The Persistence of Paragraph 175:
Nazi-style Justice in Postwar Germany

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The cover story for a 1969 edition of the popular West German news magazine Der Spiegel. The headline translates to "Paragraph 175: The law falls—does the stigma remain?"
Footnotes 8.

The Persistence of Paragraph 175: Nazi-style Justice in Postwar Germany

Despite the Nazi campaign of terror that castrated, incarcerated, and murdered gay men, the end of the Second World War did not mark the end of brutal and homophobic National Socialist policy in Germany. In West Germany, a Third Reich-era law that prohibited homosexual acts remained a part of the penal code until 1969. Rigorous enforcement of the law, paragraph 175, led to a high number of convictions in the postwar years, a level that never dropped to pre-Nazi levels. In the east, homosexuality was not decriminalized until 1968. The persistence of Nazi-style justice after the war represented Germany’s failure to learn adequately from its history.

Background

Since the creation of the German state in 1871, the penal code included a provision prohibiting sexual acts between men. However, the men were not prosecuted unless there was violence, prostitution, seduction of a minor or proof of “intercourse-like” sex. Such high standards of evidence made convictions rare, and thus granted homoerotically attracted men significant freedom from police interference in the democratic period after World War One. But after the National Socialists came to power in 1933, they worked to “Nazify” every element of the state. Increasing police powers, easing evidentiary requirements, and worsening punishments were important parts of this legal process, known as “coordination” (Gleichschaltung). The increasingly totalitarian climate in Nazi Germany made it easier to punish so-called “asocials,” a purposely vague and arbitrary category of individuals who supposedly threatened the National Socialist theory of a “racial community” (Volksgemeinschaft). Echoing the homophobia of the time, Nazi officials publicly declared
homosexuality to be a sickness and deemed homosexuals as “racial vermin” (Volksschädlinge). Gay men were among the many groups of people subject to worsening treatment in the Third Reich.

The campaign of harsher legal coordination worked its way into the laws regarding homosexual acts. In a June 1935 Supreme Court (Reichsgericht) decision, National Socialist judges removed the criterion “contrary to nature” (widernatürlich) from paragraph 175. Before the 1935 reform, the combination of the language “against nature” and the German word for indecency (Unzucht) in the paragraph 175 came to be interpreted to mean anal sex. As Geoffrey Giles writes, proving intercourse-like sex between men was “devilishly difficult.” Chief Justice of the Leipzig Regional Court (Landgericht) and Nazi party member Dr. Gerhard Lorenz pushed for the removal of this specific language. Removing widernatürlich allowed men to be charged for any indecency.

Differing from the original, terse one-sentence version of paragraph 175, the National Socialist reformers added a sentence implying that the passive party could also be charged. As Giles writes, the question of the passive party came only in the reformer’s later legal discussions. In previous court cases, judges sometimes viewed the passive partner as the victim, and refrained from punishment. In April 1935, the reformers added language that would also legally implicate the passive sexual partner. While the reformers were clearly referring to a passive partner in the law, the German language text of the law lends to an awkward translation. A literal translation of the German would include a phrase like “or

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allows such abuse to be done to him.” In my translation, I opt for a less literal, but more idiomatically clear translation. The new version of the statute read:

§ 175 Indecency between men (1935)
Section I: A man who commits indecency with another man, or engages as the passive partner to be misused indecently will be punished by imprisonment.

These two changes to paragraph 175 significantly expanded the reach of the law, effectively criminalizing any form of affection between men. It prosecuted men for kissing, mutual masturbation, love-letters or even sordid glances. In one recorded instance, a soldier on leave was arrested for merely brushing up against another man, who was an undercover SS sergeant.3

Another part of the main paragraph 175 statute was a provision that exempted minors from punishment:

§ 175 Indecency between men (1935)
Section II: The Court can refrain from punishment in minor cases when involved parties are not yet twenty-one years old.

Part two recognized sexual experimentation in younger boys. While the lawmakers ostensibly perceived such experimentation as harmless, there were many subsequent instances where teenage boys were arrested for paragraph 175 violations.4

The National Socialists also added a “severe indecency” (schwere Unzucht) subsection to the law. In paragraph 175a, the Court worked to criminalize violent rape, sexual relations with men under twenty-one years old, male prostitution and exploitative gay sexual relationships. The law called for harsh punishment for §175a violations. Incarceration sentences ranged from three months to ten years. This provision differed starkly from

3 Ibid., 351.
previous German legal norms. During the Weimar years, the Reichstag, or German Parliament, proposed only a six-month jail sentence for comparable violations.\(^5\)

The law’s reform combined with the police-state character of the Third Reich had major implications. The number of men tried and found guilty of violating paragraph 175 exploded. In the years before the reform, from 1931 to 1933, there were 2,319 convictions. After the reform, this figure rose tenfold, increasing to 22,143 for the years 1936 to 1938.\(^6\) In 1941, six years after reform, the number of §175 convictions peaked at 9,244, fourteen times the Weimar era average of 650 convictions per year.

However, the 1935 reform had effects that were more than numerical. From 1933, the number of acquittals declined steadily, dropping down to a mere quarter of all those charged in 1936. Harsher punishments also followed an increase in convictions. In September 1941, the death penalty was added as possible punishment for violating a slew of sexual crimes, including paragraph 175.\(^7\) Men with repeated offenses were considered so-called “corruptors of youth,” and were singled out for especially harsh punishment. Many otherwise law-abiding gay men faced cruel Nazi criminal punishment. While the German criminal police (Kripo) had much greater freedom in enforcing the newly reformed law, Nazi secret police (Gestapo) worked outside the established legal system and could jail indefinitely anyone deemed a “threat to German morality.” Nazi targets were often sent to concentration camps. Jailed under the guise of “protective custody,” many prisoners lost their lives.

In the Third Reich, police raided known gay meeting places and collected names of suspected homosexuals by confiscating address books and blackmail. Chief of the SS

\(^5\) Ibid., 342
\(^7\) Ibid., 351
Heinrich Himmler claimed to have membership lists including the names of millions of gay men. After a 1938 Gestapo order, arrested homosexuals could be incarcerated in concentration camps. Nazis also lobbed accusations of homosexuality to punish political dissidents, making some falsely accused 175-ers subject to the harsh treatment gays faced in the Third Reich despite not actually being gay. As Giles writes, “the paragraph was used as a tool of political persecution when no other criminal charges could be dreamt up. Whether the charge was true or not, the pink triangle on your sleeve sent you to the bottom of the camp hierarchy.”

