

III Illicit Acts? Male Homosexuality in Criminal and Disciplinary Law

Homosexual behavior cannot be tolerated within the line of duty.¹

From 1872 on, Paragraph 175 (§175) of the Imperial Penal Code made “illicit sexual acts against nature between persons of the male sex or by people with animals” punishable by law.² In its jurisprudence, the imperial courts limited applying the paragraph to anal intercourse and “intercourse-like acts.” Female homosexuality was never criminalized. In 1935 the National Socialists drastically expanded and amplified the threat and reach of punishment under what became two paragraphs.

1. §175 after 1949 in West Germany

After 1949, West Germany preserved the law in its more severe form from the National Socialist era, thus its relevance for this study.

§175 StGB

- (1) A man who commits illicit sexual acts with another man, or allows himself to be misused for illicit sexual acts by a man, shall be punished with imprisonment.
- (2) If an involved party was not yet twenty-one years old at the time of the crime the court may refrain from punishment in particularly minor instances.

§175a StGB

Penal servitude of up to ten years, and in mitigating circumstances imprisonment of not less than three months shall apply to:

1. a man who by violence or threat of present violence to life or limb compels another man to commit illicit sexual acts or to allow himself to be abused for illicit sexual acts;
2. a man who, by abusing a relationship of dependency established by service, employment or subordination, induces another man to commit illicit sexual acts with him or to allow himself to be abused for illicit sexual acts;

1 This guiding principle can be found in scores of disciplinary rulings, as for example in the decision of the 8th Division of Military Service Court Center from 8 October 1990, reproduced in BArch, BW 1/531592: BVerwG, 2 WD 5.91: Federal Administrative Court, 2nd Military Service Senate, decision from 30 July 1991.

2 The Imperial Penal Code took effect 1 January 1872; the original text is available at https://www.deutschestextarchiv.de/book/view/unknown_strafgesetzbuch_1870?p=56 (last accessed 31 Mar 2021).

3. a man over twenty-one years of age who seduces a male person under twenty-one years to commit illicit sexual acts with him or to allow himself to be abused for illicit sexual acts;
4. a man who commits illicit sexual acts or allows himself to be abused as a regular source of income, or offers to do so.³

According to the 12 May 1969 edition of *Der Spiegel*, §175 was the only law strengthened during the National Socialist era still in effect twenty-four years later.⁴ “For the homosexual minority, the legal end of National Socialism came about only twenty-four years after the collapse of the Third Reich.”⁵ Aside from threatening increased prison terms, replacing the term “illicit sexual acts against nature” (*widernatürliche Unzucht*) with the much broader “illicit sexual acts” (*Unzucht*) proved decisive. The change in wording had grave consequences as it made all sexual activity between men criminal, no longer anal intercourse alone. Masturbating in the presence of another man without any touching involved, even simply looking at another man with “lustful intent” was sufficient. “Illicit acts *with* another occurs whenever one uses the body of another man as a means of arousal or satisfying sexual desire,” reads one commentary from 1942. “It is not necessary for physical contact to have taken place or even been intended.”⁶

Between 1949 and 1969, close to 50,000 men were sentenced under §175 in West Germany, preceded by preliminary investigations – of which there were, for example, just under 100,000 between 1953 and 1965.⁷ Those detained during the era report authentically on being treated like “serious criminals” while in policy custody and awaiting trial. “We were equated with serious offenders like murderers and whoever else.”⁸

The first decades of the Federal Republic were generally a period of “strict sexual morality”; sexuality was hardly ever discussed in public, rarely even in

3 Article 6 of the law for altering the Criminal Code from 28 June 1935, RGBL. I, p. 839; the wording is available at <https://lexetius.com/StGB/175,6> (last accessed 31 Mar 2021). For a detailed account of the legal history of the cited paragraphs under National Socialism, see Burgi and Wolff, *Rechtsgutachten*, 17–22.

4 “Späte Milde,” 57.

5 Stümke, *Homosexuelle in Deutschland*, 132.

6 Commentary from 1942 on the use of the term *Unzucht* in §175, found in Stümke and Finkler, *Rosa Winkel, Rosa Listen*, 216. See also Schomers, *Coming-out*, 67.

7 Rampp, Johnson and Wilms, “‘Die seit Jahrzehnten belastende Schmach fällt von mir ab,’” 1145.

8 Günter Landschreiber, taken into custody in Gelnhausen in Hessen during the 1960s after he was reported by the mother of his ex-partner, speaking on the television documentary “Schwulen Paragraph,” broadcast on hr-fernsehen 10 October 2019 at 11.15 p.m.

private. It fit the contemporary conception of morality that legal proceedings concerning homosexuality could be, and often likely were, kept outside the public eye.⁹

§175 in particular reflected the convictions of mainstream society. In a representative survey conducted by the Allensbach Institute in February 1969, 46% of West Germans came out against the slated decriminalization of homosexuality between grown men, 36% were for it, 18% were undecided.¹⁰ It was “against popular opinion” and “against one of the most tenaciously held prejudices of German citizens,” *Der Spiegel* wrote, that the Bundestag and the government pushed through the revision of §175.¹¹

One report in *Die Zeit* from 1964 did not mince its words as to the state of homosexuals in West Germany. “Our society makes life miserable for this group, homosexuals. Today, sanctions born from the spirit of bygone centuries that no longer went unquestioned even when they were first put to writ still encourage the machinations of informants, denouncers and blackmailers.”¹²

The ultimate goal of prosecuting homosexual acts was likely to “enforce the normalization” of gay men in the direction of “mainstream sexuality.”¹³ “As with the ban on the death penalty, lawmakers had to bring better knowledge and insight to bear over and against one of Germany’s most tenaciously held prejudices,” *Der Spiegel* wrote in its usual blunt style. It was “parliamentary decision against popular opinion.”¹⁴ Federal Minister of Justice Horst Ehmke, appointed to spearhead the law’s revision by dint of office, came out with a more or less public apology that simple homosexuality’s imminent decriminalization in no way signaled a “decline in moral value judgements,”¹⁵ much less “moral approbation.”¹⁶ To conservative

9 Bormuth, “*Ein Mann, der mit einem anderen Mann Unzucht treibt*,” 53.

10 “Späte Milde,” 55.

11 Ibid.

12 Cited in Stümke and Finkler, *Rosa Winkel, Rosa Listen*, 379. A useful overview of the situation of homosexual women and men in the Federal Republic is provided in Köhne, “Gleichberechtigte Mitmenschen?” and in Wolfert, *Homosexuellenpolitik in der jungen Bundesrepublik*. See Pretzel and Weiß, *Ohnmacht und Aufbegehren* for a collected series of wide-ranging essays.

13 This is Michael Schwartz’s argument in his introductory talk at a symposium on justice and homosexuality at the Judicial Academy of North Rhine-Westphalia in Recklinghausen on December 18 and 19, 2017.

14 “Späte Milde,” 55. For a comprehensive account of Bundestag debates surrounding “morality and custom” and the controversial decriminalization of homosexual acts, see Ebner, *Religion im Parlament*, 95–142 and 185–210.

15 See Schwartz, “Entkriminalisierung und Öffentlichkeit,” 85, as well as in a subsequent talk given at the Judicial Academy of North Rhine-Westphalia in Recklinghausen on December 18 and 19, 2017.

16 First mentioned in Stümke and Finkler, *Rosa Winkel, Rosa Listen*, 354.

jurist Walter Becker, “same-sex activity” continued to constitute a clear violation of “the law of custom as defined in the Basic Law” even after it was struck from criminal law.¹⁷

In 2000, the Bundestag unanimously adopted a resolution acknowledging that “the human dignity of homosexual citizens was violated by the threat of punishment that continued to exist after 1945.”¹⁸ In June 2018, speaking with reference to the persecution and prosecution homosexuals were forced to endure in the first decades of the Federal Republic, German President Frank-Walter Steinmeier asked their “pardon on account of all the pain and injustice that went on, and for the long silence that followed.” “The German state inflicted serious harm on all these people,” Steinmeier continued; those who were “arrested, convicted and locked up” on the basis of §175 “were still forced to hide, still exposed, still risking their economic existence.”¹⁹ A report considering legal rehabilitation for men convicted under §175 found that conviction “inflicted harm to freedom, body and spirit while also imposing heavy social burdens, ranging from losing one’s job or apartment and exclusion from broad parts of society to losing one’s rights as a citizen.”²⁰ If the convict happened to be a soldier, the criminal verdict was followed by a disciplinary hearing and sentencing in a military service court, which up through to the end of the 1960s generally meant removal from service.

Such was the verdict service judges reached in one case cited at the very outset of this study – the sergeant observed having sex with a private in the bathroom of the barracks canteen one Saturday in December 1962. In February 1964, a military service court ordered Sergeant K. to be removed from service and demoted him to private first class, ruling that “the nature, gravity and effects of the drunken acts [constitute] such a gross breach of duty that the accused is no longer acceptable for service in the Bundeswehr.”²¹ Court records are silent as to the fate of

17 Schwartz, “Entkriminalisierung und Öffentlichkeit,” 85.

18 German Bundestag, Bundestag document 14/4894, 4.

19 *Die Zeit*, “Steinmeier bittet Homosexuelle um Vergebung”; *Süddeutsche Zeitung*, “Steinmeier bittet Lesben und Schwulen um Vergebung.” In the words of one eyewitness who was impacted, “That’s exactly how it was!” A letter from Michael Lindner in Hamburg to the author on 20 July 2019.

20 Burgi and Wolff, *Rechtsgutachten*, 11.

21 Taken from the court opinion of Military Service Court C1 from 20 February 1964, cited in the Federal Disciplinary Court on 25 August 1964, I WD 69/64. The full text of military service senate decisions are accessible online for viewing and research at <https://www.wolterskluwer-online.de/>, along with nearly all judgements passed down at the Federal Administrative Court, and prior to that at the Federal Disciplinary Court. Unless otherwise stated, all decisions at the Federal Administrative Court and its military service senates reproduced here come from this online resource. The author would like to thank Lieutenant Colonel Michael Peter for directing him to the site and his assistance with research.

the private. He was likely dismissed according to the guidelines of the day, which allowed without a hitch for conscripts ruled unfit or fixed-term soldiers still within the first four years of their service to be discharged immediately and unaccompanied by disciplinary procedure.²² The sergeant appealed the decision. Not only did the 1st Military Service Senate at the Federal Disciplinary Court reject the sergeant's appeal, it canceled his transitional allowance (he had since departed regularly from the armed forces) as well as any professional development funding usually provided to give soldiers a start in their civilian careers. The senate struck a decidedly sharper tone in its opinion than had the first court.

Illicit sexual acts between men, as the accused [...] and Private Sch. Committed with each other further demonstrate serious aggravating circumstances [...] On top of this comes the fact that the crime occurred within the barracks in which the accused was by all accounts Sch.'s commanding officer [...] The image that the accused presented as non-commissioned officer and superior was extremely objectionable [...] The accused accordingly lost so much by way of authority, reputation and trust that the service could no longer be expected to continue its relationship of employment with him.²³

Soldiers in particular suffered grave social consequences in addition to "civilian" conviction by a criminal court, simultaneously losing their place of work; their place of residence if they lived in the barracks, as was customary among young soldiers at the time; and not least their social world, which often revolved entirely around their company and comrades. The return home might easily be met with stigmatization or social exclusion from rural or small-town society, often making it necessary to strike out somewhere new as a stranger.

2. A World War Veteran Comes Undone

Among the careers \$175 brought down was that of a highly decorated World War II veteran with high aspirations in the Federal Republic. What might have been a "bright" future came to an abrupt end around 1 a.m. on a Saturday night in April 1958, at a parking lot in downtown Cologne.

The subsequent inditement filed by the public prosecutor's office in Cologne presents the following series of events: According to his statement, one night after

²² Under the Conscript Act in effect after 21 July 1965, conscripts could be dismissed from service due to physical or mental unfitness (§29 (2) in the earlier version). Thanks to Governmental Director Guido Gutzeit for this reference.

²³ Federal Disciplinary Court ruling from 25 August 1964, I WD 69/64.

work a police sergeant passed by a public parking lot, where he spotted a lone car parked. The light burning in the Mercedes struck him as suspicious; he approached the car and shone a pocket flashlight into the car's interior. "The two men were apparently so taken up in their activity that they did not notice the light from his pocket lamp [...] both were shocked and aghast."²⁴

The sergeant filed a criminal report. By the Monday after the fateful night, the staff officer had been brought in for questioning by the disciplinary prosecutor responsible for his unit. He vehemently disputed "any sort of mutual illicit touching." A former comrade of the accused from World War II who himself later rose to lieutenant general in the Bundeswehr could still easily recall the unhappy incident:

He [Bernd] was gay. He went to Cologne. And then he went to a local bar where gays met. He comes out, gets into his car with a lover, and behind him a policeman peeks through the rear window and sees all the fun. Well, and there you have it. He asked me, "My god, what do I do now?" I advised him to turn at once to [a higher-ranking officer he knew] [...] we brought in a legal adviser – but long story short, Bernd had to go. He wasn't allowed to set foot in the base any longer and asked me to get his things in order.²⁵

In late June 1958, right before the trial was set to begin in local court, the officer requested release from the armed forces "since he no longer felt equal to the demands made of an officer." The president of the Federal Republic granted the request effective August 1958. The celebrated officer now turned his back on Germany, fleeing abroad to build a new existence for himself in a place where he was known and prized as a war hero, anything but a "hundred and seventy-fiver."

The trial began in Cologne in July 1958; in March 1959 the civilian defendant was ordered to pay a fine of 300 DM in lieu of a sentence of thirty days in prison, which the officer forfeited *per se*.²⁶ The very possibility of the defendant's conviction under §175 owed directly to the Federal Republic having retained the paragraph in 1949 as it had been strengthened by the National Socialists, a fact that now also proved the war hero's undoing. In December 1958 the Cologne court issued an arrest warrant for the fugitive officer. Criminal proceedings against the defendant were ultimately dropped for the time being "because he had evaded prosecution [...]" by emigrating."

24 BArch, Pers 1/60262: Police chief constable's testimony as cited in the ruling at Military Service Court F, 2nd Division, Az F 2-Vla 11/59 on 5 December 1962.

25 From the transcript of an interview with a retired Lieutenant General conducted on 13 January 2004 by Dr. Kurz Braatz, quoted with his friendly permission. The first name used in the quote has been changed by the author.

26 BArch, Pers 1/60262: Cologne Local Court, 31 DS 309/58, decided 9 March 1959.

Both the armed forces and the criminal justice system might have let the matter rest at that. The disciplinary prosecutor, however, had no intention that the discharge authorities hold off on disciplinary proceedings. In 1960, two years after the incident in the parking lot, the prosecutor had a written indictment delivered to the now officer in the reserve via the consulate of the Federal Republic in the officer's new country of residence.

In January 1961 the presiding military service court decided to discontinue disciplinary proceedings. The disciplinary prosecutor appealed the decision. In July 1962, four years now after the incident, proceedings were reinstated. The 2nd Division of Military Service Court F in Stuttgart initially found that the ruling reached at Cologne local court against the man in the car with the staff officer did not bind the court, as it was not issued against the latter. The disciplinary judges resolved to hear their own evidence instead, calling the other parties to the crime and the police sergeant in to testify. The transcript of the Stuttgart proceedings is an astonishing document compared with nearly every other surviving court record involving similar cases which the author has been able to look over. What strikes one is the judges' effort to take note of any potential doubts regarding the policeman's description of events, and call his memory into question. "So many doubts [remained] [...] that proof of mutual homosexual activity appears not to have been fully established." For the policeman, the court's attack against his credibility as a witness may well have come as an entirely unfamiliar, novel experience. The sense of good will that prevails toward the defendant throughout the entire trial, on the other hand, is not matched by any other military service court proceedings examined by the author to date. It certainly is not wild speculation to assume that the defendant's wartime distinctions and his standing as a "war hero" impressed the judges and predisposed them to leniency. In weighing the pros and cons, the judges came to the decision that since "the consummation of illicit acts between men [had not] been fully proven," the defendant's removal from service would not have entered the realm of thought if the defendant had not quit himself. At most a reduction in rank to first lieutenant, as had also been requested by the disciplinary prosecutor, was appropriate. Yet the military service court in Stuttgart rejected this proposal as well, letting the rationale for its surprising leniency show clearly:

The defendant acquired and earned his service rank in the war through courageous, extraordinary dedication. He staked his life in aerial warfare for years and has been highly decorated. He has shown above-average dedication in the Bundeswehr as well, and he has never failed in office but served consistently as a model [...] The defendant lives far abroad [...] There's much to suggest that it would require a serious incident to call him up. Depriving

the defendant of his service rank in this case – in whole or in part – would be too harsh and inappropriate a punishment for his crime and level of guilt.²⁷

Further proceedings were suspended. The staff officer's case shows that in looking at restrictions against homosexual soldiers, it is essential to look beyond rulings in civil or military court, or formal measures such as military discharge. In this instance, a former Wehrmacht officer still esteemed for his record in World War II had both his career and his professional and civilian existence destroyed – all without a criminal sentence, military court ruling or a decision to remove him from service. In anticipating the impending legal proceedings, he quit the service himself.

3. Punishing Consensual Sexual Activity Between Soldiers Under §175 StGB (up to 1969)

In January 1964, the 2nd Military Service Senate at the Federal Disciplinary Court heard the case of a sergeant. The September before in 1963, Husum local court had sentenced the thirty-two-year-old, married man under §175 to a fine for “illicit same-sex acts, in particular mutual masturbation” on at least nine occasions. By the court's account, the man had had sex with other men in public toilets, though it had not gone beyond forms of joint or reciprocal satisfaction by hand. (In this case too, the very possibility of convicting the man under §175 was owed directly to the Federal Republic's upholding of the paragraph in its more severe form from the National Socialist era.)

