse than any of us, in circumstances so unimaginably extreme that we may all hope never to have to encounter them. No hypotheticals concocted by clever academics to illustrate their ruminations on these abstractions could come close to the reality recounted here in meticulous detail, verified by unarguable documentation.

The book tells the story of Konrad Morgen. Morgen, born in 1909, in Frankfurt to a family of modest means (he stated that his father “drives a

train”) pursued his studies in Germany, with some periods in other continental cities. At the age of 24, when Hitler came to power, he joined first the Nazi party “on the advice of my parents” and then the SS. In his interrogations by the Americans he portrays himself as first taken in by Hitler’s protestations of being dedicated only to peace, and as generally apolitical, principally interested in pursuing training for the civil judiciary. In Germany and on the Continent generally the judiciary is a distinct career path, starting with low-level functions and progressing to higher judicial ranks, as in other portions of the career civil service. His early career suffered some setbacks—perhaps because his commitment to Nazi civil service was insufficiently enthusiastic. He was drafted into the military branch of the SS (*Waffen-SS*) when war was declared on the invasion of Poland, but managed to avoid combat. On the invasion of France the next year, we are told—surprisingly—that he was demobilized and, reporting back to Berlin, found employment in the SS judicial bureaucracy—something, I suppose, like the JAG corps of our several services. The authors report Morgen’s early career, taking at face value his own account from his post-war interrogations by the Americans, as were standard for former SS officials.

The picture that emerges is of a dutiful son (he is now almost thirty) trying to make his way and keep his head down in dangerous times. It adds

to the credibility and therefore the power of this book that the authors are sparing in their judgments and mainly eschew psychological and sociological reflections on this somewhat colorless man. One cannot help supposing that in these routine interrogations it was greatly to Morgen's advantage to portray himself as a routine bureaucratic cog, as he could scarcely have claimed to be some kind of oppositionist. Through this period the picture he offers is such that if someone like him was tainted with some kind of guilt, then so were millions of other German—which may well be the case, but hardly a judgment on which the American authorities were inclined to act. His account of how he came to find himself in the SS judiciary is telling:

I said to the man in the personnel office that I would like to resume employment in my profession, since if one has just passed one's exams and then leaves the profession for more than a year, it is very hard to work one's way back in. He said, "OK, the Head Office of the SS Judiciary is looking for judges. So you'll get a job there."

It is only after he enters that service that the psychological and moral story that Morgen and the authors offer takes an extraordinary turn. He discovers his true passion and vocation; it is for the law, or rather lawfulness, and he pursues it relentlessly. He takes the SS creed and self-propaganda seriously, literally: it is a selfless, elite corps of dedicated servants, a kind of medieval, Teutonic *Reiterbund* pledged to absolute

loyalty and absolute obedience to the ideal of the Volk. Corruption, self-seeking, sadism and sexual (that is, racial) impurity are anathema to this ideal. Heinrich Himmler himself, the Reichsfuehrer of the SS, expressed this notion in an allocution set out in detail.

We have taken from them [the Jews] what wealth they had. I have issued strict orders . . .that this wealth should, as a matter of course, be handed over to the Reich. We have taken none of it for ourselves. . . . Whoever takes so much as a mark of it is a dead man . . . , they will die without mercy. We had the moral right, we had the duty to our people, to destroy this people that would destroy us. But we have not the right to enrich ourselves with so much as a fur, a watch, a mark, or a cigarette or anything else.

This is the ideal to which Morgen dedicates himself—or at least this is the story he told his American inquisitors after the defeat, but there is plenty of evidence that he told it to himself during the actual years of his service. A moment of revelation comes to him when he is called to investigate a small package sent via military post by a medical assistant at Auschwitz to his wife in Germany. It had aroused the suspicion of the postal authorities because of its remarkable weight, and they turned it over to the judicial authorities--Morgen. It turned out to contain several kilos of high carat dental gold. What impressed and appalled Morgen was the large number of persons who must have been murdered--twenty or fifty or a hundred thousand, he says--to obtain this quantity of gold. But it is hard to avoid the conclusion that what particularly appalled and energized this investigating

official was not the scale of suffering that these deaths must have represented but the extent of criminality, the brazen corruption on the part of the low level official who had misappropriated this treasure.

There are other examples of the focus of Morgen's sensibilities.

When he did a complete tour of the Auschwitz-Birkenau killing complex as part of his investigation of corruption in the ranks there, he was particularly impressed by a visit to the SS guard room at Birkenau. It is "here for the first time I received a real shock"; he explains:

As you know in every army in the world a military guard room is distinguished by spartan [sic] simplicity. . . [But here] instead of a desk there was giant hotel stove, on which four or five young girls were baking potato pancakes. They were obviously Jewesses, very pretty, oriental beauties, full-busted, fiery eyes, not wearing prisoner's uniforms but normal, even coquettish dresses. And they brought the potato pancakes to their pashas, who lay around on the couches and dozed, and asked them anxiously whether there was enough sugar on them, and fed them. . . . I couldn't believe my ears: These female prisoners and the SS, they called each other "du."