These prisoners were usually marked by pink triangles, a symbol that ensured cruel treatment in the camps, not only from Nazi guards but also from other prisoners due to prevailing social disapproval of homosexuality. Before the complex system of color coding was developed, some gay prisoners were marked with a yellow stripe or bar with the capital letter ‘A.’ The A was commonly known to mean “Arschficker,” a profane reference to gay sex. According to Rüdiger Lautmann’s pioneering research, the number of gay men in the concentration camps was estimated to be between 5,000 to 15,000. Many have settled on 10,000 as the most reasonable estimation. The exact number of gay men murdered in the Holocaust is unknown, but historians estimate that about two-thirds of prisoners were killed. Lautmann writes that while treatment was rarely uniform, as compared to political prisoners

8 Heinrich Himmler, "Rede vor den Gruppenführern," (February 18, 1937).
or Jehovah’s Witnesses, 175-ers were more frequently given the most deadly work assignments. They also maintained a higher death rate and lower survival rate after release.\textsuperscript{13}

After the war and Germany’s defeat, some gay survivors were released from prisons and concentration camps. There was a general hope that gay life could return to the glamour and relative freedom of the Weimar era. It did in some ways. As early as the summer of 1945, bars and clubs opened, some in still bombed-out buildings. By 1948, the gay magazine \textit{Amicus-Bundesbrief} published gay events and personals.\textsuperscript{14}

Immediately after the war, Germany was divided into four occupation zones. As part of dismantling Nazi institutions like the police and judiciary, the American military occupation government issued Army Order Number One in 1945.\textsuperscript{15} Though the order struck down many laws reeking of Nazi ideology, it did not include paragraph 175. Similarly, the Allied Control Council passed Decree No. 11 which “declared all regulations which had been issued by the Nazis as invalid,” but did not include paragraph 175 by name. Uncertainty about the status of paragraph 175 was exacerbated by the still unclear future of postwar Germany. The cohesion and cooperation of judicial system in both the east and west was an important commonality, and top German politicians clung to legal sameness as an important foundation for unification.\textsuperscript{16}

On the local level however, courts and politicians did not hesitate to legislate on paragraph 175. Varied jurisprudence on paragraph 175 persisted until the establishment of

\begin{itemize}
\item\textsuperscript{13} United States Holocaust Memorial Museum, "Persecution of Homosexuals in the Third Reich,"
\texttt{http://www.ushmm.org/wlc/article.php?ModuleId=10005261}
\item\textsuperscript{14} Andreas Sternweiler, \textit{Selbstbewusstsein Und Beharrlichkeit: 200 Jahre Geschichte Ausstellung.} (Berlin: Schwules Museum, 2004), 127.
\item\textsuperscript{16} Grau, "Return of the Past," 3.
\end{itemize}
two separate German states. West German regional courts (*Oberlandesgerichte*) tended to rule for keeping the 1935-version of the law, while Soviet Zone courts frequently repealed the Nazi-amended versions. However, overall jurisprudence varied. For example, from 1946-1947 German regional courts (*Oberlandesgerichte*) in Halle (E), Oldenburg (W), Braunschweig (W) and Kiel (W) struck down the Nazi version of paragraph 175, while courts in the states Hamburg (W), Celle (W), Düsseldorf (W) and Hamm (W) ruled in favor of maintaining the law.

In the emerging Soviet Occupied Zone’s provinces, jurisprudence diverged. As early as November 1945, authorities in the state of Thuringia invalidated all laws written after 1935. The sweeping legal reform deemed all Nazi-created law to be invalid, and the penal code reverted to the law of the Weimar years. One month later in the state of Saxon, legal authorities made a more subjective decision. In December 1945, Saxon authorities repealed all laws in force after 1933 unless they were devoid of “Nazi ideas.”

In the state of Saxon-Anhalt, two different rulings emerged. First in July 1947, the Saxon-Anhalt regional appellate court invalidated both Nazi-versions of paragraph 175 and 175a on the grounds that it was “typically” National Socialist. With a different set of judges however, the regional court ruled conversely. In July 1948, the court of Saxon-Anhalt kept the 1935 version of paragraph 175 entirely intact. The Supreme Court of Berlin (*Kammergericht Berlin*) also ruled on the law in 1946 and 1946. While jurisprudence differed in the eastern provinces, no court explicitly considered the repeal of paragraph 175. From 1946 to 1949, there were 129 court cases dealing with the legality of paragraph 175. Until the establishment

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18 Ibid.
of the German Democratic Republic (GDR) in October 1949, the status of paragraph 175 remained unclear.19

Legality and treatment in the socialist state

After the establishment of the two German states and the reestablishment of the police and criminal justice system, the GDR could finally issue a uniform decision on the Nazi-era law. Eastern lawmakers feared that a repeal of paragraph 175 would antagonize the west, which had by 1949 had formed into the Federal Republic of Germany (FRG). Before division, the similarity between East and West German judicial systems offered hope for a unified postwar Germany. Serving a practical purpose, unifying the GDR’s position on paragraph 175 eliminated ambiguity caused by the many divergent rulings in the eastern provinces. Proposing one final interpretation, the GDR’s Ministry of Justice suggested the following modifications in October 1950:

§ 175 Unnatural intercourse [reverted to pre-1935 version of the law]
Unnatural intercourse, whether between males or of humans with animals, is to be punished by jail time; also a sentence that strips civil rights may be passed.
§ 175a Severe indecency [1935 Nazi-version maintained]
A punishment up to ten years in jail, and despite mitigating circumstances no fewer than three months in jail for:
1. A man who by force or by threat of harm to life and limb forces another man to engage in such an act as either the active or passive partner;
2. A man, who by abusing a dependency founded in a service-, work-, or employment-based relationship coerces another man into engaging in such an act as either the active or passive partner;
3. A man over twenty-one years old who entices a male under twenty-one years old to engage in such an act as either the active or passive partner;
4. A man who professionally offers himself for such an act as either the active or passive partner.
§ 175b Bestiality [became inapplicable upon return to Weimar-version of §175]

19 Ibid.
The changes were ratified at a legal conference with the representatives of the federal Ministry of Justice, provincial Ministers of Justice, public prosecutors, and justices of the State Supreme Court of the GDR. These conference members reformed paragraph 175 based on a consolidation of three earlier court cases: the decision made by the Provincial High Court of Saxon-Anhalt on September 20, 1948, the State Supreme Court of the GDR on March 21, 1950, and specifically the Supreme Court of Berlin which on February 21, 1950 ruled unequivocally that paragraph 175 represented “an instrument of power for the Nazi state to prepare for war.”

Paragraph 175 reverted to its Weimar-era version because the East German Supreme Court of Berlin deemed it as furthering “fascist objective[s].” While paragraph 175 was not enforced as aggressively compared to the democratic west, convictions were hard to obtain anyway under the Weimar-era version of the sodomy law which required evidence of intercourse by witness or confession. Whereas the socialist state returned to the identical language of the penetrative-sex version of paragraph 175, the GDR Ministry of Justice lawmakers kept the identical language of the National Socialist addition of paragraph 175a. This provision of the law prohibited “severe indecency” defined as male prostitution, pedophilia, and rape. The GDR reformers defended paragraph 175a based on the law’s defense of “sexual integrity” and the “healthy development of the youth.” Co-opting Nazi theories of homosexuality, GDR courts and police defended 175a based on the prevailing myth that there were only a small number of so-called “true homosexuals” who were “corrupters” or “seducers of youth.” Despite vacillation on the part of the communist party’s

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position on homosexuality, these early legal developments foreshadowed a hesitation to punish “homosexual acts” in the east.

Before the 1950 state-wide reform however, Soviet Occupied Zone law enforcement actively sought to regulate the perceived moral depravity caused by the defeat in the war. Homosexuality and the male sex trade were targets. Police commonly patrolled train stations, which were bustling spots for male prostitutes and hustlers. The Bahnhof (train station) was not only a site for transgressive sexuality, but also the place where one could until 1958 transgress the borders of nations and travel to democratic West Germany. In their surveillance of the city’s semipublic spaces, bathrooms or train stations, the police had significant flexibility in determining whom to arrest. Ambiguity over the validity of paragraph 175 increased the flexibility of these officers.

Whereas police intervention with female prostitution involved different health agencies in the fight against venereal disease, local police had significant autonomy to decide which gay men to prosecute or even what acts constituted criminal conduct. Absent hard evidence, johns could avoid arrest. On the contrary, call boys rarely left police encounters free of prosecution. One 1950 police report illustrates this trend. After meeting near Bahnhof Friedrichstrasse, an older man by the name of Werner W. invited fourteen-year-old Fred V. to a bar for food and drinks. When they finished however, the trains had stopped running. While searching for a hotel room for the night, they stopped at a bombed-out building to urinate. According to Fred, Werner began performing oral sex on him when the boy ran off to get the attention of two policemen.