Here too there followed a ruling in military court demoting the reservist sergeant, who had since departed regularly from the service, to private first class. The disciplinary prosecutor for the military objected; the decision was too lenient for his liking. The Federal Disciplinary Court heightened the sentence by revoking the man's benefit claims for time in the service. The senate spoke out sharply against the man and any sort of homosexual activity in its ruling.

Under current Senate jurisprudence, homosexual misconduct by a soldier must be met with strict disciplinary action, as such behavior greatly jeopardizes soldiers' sense of community, camaraderie and troop cleanliness [...] The accused may not have committed indecent acts against other soldiers, but he did involve himself repeatedly with homosexual men over a

27 BAArch, Pers 1/60262: Cologne Local Court, 31 DS 309/58, decided 9 March 1959.

period of two years, first as an NCO and later as a sergeant and at times in uniform, thereby bringing severe damage as much to his own official reputation as that of the Bundeswehr.²⁸

Speaking in favor of the accused was his statement that “he acquired his homosexual tendency after being seduced by a soldier in the navy at age fourteen.” This circumstance “likely admits greater leniency in assessing his conduct, but even so the overall circumstances would not have allowed the accused to remain in service if his term had not yet expired.”²⁹

This final passage in particular reveals a traditional view of homosexuality not as something that is part and parcel of human nature but, as with a psychological “abnormality” or an illness, something that was triggered by infection from outside.

The court’s choice in wording that the sergeant “greatly jeopardize[d] [...] troop cleanliness” is also telling. Whether consciously or unconsciously, the view comes to the fore here that homosexuality was something unclean, dirty. The topos of “cleanliness” surfaces in numerous court opinions throughout the Fifties and Sixties. In one decision from 1964, military judges noted seemingly in passing, but conspicuously nevertheless, that “without washing before, [the two men] then lay down beside each other on the bed beneath the same quilt.”³⁰ Of the NCO who had been observed having sex with a private in the canteen bathroom in December 1962, the disciplinary judges wrote that his behavior was “highly detrimental to troop cleanliness, internal order and discipline.”³¹

It would be too narrow to conceive of phrases like “purifying” or “troop cleanliness” as applying especially or exclusively to homosexual activity, even if many regarded it as something dirty at the time, including many jurists. Purifying disciplinary measures, as they came to be called, were imposed for many other kinds of offenses as well. It was (and today remains) a common form of expression among jurists.

The 2nd Military Service Senate heard a nearly identical case in January 1965, again involving a sergeant. “A man with such a tendency,” the court wrote in its decision, “poses a threat to soldiers’ sense of community, camaraderie and troop cleanliness. The accused would have to be removed if he were still in service.”³² The man stood accused of “six counts [...] of illicit sexual acts, in particular mutual

²⁸ Federal Disciplinary Court, 2nd Military Service Senate, 6 Aug 1964, Az II WD 35/64, found on www.jurion.de.

²⁹ Ibid.

³⁰ Ruling at Military Service Court A on 14 May 1964, cited in BVerwG, I (II), WD 129/64: Federal Disciplinary Court, 2nd Military Service Senate, decided 10 June 1964, found on www.jurion.de.

³¹ Ruling BVerwG, 25 August 1964, I WD 69/64.

³² Ibid.

masturbation” as a civilian in 1963, again mostly in public toilets. The local court imposed a sentence of one month on probation for violating §175 in six instances. The military service court concurred with the local court’s ruling and ordered the accused to be removed from service.³³ When the defendant appealed, having since departed the armed forces under normal circumstances, the military service senate rejected his petition and increased the sentence by revoking both the man’s benefit claims for his time in the service and his right to vocational assistance with a new civilian career.

Even if comparisons are odious, striking parallels do emerge between the military service court rulings and those of the Wehrmacht judiciary from twenty to twenty-five years prior, as is shown in what follows.

4. Courts Martial from 1899 to 1945 and Parallels with Rulings in Military Service Court Rulings

On 25 September 1942, the field court martial for the eighth anti-aircraft division in Bremen sentenced a twenty-one-year-old private “in the name of the German people” to three weeks’ close arrest “on two counts of illicit acts contrary to nature.” A similar decision and rationale might have come from one of the Bundeswehr’s service courts in 1962. The parallels began with the formal procedure and working methods of the court alone, regardless of the case being heard. As with military service courts, the accused sat before three judges: a career judge (in 1942 holding the rank of General Staff Prosecutor for the Air Force) as well as two honorary members – an officer and a soldier holding the same service rank as the accused (private first class in the present case). The judges considered it established fact that two years before at the age of nineteen, the private had in his native Westphalia “committed illicit acts with another man and allowed himself to be misused for illicit acts on two instances.”³⁴ Amid the parallels, one important difference is worth pointing out: Bundeswehr service courts could only impose disciplinary measures, whereas the courts martial of the Wehrmacht were able to hand down criminal sentences. Not only did the 1942 field court martial issue the private a disciplinary

³³ BVerwG, II (I), WD 121/64: Federal Disciplinary Court, 2nd Military Service Senate, decided 15 January 1965. The decision includes references to and quotes from the initial court ruling at Military Service Court F on 30 April 1964, found on www.jurion.de.

³⁴ North Rhine-Westphalia State Archives, Westphalia inventory, Q 222/957-960, Bochum public prosecutor’s office. The file contains the decision by the field court martial for the 8th anti-aircraft division, K.St.L. 992/1942 from 29 September 1942. Thanks to Frank Ahland for this as well as the following sources.

sentence; it immediately pronounced criminal judgement over him in place of a (civilian) local court. In the Wehrmacht, as in the Reichswehr and other previous German armies (and today in many armed forces the world over), active soldiers stood exclusively under military jurisdiction. That included crimes committed as civilians or even, as here, those predating their conscription.

Like their counterparts in the Bundeswehr, Wehrmacht jurists also drew a neat distinction between those who had been seduced and were in fact “normally disposed” (deemed “casual offenders,” or *Gelegenheitstäter* by Wehrmacht jurists) on the one hand, and “habitual offenders” or *Hangtätern* on the other (another term from the Wehrmacht archives; Bundeswehr jurists preferred the expression “homosexually inclined”). One of the latter, a dancer from Düsseldorf drafted into the Wehrmacht, appeared in court in January 1945. The sentencing court in Paderborn for the field court martial presided over by the commanding general and officer of Luftgau VI sentenced the private to one year and six months in prison for “illicit acts contrary to nature” committed not while on duty but in his home town. “The accused associates with homosexual circles. In the conviction of the court-martial, the accused is therefore to be regarded as a habitual offender.”³⁵

A court decision from 1899 has also been preserved against a *Vizefeldwebel* in the Prussian Army (the equivalent of a sergeant in the Bundeswehr) from Company 10 of Regiment 56. Sentenced to six months in prison “for illicit acts contrary to nature with base degradation,” the officer sat out his prison term at the Wesel citadel.³⁶ The convict left the military without a military attestation or a civilian pension voucher, likely making it much harder for him to get a start in civilian life. Military service senates took a similar tack when they revoked the benefit claims and vocational assistance measures Bundeswehr soldiers had earned through their time in the service.

Until §175 and §175a StGB were revised, military superiors also routinely referred cases of consensual sexual activity to criminal investigators or public prosecutors. It was a policy that a major at Bonn’s Federal Ministry of Defense and his partner V., a civilian employee also working at Hardthöhe were forced to experience in 1965 when their relationship was reported upstairs by V.’s colleagues. Details about the relationship came from V. himself, who had likely confided somewhat too freely in his coworkers. A wide-ranging disciplinary investigation file opens with a comment from November 1965 that “for some time, colleagues have watched on

³⁵ North Rhine-Westphalia State Archives, Westphalia inventory, Q 926/11618, Werl Penitentiary, Arrest Files for Hermann S., 1944–1945. Field court martial ruling by the commanding general and officer of Luftgau VI, Sentencing Division I K.st. Paderborn, L 173/44, VL 814/44.

³⁶ Witten City Archives, “Witten-Alt” inventory, 2.25b.330, dossier on Robert M.

uneasily at the relationship between V., a twenty-seven staff employee, and Major S., who was forty-four.³⁷ The investigation ran its course, with the BMVg passing the matter on to criminal investigations in Bonn. Neither of the men withstood interrogation. Each began to accuse the other order to secure a more lenient punishment for himself; only in this way could investigators have found out for themselves what had gone on behind bedroom doors without any further witnesses. Ultimately, both the investigators and the court became convinced that even if the sexual activity itself had been consensual, the major had plainly seduced the much younger and more inexperienced, somewhat I staff employee.

In February 1966 Bonn local court ordered the major to pay a fine of 2,000 DM, a large sum of money at the time, in lieu of a two-month prison sentence.³⁸ The BMVg suggested to the major that he apply for his own dismissal, and in April 1966 the president of the Federal Republic recognized “a career soldier’s request for dismissal from service at his own wishes.” Yet even now the BMVg did not let up on the major, now chastised and staring into a professional abyss. “After consulting with P II 5, disciplinary proceedings against S. will be continued, since they’ve already been introduced.”³⁹ In June 1967 the military service court in Düsseldorf demoted the reservist major to private first class.⁴⁰

In 1965, military reports passed along to criminal investigators saw a lieutenant back before local court; the officer had been talked into sex by a private first class during military exercises. (There were also cases in which lower-ranking soldiers seduced their superiors.) While massaging the lieutenant in his room after sports one day the private grazed the officer’s genitals, who then removed his gym shorts. The private then pleasured the lieutenant with his hand.

Both men were sexually aroused. When [Private First Class] R. also undressed, then lay down in bed next to the accused [the lieutenant] and tried to take hold of his member again and kiss him, the accused directed him to leave the bed. Private R. resisted at first, saying that it would be an unforgettable night. When the accused [the Lieutenant] now explained to him that he had received a training in one-on-one combat and would use force if R. did not leave, [the private] got out of the bed and got dressed. He [the private] demanded a pistol with a single round of live ammunition, since he wanted to shoot himself. The accused talked him out of it, upon which Private R. came to the decision to report himself.⁴¹

37 BArch, BW 1/12819: BMVg, S II 7, Az 06-26 from 29 November 1965.

38 Ibid., Order of punishment from Bonn Local Court, 45 Cs 56-57/66 from 25 February 1966.

39 Ibid., BMVg, handwritten note from 26 May 1966 without listing the department responsible.

40 Ibid., Disciplinary prosecutor for Military Service Court A, 3rd Division for Military District Command III, AZ 25-01-30-01 1/66 from 7 July 1967.

41 BVerwG, II WD 44/66: Federal Disciplinary Court, 2nd Military Service Senate, decided 12 January 1967. The decision refers to the ruling at Ahlen local court (Westphalia) which took effect 16

Speaking in his room over the course of a good two hours, the lieutenant tried to calm the private down, pointing out the consequences that reporting to the authorities would entail for both of them. It was all in vain. Around five o'clock that morning the private reported to the officer on duty that he was guilty of a misdemeanor under §175, adding the lieutenant as a witness.

The commander of the seventh mechanized infantry division in Unna initiated disciplinary action against both men, suspending them pending final conclusion of legal proceedings in the matter. The private was quickly given immediate dismissal from the Bundeswehr under §55 (5) SG.

In February 1966, a local criminal court in Westphalia's Ahlen sentenced the reservist lieutenant and former private to pay a fine of 150 DM each in lieu of fifteen days in prison for violating §330a StGB (drunkenness) in conjunction with §175. Later that year in July during the internal military disciplinary trial, Military Disciplinary Service Court E convicted the lieutenant of a breach of duty, demoting him to the lowest service rank in mechanized infantry. The officer appealed and was vindicated, at least in part. In January 1967, after a trial that remained closed to the public, the 2nd Military Service Senate at the Federal Disciplinary Court decided to reduce the lieutenant's rank to that of a non-commissioned officer of the reserve. The officer "had only been the passive participant in the illicit activity that resulted from the drunken atmosphere. He had turned down more serious illicit acts, and finally put an end to them." The senate regarded the incident as a "one-time lapse that was out of character for an otherwise morally stable man."⁴² With that the judges were able to leave him with the reserve rank of NCO, and thus the functions of a superior.

A second set of appeal proceedings decided on in 1967 involved a first lieutenant on active duty contesting his dismissal from service. The lieutenant had previously been convicted by a juvenile court of "two counts of illicit sexual acts between men under §175, one case ongoing" and ordered to pay two fines of 350 DM and 140 DM. When the defendant appealed the decision, the 1st criminal division in regional court suspended proceedings at the state's expense and with the consent of the public prosecutor, "since the culpability of the perpetrator was minor and no public interest in prosecution" existed any longer. This was not the opinion the disciplinary prosecutor, however, who continued to take an official "interest in prosecution."

February 1966, as well as the initial ruling at Military Service Court E on 27 July 1966. Found on www.jurion.de.

⁴² Ibid.

Aside from pursuing homosexual activity outside of the line of duty while camping with adolescents from his scouting troop, the first lieutenant stood accused of repeated joint and mutual masturbation sessions with an NCO in his battalion. The noteworthy aspect of this seemingly “classic” case was that the first lieutenant and NCO had known each other before the Bundeswehr, from the very same scouting troop where the court found “illicit same-sex activity, especially masturbation” to be nearly standard practice. (“Activity of the sort was nothing out of the ordinary in the troop.”⁴³) During their time together in the service, the two now secretly continued in the barracks what had been a familiar routine in earlier days. It was just that now they stood separated by degrees of rank, with a directive governing superior–subordinate relations and how officers were expected to behave in the barracks, both in general and especially toward subordinates. The NCO was quickly dismissed without trial or further notice under §55 (5) SG. As for the first lieutenant, a military service court ordered his removal from service and demoted him to the lowest rank in the reserve. When he appealed, the presiding military service senate upheld his removal but left him with the rank of private first class in the reserve. The trial before regional court had already

failed to show that the accused had induced the non-commissioned officer to commit illicit sexual acts with him by abusing his position as an officer. No abuse of a superior–subordinate relationship occurred [...] [NCO] F. was seduced, he himself had performed illicit acts of this sort with other men, he was a willing victim [...] The accused F. was aware of the activity, it was not anything extraordinary for him, he even enjoyed it by his own account.⁴⁴

Still, the first lieutenant could not be allowed to remain in active service. Even consensual sex between soldiers constituted a breach of duty in multiple respects when it took place in the barracks and, moreover, involved a superior and subordinate. The officer had “violated his duty to respectable behavior (§17 (2) SG),⁴⁵ his duty to camaraderie (§12 SG) and his duty to provision of care (§10 (3) SG), all under the increased liability of a soldier holding a superior position (§10 (1) SG).”⁴⁶

⁴³ BVerwG, II WD 60/67: Federal Administrative Court, 2nd Military Service Senate decided 15 December 1967, with references to the rulings at Juvenile Court H on 1 November 1966, Regional Court G. on 23 December 1966, Military Service Court B on 13 June 1967. Found on www.jurion.de.
⁴⁴ Ibid.

⁴⁵ §17 (2) of the Soldier’s Act demanded that every soldier “behave in a way that doesn’t seriously detract from the reputation of the Bundeswehr or the respect and trust that his official position requires, including while off duty and away from official living quarters and facilities.”

⁴⁶ BVerwG, II WD 60/67: Federal Administrative Court, 2nd Military Service Senate decided 15 December 1967, with references to the rulings at Juvenile Court H on 1 November 1966, Regional Court G. on 23 December 1966 as well as Military Service Court B on 13 June 1967.

Unlike the military service court before it, the senate found itself disposed to assume a less serious case, “though the defendant could not be left holding any service rank that would legally confer superior functions on him. Leaving [him with] the rank of private first class in the reserve therefore seemed appropriate.”⁴⁷

The following year, in 1968, service court judges in Kiel saw no cause for leniency in the case of a petty officer second class, nor were they swayed by the defense lawyer’s reference to alcohol consumption. Rather, the officer had “deliberately approached his subordinate and repeatedly induced [him] to homosexual activity.” The judges viewed it as an aggravating circumstance that the incidents had played out in service quarters. “The nature and severity” of the violations “in their broad range” had further convinced the court of a “manifest tendency” in the petty officer, making him seem unfit for continuing to serve in the Bundeswehr. Differently than in the case of the sergeant described previously, service court judges found no excuse for suspicions of homosexuality in 1968. The decision from Kiel ordered the officer’s removal from service and demoted him to private in the reserve.⁴⁸

The backstory went as follows: In October 1967, after a night spent drinking together in the petty officer’s room, the twenty-two-year-old had talked his direct subordinate, a private, into having sex with him, albeit not against the latter’s will. The two remained sexually active in the weeks to come, each time more or less drunk but always consensually. They were found out in November, when an on-duty officer discovered them sleeping naked in bed together on a night patrol of the living quarters. The next day the petty officer tried to take his own life by slitting his wrists. Itzehoe regional court sentenced him to nine months in prison for “crimes” under §174 StGB (sexual abuse of wards) in conjunction with “crimes” under §175 and §175a StGB, though the sentence was suspended on probation against a fine of 600 DM. Both paragraphs were applied in this instance because the accused, as a man over the age of twenty-one, had had intercourse with a man under the age of twenty-one who had had been further entrusted in the officer’s care as his direct subordinate.⁴⁹ The defendant did not appeal either this decision or that of the military court and the probationary sentence, including both the fine and removal from service, became final.

In 1966, Hamburg criminal investigations took up the case of a petty officer in the navy, after a policeman had caught him engaged in intimacies with the officer of a Brazilian trading ship by the Bismarck Monument just north of the city port around 2 a.m. New Year’s Day. Speaking for the transcript with an irksome love of

⁴⁷ Ibid.

⁴⁸ BArch, Pers 12/45954: Ruling at Military Service Court A, 1st Division on 8 October 1968.

⁴⁹ Ibid., Ruling of the youth division of Itzehoe regional court on 26 July 1968.

detail, the police master reported his observations to criminal investigations, and later the military service court.