So, after touring the whole assembly line for mass murder, this scene of informal familiarity with the supposed racial enemy is what gave him the "real shock." And he gave this testimony as a witness for the prosecution at the Auschwitz trial in 1964, apparently with no appreciation of what this stray remark revealed about his system of sensibilities.

But, as the authors point out, Morgen's moral stance to the Final Solution was complicated, contradictory and conflicted. He accepted

Himmler's statements that because world Jewry had determined to destroy the Aryan race, it was now appropriate to eliminate the Jews. Indeed right up to the collapse of the Third Reich, Morgen continued in his admiration for Reichsfuehrer Himmler, the head of the SS. On the other hand, he was at pains to emphasize that he harbored no personal hatred for Jews, and the authors arrange and present the material in such a way as to support this claim. He was shocked at the brutal, often random and unauthorized killing of Jews at Buchenwald, although he accepts that the killing of Jews by the trainloads at Auschwitz was authorized by the order of Hitler, whose word was literally and constitutionally the law. And he reports a sleepless night after his Auschwitz tour when he reflected on the enormity of the mass killing at Auschwitz and an earlier, less mechanized and sanitized slaughter, the Harvest Festival massacre: In November 1943, 40,000 Jews were marched into trenches they had been forced to dig (supposedly as air-raid shelters) and were shot one-by-one. When the trenches were filled with corpses they were covered over and new ones dug.

In his later telling of this episode to his interrogators, Morgen said he was so appalled by these things--=though as the authors point out he must have long been aware of the mass killings on the Eastern front-- that he determined that some action on his part was necessary. He says that he contemplated trying to assassinate Hitler, but concluded that Hitler was so

well guarded that he could not even come close. He considered fleeing to Switzerland and denouncing the murder regime, but decided against it. His reasons included the thoughts that he would not be believed, that after all he did not want to contribute to anti-German propaganda which would be used to justify a similar program of slaughter by the allies in the event of a German defeat (a bloody version of the Morgenthau plan?), and that he could not abandon his profession and good standing, which his “dear mother and father” had sacrificed so much to allow him to attain—an almost grotesquely parodic version of the classic “good son” scruple.

In the end he determined to impede and undermine the progress of the Final Solution by “working to rule.” This meant rigorously enforcing the norms of honor and obedience to law that after all Himmler himself had claimed to insist upon. Accordingly, he proceeded to prosecute relentlessly even very senior figures in the camp hierarchy for any irregularity, self-enrichment or racial sexual peccadillo. He sought to enlarge his jurisdiction beyond corruption to include unauthorized acts of killing. The authors stick to an admirably straightforward, just-the-facts-ma’am presentation of Morgen’s own account and the supporting documents. One cannot help wondering to what extent this was an after-the-fact concoction by a man who had been a high official of the SS, intimately in contact with its worst outrages, seeking to avoid the fate of many highly placed Nazis: hanging or

long prison terms. Yet there is solid, objective, documentation of his carrying out just the campaign he claims to have set himself. He procured the execution by the SS of such figures as the camp commandants Karl Koch and Hermann Florstedt and of Georg von Sauberzweig, son of a famous World War I general. And he did seek the indictment—for having misappropriated a pouch of precious stones—of Adolf Eichman, in the midst of Eichman's project to round up and transport to their deaths at Auschwitz 400,000 Hungarian Jews. Most sensationally, he had sought out and harangued the Gestapo Chief, Heinrich Mueller, about the corrupting effect of the SS men's participation in programs of mass killing on their spirit, morality and future usefulness (after a Nazi victory). In the end, the SS hierarchy got fed up with Morgen and relegated him to less strategic duties, although some had thought that a short sentence to a concentration camp might have put him in his place.

No legal philosopher can avoid confronting the issue of the individual's moral obligations in and to the system of law in which she finds herself. H.L.A. Hart took up the positivist stance that law is one thing, morality another, and to muddle the two deserves clear thinking about both. But Hart also understood that a system of legal rules most often is a necessary condition for a peaceful, orderly and productive society—particularly a society of any size and complexity—and that the morality of

fairness entails doing one's part in sustaining a system in which one participates and from which one benefits. This seems to me to have been the view of John Rawls as well. Any such view, of course, acknowledges that there comes a point where the demands on the individual or the balance of goals within the system are so unreasonable, corrupt or evil that the individual is dispensed from this duty of fairness and may indeed be morally obligated to resist, oppose or rebel. Ronald Dworkin distinguished himself from Hart and the positivist tradition by insisting that morality infuses every aspect of law, and that the same moral considerations that Hart concedes command our fidelity in the name of fairness also guide the development and understanding of the norms that make up the system, so that we have a moral duty not only to obey the norms but to make of them at every turn the best version of the system that they could be. But his view also runs into difficulties. To be sure, in a thoroughly evil regime—and the Nazi regime is the very paradigm of such regime—an official, far from having the duty to carry forward and perfect the “spirit” of its noisome norms, is morally bound to resist, dissemble and subvert the efficacy of the system and its norms. One would think that this was just Morgen's situation. Indeed as Pauer-Studer and Velleman remind us, Dworkin even has a name for the righteous judge in such a system: he is Siegfried and his duty is to do whatever he can to destroy the efficacy of the regime and its norms. The trouble is that even