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21 Evans, “Bahnhof Boys,” 621.
When the officers saw that Fred’s information was already a part of their criminal files, the officers strongly believed that Fred was a prostitute who was exchanging sex for food and shelter. But they were unsure how to punish the john. Werner, himself a police officer since 1946, repeatedly invoked his pregnant fiancée to defend his “normal orientation” (*Ich bin normal veranlagt*). Later, the police returned to the ruined building looking for physical proof to substantiate Fred’s story, but the rain had washed away any traces of semen.23

Without hard evidence, Werner’s guilt remained unproven and he was released. In contrast, Fred was sentenced to “no less than two years in a youth home, with the possibility of being sent away for an indefinite amount of time if he remained hostile to ‘reeducation.’” In the end, Fred was transferred to three different homes before finishing his sentence in August 1952. The socialist state often tried to reform young, indigent “Bahnhof boys” like Fred.24 For the most part though, men accused of violating paragraph 175 in East Germany were subpoenaed, but were rarely charged because of a lack of suitable proof.25

In their aim to restore morality to the east, GDR policymakers trod carefully around Nazi-influenced language and legislation. While they reverted to the pre-1935 version of the paragraph 175, the GDR used a Nazi-era youth penal policy in order to curb deviant sexual behavior. Under this law, male prostitutes could be charged with not only violating paragraph 175, but also the 1943 Young Offenders Act (*Reichsjugendgesetz*), which as demonstrated in Fred V.’s case, could provide unlimited sentences for rehabilitation. In arguing that “the

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redemptive role of hard work” could prevent future aberrant sexuality among the country’s youth, East German judges came to dangerous to invoking Nazi slogans.26

From these East German police records emerged an interesting paradox. For paragraph 175, ideology did not match practice. Despite the supposed need to protect the “sexual integrity…of the youth” from older “corruptors,” it was in fact younger violators of paragraph 175 that were often more subject to increased police scrutiny and threat of arrest. In East German courts however, some judges actually sympathized with the so-called “established homosexuals.” Young male prostitutes in the DDR “could expect different treatment from ‘established homosexuals.” The established homosexuals were sometimes sympathetically viewed as ‘afflicted’ by their sexual persuasion.”27 East German lawmakers kept paragraph 175a, the subsection of the law that prohibited prostitution and exploitative sex, in order to protect youth from “gay predation.” In the west, men rather than youths were often punished harshly for their supposed spreading of homosexuality. Thus, while the paragraph 175a was created to protect youth from corrupt adults, the East German police paradoxically targeted young men for harsher discipline.

Path toward decriminalization in the GDR

The GDR decriminalized consensual sex between adult males in 1968, one year before the reform took place in the western Federal Republic of Germany (FRG). The change was the result of major legal and political overhaul, rather than liberalization or gay friendliness. From 1952 to 1968, there were three attempts to ratify an entirely new Penal Code in the GDR. All three proposals included modifications to paragraph 175, but only the 1967 draft

26 Ibid.
27 Ibid.
proposed entirely eliminating the statute. Political problems stalled the adoption of a new code until 1968.

In the early 1950’s, the east and west governments consolidated along the now familiar Cold War lines. Modeling itself after the Soviet Union, the GDR became increasingly isolated from the west. Establishing new legal norms was an essential part of the campaign to replace bourgeois life with socialism.

In 1952, the GDR’s chief executive governing body the Council of Ministers appointed Hilde Benjamin, then Vice-President of the State Supreme Court of the GDR, to lead a commission responsible for writing new criminal procedure, court procedure and penal code. The committee grappled with the influence of two camps in the socialist party. First, they were influenced by the legacy of the KPD and SPD, the 1920’s German socialist parties, which supported a campaign to repeal laws against consensual adult male sexual acts before the rise of the Nazism. Second, the more homophobic and conservative voices in the SED tried to influence Benjamin. These social conservatives did not support the repeal of paragraph 175, and were undisturbed by the echoes of National Socialist rhetoric in their calls to protect so-called “healthy sexual mores.”

In a bold move, Benjamin’s committee of lawmakers recommended removing paragraph 175 and keeping paragraph 175a, essentially decriminalizing mere homosexuality. The committee considered testimony from legal and sociological experts. In a note to the commission, the German Society for Sexology explained the distinction between paragraph 175 and 175a:

> There is a kind of homosexuality against which punishment is ineffective since it contradicts a basic human drive. The state should only be concerned with using the

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law to protect third parties. Thus, requisite offenses such as the exploitation of dependency-relationships, force, the exploitation of the sexual inexperience of innocent minors, and [male] prostitution should always be punishable. The existing Paragraph 175 of the criminal code contains an offense that is legally irrelevant and should be repealed.29

In its 1952 draft, the committee concluded that only rape, molestation, and prostitution were “harmful to society,” and that consensual adult male intercourse posed no particular danger.30

The East German Parliament (Volkskammer) passed the final proposals for new court regulation and criminal procedure, but Benjamin’s enlightened criminal code was not adopted. The penal code draft of 1952 was never even discussed or debated in the Volkskammer. The death of Stalin and the Rebellion of June 17, 1953 were major political crises that caused the SED to temporarily abandon its goal of progressive legal reform. In the instability that followed, the GDR returned to more conservative and morally judgmental arguments against homosexuality. Despite Benjamin’s courageous proposal, the GDR returned to conservative theories about homosexuality.

The long-time absence of a coherent position on homosexuality indicated the GDR’s wish to avoid the topic of homosexuality all together. In some speeches, SED officials denied the existence of homosexuality.31 As Dagmar Herzog writes, homosexuality ran counter to the official communist scripts in two important ways. First, homosexuality was problematic because party leaders had alleged that it was the result of bourgeois excess, and thus it should not have existed in the socialist GDR. Second, it was problematic because the basic tenets of socialism alleged that people are marginalized only by class differences, and thus a


31 Ibid.
communist state would have complete social cohesion.\textsuperscript{32} Clearly, the persistence of gay individuals in the postwar east challenged the ideological foundation of the entire East German state.

Although official policy vacillated, the 1950’s were a conservative time in the GDR. After 1952, a campaign that both encouraged heterosexual relationships and punished homosexual transgressions was proposed in order to deal with the “remnants” of homosexuality from Germany’s capitalist days. Official party logic alleged that only with the full nationalization of industry and establishment of socialism would sexual deviation truly disappear. More than ever in times of political instability, moral discourse aided the GDR in its establishment of a national identity that unified sexual normalcy and morality with socialism.

In both Germanies, sexual conservatism provided a medium for Germans to express their war guilt. However, in the GDR, legal reform sought to link conservative moral righteousness with class struggle. Thus, sacrificing individual freedoms, including sexual freedoms, was seen as patriotic and productive for the socialist state. While the laws policing private sexuality are a good example, the delegates at the Fifth Party Congress also adopted the “Ten Commandments of Socialist Morality” in order to overcome what they claimed to be bourgeois “immorality and non-culture.”\textsuperscript{33}

Despite earlier objections to removing paragraph 175 from the penal code, the SED ordered police and judges to end the practice of arresting and punishing consenting gay adult male relationships in December 1957. The Criminal Law Amendment Act of 1957


\textsuperscript{33} Grau, “Return of the Past,”23.
based the reform on the grounds that private consensual sexual relationships were not a danger to the socialist state.\textsuperscript{34} Despite this early moratorium on arrests, paragraph 175 remained a part of the penal code.