The area is often frequented by homosexuals who pursue their tendencies there. The accused and the Brazilian drew the attention of the witness [...] who initially got his service dog into position before approaching the pair from the opposite side. At about three steps' distance he shone the flashlight he had brought with him on the couple, and was able to observe the Brazilian embracing the accused with both arms and kissing him on the mouth. The accused was simultaneously holding the Brazilian's aroused member with both hands as it stuck out of his pants and rubbing it. The fly of the accused also stood open. The witness was not able to observe whether the member of the accused was hanging or sticking out. The accused and his partner allowed themselves to be taken to the nearby police station in St. Pauli without resisting.⁵⁰

The petty officer explained that he had gone to St. Pauli looking for sex with a prostitute he knew, but had not found her. He had spent the rest of New Year's Eve in and out of Hamburg's bars, eventually encountering the Brazilian at the public bathroom by the Steintor. The officer had then thought to accompany the Brazilian for part of the way back to his ship, toward Altona. How he had wound up at the traffic circle in front of the Bismarck Monument engaged in sexual activity, the officer could not say. He knew in any event that the Brazilian had been the one to initiate the "advances." It was the first time the officer had gotten "mixed up" in something of the sort; he had not ever "taken part in same-sex activity," though he had had sex with more than forty women.

The lead public prosecutor discontinued the investigations being pursued under §175 StGB.⁵¹ Military service judges, for their part, stressed that criminal proceedings being suspended did not stand in the way of "punishment" by the Bundeswehr judiciary. (In doing so, they abandoned a principle that was otherwise consistently upheld, namely that Bundeswehr jurists were not there to punish, but only to impose disciplinary sanctions.) The petty officer, "disappointed [...] at not having found the girl, succumbed to the Brazilian's rough advances"; he had never engaged in same-sex activity before and had excellent marks in the service. What was more, the sex had occurred in a public place, at the traffic circle in front of the Bismarck Monument, "and not in the bushes or other places where homosexuals usually withdraw." The only thing the judges did find "concerning" was that the accused had let himself get involved in "this type" of sex on a public square, yet this alone could not justify his removal from service. A very lenient ruling came

50 BArch, Pers 12/45777: Military Service Court A, 1st Division, decided 23 August 1966.

51 Ibid., Nolle prosequi by the lead public prosecutor at Hamburg Regional Court, 4 March 1966.

out of the court's deliberations, demonstrating a remarkable degree of goodwill toward the accused in comparison to other decisions in similar cases. The officer was demoted by one rank in seniority and a further year's delay in reinstatement to the next rank (i.e. his former rank of seniority).⁵² The officer's lawyer had clearly handled the case adeptly; only on the rarest of occasions throughout the 1960s did an NCO or sergeant emerge unscathed from the Bundeswehr judiciary for proven homosexual activity. Put in headline form, the case might have read "Dastardly Brazilian seduces innocent and unwitting German NCO."

5. Psychiatric Evaluations as a Means of Adjudication

Throughout the 1950s and 1960s, psychiatric evaluation presented an entirely common way of determining homosexual tendencies in the court system, as with the case of a staff sergeant in 1967. The sergeant had become involved with a stranger in a public urinal when a police official, whether coincidentally or not, made an inspection of the facility and caught the two "red-handed." Stuttgart local court imposed a fine of 150 DM on the sergeant for violating §175 StGB; a military service court then sentenced the sergeant to be removed from service and reduced his rank to plain sergeant.

In fixing the disciplinary measure, the military service court found that while the staff sergeant could not be shown to have engaged in same-sex activity while on duty, it was "to be feared that here too [while on duty] he would slip up at some point, all the more so as the past life of the accused shows that sexual deviancy is not foreign to his nature." Nor was his misconduct based on seduction, but his own impulses. "As such, the trust in him carrying out his official duties in accordance to regulation has been irrevocably destroyed, as his tendency could also bring harm to the troops from an intelligence standpoint."⁵³ The sergeant appealed. The 1st Military Service Senate repealed the initial sentence, demoting the accused instead to private first class. This allowed him to remain in active service, even if with the rank of a common soldier. The decision was based on a series of psychiatric evaluations, the last involving a full thirteen-day stay at a hospital. The resulting report certified the sergeant with a "latent homosexual drive as a partial symptom of neu-

⁵² Ibid.

⁵³ BVerwG, I WD 33/66: Federal Administrative Court, 1st Military Service Senate, decided 20 October 1967. The decision refers to the order of punishment by Stuttgart Local Court on 29 March 1965, and quotes from the ruling at Military Service Court D on 25 April 1966. Found on www.jurion.de.

rosis,”⁵⁴ allowing the senate to refrain from removing the sergeant from service, unlike the initial measure.

A military prosecutor requested a similar psychiatric evaluation for a petty officer second class in 1968. That February while at a party with friends, the officer had “laid his right arm over the shoulder [of a private], kissing him on the mouth and cheek, and licking his cheeks.” It was not the “delighted” private who had reported the incident but other soldiers, which their superior then reviewed before passing it on to the Flensburg public prosecutor. An investigation for suspected violation of §175 StGB was suspended that April due to lack of evidence. The petty officer had previously spent two weeks in the neuro-psychiatric department of the Bundeswehr Hospital in Hamburg, where he received a “thorough physical examination and psychiatric as well as psychological review.”⁵⁵ The court records contain the doctor’s report, which does not shy away from intimate details about the officer’s sexual activities from adolescence on. The Bundeswehr psychologist found “a truly low level of” intelligence, “certain tendencies in the direction of homoeroticism” and “homoerotic patterns of behavior under the influence of alcohol,” but no signs of a “homosexual tendency.”⁵⁶ The military service court in Kiel heard the case later that year in July, after which it discontinued proceedings based on the psychiatric report.⁵⁷

Such reports remained common through the 1970s as a way to determine homosexual tendencies, and into the 1980s on isolated occasions. They were also employed to rule out those same tendencies, as in the 1974 case of a senior staff physician (equal in rank to major). One Thursday morning another soldier, an acquaintance of the physician, had seen the latter hugging and kissing a “good-looking young man” on the street, “including a French kiss and taking hold of his companion’s genitals above his pants” (taken from the witness statement). The witness reported what he had observed to his superiors who then took disciplinary action, one part of which included four weeks (!) of inpatient observation at the neuro-psychiatric division of a Bundeswehr hospital. The resulting psychological report concluded that “the conditions for early retirement laid out under §44 (3) SG have not been met due to lack of demonstrable homosexuality [on the part of the senior staff physician].” The one filing the report, incidentally, also held the rank of senior staff physician. His words, paired with those of the defense lawyer concerning his

⁵⁴ Ibid.

⁵⁵ BAArch, Pers 12/45936: Report from the neuro-psychiatric division at BWK Hamburg to the legal advisor at WKB Kiel, 1 April 1968.

⁵⁶ Ibid.

⁵⁷ Ibid., Ruling at Military Service Court A, 1st Division on 12 July 1968.

client's alcohol consumption prior to the event, allowed the military service judges to view the incident "not as an expression of homosexuality, but simply excess of alcohol," albeit one which "had given the impression of a homosexual tendency." The judges imposed a one-year ban on the physician's promotion.⁵⁸

Another staff sergeant was made to undergo psychiatric evaluation in a Bundeswehr hospital in 1967. He had not drawn any attention in the line of duty previously, but was then "caught" engaging in homosexual activities in his private life – most recently, and probably decisively for his fate, in a public toilet. Police investigators began a meticulous search for earlier crimes, uncovering numerous homosexual "offenses" that reached back to 1963 in the process. The local court sentenced the man to eight months in prison on nine counts of illicit sexual acts with men, suspended to three years' probation in exchange for a fine of 800 DM. The commander of the staff sergeant's armored battalion opened a disciplinary investigation into the same matter, shipping the sergeant off to the neuro-psychiatric division at a Bundeswehr hospital in the interests of obtaining an "expert opinion." The doctors there found him "permanently unfit for assignment due to inability to perform." Army personnel command placed the staff sergeant in retirement as unfit to serve under §44 (3) Clause 1 SG. With that it was "case closed" for the troops; not so, however, for the military disciplinary prosecutor or the military service judges, who stripped him of his retirement pension for official misconduct in 1968.⁵⁹ To put it plainly, the Bundeswehr judiciary was removing the material basis for the retirement into which it had forced the staff sergeant.

The sergeant's lawyer filed an appeal, arguing that his client's homosexual tendencies "had been recognized as an illness through the administrative act of placing him in retirement," one to which the disciplinary court was also bound. The service senate judges rejected this line of reasoning, replying that retirement had come about "from an inability to serve derived from [the accused's] tendency," whereas the "cause for disciplinary action [...] is not a soldier's same-sex tendencies but their enactment." Nor in this instance did the judges at the Federal Administrative Court accept the lawyer's accusation of double jeopardy (protected against by the constitution); career sanctions were not imposed under general criminal

⁵⁸ Ruling at the 12th Division of Military Service Court North on 16 September 1975, mentioned in BVerwG, II WD 57/75: Federal Administrative Court, 2nd Military Service Senate, decided 29 April 1976. Found on www.jurion.de.

⁵⁹ BVerwG, II WD 59/68: Federal Administrative Court, 2nd Military Service Senate, decided 10 June 1969. Includes references to the rulings at Rheine Local Court on 25 July 1967 and a military service court on 24 July 1968. Found on www.jurion.de, as well as what follows.

law “but were typical of disciplinary action, which falls under disciplinary law, not criminal law.”

From a strictly legal point of view, disciplinary action was not the same thing as punishment *per se*. Bundeswehr jurists placed value on the proper designation of “disciplinary measures.”⁶⁰ The constitutional ban on double jeopardy would have precluded disciplinary action after conviction by a local or regional court.

Generally speaking, the mere existence of §175 StGB, when paired with the punishment it threatened, prevented homosexual men in the Federal Republic from living a life that was in keeping with their nature, and restricted them in expressing their sexuality and way of loving. Their experience was one of standing outside a mainstream society that was hostile to them, and of persecution at the hands of the state and its judicial system.

In a rare case of extremes, in 1969 three gay men from Rhineland-Pfalz, among them a conscript, chose the most radical path for rejecting society and its norms when they murdered four innocent soldiers guarding a munitions depot in Saarland. The case garnered a great deal of public attention at the time, with the homosexuality of the perpetrators playing a star role in the media interest.

6. Excursus: The 1969 Murder of Four Soldiers

20 January 1969, 3 a.m., paratroopers on watch at a munitions depot in Saarland's Lebach are surprised in the middle of an otherwise peaceful night by an insidious attack on the guardroom. Private Dieter Horn, Private First Class Arno Bales and Sergeant Erwin Poth are shot in their sleep, Private Ewald Marx later succumbs to his wounds. A further soldier survives with severe wounds. The two perpetrators make off with three G3s, two P1s, and a thousand rounds of ammunition.

MAD, the police and the public prosecutor's office initially assumed a politically inspired – i.e. radical leftist – attack on the Bundeswehr in the ensuing investigation. The highly active *Außerparlamentarische Opposition* (APO) came under suspicion; another possibility was a group from the communist underground seeking to arm itself for guerrilla warfare in the event of war with the Eastern Bloc. Military counterintelligence analysis even entertained the notion of Bundeswehr sympathizers or members of the armed forces looking to show up serious security gaps in guard details as a possible background to the assault, before dismissing the

⁶⁰ In the old version of the Military Disciplinary Code, disciplinary measures decided in court, or “gerichtliche Disziplinarmaßnahmen” as they are called today in Germany (see §58 of the disciplinary code), were designated “disciplinary punishments,” or “Disziplinarstrafen.”

explanation as highly unlikely and focusing instead on the radical left. The case was not solved by MAD however, but by the ZDF TV show “Aktenzeichen XY [...] ungelöst” [File Reference XY [...] unsolved] and a fortune teller in Remagen who had previously been blackmailed by the criminals.⁶¹ The actual motive took both police and MAD by surprise. The culprit turned out to be a young man who until December 1968 had served as a conscript in Paratrooper Battalion 261 in Lebach. Working alongside his boyfriend, the conscript had planned the attack on the munitions depot, which was familiar to him from his time as a conscript, in order to secure weapons and ammunition to rob banks. The conscript had stolen a P38 pistol during a military exercise in Baumholder with the same purpose in mind; his partner had taken another pistol from the evidence room at Landau local court, where he worked as a legal secretary. Another friend had been involved in the planning as well, a conscript working at the Bundeswehr hospital in Koblenz at the time of the crime. The ultimate motive was the three friends’ desire to finance a life together in South America or the South Pacific, far away from the hostility they felt from German society.⁶² As the trial played out before Saarbrücken regional court in the summer of 1970, media attention came repeatedly to rest on the sexual orientation of the three accused. In one report the trial observer for *Der Spiegel*, Gerhard Mauz, set fictitious words of understanding in the mouth of the regional court president regarding the specific problems faced by a minority that up until the year before had been subject to legal persecution.

“Mr. Fuchs,” Mr. Tholl might say, “you have formed a disposition toward Ditz and especially Wenzel that one generally calls homosexual. A prejudice exists against this disposition – it is called ‘deviant,’ even today” [...] “It might be possible to recognize the path by which you found your way to one another, to join together against a world from which you feel barbarically excluded and irrevocably judged.”⁶³

In August 1970 the Saarbrücken court sentenced the two men to lifelong sentences for murder, and gave the Koblenz conscript six years in prison for aiding and abetting a murder. For one of the two main criminals, a “lifelong” sentence meant release

⁶¹ One of the blackmailers employed the same pseudonym with the female fortune-teller as in his subsequent letter of confession to the attack in Lebach. The fortune-teller had taken down the license plate of the blackmailer at the time. When she heard and saw the distinctive name on television, she informed the police, and the license plate number quickly lead to the criminals. For more see the TV documentary “Der Soldatenmord: Die Schüsse von Lebach,” a part of the series “Die großen Kriminalfälle,” first broadcast 6 February 2001 on ARD.

⁶² Storkmann, “20. January 1969.”

⁶³ Mauz, “Warum so und später anders...?”

in 1993 after twenty-three years, as was common practice. The second, seventy-five as of 2018, has declined to submit a petition for release for thirty years now and still sits in prison.⁶⁴ Such an appalling and senseless act was not and cannot be justified by the persecution of homosexuality at the time; all the same, it was the same-sex orientation of the culprits, their service in their Bundeswehr and the potency of §175 that held the center of media interest.

7. “Lex Bundeswehr?” The BMVg and the Decriminalization of Male Homosexuality in 1969

In 1969, West Germany declared sexual activity between consenting adult men (those over twenty-one at the time) exempt from punishment. Jurists spoke of “simple homosexuality” in distinguishing it from more serious cases, which continued to be punishable.

§175 StGB Illicit Sexual Acts between Men

- (1) A term of imprisonment of up to five years shall apply to:
 1. a man over eighteen years of age who commits illicit sexual acts with another man under twenty-one years, or who allows himself to be abused for illicit sexual acts;
 2. a man who abuses a relationship of dependency established by service, employment, or subordination by inducing another man to commit illicit sexual acts with him, or who allows himself to be abused for illicit sexual acts;
 3. a man who commits illicit sexual acts or allows himself to be abused as a regular source of income, or offers to do so.
- (2) In the case of Paragraph 1 No. 2, the attempt is punishable.
- (3) The court may refrain from punishment where a party was not yet twenty-one years of age at the time of the crime.⁶⁵

The 1969 reforms reached far beyond §175 and addressed the previous prohibition on adultery and “procurement in the sense of exchanging partners.”⁶⁶ Yet both publicly and behind closed doors, a serious debate emerged, especially regarding the future of the “homosexual paragraph.” In private, conservative jurists and politicians sought to avert what they feared would be a “worst-case scenario” for discipline and order in the Bundeswehr, one in which men ages twenty-one and up

⁶⁴ Meyer, “Lebacher Soldaten-Morde.”

⁶⁵ Burgi and Wolff, *Rechtsgutachten*, the current phrasing since 1 April 1970. In the version from 1 September 1969, for “term of imprisonment” simply read “prison.”

⁶⁶ BArch, BW 1/187212: Bundestag legal affairs committee, resolutions of the criminal law division, 19 September 1968.

would be allowed to engage in sexual intercourse without fear of reprisal, even in close quarters or group situations as found in the Bundeswehr or the Federal Border Police. The problem had been “discussed in detail” both in the special committee at the Bundestag and the “Grand Criminal Law Commission,” with BMVg jurists playing an important role in the background. By 1958, with §175 StGB already on shaky ground and reform anticipated, conservatives – here taken in a double sense to mean adhering to a current in partisan politics but also traditional values and inherited social structures – had envisioned a new paragraph to protect against the “clearance” of sex between men in the Bundeswehr and Federal Border Police. The second paragraph of the new §222 StGB would read: “Men who live together in an association or group and commit sexual acts with each other shall also be punished”⁶⁷ – a law specially conceived for the Bundeswehr and the border police. §222 was never introduced, though it “would have been decidedly better,” as one jurist lamented in *Neue Zeitschrift für Wehrrecht* in 1970.⁶⁸

A peek behind the curtains at the work of the criminal law subcommittee within the Bundestag Committee on Legal Affairs reveals that the specific “age of consent” of twenty-one was worked out with a view toward Bundeswehr fears about “impairments to military order and a resulting decrease in the fighting power of the Bundeswehr.”⁶⁹ Sources show the lengths to which the BMVg went in pushing for regulations specific to the armed forces. Strictly speaking it was military leadership, and Chief of Defense Ulrich de Maizière to be exact, who spoke out vehemently in favor of keeping homosexual behavior between soldiers a criminal act. At the time leadership sought no less than a law created specifically for soldiers, even if it was not supposed to look that way.