a regime as grossly evil as the Nazi regime may have—and certainly did have—large swaths of social regulation that were conducive, even necessary to peaceful, orderly and productive social relations. There were rules of property and contract, rules that forbade and punished some (not all) citizens' aggressions against others, and the magistrates who interpreted and administered such norms were in many instances maintaining just relations between persons. An ordinary civil judge in such a regime might be analogized to doctor who, as a matter of professional probity, ministers to whomever comes within his range of concern. But perhaps if the regime is bad enough—and the Nazi one was—then keeping even this peripheral machinery going helps sustain it, and then such participation is participation in evil. Rebellion and sabotage become everyone's calling.

Lon Fuller offered an intriguing intermediate position, centered on what he called the inner morality of the law. Law, in his view, to be law at all must at a minimum comport with certain norms: regularity, publicity, clarity, stability. This is not just a definitional matter: if law at minimum is the general enterprise of submitting human conduct to the discipline of rules, there are minimum characteristics that a regime's prescriptions must have in order to fulfill that function. Perhaps Morgen had some such conception in mind when he insisted on the unwavering enforcement of the regime's own publicly promulgated rules. But it is far from clear that Morgen's project

would have brought down or even ameliorated the Nazi regime. True, the mass murder of millions had not been explicitly and publicly promulgated. It is far from clear that it would have failed if it had been. Maybe indeed Morgen was making the Nazi regime more not less effective in effecting its monstrous purposes.

Pauer-Studer and Velleman conclude with reflections about what Morgen and his situation tell us about morality and its relation to law. As throughout the book, these reflections are neither ponderous nor lengthy. They do not seek to be definitive; rather they invite us to consider the case and point us in some of the directions our reflections might take us. This is a welcome and engaging aspect of the book. And it gives us still greater confidence in the fairness of their account, that so much is conveyed in documents and in excerpts from Morgen's own testimony and writings. I am driven to ask, what would I have done in Morgen's shoes? What should I have done? We are given the picture of Morgen only in the fraught years from 1933 onwards, but I wonder what Morgen would have been like had there been no Hitler, no Nazi regime, no Second World War. What if he had lived out his whole career well before the First World War turned the world upside down? Or indeed if he had been born in 1970 instead of 1909? It seems to me he would have been an unremarkable man, more than a little pedantic, not deeply cultivated, almost the caricature of the middle level

official: hard working, conscientious, unimaginative, incorruptible and thoroughly uninteresting. The bureaucracies not only of Germany but of all developed constitutional regimes are stuffed with people just like that—and are probably better off for it. Starting then with this utterly familiar type, I go on to ask, how might one expect such a person to respond in the extreme circumstances of Hitler’s Germany? Having joined the Nazi party “on the advice of my parents,” what stories does he have to tell himself to accept the doctrine, expounded by Himmler, that the Jews must be annihilated as a matter of self-defense, then retaliation, that Germany has not only the right but the destiny to empty of its population vast portions of an adjoining country so that it may be settled by members of its own ethnic group, that the peoples outside of this area could be turned into a helot class, permitted to exist only so far as it served their conquerors’ interests, that the industrialized killing of millions of men, women and children is a regrettable necessity, that sexual relations with someone of another ethnic group—“*rein Polnisch*,” not to mention a Jew—was a grave and polluting transgression? And having accepted all this, then what does it take, when you have seen the working of all these notions in practice—the uniforms, the trains, the women clutching their terrified children at the railroad platforms, the corpses, the gore, the pretend locker rooms, “communal showers” from whose shower heads not water but poison gas will come, the piles of

clothing, mountains of eyeglasses, kilo bars of dental gold—what does it take to make you think again? Or does all this force you to dig yourself deeper into these at first abstract justifying notions, to persuade yourself that by purging this machinery of death of its incidental excrescences of petty theft, of administrative irregularity, of cruelty beyond the necessity of the project as a whole, of slovenly behavior as in the Auschwitz guard room, you are making the world a little better, maybe hastening the day when none of this will be necessary? What kind of people are these, these ordinary mid-level bureaucrats? At other times and in other circumstances they would have been much like the rest of us. Of this vast army of ordinary men and women how do we know who will be the killers, who the willing accomplices, who the knowing time-servers, and who the heroes? How do we know by what processes, moved by what confrontation, what realization, some may change from being guilty time-servers to being heroes of resistance—or like Morgen something in between? How do we know what we would have been in such circumstances, what stories we might have told ourselves to justify acquiescence or complicity, what insight would have moved us to resist? How do we know who we are, what we would be in such times?

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