In 1957, in this more conservative environment, Benjamin and her committee drafted another penal code. Unlike the draft of 1952, the Ministry of Justice consulted less progressive voices. In a seemingly democratic town hall forum, the laborers at a Leipzig power plant echoed the political conditions of the time when they demanded “for the majority of the working people, homosexuality was morally deplorable….”\textsuperscript{35} According to the Deputy Military Prosecutor Schille,

\begin{quote}
The decriminalization of homosexuality must be firmly resisted. Cases of homosexual acts are quite random in the army today. However, where they do arise, they have to be regarded as dangerous, above all, since they have a tendency of spread.\textsuperscript{36}
\end{quote}

With this regressive argument about the contagiousness of homosexuality—some forty years after German sex researcher Magnus Hirschfeld offered empirically-sound studies showing that sexual orientation was an immutable characteristic—the commission voted to maintain paragraph 175. Benjamin completed the penal code draft of 1958, but a poor economic situation and rapidly declining population took center stage. Once again, political instability delayed legal reform.

After the collapse of the 1958, it took another five years before the criminal code would be reevaluated. In light of the rapidly evolving conditions caused by the erection of the Berlin Wall in 1961, the SED leadership sought to codify new social norms in the GDR with another attempt at revising the penal code. Again led by Hilde Benjamin, a subcommittee of

\textsuperscript{34} Gesetzblatt der DDR, Teil I, Nr. 78 vom 11.12.1957
\textsuperscript{35} Grau, “Return of the Past,” 17.
\textsuperscript{36} Ibid.
the Ministry of Justice worked for three years to draft a new code. In 1957, she submitted a version without paragraph 175 altogether, decriminalizing consensual adult sex between men. More surprisingly, paragraph 175a was also repealed. Therefore, this last draft would not single out gay men in the punishment of rape, prostitution, and exploitative sex. Instead, the relevant statutes applied to both homosexuals and heterosexuals. Homophobia remained a part of the law in newly added paragraph 151 which included a higher age of consent for homosexual partners. For both men and women, the law criminalized same sex activity between someone over eighteen and someone under eighteen. In contrast to the lengthy discussions in previous drafts, the Volkskammer passed the penal code without controversy in 1968.

Thus, the socialist government’s repeal of paragraph 175 marked the end of the de jure criminalization of homosexuality in East Germany. The history of legal reform and treatment of homosexuals in the GDR are in stark contrast to treatment in the western FRG, where the harassment and imprisonment of homosexuals remained a prominent part of gay life until 1969. While it seems as if the GDR was merely one year ahead of the FRG, the 1957 arrest moratorium had a profound effect on the lives of homosexual men.

In the west, the repeal of paragraph 175 was accompanied by overall sexual revolution, but the experience of gays and lesbians was not profoundly different after 1968 in the east. More than paragraph 175 or its penal code, the high level of citizen surveillance in the communist east affected the postwar experiences of gays and lesbians. While paragraph 175 was not enforced since 1957 and later repealed, the communist state restricted nearly all semblances of gay life. Because the state absorbed privately owned businesses, the gay

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37 Herzog, *Sex after Fascism*, 198.
community that had emerged from shadowy West German bars could not exist in the DDR.\footnote{Kurt Starke, \textit{Schwuler Osten: Homosexuelle Männer in der DDR}, (Berlin: Christopher Links Verlag, 1994): 18.} Tight restrictions on speech and organizing meant that there were no homosexual political organizations, no gay newspapers, and no general infrastructure for gay culture.\footnote{Andreas Sternweiler, \textit{Selbstbewusstsein und Beharrlichkeit: 200 Jahre Geschichte}, (Berlin: Schwules Museum, 2004), 37.} Paradoxically, a gay community flourished in West Germany, where police harassment and prosecution remained a salient feature of gay life.

The pushes to eliminate Nazi-derived parts of paragraph 175 should not be interpreted as a tendency for liberalization or gay friendliness. Reforming homophobic law was not an important part of SED policy. Although enforcement was lax compared to the west, hundreds of cases affirmed the overall appropriateness of a law outlawing homosexual acts. Homosexuality did not merely remain socially taboo, but SED officials resolved to continue their moral condemnation of it. As part of the GDR’s moral agenda, the disturbing denigration of homosexuality continued well into the 1970’s. Some gay youth had to even endure coercive psychotherapy.

At the same time, East German sex advice manuals often invoked sexual theories reminiscent of the Third Reich in order to scare youth from non-normative sexuality. In 1955 Rudolf Neubert, the author of a popular sex advice book \textit{The Question of the Sexes}, wrote that the small number of “actual” homosexuals were to be pitied because they suffered from “a deformation of the inner glands.” According to Neubert, homosexuality could be treated with “hormone preparations, surgery, and…psychotherapy.”\footnote{Herzog, \textit{Sex after Fascism}, 197.} But like the Nazis before him, Neubert insisted that there were few “true homosexuals,” arguing that the majority of homosexuals had been seduced in youth. This characterization of “true homosexuals” as
corrupters of otherwise heterosexual youth was a familiar element in Himmler’s speeches about homosexuality, and remained a part of attitudes about homosexuality in the postwar west. Neubert went as far as to argue that homosexuality occurred chiefly among “asocial elements from other social strata,” again invoking the language of the National Socialists.

Despite the state’s strict control on gay expression, a group of gay and lesbian activists challenged the communist state’s prohibition on speech and organization in the 1970’s. A West German film inspired some of these gay dissenters. The film *It Is Not the Homosexual Who Is Perverse, But the Society in Which He Lives* followed a gay man’s sexual conquests, disenfranchisement, and eventual incitement to political action. Some East German gays and lesbians saw the film and quite literally answered its message to protest in the streets. In 1973, a group of gay and lesbian activists arrived at the closing ceremonies of the World Festival (Weltfestspiele) with a banner that read “We homosexuals of Berlin welcome the participants of the tenth World Festival Games and socialism in the GDR.” However, their efforts were quickly thwarted by state security forces.41

### Postwar legal developments in the West

The gay community faced quite a different world in West Germany. In the Federal Republic of Germany, the crackdowns began with surveillance and arrests. Some of the surviving gay victims of the Holocaust found themselves subjected to a similar justice system in post-war Germany. Despite having survived concentration camps, some of these men were charged with violating the same law and were reincarcerated. Police in the postwar west also restarted the tactic of creating “pink lists” of suspected homosexuals and using blackmail to

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41 Starke, 20.
garner convictions, a common strategy in the Third Reich.\textsuperscript{42} Despite doubts of paragraph 175’s constitutionality under the new West German constitution, known as the Basic Law (\textit{Grundgesetz}), the sodomy law remained in its 1935 form with reduced maximum sentences in the postwar West German penal code.\textsuperscript{43}

While convictions were easier to obtain in the west, sentencing still varied based on judicial temperament and the specific circumstances of the defendant. In Hamburg’s courts, where paragraph 175 was kept in its harsher form, Associate Justice Wartemann often doled out lighter sentences to the men found guilty of violating paragraph 175. In one 1951 case, the judge sentenced the accused to the lightest punishment possible: a three Deutschmark fine and one day in jail.\textsuperscript{44} In the popular West German newsmagazine \textit{Der Spiegel}, Judge Wartemann openly defended the light sentence because the same-sex sexual acts happened in the privacy of the defendant’s home. Using euphemisms for sex, the judge wrote that “the events did not receive much open publicity.”\textsuperscript{45} But beyond privacy, the court even challenged the purpose of jailing paragraph 175 violators. The Association of Hamburg Lawyers agreed with the light sentence. The association was so confident about the purposeless nature of the law that they predicted that the Federal Ministry of Justice would repeal paragraph 175 “in the coming weeks.”