The BMVg lawyer charged with the affair acquiesced to demands that he advocate for special regulations regarding soldiers during the committee session, “certain reservations regarding criminal law dogma notwithstanding.” In legalese it was not special regulations that were spoken about here but “expanded protection for soldiers under criminal law.” Concretely, the BMVg called for the “protection of criminal law” to be upheld for those under twenty-one years of age, subordinates and those within enclosed military facilities.⁷⁰ The Federal Ministry of Justice rejected the proposal as “too far-reaching,” but declared itself willing to accept it

⁶⁷ Schwalm, “Die Streichung des Grundtatbestands,” 85.

⁶⁸ Ibid.

⁶⁹ Burgi and Wolff, *Rechtsgutachten*, 33. For the political and judicial debates surrounding the 1969 reform of §175 StGB during the 1960s and 1970s and their impact on the armed forces, also see Brühöfener, “Contested Masculinities.”

⁷⁰ BArch, BW 1/187212: BMVg, VR II 7, 17 January 1969, as well in the following. (Emphasis in the original).

if the BMVg lawyer were able convince the legal affairs committee in the Bundestag. The decision now lay before parliament and thus in the hands of lawmakers, where it belonged. 16 January 1969 was the pivotal day. Shortly before the session was set to begin, a brigadier general approached the BMVg lawyer. The general had spoken with the chief of defense; the lawyer would have to exact even greater “protection under criminal law” for soldiers. General de Maizière now demanded that “every homosexual act by a soldier be punishable in every instance, no matter when, where, or with whom.” At the same time, de Maizière had explicitly stipulated this could not result in a “Lex Bundeswehr.” Yet the one was not possible with the other. The BMVg lawyer himself called it a “practically unachievable demand,” tantamount to preserving a law (§175 StGB) upon whose repeal the committee was “resolutely (unanimously!) determined.”

A memorandum put out directly before the meeting by the senior department head for all non-military offices at the BMVg similarly lamented the chief of defense’s “much farther-reaching” demands.⁷¹ Neither he nor his legal department had been informed ahead of time. During the morning session, the BMVg representative presented the committee with wording for a new version of §175 StGB that was in keeping with the BMVg’s initial set of wishes; according to the report, the committee members responded “quite open-mindedly.”⁷²

During the midday pause, the lawyer then drafted a new version of §175a to include the sweeping demands of the chief of defense.

A term of imprisonment of up to three years shall apply to anyone who

1. as a Bundeswehr soldier
2. as a law enforcement official of the Federal Border Police or the riot police or
3. as a member of the Civil Defense Corps, or while performing alternative service, commits illicit sexual acts with another man or allows himself to be abused for illicit sexual acts, insofar as the crime is not punishable under §175.⁷³

On paper one finds the comment “worked out due to request from mil., in line with the Engl. and Swiss solution.” Presumably the introduction of the Federal Border Police, riot police and Civil Defense Corps represented an attempt to blur the impression of creating a law created specifically for soldiers. The new proposal had the effect of “chilling somewhat the committee’s visible readiness from that

⁷¹ BAArch, BW 1/187212: BMVg, Head of Department III, 17 January 1969.

⁷² Ibid., BMVg, VR II 7, 17 January 1969.

⁷³ BAArch, BW 1/187212, sheet 49: BMVg, VR II 7, suggested formulation, solution No. 1, undated, as well in the following. The draft used the term “penal servitude,” later it was emended by hand to “term of imprisonment.”

morning to accommodate the interests of the Bundeswehr.”⁷⁴ Even that account was glossed over. With his heightened demands, de Maizière had minimized the chances of his ministry’s previous, more moderate proposal succeeding; the legal affairs committee now looked on any sort of law particular to soldiers with skepticism.

Thus, the drastic stipulations backfired, figuratively speaking. With the “military side” still holding tight to its maximal demands,⁷⁵ Minister Schröder of the CDU decided against them, charging the lawyers in his own ministry with advocating only for the original, more moderate request. Two elements for a crime should “unconditionally” be brought to bear, namely, “a.) active and passive parties must both be soldiers; b.) the crime must have a material or spatial relationship to military service.”⁷⁶ With that de Maizière’s demand that *any* homosexual activity by a soldier be made punishable, including with civilians, was off the table.

The defense ministry’s lawyers ultimately came up short in the behind-the-scenes struggle, unable to hold even the final line of defense regarding a “material or spatial relationship to military service.” The BMVg was able to notch a minor victory in retaining a ban against homosexual activity for those under twenty-one, an age limit that was fixed not least in deference to the interests of the Bundeswehr. The age group that continued to stand under threat of punishment represented those eligible for military conscript. In reality, the age limit led “to the objectively unjustifiable result that men of the same age who kept up a homosexual relationship until their eighteenth year went unpunished, became subject to punishment between eighteen and twenty-one, then again became exempt from punishment after that.”⁷⁷

Within specialist circles as at *Neue Zeitschrift für Wehrrecht*, jurists picked the reform of §175 StGB to pieces (“not exactly the lawmaker’s finest work”) while considering the implications for the armed forces. The fact that it was the Bundeswehr that had called for the age-limit did nothing to alter the “imbalance in the new regulation.”⁷⁸ Still, the author wrote, all the accusations of a “Lex Bundeswehr” missed the mark; the reform did not stipulate any special regulations for communities or groups, nor did the age limits and special protection afforded to relationships of

74 Ibid., BMVg, VR II 7, 17 January 1969.

75 Ibid., BMVg, Head of Department III, 17 January 1969.

76 Ibid., BMVg, Minister’s office, 17 January 1969 (with handwritten notes from Defense Minister Schröder), also in VR II 7, 22 January 1969.

77 BArch, BM 1/6727, Bundesrat: Motion by the State of Baden-Württemberg for the Bundesrat session on 23 October 1970. This was the justification used by the state government in Stuttgart to motion that the Bundesrat replace “twenty-one” with “eighteen” in §175 (1) No. 1.

78 Schwalm, “Die Streichung des Grundtatbestands,” 83. In what follows as well.

service, employment or subordination apply to the armed forces alone, but generally.⁷⁹ So had a law been created specifically for the Bundeswehr or not? Perhaps not in letter, but in intention it was beyond doubt.

Reference to the age limit of twenty-one being introduced at the Bundeswehr's request in 1969 also appears in the defense ministry's written internal correspondence from the following year. The Air Staff for example expressed great satisfaction

that young adults and those dependent on a relationship of service or subordination continue to find protection from homosexual assault in the new version of the statutory provision. It especially takes into account the justified demands that the Bundeswehr has made on account of the specific nature of a soldier's life. The exceptional aspects of the military context have not changed in this respect compared to the past. Protection under criminal law thus continues to be a requirement. In my view it cannot be replaced by status law or disciplinary measures, especially because they are not as comprehensive in their effects as legal regulation.⁸⁰

The BMVg was not able to prevent the revamping of sexual offense law in 1969. Yet, as seen here with air force leadership, it was satisfied to see that at least conscripts between the ages of eighteen and twenty-one-years-old would continue to enjoy protection from "homosexual assault" under the law and – in the event they desired each other – to know they were subject to it.

How would the armed forces deal with the newfound liberality in criminal law within its ranks? Military criminal courts did not exist in West Germany after 1945, and for good reason.⁸¹ Even before the reform took place, BMVg lawyers recognized that the new, more liberal laws governing sex offenses would impact disciplinary measures; a form of behavior that is no longer punishable under criminal law also loses "weight" as a breach of duty or misdemeanor. There would be cases that could now "no longer in any way" be seen as a service violation. Jurists warned that doing away with the criminality of simple homosexuality would cause "considerable problems" for the Bundeswehr's administration of justice by 1968.⁸²

⁷⁹ Ibid. Schwalm coined the phrase "Lex Bundeswehr" for the new version of §175 StGB in his 1970 essay. As shown above, Chief of Defense de Maizièrre had already used the phrase in January 1969, albeit in an internal document (BArch, BW 1/187212: BMVg, VR II 7, 17 January 1969). It is doubtful that Schwalm was aware of the usage, and more likely that he came up with the term, which comes to mind quite quickly on its own. The term has been used repeatedly since, as in Brühöfener, "Contested Masculinities," 303.

⁸⁰ BArch, BM 1/6727: BMVg, Fül II 6, 7 October 1970.

⁸¹ A military criminal code has existed in the Federal Republic since 1957, however; the law applies to punishable crimes committed by Bundeswehr soldiers.

⁸² BArch, BW 1/187212, disciplinary prosecutor for the Bundeswehr, 27 September 1968.

The age limit was eventually lowered to eighteen in 1973, brought on by the age of legal adulthood being lowered generally.

8. “Civilian Courts’ Lax Handling of Homosexuality”: Disciplinary Rulings against Consensual Sex after Criminal Reform

Jurists in the BMVg’s administrative and legal affairs department did not regard a more liberal “moral criminal code”⁸³ as fundamentally impacting how homosexual activity would be assessed under service law, writing in 1970 that the catalog of duties enshrined in the Legal Status of Military Personnel Act (Soldier’s Act) operated independently alongside the stipulations of criminal law, and thus “was not directly affected” by any changes. This meant same-sex activity could still constitute a violation of duty “even in the event that” the crime no longer stood under “threat of criminal punishment.” The lawyers stated it even more clearly: Same-sex activity “by soldiers with other soldiers, but also with third parties [!]” was fundamentally to be regarded as a serious breach of duty.⁸⁴

In August 1969 the BMVg sent out an advisory about the new legal situation to every commander and head of office so as “to avoid confusion.” The note observed that the “catalog of duties” laid out in the Soldier’s Act stood independently alongside the provisions of substantive criminal law as a matter of course, given the different aims that criminal and disciplinary law pursued. The liberalization of the “moral criminal code” had “no fundamental impact” on service law: same-sex activity among soldiers would continue to be regarded as a breach of duty even if it was no longer punishable as a criminal act.⁸⁵ BMVg lawyers drafted a list of scenarios to assist with applying the service law going forward.

1. The crime *fulfills* the elements of an offense under the *new version of §175 StGB*.
2. The crime *does not fulfill* the elements of an offense under the *new version of §175 StGB*, but involves same-sex activity
 - a.) between a soldier and another soldier, another member of the Bundeswehr, or with a third party inside military installations or facilities;
 - b.) between a soldier and another soldier or member of the Bundeswehr outside of military installations or facilities, especially those between a superior and a subordinate, a soldier of a higher-ranking service group and a member of a lower-ranking service

⁸³ The original German term is “Sittenstrafrecht.”

⁸⁴ BArch, BW 24/7180: BMVg, VR IV 1, 29 September 1970.

⁸⁵ BArch, BW 2/31225: BMVg, Füs I 3, Az 16-02-02, 7 August 1969.

- group, an older man and a significantly younger man, or a soldier and another soldier or member of the Bundeswehr who belong to the same unit or service post;
- c.) between a soldier engaged in official duties and an outside third party outside of military installations or facilities;
 - d.) between a soldier with an outside third party outside military installations or facilities in cases other than those named in a.) and c.), if the crime or its discovery affects official interests.⁸⁶

With that, the commanders and office heads had it in black on white: They were able, in fact were obligated, to bring disciplinary action against soldiers for any kind of sex involving other soldiers or civilian member of the Bundeswehr, even if that were to occur “outside military installations,” be it in one’s hometown apartment or a hotel. Yet even sex outside the barracks with a man who did not belong to the armed forces was subject to disciplinary action if the soldier involved was on official duty, or, barring that, if “the crime or its discovery [affected] official interests.”

Still, proceeding by process of elimination, BMVg officials and lawyers had for the first time opened the door to no longer regarding consensual sex outside of the barracks with a non-member of the armed forces a breach of duty. In doing so, however, they drafted a paragraph that could be interpreted at will, and applied to any case involving sex between men – as soon as it was discovered, that is. This had *always* been the case, as without an act’s discovery there would be no cause for the Bundeswehr to begin an investigation. “For soldiers, discovery of the crime and the perpetrator’s membership in the Bundeswehr routinely results in a considerable loss of authority and trustworthiness, disruption to troops’ internal composition, their order, discipline, and sense of camaraderie, and damage to the reputation of the Bundeswehr.”⁸⁷ Fundamentally, the lawyers in Bonn wrote, the changes in criminal law did not matter to them; as far as soldiers were concerned, practically every form of homosexual activity would still be subject to disciplinary action. The parents of conscripts would “rightly” expect the Bundeswehr to keep the official realm and, “as far as possible the extra-official realm [!] free of homosexual relationships.”⁸⁸

In 1993, the commanding officer for Military District Command III (an area corresponding to the state of North Rhine-Westphalia), General Major Manfred Würfel, was still wondering aloud in *Der Spiegel* “How can I make it clear to my

⁸⁶ Ibid., original emphases.

⁸⁷ BArch, BW 24/7180: BMVg, VR IV 1, 29 September 1970. The same wording can be found in BArch, BW 24/7180: BMVg, Füs I 1, 9 September 1970.

⁸⁸ Ibid.

people that I cannot tolerate homosexuality in my units [...] when it's no longer punishable in society at large?"⁸⁹ By the article's account, the general was "at loggerheads with civil jurisdiction" and "feared for troop discipline if the lax treatment of the male homosexual community at the hands of the civilian courts spread within the 'tightly confined quarters' of his own 'male community'" –this was in 1993, mind you.

The Federal Administrative Court for its part had been ruling since 1970 that homosexual conduct no longer represented a breach of duty, provided it occurred outside of service and was not tied to official responsibilities in any particular way. That year saw a ruling on the appeal of a petty officer second class previously convicted in disciplinary court; as the first trial involving a soldier's homosexual activity since the reform of §175, the decision had a bearing on future precedent.

The legal reforms that decriminalized homosexual activity between adults took effect on 1 September 1969, and immediately began to work in favor of the petty officer. Just four days before, at the proverbial final buzzer, Military Service Court F had ordered him removed from service, simultaneously reducing his rank to private first class. The officer stood accused of carrying on homosexual relationships in private as well as attempted advances on fellow soldiers, a charge which proved untenable when the service court heard evidence. Actions taken in the purely private sphere were all that remained, some reaching back to 1963, long before the officer had entered the service. The court decided nonetheless that a service violation had occurred and imposed the harshest possible disciplinary measures – in other words, a ruling that was entirely in keeping with the previous hard line.⁹⁰ When the officer appealed, the judges on the military service senate cleared the initial ruling from the table. To date, disciplinary action had always involved cases where the behavior was at the same time criminal. For the first time now, that no longer applied. The judges considered it immaterial that the behavior itself occurred before 1 September 1969, as the accused had not been punished by a criminal court before 1 September and thus could no longer be punished per §2 (2) StGB.⁹¹

As §17 (2) SG stated, however, conduct did not necessarily have to be criminal to be in breach of duty. "As such, the depenalization of simple homosexuality does

⁸⁹ "Versiegelte Briefe'."

⁹⁰ Ruling by the 6th Division of Military Service Court F on 28 August 1969, mentioned in BVerwG, II WD 73/69: Federal Administrative Court, 2nd Military Service Senate, decided 10 June 1970. Found on www.jurion.de.

⁹¹ BVerwG, II WD 73/69: Federal Administrative Court, 2nd Military Service Senate, decided 10 June 1970.

not mean that homosexuality has lost its disciplinary import in general.” Still, in this case it had, as

the situation is different in cases of the present type, which concern events that took place outside the Bundeswehr and without any ties to the official realm. Henceforth, such behavior cannot be recognized either as damaging to the Bundeswehr’s reputation or unworthy of respect regarding the soldier concerned. The end of simple homosexuality as a crime rests on the notion that a liberal society must tolerate behavior that may well deviate from the norm, but fundamentally belongs to people’s private sphere. The senate is well aware of the fact that general appraisal has not changed at the same time as the legal system. Continuing with the previous form of rejection – itself subject to changes in perception anyway – cannot, however, be granted disciplinary relevance; in this regard the concept of tolerance holds greater relevance.⁹²

All this meant the petty officer should be acquitted. The records leave it uncertain as to whether his acquittal subsequently offered him a way forward in the navy. He had already been admitted once before in late 1968 to the neuro-psychiatric department of a Bundeswehr hospital “on suspicion of a homosexual disposition.” Upon evaluation, physicians determined that “he was homosexually predisposed and thus permanently unfit for assignment.” Efforts by the officer’s superior to remove the officer as unfit to serve under §55 (2) SG were discontinued after disciplinary court proceedings began. Court records, however, remain silent on whether – with disciplinary proceedings now ended in acquittal – the “medical card” would be played again in order to “be rid” of the petty officer.

Independently of how the officer fared personally, the judges were well aware that their ruling was breaking new legal ground, and would have a signaling effect. The revision of §175 could not stop at the doors of the military service courts. The decision circulated in specialist judicial journals, drawing commentary and summary of its key message: “Homosexual activity outside of the Bundeswehr and without any connection to the official line of duty, no longer punishable as of 1 September 1969, is in any event not a breach of duty if the same-sex relationships have not been carried out in an offensive or – as necessitated by particular circumstances – conspicuous manner.”⁹³

With the 1970 ruling, military service senates recognized case law that had been adopted by disciplinary senates for civilian public servants five years previously. In 1965, the Federal Disciplinary Court ruled that disciplinary action could only be taken against a state employee based on his homosexuality “if his conduct

⁹² Ibid.

⁹³ *Neue Zeitschrift für Wehrrecht* (1971): 31.

at work or in public was liable to give offense.”⁹⁴ Four years before criminal law reform, the highest disciplinary court thus provided a way for civil servants known to be homosexual to remain in service, assuming they did not “arouse public indignation.” Concretely, this meant that homosexual state employees were finally able to be private in private. If they were to give cause for “offense,” on the other hand, it would diminish the reputation of the civil service and thus the state – another parallel to the careful legal protection afforded to the “reputation of the Bundeswehr.”

Independently of changes in its status under criminal law as expressed in the repeal of the earlier version of §175 StGB, same-sex activity between members of the Bundeswehr is and remains intolerable for a male community as tightly quartered as the army. It is not only that [such activity] diminishes moral cleanliness, nor that the unit’s reputation and public perception of the Bundeswehr in general are damaged. Graver still is the risk of a disruption in internal order, which must be sustained by discipline and authority.⁹⁵

It was in these no uncertain terms that the judges on the 2nd Military Service Senate at the Federal Administrative Court ruled against a sergeant first class in 1970. The sergeant was charged with carrying on consensual sexual activity, even a love affair with a young private in his battery, i.e. one of the companies in his artillery troop. Throughout 1967 other soldiers in the battery had repeatedly observed the two “conspicuously tumbled about with each other,” stroking and kissing each other lovingly. The soldiers filing the report subsequently served as key witnesses against the defendants, who disputed the charges. The state prosecutor opened an investigation into the sergeant and private for suspicion of sexual crimes under §174 or 175 StGB,

yet sufficient suspicion of a criminal act could not be demonstrated. It was predominately “battery talk,” soldiers swapping rumors that did not stand up upon closer inspection [...] More serious seems the witness statement [of Sergeant B.] that upon entering the room of the accused he had [...] seen [the accused] and R. in a tight embrace, kissing each other. These statements were also disputed by both accused. There is no doubt as to the veracity of the witness Sergeant B.’s statement. A simple kiss between men, however, is not generally regarded as illicit under jurisprudence or legal doctrine [...] differently from what is termed a French kiss. Under BGH 1/298 a kiss – particular aberrations notwithstanding – is *not* an illicit sexual act. Since Witness B. saw the two defendants only very briefly upon opening the door to the room, these kind of aggravating circumstances against them cannot be proven; French kissing for example would hardly have been possible to identify.⁹⁶

⁹⁴ Gollner, “Disziplinarsanktionen gegenüber Homosexuellen im öffentlichen Dienst,” 106–7.

⁹⁵ BVerwG, 25 June 1970, II WD 18/69, ruling of the Second Military Service Senate at the Federal Administrative Court on 25 June 1970. Found on www.jurion.de.

⁹⁶ Here and in the following: Nolle *prosequi* from State Attorney T. dated 2 July 1968, cited in the

The Bundeswehr's own disciplinary justice system, however, brooked no doubts in favor of the accused. The first division of Military Service Court D found the sergeant guilty of breach of duty and ordered his discharge. The sergeant appealed, to no avail. In 1970, the Second Military Service Senate at the Federal Administrative Court upheld the initial verdict against the sergeant's love for the private, holding the observations of a range of witnesses for both to be credible and sound. The senate was convinced that "all the touching had been an expression of homoerotic relationships."

The external order and internal composition of a military unit demand at all times that the unit remain free of injurious ties of this sort. To such an extent a soldier, but especially a superior, must impose discipline and restraint on himself; above all else he must serve as an example of poise and commitment to duty to younger comrades, and a guarantor of respect for the dignity and honor of fellow soldiers. In this the accused has lapsed, losing his authority as a superior and destroying his employer's trust in him.

By way of postscript, the court records mention in passing that the two men continued their "close friendship" even after the private's time as a conscript had come to an end and the sergeant was first suspended, then dismissed.

a.) "Otherwise Normal." A 1970 Ruling on a Staff Sergeant and Five Other Soldiers

1970 saw a further case of consensual sexual activity between soldiers in the barracks tried in a service court. That April, the court ruled that "same sex activity within a confined male community is inimical to the inner composition of troops and their discipline to a high degree," and that it continued to constitute a serious violation of duty even with legal reform. Before the judges stood a staff sergeant, a mature man serving as a fixed-term soldier, the married father of a school-age child who between 1968 and 1969 had repeatedly had consensual sex with another staff sergeant in his unit. The case was tried in local court before the criminal law reforms had gone through; the defendant had been ordered to pay a fine of 210 DM in lieu of two weeks imprisonment for crimes under §175 StGB. The staff sergeant was not alone – a total of six soldiers who were sexually active with each other had been discovered within the company. Three of the soldiers also received fines in the local court proceedings; another was sentenced to three weeks in prison,

ruling of the 2nd Military Service Senate at Federal Administrative Court, II WD 18/69, 25 June 1970 (emphasis in original).

apparently without probation; while the sixth, a staff sergeant regarded as a repeat offender, was given three months in prison on nine criminal counts under §175 StGB.⁹⁷

Four of the soldiers involved were dismissed swiftly and without delay from the Bundeswehr via the administrative route, under §55 (5) SG. The remaining two, a lieutenant and the staff sergeant, had disciplinary proceedings initiated against them; both had been in the service more than four years, blocking simplified dismissal under §55 (5) SG. Disciplinary proceedings against the lieutenant ended with an eight-month pay reduction by one-twentieth. The leniency of the verdict came about from the judges' assumption that the lieutenant had acted in a state of full intoxication. The staff sergeant, on the other hand, could not show having consumed a considerable amount of alcohol before sex. This absence of what the judges viewed as an exonerating factor led them to consider him at least latently, and at times actually, interested in same-sex activity, or "an otherwise normal and plain casual offender" in their phrasing. The service court deemed his activities a serious breach of duty. "Anyone who, like the defendant, engages so unreservedly in homosexual activity with a [soldier] of equal service rank makes himself untenable as a superior." A demotion in rank to private first class followed.⁹⁸ The fact that the staff sergeant was not dismissed in 1970 reveals that the previous years' legal reforms were also having a moderating effect on the Bundeswehr. Previously, NCOs had as a rule been dismissed for similar, even less concentrated sexual activity.

Later that year in December 1970 the 1st Military Service Senate at the Federal Administrative Court again upheld the new liberal line, this time repealing an initial court decision to remove a staff sergeant from service. The sergeant had on separate occasions directed different (and willing) young men to sleep with his wife in front of him. While they had intercourse with his wife, he would then touch the men intimately. The scene repeated itself nightly, at times involving other young men and always to the delight of all those involved, until a neighbor complained about the nocturnal disturbances to the police. The "lively threesomes" (the judges found the more sober term "triplet intercourse") entered the purview of the law. Kempten regional court sentenced the sergeant to one year without probation for "attempted aggravated illicit homosexual acts in conjunction with continued aggra-

⁹⁷ Ruling at Ellwangen Local Court on 21 April 1969, found in BVerwG, II WD 67/70. Ruling in appeal proceedings before the 2nd Military Service Senate at the Federal Administrative Court on 12 November 1970. Found on www.jurion.de.

⁹⁸ Ruling of the 1st Division of Military Service Court D on 28 April 1970, found in BVerwG, II WD 67/70, ruling in appeal proceedings before the 2nd Military Service Senate at the Federal Administrative Court on 12 November 1970.

vated procurement” – for consensual sex in his own bedroom.⁹⁹ The verdict did not stand. During appeal proceedings, the regional court shifted the ruling slightly but significantly to “continued aggravated procurement with illicit homosexual acts” and commuted the prison sentence to a fine.

In its own disciplinary proceedings that same year, a military service court ruled that the sergeant should be removed from service.¹⁰⁰ This harsh verdict was not upheld either. The military service senate overturned the decision, and in its ruling lay out baseline considerations for disciplinary action against private sexual conduct: “As with any other off duty transgression in the private sexual realm, [soldiers engaging in homosexual activity] constituted a violation of duty only if the transgression affects the official realm by disrupting military order.”¹⁰¹ As the wording and meaning of §17 (2) SG made clear, the duty to maintain respect and trust was “not an end in itself.” Nor was the ban on conduct detrimental to respect or trust meant “to make the soldiers of the Bundeswehr into a sort of moral model for the rest of the population – such an aim would likely be condemned to failure from the outset for an army of conscripts the size of the Bundeswehr.” Barring a “spatial or personal connection with service,” a breach of duty would be present only in cases of exception, “if the action is particularly reprehensible.”¹⁰² A much lesser form of disciplinary action that was exclusively financial in nature was now taken in place of removal from service.

The winds of change that had begun to course through society in 1968, including at the Federal Administrative Court, could again be felt in the leniency of the 1970 verdict. New names now stood beneath the rulings of the military service senates; new judges bringing new ideas with them to the courts. With such a mild verdict, those judges now drew a clear line between what held official relevance and what had to remain private. Inconsequential sex games in one’s own bedroom, even if they did raise eyebrows or unleash secret fantasies, were generally a private matter. The sexual revolution had changed minds, the judges’ included – a process to which the verdict from Kempten regional court, which commuted an initial sentence of one year in prison without probation to a small fine, can attest. It was not the somewhat curious nature of the case at hand that proved the deciding factor but rather that, once again, the highest disciplinary court had ruled that non-crim-

⁹⁹ BArch, Pers 12/45043, with references to the ruling at Kempten Local Court, 7 July 1969.

¹⁰⁰ Rulings at Kempten Local Court on 18 September 1969 and Military Service Court D on 4 March 1970, mentioned in BVerwG, I WD 4/70: Federal Administrative Court, 1st Military Service Senate, decided 3 December 1970. Found on www.jurion.de.

¹⁰¹ BVerwG, I WD 4/70: Federal Administrative Court, 1st Military Service Senate, decided 3 December 1970.

¹⁰² Ibid.

inal homosexual activity or relationships pursued by soldiers outside the line of duty no longer constituted a violation. This principle was subsequently upheld by every ruling in administrative court.

b.) Private Is Private – or Is It?

The question of the day was how the line of duty should be demarcated. In taking disciplinary action, the necessary link to the official realm was obvious in the case of a soldier who had sexually molested or even assaulted another soldier; just as consensual sexual activity between soldiers while in a barracks continued to represent a violation of duty. The “defining criteria for the scope of duty should be whether a soldier is party to the homosexual activity.”¹⁰³ But what was to be made of consensual sex between soldiers when it occurred fully in private, away from the barracks and after hours? A more recent legal report found that as of 2000 the Federal Administrative Court still had not settled the matter.¹⁰⁴ To give one concrete example of the issue at hand: Was it a breach of duty if two men met in one’s apartment for sex, and it came out that both were soldiers during a cigarette afterwards?

There were no such doubts when it came to existing superior–subordinate relationships – in that case, sexual activity was punished as a breach of duty even when it was pursued in private, or outside barracks gates. Military service courts used a fine-edged ruler in doing so: Even an abstract relationship of subordination sufficed according to the directive governing superior–subordinate relations, a situation that led to officers and NCOs being reprimanded for sexual relationships with lower-ranking soldiers from other units but who were in their barracks. In individual instances, the possibility of soldiers from separately stationed battalions but the same regiment or brigade meeting during joint exercises was enough to establish a relationship of subordination in the eyes of the court. In 1980 for example, the 2nd Military Service Senate at the Federal Administrative Court upheld a verdict against two soldiers from different units within the same regiment who had met purely by chance and then had sex with each other; the ruling even referred to the two companies’ being stationed 100 km away from each other.¹⁰⁵ It

¹⁰³ BACh, BW 1/502107: Report from Doctor of Law Armin Steinkamm, Bundeswehr University Munich, 25 January 2000, here p. 2.

¹⁰⁴ Ibid.

¹⁰⁵ Federal Administrative Court, 2nd Military Service Senate, BVerwG, 2 WD 80/79, decided 2 September 1980. Found on www.jurion.de and mentioned in 1985 in Lindner, “Homosexuelle in der Institution Bundeswehr,” 213. For a full account of the verdict, see chapter 3, section 8.c.

was necessary to establish a given act's ties to service in order to find it in breach of duty; the question of how to do so lay in the hands of the disciplinary courts, with judges given a great deal of discretionary authority. Over the course of the coming three decades, they came to interpret the line of duty more and more narrowly; conversely, more and more cases of private sexual activity escaped disciplinary sanction (or, as Bundeswehr lawyers liked to call it, "valuation").

Responding in 1979 to a query from Bundestag deputy Herta Däubler-Gmelin, the Ministry of Defense stressed that no special principles were brought to bear in the "disciplinary valuation" of homosexual activity compared with other sexual activity, with adultery cited as a concrete example.¹⁰⁶ Only in instances where that activity stood in close spatial or personal proximity to the line of duty, thus disrupting military order, could disciplinary action result. That was the case if the activity occurred within service quarters or on official property, the ministry continued, or if the other partner was a soldier or otherwise belonged to the Bundeswehr.¹⁰⁷ Considering the implications somewhat more carefully here, this (once again) classified consensual sex between two soldiers who did *not* know each other from service as a violation of duty. To take back up with the scenario, if during their cigarette the two men discovered that they both happened to be soldiers, both could attest to a violation. Yet here too, there was no judge without a plaintiff, and that included military service courts. Gay soldiers nonetheless remained uncertain as to whether they were committing a breach of duty or not in having sex with other soldiers, whether at home or elsewhere.

A G1 memo written by Füs I 4 put out in 1986 looked to bring some order to the chaos surrounding disciplinary action for sexual activities that soldiers engaged in off duty and outside the barracks. The proposal put to the chief of defense and Minister of Defense sought to regulate *all* issues pertaining to homosexuality, sketching concrete hypothetical cases to cover every situation conceivable. The section concerning disciplinary measures made any and all homosexual activity involving subordinates or lower-ranking soldiers a breach of duty, "regardless of whether it is performed on or off duty, in or outside of service quarters, and against their will or with their consent."¹⁰⁸ Note here the use of the term "lower-ranking" as opposed to subordinate, for instance. Under the somewhat complicated regulations governing superior-subordinate relations, a higher rank hardly means the soldier is also

¹⁰⁶ BArch, BW 1/304284: BMVg, VR I 1, 15 February 1979, also BMVg, parliamentary state secretary to MdB Herta Däubler-Gmelin (SPD), 23 February 1979.

¹⁰⁷ Ibid.

¹⁰⁸ BArch, BW 2/31225: BMVg, Füs I 4 to the minister via the parliamentary state secretary, 22 October 1986, annex, identical to BArch, BW 2/31224: BMVg, Füs I 4, July 1986.

a superior. Yet a man in this position would also be guilty of violating his duty, at least in theory. Concretely, this would have meant that aside from the obvious case of sexual acts carried out against subordinates' will, a soldier would be guilty of a breach of duty if – to stay with the previous image – it had come out during “the cigarette after” consensual sex between men in one or the other's private residence that both were soldiers but held different ranks. Given the low probability that both men held the same rank, the great majority of these private, often chance encounters would fall under a breach of duty.

The BMVg draft also foresaw classifying homosexual activity between soldiers and/or the civilian staff of the Bundeswehr that “diminished respectability or trustworthiness” as a breach of duty not only when it occurred in service quarters, but while off duty and outside the barracks as well. While the specific meaning and interpretation of the clause was left open, the actual phrasing would have opened the door to prosecuting private sexual encounters between men who both happened to be in the military, even as civilian employees. Finally, in keeping with current ruling practice at military service courts, homosexual activity with “outsiders,” or people without any connection to the Bundeswehr, would also have been regarded as a breach of duty if “committed in an offensive or – brought on by the particular circumstances – conspicuous manner.”¹⁰⁹ That included all crimes under the criminal code. The draft was never put into practice, likely to the benefit of gay soldiers on these points at least. The new regulations would have resulted in any number of new potential violations. Instead, military service courts continued to operate on a case-by-case basis.

Consensual sex between soldiers, even while off duty, outside the barracks and involving soldiers from different units, continued to be classified as a breach of duty after 1970 when it involved an officer or NCO who had intercourse with a soldier he knew to be of lower rank. The Federal Administrative Court elaborated on this rule in 1980, using as an example the case of a sergeant first class who had been accused of having sex with a private from another barracks. The case also demonstrates that the line dividing sexual assault from consensual acts could not always be drawn free of doubt. Often, it was one word against another. Where did consensual sex end and assault begin? In 1979 this question, which holds renewed, or rather continued relevance today (in the “Me Too” movement, for example), stood at the center of the evidence heard against the sergeant.

109 Ibid.

c.) A Mild Verdict against a First Sergeant from 1980

A first sergeant spent his 1978 summer vacation at home. One night on his way back from a club around 2 a.m., he met a private also dressed in civilian clothing who asked whether he was going to the barracks. The accused replied in the negative, but showed himself willing to take the private part of the way there. It is important to know in classifying the case that the two did not know each other from the line of duty, and had never met before. They served at different locations, but in the same regiment – a fact that would eventually prove relevant during sentencing. After a night spent consuming a significant amount of alcohol at the sergeant's apartment, the two wound up having sex when they woke up later that morning. The private left the sergeant's apartment around noon, not before enjoying another beer together. Back at the barracks he lay down to sleep, exhausted and hungover. His absence from service had not go unnoticed; he was woken by his superior informing him that he could expect disciplinary consequences for his conduct, which had drawn attention on multiple previous occasions.

Ordered before the battery commander, the private did not know how else to help his cause other than report on the morning's events in the sergeant's apartment – and to cast it as sexual assault, evidently in the hopes of greater leniency. His calculations were correct, initially at least; no disciplinary action was taken and instead the sergeant became the central focus. The sergeant was initially banned from showing up to service and later given provisional suspension, with half of his pay docked. The public prosecutor opened an investigation against him on suspicion of insult, bodily harm and sexual coercion, but discontinued proceedings in March 1979 when no evidence of criminal activity could be shown. The credibility of the lone witness in the case, the private, seemed too much in doubt to the prosecutor.¹¹⁰

With that the Bundeswehr might have filed the case away – if the disciplinary prosecutor for the military had not opted to proceed, that is. In September 1979, fourteen months after the incident in question, a military service court ruled the “behavior of which the soldier was accused in the indictment proven, considering it a willful violation of his duties to uphold respectability and trust outside the scope of duty (§17 (2) Clause 2 SG) and camaraderie (§12 SG), and thus a breach of

¹¹⁰ Nolle prosequi from the public prosecutor at Itzehoe Regional Court from 13 March 1979, mentioned in the 2nd Military Service Senate of the Federal Administrative Court, BVerwG, 2 WD 80/79, decided 2 September 1980.

duty (§23 (1) SG), committed under the increased liability of a soldier in the position of a superior (§10 (1) SG).¹¹¹ The court found further that:

due to their potentially grave consequences, homosexual acts by non-commissioned officers toward subordinates should be considered an especially grave form of misconduct. The associated loss in esteem and authority for the superior may be adverse to discipline and ultimately affect troops' operational readiness. [By acting in such a way] a superior puts himself in the hands of his subordinates in a certain sense, and may lose the independence and freedom necessary to act in roles of leadership.¹¹²

Given such a forceful opinion, the leniency of the verdict itself came as a surprise: a ten-percent reduction in salary for one year. The judges found that the first sergeant had never abused his position as a superior, nor was the private his subordinate. The sergeant also served in another location. Nothing harmful, in particular no loss in authority, had resulted in the line of duty. "The matter" had, it was true, become public knowledge within the officer corps, "but had not caused a sensation." What was more, "the incident" had not played out in a military installation but a private apartment.