Despite their guarantee, the Nazi-era antisodomy law only received its first serious challenge seven years later in the west. In 1957, two men charged with violating paragraph 175 Oskar K. and Günter R., contended that they were convicted by a National Socialist law, therefore requiring extra scrutiny from jurists. Appealing to the highest court in West

\textsuperscript{42} Ibid., 127
\textsuperscript{43} Ibid., 128
\textsuperscript{44} “Paragraph 175: Gebot des Gesetzes,” \textit{Der Spiegel}, December 26, 1951, 7-8.
\textsuperscript{45} Ibid.
Germany, the Federal Constitutional Court (*Bundesverfassungsgericht*), the men argued that §175 represented Nazi racial ideology and a violation of two West German constitutional principles. First, the men argued that it violated Article 2 Section 1, which safeguarded one’s right “to the free development of his personality.” Second, because the law only punished homosexual acts between men and exempted women, the men posited that paragraph 175 violated Article 3 Section 2. This section of the constitution designated that “men and women are equal.”46

The justices on the Federal Constitutional Court used a selective history to dismiss the contention that paragraph 175 was a National Socialist law and thus unconstitutional, focusing almost exclusively on the existence of sodomy laws in Germany since 1857. With historical precedence on their side, the justices focused on the ancient laws punishing sodomy. They traced them back to the Old Testament, through the early sixteenth century, early Prussia, and up to the present. When having to review the law’s contentious reform during the Third Reich, the judges explained that the 1935 reform was merely based on the practical challenges for police and prosecutors who wanted to overcome the great “evidentiary difficulties” (*Beweisschwierigkeiten*) in convicting same-sex attracted men.47 Excluded from their analysis was the connection between Nazi racial policies that defined homosexuals as threats to the Aryan race and the *Volksgemeinschaft*. Additionally, the jurists cited the widespread silence on the part of the Basic Law’s framers to prove that §175 in fact did not violate the guarantee of freedom of personality. Likewise, the court interpreted the widespread government

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reticence on the constitutionality of §175 from the Bundestag, the Bundesrat, and the Bundesregierung as de facto approval.48

Despite their terse dismissal of paragraph 175’s connection to murderous Nazi ideology, the justices spent a significant amount of time explaining the innate differences between male and female homosexuality—a difference that ostensibly justified excluding lesbians from punishment. This was important to defend because Article 3 Section 2 had prohibited gender-based inequality. According to Oskar and Günter, paragraph 175 had to either punish “indecency” between gay men and lesbians equally or not at all. Aided by the opinions of eight “experts,” the justices dismissed the plaintiffs’ argument that the antisodomy law had violated the Basic Law’s guarantee of equality between men and women. The testimony illustrates postwar West German attitudes toward gender and sexuality.

This was not the first time paternalistic laws came in conflict with the new constitutional guarantee of gender equality. As Robert Moeller explains, the constitutional prescription for equality of the sexes had plagued Konrad Adenauer’s conservative government long before the 1957 court case. In applying the constitutional principle of equality, the Federal Republic of Germany (FRG) used normative understandings of gender to justify the continued legal inferiority of women. While there was general consensus in the government to overturn provisions of a blatantly sexist 1900 law that denied women the right to enter into contracts or own property, conservative legislators had difficulty determining who should have the final word in cases of “irreconcilable differences” between spouses. Adenauer posited that “just as the mother…subordinate[s] herself to the father, so should the

48 Ibid.
Therefore, it should be unsurprising to see paternalistic analyses of gender and sexuality in the 1957 case, some of which mirror National Socialist propaganda about motherhood and deviant sexuality.

In defending the antisodomy law, the court solicited various expert testimonies, including criminologists, sociologists, and psychologists. Together, these voices of “science” cast homosexuals as only depraved and perverse. One of their expert witnesses, Helmut Schelsky, had in other publications described sexuality as a socially constructed phenomenon. But in his testimony, he used an epistemology of absolute sexual morality to typify homosexuality as inherently immoral. He characterized homosexuality not as a benign form of variation from socially constructed sexual norms, but rather as a symbol of a society in chaos and disequilibrium. Nazi propagandists used similar language to describe the “moral decadence” of the Weimar era.

In order to lessen the burden of the equality article, the court then argued that great physiological and sexual differences between men and women could allow for variation in law. Equality did not require what the justices characterized as “senseless leveling” (Gleichmacherei). Equal application of law would only be necessary when men and women were equally subject to similar circumstances. Because purported innate biological differences subject male sexuality to different circumstances, separate treatment was deemed constitutional. Scientists’ testimonies were based on gender-normative, stereotypical understandings of gay men and lesbians. The homophobic attitude of the judges is instantly

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detectable by their writing that “the male homosexual tends to seduce adolescents. The record shows that the majority of homosexuals have succumbed to their inclination.”51 Male homosexuals were characterized as dangerous, sex-obsessed, seductive pedophiles, while lesbians were characterized as harmless. The dualism justified unequal application of the law.

Sexologist Hans Giese contributed to the argument that from birth, male and female sexuality was opposite in nature. Although Giese had once written that homosexuality posed no danger to society and argued in support of homosexual rights, his testimony was used to explain why male homoerotic sexuality warranted a different set of laws. His stereotypical analysis posited that men were driven by an “excess of sexual drives,” evident in their ability to get aroused and to reach orgasm quickly. On the opposite end, women were driven by a “procreative instinct” that designed their sexuality for motherhood by forming more long-term monogamous relationships and relationships that were not primarily sexual.52 Therefore, women were considered passive sexual beings not capable of the same scale of social destruction as gay men. The court wrote,

On the subject of societal endangerment, male homosexuality deserves greater attention than lesbian love. Male homosexuality is inherently promiscuous. It endangers public health and public cleanliness, and it undermines the family. [While] male homosexuality appears freely in public, lesbian love is practiced secretly; it avoids the public and happens much less frequently. Girls will be preserved not only by their strong shyness…, but also by their earlier heterosexual activity with older partners…53

Therefore, according to the court’s reasoning, lesbianism did not represent “societal endangerment” (soziale Gefährdung), while the excess sexual drives of men increased the likelihood of their sexual promiscuity and aggression, an aggression that from the

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51 BVerfGE 6, 389 - Urteil, 408-409
52 Moeller, West Germany Under Construction: Politics, Society, and Culture in the Adenauer Era, 412
53 BVerfGE 6, 389 - Urteil, 408
court’s characterization would seemingly cause the downfall of society. Paradoxically, these same “dangerous” male sexual drives were the ones the court cited to explain how heterosexual men “anchored” normative sexuality for women.

In trying to prove that paragraph 175 was not Nazi-influenced and thus unconstitutional, the court ironically used language that echoed the words of Nazi propagandists. The testimony deemed homosexuality as a “characteristic of periods of social chaos and instability” just as National Socialist propaganda referred to conflated freedoms of the Weimar-era as unstable. Nazis had also hysterically criticized the Weimar’s “moral decadence.”