When the military prosecutor appealed, the case landed before the 2nd Military Service Senate. The case files and appeals decision show the lengths to which the Munich judges went to clear up what had transpired in the sergeant's bed, practically dissecting the series of events. To make a long story short here, too, the judges did not believe the sergeant's testimony that the caresses had begun with the private, nor did they think much of the private's account that he had been forced into sex against his will. "The senate is convinced that the truth lies in between the two accounts [...] In the conviction of the senate, both sought sexual satisfaction by mutual agreement in this sense."¹¹³

Even if the case involved consensual sex outside both the confines of the barracks and a superior–subordinate relationship, it was clear to the senate that the sergeant had committed a breach of duty. The connection to the line of duty arose from the circumstance that the sexual partner was another soldier, a conscript, who may not have been in the same unit but was in the same regiment nonetheless.

It casts serious doubt on the trustworthiness of a soldier in the position of a superior when he – be it with his partner's consent – engages in same-sex relations with another soldier.

¹¹¹ Ruling by the 6th Division of Military Service Court North on 6 September 1979, cited in Federal Administrative Court, 2nd Military Service Senate, BVerwG, 2 WD 80/79, decided 2 September 1980.

¹¹² Ibid.

¹¹³ Federal Administrative Court, 2nd Military Service Senate, BVerwG, 2 WD 80/79, decided 2 September 1980. A copy is available in BArch, BW 1/546379.

His superiors have no guarantee that he can be assigned to train young conscripts without one day looking for a similar kind of contact within the more immediate scope of his unit or subunit, thus provoking all the negative effects on troop discipline and cohesion.¹¹⁴

Still, the judges saw an array of mitigating factors in the case: The lack of a concrete superior–subordinate relationship for one, and especially their assumption that the sex had been consensual, contrary to the private’s testimony. Complicating matters was “the particular intensity of the same-sex activity, such as rarely comes before military service senates as the subject of evaluation.” They overruled the decision, increasing the sentence to a three-year ban on promotion.¹¹⁵ The significance of the verdict beyond the case itself lay in concretizing the landmark 1970 decision as to how private and consensual homosexual acts between soldiers should be assessed in a disciplinary context, at least where officers and NCOs were involved. As a rule, they would continue to be seen as service violations.¹¹⁶

Postscript: After the state prosecutor halted his investigation, the first sergeant continued to serve as usual in his unit; a few weeks after the military service court’s ruling he was formally recognized by his battery commander for exemplary performance of duty.¹¹⁷

d.) “A Deviation in Impulse under the Disinhibiting Effects of Alcohol”

Another sexual encounter from 1988, this time between a senior staff physician and a private first class during a stay on military training grounds, clearly was not a case of assault but a consensual act. The military prosecutor nonetheless spotted a serious breach of duty, both on account of the different service ranks as well as the site of sexual activity being within service quarters. They had also been observed by other soldiers, a classic case of being “caught in the act.” Here it was not the deed itself that occupied the court’s attention when it took evidence, which stood uncontested, but the task of differentiating between a “genuine” homosexual orientation and a mere “deviation” in feeling. What proved to be a clever defense strategy ended up shielding the senior staff surgeon from demotion. A first court did

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ The decision received mention as early as 1985 due to its fundamental significance in Lindner, “Homosexuelle in der Institution Bundeswehr,” 213; later it was also mentioned in BW 1/546379 and BW 1/502107 in a report from Doctor of Law Armin Steinkamm, Bundeswehr University Munich, 25 January 2000.

¹¹⁷ As is mentioned in the later ruling by the military service senate.

initially demote the officer by one rank to staff surgeon. The judges considered it a mitigating factor that no direct superior–subordinate relationship existed between the soldiers but only one based on rank. Nor was the reservist private “some young conscript, but a grown man of thirty-two years who voluntarily and with his full approval got mixed up in homosexual activity with the [other] soldier.”¹¹⁸

It was decisive for the judges that an expert psychological report had not detected a “marked tendency toward homosexuality” in the accused; “the homosexual actions could [instead] be traced back exclusively to a deviation in impulse under the disinhibiting effects of alcohol.”¹¹⁹

The officer clearly had a good lawyer; in his grounds for appeal, the lawyer insisted that his client’s same-sex activity was “not a serious breach of duty as he stood under the heavy influence of alcohol, and thus succumbed to a deviant impulse.” The judges at the Federal Administrative Court concurred. First, however, the judges delved into the fundamentals, underscoring and upholding previous assessments of “homosexual misconduct by soldiers” that could not be tolerated within the line of duty.

Troop cohesion would be severely disrupted if homosexual relationships between individual soldiers, with all their emotional implications, were to be tolerated. Homosexual activity between superiors and subordinates is all the more intolerable as it not only weakens the superior’s authority but subordinates’ readiness to obey [while also leaving] the superior susceptible to blackmail, which is inimical to performing one’s official duties and coexisting within the ranks. It is for this reason that if a superior’s personality is characterized by a tendency toward homosexuality and corresponding activity within the line of duty, removal from service must be the standard measure of punishment applied.¹²⁰

Over the following ten years this excerpt was redeployed word for word in a multitude of statements by the federal government and its departments for defense and justice, serving consistently as confirmation by a supreme court of the restrictions that had been retained against homosexual superiors.¹²¹ Yet at the time, the judges

118 Ruling by the 4th division of Military Service Court Center on 14 October 1987, cited in BVerwG, 2 WD 6/88: Federal Administrative Court, 2nd Military Service Senate, decided 7 June 1988. Found on www.jurion.de.

119 *Ibid.*

120 BVerwG, 2 WD 6/88: Federal Administrative Court, 2nd Military Service Senate, decided 7 June 1988.

121 See for example BArch, BW 2/31224: BMVg, VR I 5 to Füs I 4, 16 December 1992; BW 1/546379, BMJ, “Bericht für den Rechtausschuss des Bundestages zur Lage von Menschen mit gleichgeschlechtlicher Orientierung,” 15 October 1997.

viewed the case in a different light, replacing the initial verdict of demotion with a more lenient sentence of a three-year ban on promotion.¹²²

Soldiers who engaged in homosexual activity while on-duty or within military installations – in the present case on military training grounds – could thus hope for leniency from disciplinary judges, even in the event one was a superior and the other of lower rank. Yet those hopes were justified only if it was not a “genuine” homosexual tendency that was identified but merely a “deviant impulse,” ideally under the influence of alcohol. A “deviant impulse” in a state of drunkenness existing as “substantial mitigating factor” is something that can only be found in the papers of the BMVg’s legal division. “Cleansing measures,” i.e. demotion in rank and removal from service, could be overlooked entirely even in the case of “insistent homosexual advances” if these came “merely” from “the disinhibiting effects of alcohol.”¹²³

The jurist Georg Schwalm had already explicitly pointed out the necessary legal distinction in the military between “real, i.e. fixed” and “false” homosexuality in 1970, as well as possible “impairments in the capacity to inhibit” homosexual activity, “e.g. alcohol consumption, prolonged isolation in a male community,” which could provide grounds for mental incapacity in the legal sense.¹²⁴

9. Sexual Assaults Perpetrated by Homosexual Soldiers

Records also reveal numerous cases of sexual assault by NCOs and officers against lower-ranking, largely younger soldiers. Public and media attention has focused almost entirely on women as the victims of sexual assault, with men, especially soldiers, finding close to no consideration as victims. To date, crimes of the sort seem to have remained entirely off the radar of the media, academic scholarship and the public.¹²⁵ The *New York Times* broke with the tradition in September 2019, reporting that some 100,000 men in the U.S. armed forces had experienced sexual assault in recent decades; in 2018 alone the number was close to 7,500 men. By comparison, that same year the Pentagon recorded 13,000 cases of female soldiers falling subject to sexual assault. The challenge facing both the investigating authorities

¹²² BVerwG, 2 WD 6/88: Federal Administrative Court, 2nd Military Service Senate, decided 7 June 1988.

¹²³ BArch, BW 2/31224: BMVg, VR I 5 to Füs I 4, 16 December 1992.

¹²⁴ Schwalm, “Die Streichung des Grundtatbestands,” 88.

¹²⁵ In 2018 Élise Féron cracked open the taboo with a groundbreaking study of sexual violence against men in war and civil war: Féron, *Wartime Sexual Violence against Men*.

and the statistics themselves was that only one in five male soldiers reported their assault.¹²⁶ According to the *New York Times* article, the Pentagon had first started gathering numbers about male victims of sexual assault in 2006; before then, the US Department of Defense had been certain it was exclusively an issue for women. Assaults either were not reported in the first place, or were not pursued.¹²⁷

Within the Bundeswehr as well, court rulings and disciplinary action reveal more than a handful of isolated instances in which men fell victim to sexual assault, even sexually motivated violence, during their time as soldiers. These and similar cases were (and to this day remain) obviously punishable under disciplinary law and criminal law where applicable, independently of the question of homosexuality. In early January 2000, a paper put out by the Bundeswehr's personnel department once again reached the conclusion that homosexual activity should not be evaluated any differently than heterosexual activity in a disciplinary setting.¹²⁸ Sexual assault does not necessarily involve a purely sexual motivation; it can also serve as a demonstration, or rather an abuse of power. In what follows, several select examples from an alarmingly long list will be discussed.

"Here, I'll show you." And before the witness knew it, the accused had removed his erect penis from his trousers. When the witness asked what exactly that was supposed to mean, the accused replied "Why don't you show me yours so we can compare them."¹²⁹

The witness referred to here in the Rendsburg court's decision was a private first class, the accused a staff sergeant. When the private refused the sergeant's demands the latter insisted "Don't make such a fuss!" and grabbed between the soldier's legs at his genitals, at which point the soldier invented an excuse to leave the room. It came to light in conversation with another soldier that a different private had experienced a similar attempt by the same sergeant a week before, though he had quickly extracted himself from the situation. In its 1957 decision, the mixed bench in Rendsburg settled on a fine of 300 DM.¹³⁰ In subsequent disciplinary proceed-

¹²⁶ The male victims, most younger than twenty-four, were of low military rank. According to the Pentagon, more than half of the assaults were committed by men. Quoting the original article from the *New York Times*, *Der Spiegel* reported 30% of the men stating that the perpetrators had been female, while 13% of the cases had involved multiple perpetrators of both sexes. For the article in *Der Spiegel* see "New York Times: Zehntausende Männer im US-Militär sollen Opfer sexueller Übergriffe geworden sein." The original article came under the headline "More than 100,000 men have been sexually assaulted."

¹²⁷ Phillips, "More than 100,000 men have been sexually assaulted."

¹²⁸ BArch, BW 1/502107, no pagination, BMVg, PSZ III 1, 5 January 2000.

¹²⁹ BArch, Pers 12/45377: Ruling at Rendsburg Court on 22 November 1957.

¹³⁰ Ibid.

ings, the military service court in Kiel ruled that the sergeant be removed from service.¹³¹ In 1959, the military service senate at the Federal Disciplinary Court denied the appeal of the accused.¹³²

That same year the Federal Disciplinary Court had also denied a senior NCO's appeal against an initial court ruling to remove him from service. A mixed bench court in Hamburg found that the accused had either touched or attempted to touch the genitalia of five different soldiers under his command, in some cases repeatedly, and sentenced him to a total of nine months in prison on five criminal counts under §174 StGB in conjunction with a misdemeanor under §175 StGB. Military Service Court C subsequently ordered the NCO's removal from service based on the findings in criminal court. "The Bundeswehr has to guarantee the public that every effort is being made to protect young soldiers from harassment and seductions of this sort. The Bundeswehr also holds a responsibility toward the parents of young soldiers in this regard, especially conscripts."¹³³

A court ruling against a staff sergeant from 1961 reads similarly. The sergeant had repeatedly kissed a young conscript, "partly with his tongue," and "tried in vain to perform anal intercourse on him." A week later he exhibited the same behavior toward another young soldier. The mixed bench sentenced the accused to three months in prison. When the public prosecutor's office appealed, the superior criminal division at regional court raised the sentence to a total of five months in prison for two counts of treating a subordinate in a degrading manner, one in conjunction with illicit sexual acts between men. The sentence was suspended on probation. Meanwhile, the military service court ordered the defendant's removal from service, granting him 50 percent of his pension for one year. When the military prosecutor appealed, the court's decision was modified so that the entire allowance fell by the wayside.¹³⁴

Sources also document a serious case from 1962 in Flensburg. A naval commander and the head of a ship was accused of three attempts of aggravated illicit sexual acts, the majority with soldiers under his command, and three further counts of completed illicit sex. The commander was taken into temporary custody,

131 BACh, Pers 12/45377: Military Service Court A, 1st Division, decided 20 June 1958.

132 *Ibid.*, Military Service Senate at the Federal Disciplinary Court, WD 12/58, decided 28 January 1959.

133 BVerwG, WD 5/59: Federal Disciplinary Court, Military Service Senate, ruling on 11 March 1959, referring to and quoting from the initial court ruling at the 1st Division of Military Service Court C on 16 December 1958. Found on www.jurion.de.

134 BVerwG, WD 8/62: Federal Disciplinary Court, Military Service Senate, ruling on 9 May 1962, referring to and quoting from the initial court ruling at Military Service Court C on 15 November 1961. Found on www.jurion.de.

which changed the following day to detention awaiting trial. The regional commander concurred with the state prosecutor's office in Flensburg that "in order to protect the reputation of the Bundeswehr," only a brief press report should be released, reading "On 28 August 1962 an officer stationed in Flensburg was arrested on suspicion of crimes against §175 and 175a StGB." The high rank of the accused (something that could not be gleaned from the skimpy press report) brought the case to the attention of the Kiel state chancellery via the lead attorney general and the ministry of justice.¹³⁵ The BMVg opened investigations under disciplinary law in November 1962, with the ongoing criminal investigation taking precedence.¹³⁶ In April 1962 Flensburg Regional Court sentenced the ship commander to a term of one year in prison.¹³⁷ With the sentence the staff officer automatically lost his status as a career soldier, his service rank and his entitlement to a pension, and disciplinary proceedings were suspended.¹³⁸

The sheer number of cases in which the military service senates went beyond initial court rulings also merits attention, as with proceedings in 1964 against a captain: Brought in on two counts of attempted advances against soldiers in his company, the captain was initially given a very lenient sentence of an eighteen-month reduction in pay by one-tenth by the military service court in Kiel. On two separate occasions after an evening spent drinking together in his private apartment the officer had grown insistent, looking to caress and kiss the soldiers. Both times the soldiers had quickly left the apartment, before going on to report the incident. A third instance came to light in the course of the investigation. The military judges did not mince words in their ruling: "An officer and career soldier who draws suspicion from young soldiers, and gossip about holding homosexual tendencies and having made advances in that direction, deserves a punishment suitable to have a lasting deterrent effect."¹³⁹

The judges opted nonetheless for mild disciplinary action. A real homosexual tendency could not be demonstrated. What was more, the captain had been blocked by the ongoing disciplinary proceedings from repeating a staff officer's course he had failed once before, and was already facing an early end to his time in the service. The senior public prosecutor's office in Kiel ultimately rejected the facts of the case, classifying the advances as an insult and ordering the captain to pay a

¹³⁵ BArch, BW 1/12609: Commander of Territorial Defense Staff I A Flensburg, Az 13-00-21, 29 August 1962, Special Incident: Here the arrest of FKpt [...], first interim report.

¹³⁶ BArch, BW 1/12609: BMVg, P III 5-H, H 313/62, from 29 November 1962.

¹³⁷ BArch, BW 1/12609: Ruling at Flensburg Regional Court, Az 6 KLE 2/62 (I 1475/62), 3 April 1963.

¹³⁸ BArch, BW 1/12609: BMVg, P III 5-H, 18 October 1963.

¹³⁹ BArch, Pers 12/45631: Ruling at Military Service Court A, 1st Division, 11 June 1964.

fine of 100 DM. While the military prosecutor may have been helpless against the forbearance shown by the public prosecutor, he was still able to appeal the leniency shown in military court. The military service senate repealed the first court's decision in a harsh critique, ordering immediate removal from service.¹⁴⁰

A petty officer first class was dismissed under similar circumstances when he became sexually aggressive toward a petty officer second class enrolled in a course he was overseeing. One night around 11 p.m., as the course participant lay awake in bed, the officer had entered his room under the influence of alcohol and touched the student directly on his genitals. He then invited him to come have a beer or two in his room, where the two proceeded to have oral intercourse. The events did not remain under the cover of night; the chief of inspection struck up a disciplinary investigation and passed the case on to the public prosecutor's office. Niebüll local court sentenced the first class petty officer to one month arrest for illicit acts with a man under §175 StGB, which was suspended in return for a fine of 400 DM. The court acquitted the officer of the more serious charges of sexual coercion and abusing a relationship of dependency under §175a StGB. While a direct relationship between superior and subordinate did exist, it had not mattered to the student at the time of the offense. "To him what mattered was that he would get a bottle of beer." The student also admitted to letting himself enjoy the "illicit acts."¹⁴¹

Disciplinary action followed after the criminal case, resulting in the petty officer's removal from service. The judges deemed it particularly serious that the accused "took the sailor's genitals in his mouth." The military had to heed "cleanliness in the moral realm, not simply among soldiers per se," but especially from higher-ranking soldiers in positions of leadership where subordinates were involved. The loss of confidence in the petty officer weighed so heavily that it was unreasonable for him to continue in service.¹⁴²

A case against a staff sergeant from 1966 also resulted in a harsher verdict at the military service senate than the first court. Between 1963 and 1964 the officer had on three separate occasions grabbed the genitals of rank-and-file soldiers. The judges grounded their decision in clear and basic terms: "Both the military itself as well as the general public must under all circumstances be able to rely on the fact that longer-serving soldiers will not assault young conscripts in a homosexual manner."¹⁴³ The final attempt ended with a private and another soldier setting

¹⁴⁰ BArch, Pers 12/45631: Ruling at 2nd Military Service Senate at the Federal Disciplinary Court, II (I), WD 125/64 on 9 March 1965.

¹⁴¹ BArch, Pers 12/45897: Ruling at Niebüll Local Court on 26 June 1967.

¹⁴² *Ibid.*, Ruling at Military Service Court A., 1st Division on 16 November 1967.

¹⁴³ BVerwG, II WD 19/66: Federal Disciplinary Court, 2nd Military Service Senate ruling on 26 July

about the staff sergeant with their fists and locking him in his room. A mixed bench in Neuburg (Donau) granted the two soldiers acquittal during main proceedings. The court then ordered the sergeant to pay a fine of 210 DM for the “continuing offense of physical insult.” Remarkably, the criminal court denied that the elements for a crime had been satisfied either under §175 or §175a. The elements of §175a Number 2 StGB required that “the perpetrator uses a relationship of dependency to induce another person to perform or tolerate illicit sexual acts.” On its own, the existence of a relationship of dependency between the parties to the offense would not necessarily lead to such a situation arising. Nor did the Neuburg jurors’ find “any sort of pressure present whatsoever.” In main proceedings the military service court halved the amount of time that the staff sergeant, since departed regularly from the armed forces, was entitled to a transitional allowance. The court did, however, let him keep his rank and thus his position as a superior, unlike many other cases. Evidently the judges did not see the accused as having a “genuine” same-sex orientation; the staff sergeant successfully referenced his marriage and five children in contending that he could not be homosexual. All the leniency was too much for the military prosecutor. The sentence was increased upon appeal and the reservist staff sergeant was demoted to private first class.¹⁴⁴

At times, judges’ method of measuring specific sexual acts in their time and place against the provisions governing superior–subordinate relationships could lead to curious phrases, as when finding that a staff sergeant “was not the superior of former Medical Orderly S. at the time he was masturbating in front of him.”¹⁴⁵ This sentence came down as part of a 1987 decision by Military Service Court South against a sergeant arraigned on five counts of sexual assault against soldiers in his company. After hearing detailed evidence, the judges acquitted the accused on three of five counts. They considered the other two counts proven and demoted the staff sergeant by one rank. Civilian proceedings in the same matter had already

1966, referring to court rulings at Neuburg (Donau) on 26 January 1965 and Military Service Court D on 29 November 1965. Found on www.jurion.de. Practically the same wording can be found in the ruling at the 2nd Division of Military Service Court C on 10 July 1968 as cited in BVerwG, I WD 54/68: Federal Administrative Court, 1st Military Service Senate, decided 12 February 1969, supplemented with the warning that such acts would not have a “lasting influence” on the “moral development” of conscripts. Found on www.jurion.de.

¹⁴⁴ BVerwG, II WD 19/66: Federal Disciplinary Court, 2nd Military Service Senate, ruling on 26 July 1966, referring to court rulings at Neuburg (Donau) on 26 January 1965 and Military Service Court D on 29 November 1965. Found on www.jurion.de.

¹⁴⁵ Ruling at the 4th Division of Military Service Court South on 9 July 1987, cited in BVerwG, 2 WD 69/87: Federal Administrative Court, 2nd Military Service Senate, decided 11 November 1988. Found on www.jurion.de.

been suspended on the condition the defendant pay a fine of 500 DM. The service court judges based the relative leniency of their ruling on the “considerable time” that had elapsed since the offenses were committed; a “favorable social prognosis due to familial relations being reestablished”; and, as cited above, the absence of a specific superior–subordinate relationship at the time of either offense. Given that the offense had not since been spoken about in the line of duty, “a court disciplinary measure of reduction to the rank of sergeant it is essential, but also sufficient, taking into account a general preventative perspective on disciplining violations of duty.”¹⁴⁶

The military prosecutor appealed with the aim of having the staff sergeant removed from service, and succeeded. The military service senate discussed the allegations anew, with an attention to detail that is rarely on display in similar rulings. Yet the judges also identified mitigating factors; the accused was married and had never drawn attention to himself before “in a homosexual respect.”

It had to be assumed in favor of the soldier therefore that his willingness to engage in same-sex activity existed only in latent form and, at least in part, only appeared as a deviant impulse under the influence of alcohol. Yet a disposition of this sort is more easily controlled than a genuine inclination toward homosexuality, and generally allows for more favorable future prognosis.¹⁴⁷

Still, in determining the scope of disciplinary action, the judges found themselves faced with a formal legal issue.

In light of the significant extenuating circumstances surrounding the offense itself, removal from service would not have been a foregone conclusion. The cleansing measure of demotion in rank would, however, have been unavoidable. Yet the demotion in rank from staff sergeant to sergeant imposed by the military service division was inappropriate to the nature and severity of the violation. The senate no longer considers the soldier fit to remain a superior in the rank of senior non-commissioned officer. If, however, a senior non-commissioned officer's reduction to the rank of enlisted soldier or even non-commissioned officer is appropriate to the nature and severity of such violation, it can only lead to removal from service if it involves a career soldier who may only be demoted to sergeant (§57 (1) Clause 1, WDO [Military Disciplinary Code]).¹⁴⁸

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

In short, the staff sergeant fell victim to the traps and snares of disciplinary law. The special clause in the Military Disciplinary Code left the judges with no option but to order his removal from service.

a.) Parallels to Rulings in Imperial Navy Courts of Honor

As with the Bundeswehr, consensual sex between superiors and subordinates in the Imperial Navy constituted both a breach of official duty as well as a criminal act under §175. The federal archives house court of honor documents from Baltic Navy command, for example, including one 1883 ruling against a lieutenant in the navy released from service for “crimes against morality and illicit acts” with subordinates from the officer corps.¹⁴⁹ Ten years later, records show a decision reached against a lieutenant commander for “illicit sexual acts against nature” with a cadet: “Dismissal without adornment/without honorable farewell.”¹⁵⁰ The sources withhold comment on whether the case involved consensual sex or sexual assault, though it was ultimately of little importance anyway, as both were punishable and insulting forms of conduct.

In 1904 a court of honor admonished a lieutenant after he had drunkenly ordered an NCO to his room then commanded him to let his pants down and show his genitals.¹⁵¹ The officer got off with an extremely light punishment, managing to credibly present a case that he did not harbor any homosexual ambitions and had merely wanted to inspect the NCO for possible venereal diseases. An additional, and likely deciding factor assisting him before the court was his drunkenness at the time of the offense. In this case, the judges overlooked the fact that the defense strategy lacked internal cohesive force on this point – an uninhibited state of drunkenness hardly aligns with a circumspect, solicitous intention to prevent the spread of venereal disease. The latter was likely merely an assertion made to shield himself, albeit one which was then believed. The important point was that the officer was not a “homosexual by inclination.” Bundeswehr service court judges would in all likelihood have come to a similar decision.

¹⁴⁹ BAArch, RM 31/1857, Baltic Sea Naval Station [of the Imperial Navy], Headquarters, ruling of the court of honor from 3 August 1883. The author would like to thank Commander Dr. Christian Jentzsch of the ZMSBw for directing him to this source. For a fuller account of courts of honor, see Jentzsch, *Vom Kadetten bis zum Admiral*.

¹⁵⁰ BAArch, RM 31/1857, Court of honor ruling from 4 November 1893.

¹⁵¹ BAArch, RM 31/1857, Court of honor ruling from 26 January 1904.

b.) Disciplinary Action after Acquittal in Criminal Proceedings

Sources also record many instances in which soldiers are found guilty of homosexual activity by a military service senate after first being acquitted on the same charge in criminal court. This does not mean that the senate decisions were erroneous, however. Criminal proceedings hold different legal interests than disciplinary proceedings. The same matter might be unthinkable for punishment under criminal law and still represent a violation of duty, a situation that was not always easy to communicate to the parties involved.

Such was the case with a staff sergeant who had been an officer cadet for a time in the mid Sixties. Acquitted in three instances of “committing illicit sexual acts with a man” by a first criminal court, a second court then acquitted him of the final remaining count on appeal. He was charged in every instance with having touched fellow soldiers on their genitals with sexual intent, at times unclothed while in the bathroom or washroom, at others above their uniform trousers. The soldiers put up resistance in every case, one with the words that the accused “probably didn’t have enough going on with girls.” A mixed bench found that none of the acts of lesser duration and intensity met the elements of a crime under §175, leaving only “an attempt at illicit sexual acts under §175 StGB, which is not punishable.” The staff sergeant petitioned for release from the Bundeswehr even before appeal proceedings (and acquittal) at regional court. A military service court found the now reservist sergeant guilty of deliberate breach of duty on all counts, but did not consider demotion a fit measure and suspended the process. The decision was subsequently overruled at the Federal Disciplinary Court when the military prosecutor appealed and the sergeant was demoted to the rank of private first class.¹⁵²

To clear up any potential false impressions: It was not officers and non-commissioned officers alone who appeared before disciplinary judges for infractions related to homosexuality. Enlisted soldiers showed up as well, as for example in 1966 with a private and NCO candidate for repeatedly attempting to touch fellow soldiers’ genitals, whether in the bathroom or through the flies in their uniforms. The soldiers had repelled his advances in every instance. After a first criminal court partially acquitted him, his appeal at regional court cleared him of attempted aggravated same-sex acts when a “will to seduce [was] not demonstrated.” Nor were the elements of a crime under §175 StGB “present, as in every instance the accused was immediately pushed away by the two witnesses, and attempts at illicit same-

¹⁵² BVerwG, II WD 8/66: Federal Disciplinary Court, 2nd Military Service Senate, ruling on 21 April 1966, referring to rulings at K. court on 10 October 1963, K. regional court on 1 October 1964 and Military Service Court E on 20 September 1965. Found on www.jurion.de.

sex activity do not stand under threat of punishment.”¹⁵³ For its part, the military service court considered the established behavior “defamatory and morally objectionable” and held the accused “guilty of having violated his duty to respectable behavior (§17 (2) SG) and camaraderie (§12 SG).” The disciplinary judges viewed it as an aggravating circumstance under §10 (1) SG that in one case the private had been the ranking officer among all the soldiers in his unit as the NCO on duty. The court demoted the private, who had already been reduced to a rank-and-file career track and departed from the military regularly after completing his two-year service obligation, to an airman in the reserve.¹⁵⁴

As a side note, the court took note of the fact that the former soldier was due to marry a few days after his trial in the service senate. In reviewing the personal circumstances of the accused, which always precede court rulings, it is striking that the vast majority of cases involve men who are married and often fathers already, or who get engaged and start planning for marriage shortly before the proceedings. As discussed in chapter 2, marriage represented a common path to escape the stigmatization of homosexuality, not merely for homosexual soldiers but any number of people of same-sex orientation in society at large.

c.) Drunkenness as a Mitigating Factor

Numerous other rulings at military service courts reveal that being under the influence of alcohol was generally viewed as a mitigating circumstance during sentencing, with the serious charge of homosexual activity often dismissed in favor of the much less serious charge of full intoxication. One decision from 1962 underscores the point in exemplary fashion. Drunk from his visit to a bar that night, a staff sergeant drove his own car back to the barracks, a private from his unit in the passenger seat. When the private nodded off to sleep, the NCO opened his fly and played with his exposed genitals. “After [Private] F. woke up and pushed the accused away, [the accused] continued driving, but shortly before the Bundeswehr barracks stopped again and tried to open the fly of the sleeping [private]. The private now energetically resisted the harassment from the accused, upon which the latter drove into the barracks.”¹⁵⁵

¹⁵³ BVerwG, II WD 27/66: Federal Disciplinary Court, 2nd Military Service Senate, ruling on 13 December 1966, referring to the rulings at P. court on 15 July 1965 as well as Military Service Court B on 13 April 1966. Found on www.jurion.de.

¹⁵⁴ Ibid.

¹⁵⁵ BVerwG, II WD 35/63: Federal Disciplinary Court, 2nd Military Service Senate, ruling on 14 Oc-

For his actions, a regional court initially sentenced the accused “to three weeks in prison and two weeks’ arrest” for crimes under §175 StGB and misdemeanors under vehicle licensing regulations as well as traffic law.¹⁵⁶ On 14 December 1962, the military service court demoted the staff sergeant to plain sergeant, a ruling with which the military service senate would take issue during appeal proceedings two years later. As in so many other cases, the first verdict interpreted the defendant’s drunkenness in his favor; it was what “explained” the sergeant’s assault on the sleeping private and precluded “genuine” homosexuality. This interpretation led the service court to an astonishingly light sentence which left the accused in the rank of sergeant and non-commissioned officer, and thus in a supervisory role. In a word, being drunk at the wheel was regarded as a much less serious infraction than a “genuine” homosexual disposition. A short while later the demoted sergeant let himself go again, drawing two further accusations of attempted sexual advances on other sergeants. This time the military service court demoted him to private first class.¹⁵⁷ The Federal Disciplinary Court later rejected the military prosecutor’s appeal against what he considered to be overly lenient decisions in the first instance.

Substantial alcohol consumption subsequently “spared” many soldiers their departure from the armed forces, again in spite of sex offenses against lower-ranking soldiers directly within their official orbit. This was the case with another staff sergeant in 1967: On two separate occasions after a party with other soldiers, the NCO entered a private’s room later that night as the private lay in bed, took hold of his penis and fumbled with it. Other soldiers took note and reported the incident. A disciplinary investigation was opened and the NCO’s superiors passed the case on to the public prosecutor’s office; the elements for a crime under §175 and §175a may have been met, after all. Yet for the mixed bench in Wuppertal, the drunkenness of the accused put sentencing him under §175 out of the question even if those elements had been satisfied. Instead, the court ordered him either to pay a fine or spend thirty days in prison for full intoxication.¹⁵⁸ The accused’s drunkenness was similarly viewed as a mitigating circumstance during proceedings at the military service court, which imposed the least reduction in rank possible, to plain sergeant. This was feasible because the judges did not see any evidence for the accused

tober 1964, referring to the initial ruling at the military service court on 14 December 1962. Found on www.jurion.de.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid., with references to the later ruling by the military service court on 27 January 1964.

¹⁵⁸ BVerwG, II WD 39/68: BVerwG, 2nd Military Service Senate, ruling on 5 December 1968, with references to the court decision in Wuppertal on 2 February 1968 as well as Military Service Court E on 24 July 1968. Found on www.jurion.de.

actually holding same-sex tendencies. Had this not been the case the staff sergeant would not have been able to reckon with clemency at all, as shown by numerous other rulings. Yet the decision was too lenient for the military prosecutor. On his appeal the service senate demoted the sergeant a further rank to private first class, although not on account of his possible homosexuality (“the accused has not previously appeared in a homosexual context”) but his “intemperate drinking.”¹⁵⁹

Cologne local court heard a case that was similar down to many details the year before, in 1966. After a night of drinking a staff sergeant had entered the enlisted soldiers’ quarters, laid down in bed next to a sleeping private and agitated the man’s penis – until the private woke up that is, and put an “energetic” end to the business. The judges in Cologne had their doubts as to whether the staff sergeant had been fully intoxicated, but applied the principle of *in dubio pro reo*, sentencing him for full intoxication under §330a StGB instead of §175 and issuing a fine of 300 DM.¹⁶⁰ The Bundeswehr judiciary concurred with the local court’s assessment – the accused had “never drawn attention in this context,” leading the court to assume not a drive toward homosexuality but “one-time misconduct that was out of character.” The service court demoted the sergeant to private first class.¹⁶¹

Drunkenness similarly demolished a sergeant’s inhibitions one Monday evening in October 1979, while eventually also bringing him a lenient sentence. The judge ruled out any homosexual ambitions on the part of the accused, who in his intoxication had merely “given a bad impression of seeking same-sex satisfaction from subordinates.”¹⁶² Weighing heavily against the sergeant was a culpable violation of the duty to behave in a respectable and trustworthy manner, brought on by excessive alcohol consumption. Weighing in his favor the judges saw a “certain lack of contact” and “frailty”; this and other problems “may be wrapped up with each other in an inextricable knot of cause and effect.” In the end the judges showed a great, even startling degree of clemency, banning the sergeant’s eligibility for promotion for two and a half years and reducing his pay by one-twentieth for a year but not demoting him. The sergeant had already been transferred to another company by the time proceedings began. He was most likely pleased with the mild sentence, and neither side appealed.¹⁶³

A staff sergeant also got off lightly in a case from 1987. One night the sergeant had assaulted a nonrated soldier from his platoon while in his lodgings, using phys-

¹⁵⁹ Ibid.

¹⁶⁰ BArch, Pers 12/45828: Ruling at Cologne Local Court on 4 March 1966.

¹⁶¹ Ibid. Military Service Court A, Division 1a, decided 17 August 1966.

¹⁶² BArch, Pers 12/45309: Military Service Court Center, 5th Division, decided 26 June 1980.