In the opinion of the court, the justices wrote that the majority of homosexual men follow their tendencies to seduce and convert adolescent boys. Nazis also proliferated the nasty stereotype of the homosexual man as the “seducer” and “corrupter” of youth to justify their mass murder. According to Himmler, who led the Reich Central Office for the Combating of Homosexuality and Abortion, homosexuals were pederasts who seduced and corrupted otherwise normal youth, turning them into depraved homosexuals and thus spreading the illness of homosexuality.

By defending §175 on the basis of innate sexual differences between men and women, the court’s language again echoed National Socialist propaganda about lesbians. Lesbian sexuality was not explicitly prohibited in the Third Reich because in a system of such pronounced gender hierarchy, it was believed that all women were passive sexual partners. Because of their submissiveness, the Nazis contended that women could be “cured” of their

55 Ibid.
lesbianism by male penetration and impregnation at any moment. In the 1957 constitutional challenge, the German Constitutional Court appropriated the Nazi ideology that deemed female sexual self-determination unthinkable.\textsuperscript{56}

Absent from the court’s litany of scientific testimonies is any mention of Magnus Hirschfeld, the groundbreaking German sexologist who suggested that homosexuality was like a third sex, an immutable trait conferred at birth. Under his theory, policing same-sex love was pointless because homosexuality could not be “spread” from person to person. Unlike the “expert testimony” in the case, his research left room for positive perceptions of homoerotic love. Hirschfeld also led the Weimar-era campaign to repeal Paragraph 175. After Hitler came to power, a group of Nazi students raided and destroyed Hirschfeld’s Institute for Sexual Research in Berlin.\textsuperscript{57} In the court case, the silence of the judges recreates Nazi violence, again destroying the work of a Jewish and gay German.

Because homosexuality remained illegal after the war, the effect of paragraph 175 on the lives of gay men often went undocumented. But in a May 1969 interview, only a month before the decriminalization of homosexuality in the FRG, a closeted gay man by the moniker “G.” candidly described his confrontations with prejudice and the law. G was 31-years-old at the time, and he worked as clerk for a large retailer. He shared an apartment with his partner in a major city in the Rhineland. Blackmail remained a constant fear in the time of the Nazi version of paragraph 175. As G. explained, “there is blackmail again and again…the elimination of paragraph 175 would be a start…” While pointing out a scar on his head, G. described being attacked. After meeting a man at a bar and walking to a dark corner,

\textsuperscript{57} Bergen, 56
presumably to be affectionate, G. explained that “he struck me in the head and robbed me of my cash on hand.”

Paragraph 175’s prohibition of affection between men not only allowed police to raid suspected homosexual meeting points and bars, but the law also left gay men vulnerable to extortion. If they did not pay up, men like G. would be outed. Additionally, G. could not report the incident to the police for fear of creating a record. As he explained,

…If I had not been afraid to go to the police and notify them, and eventually be registered, then yes, I could have gone to the police. But I could not go to like that and let him carry on because I'm just afraid that, if I go to the police, an index card [on me] will be set up somewhere. If I attract attention a second time—either through ID check in a bar or a restaurant, or if someone accused me of being so [a homosexual]—then the likely validity of a one-sided accusation being true is already much higher, because I'm pre-registered, because I'm on record somewhere ... well ... If not for the paragraph, I would have pressed charges.

Luckily for G., paragraph 175 was amended to decriminalize consensual sex between men only a month after his interview.

Road to Repeal in the Federal Republic of Germany

The decriminalization of paragraph 175 occurred in the context of a nationwide attitude shift. The rise of the student movement and the New Left in the 1960’s and 1970’s in West Germany led the move to the left. In the western FRG, postwar reconstruction was led by Konrad Adenauer and his conservative, Christian Democratic Union/Christian Social Union coalition government. In his role as chancellor from 1949 to 1963, Adenauer established parliamentary government, a free-market economic system, and aligned the FRG with the West’s anti-Communist Cold War politics. In the country’s infancy, West Germany

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59 Ibid.
saw an unprecedented economic boom known in German as the *Wirtschaftswunder* or “economic miracle.” Despite the relative stability of the west, anti-democratic government measures and the Nazi past of many top government officials stoked fears of a return of fascism.

Triggered by the unlawful arrest of journalists and establishment of so-called emergency laws, German students staged a number of protests, some of them violent, in opposition to these and other perceived problems. While it is difficult to characterize in broad brush a movement without a totally central figure, the student protesters generally worked for leftist causes of the time: for gay rights, for women’s liberation, against the Vietnam war, against the right wing German press, against poor treatment of students and for coming to terms with their parents’ and the country’s National Socialist past. Similar political upheaval in the United States and Western Europe, especially in opposition to the Vietnam War, influenced the West German protestors. On June 22, 1966, West German students at the Freie Universität Berlin staged their first sit-in in opposition to anti-democratic measures in the university administration and in the government of the FRG.60

In the early 1960’s, the West German Department of Justice led the first attempt at reforming the penal code, including paragraph 175. In 1962, the CDU-controlled Bundestag proposed a very conservative draft.61 In the draft, lawmakers planned to reduce the maximum sentence for paragraph 175 to three years, and they planned to restrict the law so that it only prohibited “intercourse-like” (*beischlafähnlich*) sex—essentially a return to the pre-1935

61 Herzog, *Sex after Fascism*, 222.
version of paragraph 175. As outlined above, the East German government reverted to the pre-1935 version of paragraph 175 immediately after the war, and had stopped prosecuting the crime after 1957.

The conservative lawmakers also proposed a reorganization of the laws that regulated adultery, contraception, and some 17 other offenses with the word “indecency” (Unzucht) in their title. These laws would have been grouped under the title “Crimes against the moral order” (Straftaten gegen die Sittenordnung). Adhering to the legal philosophy that the law builds moral character, Adenauer and his conservative lawmakers argued that decriminalizing homosexuality would be the first misstep on an immoral slippery slope. In the 1962 Bundestag debate, he explained that “after the decriminalization, their [homosexuals’] next task would be social recognition of homosexual acts.”

However, backlash from the left caused the conservative lawmakers to abandon the 1962 draft. In the context of rapidly changing perspectives on sexuality, sixteen progressive legal scholars began work on the so-called “Alternative Draft” (Alternativenentwurf) in 1966. The authors of the draft attacked the legal philosophy at the core of sexual conservatism. In response to the 1962 draft, they wrote that “criminal law cannot on its own volition protect sexuality and general morality…” The lawmakers also rejected general societal disapproval of homosexuality. Finished in 1968, the progressive draft served as the basis for renewed discussions on the reform of the West German criminal code.

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63 Ibid.
64 Herzog, Sex after Fascism, 222.
65 Alternativenentwurf eines StGB, Besonderer Teil, Sexualdelikte, 9.
66 Ibid.
Before the end of the FRG’s grand coalition under Chancellor Kurt Georg Kiesinger in June 1969, the West German government passed a new version of the penal code that repealed laws emblematic of the postwar sexual conservatism. Kiesinger’s coalition included the two largest political parties in the FRG, the center-left Social Democrats (SPD) and the conservative Christian Democrats (CDU/CSU). Paragraph 175’s repeal occurred in the context of the rise of the student movement and a general liberalization of attitudes in West Germany. The shift in public opinion affected internal party politics of the CDU/CSU too. In debates over paragraph 175 in the Bundestag, even the conservative Christian Democrats began to admit to what Herzog called the “new circumstances.” The party acknowledged that it must “modernize.” In an example of this shift, CDU/CSU representative Max Güde argued in the Bundestag that the “inappropriateness of criminally punishing [homosexuality] has won out.” Reform emerged through a compromise. Despite internal party liberalization, the CDU/CSU was adamant about maintaining a higher age of consent for gays based on the “dangers for the sexual development” of young people. Knowing the enormity of the reform, the liberal SPD accepted the compromise. Among the anachronistic transgressions the Bundestag decriminalized were the laws banning adultery, “seduction through false promises,” and homosexuality.68

After more than three decades of Nazi law, paragraph 175 saw reform in West Germany. The new version read:

§ 175 Indecency between men (1969)
(1) There shall be imprisonment of up to five years for:
1. A man over eighteen years old who engages as the active or passive partner in indecency with another man under the age of twenty-one;

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68 Herzog, Sex after Fascism, 223.
2. A man, who by abusing a dependency founded in a service-, work-, or employment-based relationship, coerces another man into engaging in such an act as either the active or passive partner;
3. A man who professionally offers himself for such an act as either the active or passive partner.

(2) In the case of paragraph 1 Number 2 the attempt is punishable.
(3) With an involved party who at the time of the act had not yet reached the age of twenty-one years, the Court can refrain from punishment.

§ 175b [repealed] 69

The new version removed 175b, the section of the law that prohibited bestiality. Moreover, the 1969 reform only sought to punish the “qualified cases” from paragraph 175a, or the laws against “severe indecency” (schwere Unzucht). These qualified cases included violent rape, adult sexual relations with men under twenty-one years old, male prostitution and exploitative gay sexual relationships. Thus, the new law decriminalized “mere homosexuality.” The only prejudice that remained was the older age of consent required for gay sexual relationships. In contrast to other European countries, the minimum age for consensual sex between men at that time was 16 in Italy, 14 in Luxembourg, and 15 in Turkey. 70

Conclusion

Germans inadequately confronted the social and legal stigma of homosexuality after the war. Despite the many political and ideological differences in the democratic west and communist east, both sides of postwar Germany invoked a sexual conservatism reminiscent of Nazi theories of sexuality. In contrast to Hirschfeld’s research that homosexuality was an innate and harmless characteristic, Chief of the SS Heinrich Himmler argued that all men had homosexual “potential.” By framing male same-sex attraction as an illness caused by a few “true homosexuals,” Himmler could justify the number of homosexual incidents in the SS.

Based on his understanding of non-normative sexuality, defendants charged with paragraph 175 often claimed that they were not “true homosexuals,” and rather that their sexual transgression represented only a “momentary lapse.” As Herzog notes, defendants used the momentary lapse argument during both the postwar period and the Third Reich. In Nazi Germany, defendants who openly admitted their sexuality guaranteed their “path into the concentration camp.”

In the 1950’s, this sexual conservatism took different forms based on each German government’s goals and ideology. While both the east and west launched campaigns against homosexuality, premarital sex, abortion, and general moral licentiousness, their reasons and language differed. In the West, sexual conservatism was framed in terms of Christian morality. Christian figureheads quite literally appropriated Nazi rhetoric of race when they suggested that abortions “damaged the life-force of the German Volk.” Likewise, Christian supporters of paragraph 175 defended the law for its function in protecting “the German Volk in its moral and healthful strength.”

Many attribute laws like paragraph 175 and increased police regulation of sexuality as symptomatic of conservative, McCarthy-era Cold War politics, but such an explanation is simplistic and inadequate. Although there were similar gay and communist witch hunts in the United States, it is important to recognize the uniqueness and significance of sexual conservatism in Germany. No other country had seen the extremes of fascist sexual ideology.

Gay men were repressed in both postwar West and East Germany. Despite the East German SED’s liberalization of “mere homosexuality,” or consensual sex between gay adult

71 Herzog, Sex after Fascism, 90.
72 Ibid., 131.
73 Ibid., 93.
males, it remained illegal to organize gay liberation organizations and at times the socialist government officially even denied the existence of homosexuality in its self-proclaimed socialist utopia. Similarly, Germany was unique in that it experienced a serious campaign to repeal their antisodomy laws in the context of a relatively progressive Weimar-era. Indeed, the 1929 campaign to repeal paragraph 175 was a very early and serious attempt to legalize homosexuality in Germany.

Progressive legal treatment of homosexuality in other Western European countries also weakens the simplification that German legal homophobia echoed Cold War politics. Repression in Germany was not entirely the norm for all western Cold War allies: France, Denmark, Italy, Sweden, Switzerland, and the Netherlands had abolished antisodomy laws by the late 1950’s. Additionally, Germany had signed the 1950 European Convention on Human Rights, which guaranteed “fundamental rights to freedom and privacy,” rights ostensibly in conflict with the German state’s regulation of bedroom activities.74

The refusal of post-war lawmakers to eliminate paragraph 175, a law that caused the murder of thousands of gay men, indicates Germany’s failure to learn from its recent, devastating history. In the east, gay victims of National Socialism faced strict sanction on speech and organization. In the west, gay victims of National Socialism were not only refused postwar reparations, but were forced to live in fear of police harassment and incarceration. Almost all of the gay survivors of the Holocaust lived in West Germany, East Germany, or Austria, countries where same-sex sexual activities remained prohibited. Because of persisting social stigma and legal prohibition in the post-war era, the personal memories of

gay men existed as a sort of estranged contraband. Post-war attitudes and laws that punished homosexuality effectively erased the memory of gay victimization.\(^{75}\)

Quoted in a local newspaper in 1960, the mayor of Dachau Hans Zauner tersely summarized the place wartime gay oppression occupied in the West German collective memory when he said, “You must remember that many criminals and homosexuals were in Dachau. Do you want a memorial for such people?”\(^{76}\) Unfortunately prescient of Zauner, there would be no official memorial to the homosexual victims of the Holocaust until 1985 when gays received their first public commemoration by the West German President Richard von Weizsäcker.\(^{77}\)

The postwar period lacked a meaningful confrontation and explication of suffering in the Holocaust and German guilt. The persistence of legal prohibitions made it dangerous for gay men to give testimony or write about their experiences. Furthermore, many gay victims wished to forget about their traumatic experiences all together. As Erik Jensen highlights, the titles of books that emerged from the period indicate a feeling of coming out of the darkness. As he wrote,

Gay activists sought to reclaim the erased histories and historical invisibility…Beginning in the 1970’s, gays and lesbians in West Germany established archives, research projects and oral history collections. The titles of many of the resulting books, such as *Becoming Visible* and *Hidden History*, suggest that the sense of both liberation and permanence that came from having a past.\(^{78}\)

The resuscitation of a narrative of gay victimization allowed for the creation of collective identity and subsequent gay political movement.

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\(^{76}\) Jensen, 321.

\(^{77}\) Ibid.

\(^{78}\) Ibid.
Public memory of the Holocaust was quickly distorted to fit the respective political purposes of the divided state. In the west, where communism was perceived as an existential threat to the entire Federal Republic, postwar narratives minimized the incarceration and oppression of leftist political prisoners. There was a tendency in the postwar West to exclude Sinti, political prisoners, and homosexuals from the collective memory. These omissions tended to collapse National Socialist atrocities as only the mass extermination of Jews. The role of history and collective guilt had serious consequences. In 1956, the West German Bundestag passed a law paying reparations to victims of the Holocaust. Entitled the Wiedergutmachung Law or literally “the make well again,” it made no mention however, of the persecution of homosexuals, disqualifying them from receiving compensation.79

The persistence of paragraph 175 had more than symbolic and Moreover, the sheer volume of convictions in the post-war west illustrates that Nazi law and police practices continued after 1945. In one twelve-year span in the postwar period, the number of paragraph 175 convictions almost matches the number in the twelve years of the National Socialist regime. As Jürgen Baumann reports, between 1953 and 1965, German police recorded 98,700 175-ers, of whom 38,000 were found guilty.80 This figure comes close to the number of paragraph 175 convictions during the Third Reich, when about 100,000 men were charged with violating 175, of whom about half were convicted.81 Paragraph 175 convictions never dropped back down to their Weimar-era level, clearly illustrating the effect of Nazi justice conferred through the 1935-version of paragraph 175.

79 Ibid.
80 Jürgen Baumann, Paragraph 175: Über die Möglichkeit einfache, die nichtjugendgefährdende und nicht öffentliche Homosexualität unter Erwachsenen straffrei zu lassen (Berlin: , 1968), 63-66.
Like the role of history in establishing gay identity, history and myth as part of memory in the public and political discourse played an essential role in shaping German self-identity. Collective memories often shape the political aspirations of a country, and have meaningful consequences. For example, before the rise of Hitler, the National Socialists and other fascist political groups spread the “stab in the back” myth, which argued that conspiratorial Bolshevists and Jews had plotted for the German loss in World War I. Such a myth strengthened the political rhetoric of Nazi campaigns.

In the eastern German Democratic Republic, the state rigidly controlled the memory of National Socialism. State identity and legitimacy was predicated on a narrative of antifascist resistance to the Nazis as the political basis for the communist state. The state ideology
exonerated the GDR from war guilt, since state officials argued that the East was where the fight against fascism continued in the opposition to capitalism.

The distortions of the GDR are most visible in some former concentration camps, where representations of historical oppression take on new ironies considering that the communists used existing facilities to imprison political prisoners and work them to death. For example, a former Nazi concentration camp Saxonhausen had been one of these “Speziallager” in the Soviet-occupied zone. Historians estimate that fifteen to thirty thousand died at the hand of this communist camp. In 1961, the GDR opened the memorial to Saxonhausen and erected a large tower to commemorate the victims of Nazism and to perpetuate the antifascist myth.

Today, history and memory of gay persecution also plays an important role in political campaigns. For the contemporary gay political movement, publicizing the long neglected experience of gay men in Holocaust history has been essential in shaping a common identity and in finding a voice for its contemporary political aspirations. A look at the most recent German memorial to the gay victims of Nazism illustrates how malleable history can become when exposed to political aspirations.

In Berlin, the Memorial to the Homosexuals Persecuted by National Socialism (Denkmal für die im Nationalsozialismus verfolgten Homosexuellen) was erected in May 2008. The memorial is a grey concrete structure or “stela” close in location and in style to the older Denkmal für die ermordeten Juden Europas. In a window in the structure, viewers can watch a video loop of two attractive men tenderly kissing in the woods. One must explore whether this memorial is an articulation of contemporary political ambition or history.

Essential to understanding the role and impact of the memorial are its aesthetic qualities and implications. First, the video is shot in black and white. The effect of the absence of color is a familiar technique to invoke feelings of veracity or documentary. French filmmaker Alain Resnais employed this technique in his documentary Night and Fog to differentiate between contemporary (color) and historical (monochromatic).83 This revives the question of representing history in the memorial. Its designers create a historical effect that contradicts realities of gay suffering in the Holocaust and postwar period. For example, the men kiss, ostensibly unconcerned with the ramifications of police detection. However, gay men in both the postwar period and Third Reich faced imprisonment for behavior deemed

83 Night and Fog. (Nuit et Brouillard), DVD, directed by Alain Resnais. (France: Criterion Collection, 1955).
“lewd” or “against nature.” The creator of the memorial wishes to empower the gay community by subverting social and sexual norms with the film. Although, juxtaposed to the image of empowerment are the aesthetics of documentary footage. This creates a problematic conflation of politics and history.

Second, in the inclusion of history, the video and memorial awkwardly represents a period of trauma with the imagery of love. The sexual and romantic energy of the video is incompatible with the history of persecution. Similarly, postwar German thinkers have grappled with beauty in the face of one of the most tragic events in history. As German philosopher Theodor Adorno famously wrote, “poetry after Auschwitz is barbaric.” In aiming to be a memorial to gay victims of National Socialism, the video presents a visual of beauty and love in a way that is perverse and almost revisionist.

Third, other aesthetic qualities contribute to the problematic nature of the memorial. The shape of the structure is askew with the ground. But unlike the Memorial to the Murdered Jews of Europe (Denkmal für die ermordeten Juden Europas), the gay memorial stands alone. When walking through the Jewish memorial, the varying height of the ground and the hundred or so stelae disorients the visitor. Yet from afar, the memorial to gay victims looks like a neglected house that has been sinking into the ground—an unfortunate impression given the decades of neglect on this very issue.

To see the memorial up close, a visitor must walk through a small path carved out of the Tiergarten to the strange-looking concrete structure. Whereas the Jewish memorial includes hundreds of stelae and is situated in the center of Berlin’s federal government district, the gay memorial seems tucked away. Its shape, location, and singularity contribute to

this neglected impression. Additionally, in order to view the video of men kissing, one must walk up to a small window on the side of the structure. The implication of this hidden memorial and even more hidden video window leaves an impression that there is an element of homoeroticism that should still be condemned to shame. The aim of the filmmaker to empower through the shots of kissing seems in conflict with the hidden placement of the memorial and the video.

Fourth, the creation of separate memorials for victims of National Socialism has its own symbolism. While on its face, the creation of a public memorial for the gay victims of the Holocaust is merited, creating separate memorials seems to indicate that there were no gay Jews that suffered. Of course, there certainly were. According to one account by a gay Jewish Saxonhausen prisoner, these prisoners were first and foremost perceived as homosexuals. This “hierarchy” of identity had been predicted by the Nazis, as it existed in their prisoner classification code, Jewish violators of paragraph 175 wore the pink and yellow triangles. The pink was sewn upside-down and on top of the yellow triangle, forming a multicolored Star of David. Such an image can form a metaphor for the interrelatedness of prejudice.

These artificial cleavages between sexual and religious identity demonstrate the limits of understanding not only gay oppression or the basics of human sexuality, but also the limits of understanding anti-Semitic propaganda and law. Sexuality was a salient element of anti-Semitic propaganda. Like the metaphor of the pink and yellow Star of David, the Nuremberg Laws instituted in 1935 were based on oppressive, sexual propaganda that Jews were like

dirty “bacillus.” Under the laws, Jews and “Germans” (that is non-Jewish Germans) were banned from marrying or having sexual intercourse.

The memory of gay persecution under National Socialism has been often mishandled in postwar Germany. The persistence of National Socialist-devised legislation in the immediate postwar period leads to an inevitable assumption—that National Socialism had some positive externalities worth keeping. Certainly, the end of the war in 1945 did not mean a watershed shift in ideology on homosexuality.

Adequate gay Holocaust literature and memorial spaces would allow second and third-generation Germans to connect with their inherited guilt and learn from suffering of others. Philosopher and author Heinrich Böll believes that literature and memorials play an important role in Germans’ coming to terms with their past. Art that reflects gay suffering at the hands of National Socialism, but that is also nuanced enough for individual interpretation allows a reader to think critically about their own metaphysical and moral guilt. Thus, through hermeneutics or interpretation of symbolism, one can essentially come to terms with one’s own past and learn from it.86

Ultimately, paragraph 175 represents a failure of justice in the postwar period. Germans must self-reflect on their history and learn from their errors. Therefore, recreating or maintaining Nazi-influenced systems of oppression in the postwar period represented a failure to come to terms with Holocaust guilt.

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