¹⁶³ Ibid.

ical force to make him engage in passive oral intercourse and demanding that the gunner also engage in active oral intercourse. The soldier managed to free himself from the sergeant's grasp and flee. The military service court merely demoted the staff sergeant to plain sergeant. A similar incident would doubtless incur much more severe disciplinary action by today's standards; it is doubtful whether the ranking officer would be able to remain in service. Not so in 1987. The service court saw "no cause" "to assume a tendency toward homosexuality as marking the personality of a soldier who has not previously drawn attention in a homosexual respect, and thus to raise the question of his removal from service."¹⁶⁴ Here too, the judges proceeded under the premise that it was merely a "deviant impulse" brought on by alcohol, leading them to the conclusion that "despite serious homosexual activity against the will of the witness," the staff sergeant was still tenable as a senior NCO.¹⁶⁵

It casts serious doubt on the trustworthiness of a soldier in a position of leadership when he engages in same-sex activity with another soldier in military installations, even if with the latter's consent. Behavior of this sort between a superior and a subordinate is liable to create a relationship of dependency that is not merely injurious to discipline but leaves the superior susceptible to blackmail. Common soldiers, who as a general rule are required to live in barracks, must also not be exposed to the risk of being made an object of sexual desire against their will by their superiors.¹⁶⁶ These unambiguous, basic phrases could be found in an appeals decision taken against a sergeant first class in 1990.

Three years earlier (such was the length of the disciplinary proceedings), the sergeant had had sexual intercourse with a nonrated soldier at his service post. One evening he and the private had emptied a bottle of vodka; the local court ruling then reads that the sergeant performed anal intercourse on the private without a condom. The private later disclosed what had happened to a comrade, and reported to the medical station. The private's disclosure turned into an investigation on charges of sexual abuse of those incapable to resist (§179 StGB). At the start of work the next day police led the sergeant away in handcuffs. The chief had the soldiers line up then, visibly affected, informed them of what had happened. Among the soldiers there circulated a rumor that the sergeant had either offered

¹⁶⁴ Decision of the 8th Division of Military Service Court North on 18 August 1987, cited in BVerwG, 2 WD 63/67: Federal Administrative Court, 2nd Military Service Senate, decided 8 June 1988. A copy is available in BArch, BW 1/531591.

¹⁶⁵ Ibid.

¹⁶⁶ BArch, BW 1/531592: Ruling at the 8th Division of Military Service Court Center on 8 October 1990, cited in BVerwG, 2 WD 5/91: Federal Administrative Court, 2nd Military Service Senate, decided 30 July 1991.

the private money for sex or paid him.¹⁶⁷ In 1988 local court cleared the sergeant of charges under §179 StGB when they could not be substantiated beyond doubt.¹⁶⁸

The military prosecutor continued with his investigation, and in 1990 the case came before military service court. In the proceedings the judges were bound to the sergeant's acquittal from the criminal trial; German jurists speak of a *Sperrwirkung*, a ban that only allows subsequent disciplinary proceedings to consider facts that do not fulfill the elements of a criminal act. Among other things, it meant the charge of anal intercourse against the private's will could no longer be considered in reaching a verdict. While the judges still concluded that a serious violation of duty had occurred, a "series of mitigating factors," the accused's considerable intake of alcohol chief among them, meant they could look past a demotion in rank. In the end a near two-year ban was placed on the sergeant's promotion.¹⁶⁹ In this case as well, the judges saw drunkenness as an exonerating circumstance.

The military prosecutor appealed the ruling. Going by the current case law in the military service court, the accused should have been removed from service, but at the very least demoted. In light of "such weighty and intensive homosexual activity" the soldier could not be "credited" with an alcohol-induced lack of inhibition, all the more so as the private himself had not taken any sort of initiative toward homosexual activity.¹⁷⁰ (Note here the revealing use of alcohol consumption as a "credit.")

Yet the military service senate too recognized a series of extenuating circumstances in favor of the accused, the most important being an expert report that had been unable to determine any "homosexual tendency" in the accused. "The soldier's homosexual activity sprang instead from a deviant impulse under the disinhibiting effects of alcohol," and should consequently be seen as a "slip-up." The sergeant had also not "proceeded in brutal fashion," which meant "no instance of 'rape' was present." By today's standards, the court's assessment and formulations appear as incomprehensible as the mild disciplinary measures. "Having considered all the incriminating and exonerating factors, the senate was of the opinion that the

¹⁶⁷ Interview with H., Bruck an der Großglocknerstraße, 2 August 2018. H. was a soldier in the unit at the time.

¹⁶⁸ BArch, BW 1/531592: Ruling at L. Local Court on 6 June 1988, cited in BVerwG, 2 WD 5/91: Federal Administrative Court, 2nd Military Service Senate, decided 30 July 1991.

¹⁶⁹ BArch, BW 1/531592: Ruling at the 8th Division of Military Service Court Center on 8 October 1990, cited in BVerwG, 2 WD 5/91: Federal Administrative Court, 2nd Military Service Senate, decided 30 July 1991.

¹⁷⁰ BArch, BW 1/531592, Military prosecutor grounds for appeal, cited in BVerwG, 2 WD 5/91: Federal Administrative Court, 2nd Military Service Senate, decided 30 July 1991.

soldier, despite certain concerns, should be allowed to remain in the service rank group of senior NCO. As such, demotion to plain sergeant was appropriate.”¹⁷¹

Recall that what was being tried in this instance was homosexual intercourse performed on a rank-and-file soldier and direct subordinate against the soldier's will, or at least without his consent. For the soldier who had been penetrated involuntarily, it must have been totally irrelevant whether his superior was a “genuine” homosexual or had abused him out of a “deviant impulse” under the influence of alcohol. Yet the disciplinary judges’ were not primarily concerned with redress for a victim of sexual assault. Rather, they were taken up almost exclusively with maintaining troop order and discipline. In their eyes, a perpetrator who purported to be “merely” “stray” or drunken posed a significantly smaller risk to troops than if he showed a “genuine” inclination toward homosexuality. At the same time, the leniency shown to casual offenders – ideally operating under the influence of alcohol – that crops up repeatedly in disciplinary court rulings lacks internal logic. Even given the interest in maintaining troop order and discipline, intoxicated, “stray” instances of sexual assault against soldiers posed no less of a risk than if those same acts were committed by “genuine homosexuals.” Someone who had harassed or assaulted others, even if he did so while drunk, could still become a repeat offender. Under sober consideration, it even seems quite a bit more likely that a person who gravitates toward excessive alcohol consumption will on more than a single occasion lose control over themselves and their “feelings” and come to harass or attack other soldiers. Yet almost without fail, the Bundeswehr jurists reserved their harshest disciplinary measures for offenders who had been identified as “genuine” homosexuals.

The verdict against the sergeant first class found its way into the press, where it came in for harsh criticism. “Love between men jeopardizes the Bundeswehr: BVG upholds a verdict against anal intercourse in service,” read one headline in *taz*.¹⁷² In June 1992 *Berliner Tageszeitung* reported in tabloid fashion: “Sex verdict from administrative court: Soldiers can’t love men.” Yet the editors evidently could not decide what to decry, the verdict or the act itself. The judges determined that rape had not occurred “because the subordinate was not will-less,” even if it was due to alcohol and fatigue that he had not resisted anal intercourse. The paper found the sergeant had “gotten off lightly,” only being demoted to plain sergeant. The “dis-

171 BAarch, BW 1/531592, BVerwG, 2 WD 5/91: Federal Administrative Court, 2nd Military Service Senate, decided 30 July 1991, extensively quoted and commented on in *Neue Zeitschrift für Wehrrecht*, 2/1992, 78–79.

172 “Männerliebe gefährdet die Bundeswehr,” cited in Schwartz, *Homosexuelle, Seilschaften, Ver-rat*.

inhibiting effects of alcohol” had proved decisive in court, as had the sergeant’s “above-average service” and “clean record to date.”¹⁷³ The paper took up the ruling a second time in an opinion column entitled “Bundeswehr = Middle Ages?” that contained a diatribe against the armed forces. All people were equal the column noted, although this principle clearly did not apply in the Bundeswehr. There was no other way to make sense of the verdict “against love between men.”

If a private loves a female medic, nothing happens. If a major sleeps with his secretary, nothing happens. If a captain finds his delight in a female army physician then again, nothing happens. But when a homosexual first sergeant has sex with a subordinate, he’s tossed out of the army dishonorably, or at least demoted. Like in the Middle Ages. Does the army really need this sort of gay-bashing? Aren’t we finally in a position to at least tolerate minorities?¹⁷⁴

What was being tried and decided on again here? Sexual intercourse performed on a rank-and-file soldier and direct subordinate against the soldier’s will, or at least without his consent. The commentary in the *Berliner Tageszeitung* leaves a very strange impression if one keeps the crime front and center. As justified as concerns about ending restrictions on gays in the army may have been, they were just as out of place in this setting; the editors chose the wrong case from which to launch a moral inditement of the Bundeswehr. It made (and continues to make) a large difference whether a private loves a female medic or a superior assails his subordinate and, as in the present case, at the very least physically penetrates him without his consent – rapes him, in other words. In 2022, the instance would be subject to disciplinary punishment as a matter of course, potentially criminal punishment. It was not that the offender, which is what the sergeant must now be designated, fell victim to the Bundeswehr’s rumored homophobia – on the contrary, he got off “lightly,” as the paper noted rightly. The disciplinary judges sought out anything and everything that spoke in favor of his exoneration, found it, and added it to the scales. Taking the sergeant’s punishment as evidence for “gay bashing” and “medievalism” on the part of the Bundeswehr fully missed the mark.

The miraculous, exonerating side-effects of alcohol were not limited only to trials conducted against soldiers; other academic research has come to similar conclusions.¹⁷⁵ Excessive alcohol consumption did not provide *carte blanche* in every case, however. Service court judges were capable of reaching other, harsher verdicts as well.

¹⁷³ “Soldaten dürfen keine Männer lieben.”

¹⁷⁴ Kütke, “Bundeswehr = Mittelalter.”

¹⁷⁵ Bormuth, “Ein Mann, der mit einem anderen Mann Unzucht treibt,” 51.

In 1980 a lawyer claimed drunkenness in defending a staff sergeant against six counts of attempted sexual assault before the central service court in Koblenz. The nocturnal attacks against the subordinate soldiers in question already lay years in the past. The soldiers had resisted the sergeant's advances down to the last, with one private threatening that he and his buddies would "give him what he needed when the time came."¹⁷⁶ In November 1976, the same private reported the attack to an on-duty NCO; the ensuing investigation unearthed an entire series of similar but unreported incidents reaching back to 1973. The soldiers explained their silence either with reference to a good working relationship with the accused, or fears of damaging an application to become an NCO.

The case highlights what is likely the large number of sexual assaults against soldiers that have gone unreported and unpunished, whether out of a mistaken understanding of camaraderie, fear of reprisal or threats by a ranking officer. Only one in every five soldiers reports their assault.¹⁷⁷ In the case of the staff sergeant, the disciplinary investigation uncovered multiple false official reports, financial irregularities and one especially curious incident: One night around midnight while at a discotheque, the sergeant had promoted two pilots in his unit to privates, doing so without any legal basis and what was more while in West Berlin, where the Bundeswehr did not exist at the time due to the Allied right of control. (The accused did not let it rest with the midnight disco ceremony, but registered it in their military ID cards with his signature.) The military service court punished the long list of violations, including sexual assault, with removal from service.

Prior alcohol consumption was not enough either to dispose the judges at Military Service Court South in Ulm toward leniency in 1980. The court was faced with deciding on the fate of a captain who had wrecked his own professional path shortly before he was set to take over a company. The indictment listed five instances in which the captain, who worked in an officers' club, was said to have approached orderlies with sexual intent on two evenings, in December 1978 and again in March 1980. The ruling pedantically listed the quantities of beer, wine spritzers ("composed of 1/8 liter wine and 1/8 liter of sour sparkling water"), mixed drinks ("Asbach with Cola"), schnapps and cognac that had been consumed prior to the advances. Once drunk, the captain had touched multiple orderlies in the area around their upper thighs, also trying unsuccessfully to open their uniform trousers. The soldiers had avoided the contact. One soldier later testified that while

¹⁷⁶ BArch, Pers 12/45181, Ruling at Military Service Court Center, 1st Division, 31 March 1980.

¹⁷⁷ Years later in 2006, the *New York Times* and in turn *Der Spiegel* would draw attention to the problem facing investigating authorities and the statistics (Phillips, "More than 100,000 men have been sexually assaulted"). See the beginning of chapter 3, section 9.

he “kept pushing [the captain’s hand] away,” he had not “dared” to do any more “for fear of professional repercussions.”¹⁷⁸ In both instances, later that night the officer had come up to the rooms where the soldiers were sleeping and tried to touch them. The soldiers once again repelled the attempts, one fending the captain off with a punch. An expert attested to the defendant’s reduced culpability as a result of heavy alcohol consumption. The court followed the report, but the “mitigating causes” were not enough for them to refrain from strict disciplinary measures. “A captain who assaults common soldiers between the ages of nineteen and twenty-one on repeated occasion diminishes the trust his employer has in his cleanliness and respectability so gravely, that as a general rule he is no longer tenable in the Bundeswehr.”¹⁷⁹

The Bundeswehr, the court opinion continued, further owed it to soldiers’ parents “to do everything in its power to protect their often quite young and inexperienced sons from homosexual attacks by superiors.”¹⁸⁰ There is nothing more to add to the opinion, which even today remains completely justified, regardless of sexual orientation. Yet the verdict stands out in its severity compared with similar, even significantly more serious cases of sexual assault; after all, the reasons it cites read like many others that ended in more lenient disciplinary measures. The risk of a repeat incident is mentioned explicitly and may well have been the deciding factor. As a “latent homosexual,” the officer ran a risk of committing another assault after drinking – a risk the Bundeswehr was not prepared to accept.

Military service judges in Münster had another, highly similar case to rule on in 1983. The letter of inditement charged another captain and company leader with seven detailed counts of sexual assault against rank-and-file soldiers in his company within the space of half a year. When the fifth soldier listed in the letter reported what had happened to his spokesperson in March 1982, the spokesperson replied having heard similar reports before, and that it was a “precarious situation.” The situation was indeed precarious; that same night the captain assaulted two other soldiers. According to the verdict, the company sergeant and spokespeople for the troops and NCOs had searched for a way to report the incidents “without one of themselves coming to harm.”¹⁸¹ Just how difficult it was for them to report

178 Ruling at Military Service Court South, 1st Division on 7 October 1980, AZ S 1–VL 10/80.

179 Ibid.

180 Ibid.

181 BArch, BW 1/531591, ruling at the 14th Division of Military Service Court North on 21 July 1983. The assault occurred in a barracks named after Prussian War Minister General Karl von Einem. Von Einem himself emerged as advocating a particularly hard line against homosexual officers (for a full account see this work, chapter “Early Days: Homosexuality’s Reception in Previous German Armed Forces”).

their boss can be seen from the chronology alone: After three incidents on the same evening in March, the captain was not banned from performing his duties until early July. The military service court heard the case in June 1983 and came to an unambiguous conclusion. Young conscripts had to be able to expect “not to be abandoned to the personal desires of their superiors.”¹⁸² The liberalization in sex offenses pertaining to homosexuality cited by the defense had no standing in the Bundeswehr. This was an unhappy turn of phrase, as the decriminalization of simple homosexuality obviously applied to soldiers and the armed forces as well. The Bundeswehr neither had nor has a separate criminal justice system. Yet it does have its own internal disciplinary laws, and this is certainly what the judges meant. Most importantly though, a loosening in the laws governing sex offenses could not serve as an excuse for sexual assault, hence the verdict: The captain should be removed from service.¹⁸³ His lawyer appealed, to no avail. While the military service senate saw exonerating factors in the captain’s exceptional service record and consumption of alcohol beforehand, “these causes for leniency were not sufficient to refrain from the utmost disciplinary measures in light of the nature and severity of his transgressions.”¹⁸⁴ The judges allowed the captain retain his rank in the reserve nonetheless.

In 1984, the German Bundestag took up the subject of how to protect young conscripts from “same-sex seduction” in the barracks. In response to a question from a CDU deputy that the transcript notes met with “laughter from the SPD and the Greens,”¹⁸⁵ Parliamentary State Secretary Würzbach (also CDU) argued:

Experiencing one or the other reaction just now, this is to my mind a very serious matter (applause from the CDU/CSU). For how would one of us, one of you, one of the parents of a conscript react if they were forced to learn that a conscript had a non-commissioned officer, an officer, a superior who was trying in one way or another to establish a relationship of dependency [...] in this capacity?

In the subsequent course of debate, Würzbach was explicit about the fact that “such [consensual, homosexual] activity [between adults] is not subject to punishment by law, there’s no argument about that, no two opinions.”

¹⁸² Ibid.

¹⁸³ Ibid.

¹⁸⁴ BAArch, BW 1/531591, BVerwG, 2 WD 57/83: Federal Administrative Court, 2nd Military Service Senate, decided 25 July 1984.

¹⁸⁵ German Bundestag, 10th legislative period, 47th Session, 19 Jan 1984, typed transcript, 3378. In what follows as well.

**d.) “Why Are You Only Reporting This Incident More than Half a Year Later?”
Investigations into Navy Officers**

Asked in December 1989 by the investigating officer why he was only reporting the incident now, with more than half a year gone by, a private replied that the topic had caused him embarrassment, especially as he did not know whether the examination of his genitalia had been “lawful or unlawful.”¹⁸⁶ A petty officer second class answered the same question by explaining his assumption that the alleged “hygienic exam” was normal procedure – it was not until November 1989 that he heard from other soldiers who received similar “examinations.” The circle of those sharing the experience quickly expanded until at last a petty officer at the base medical station inquired whether such an exam was permitted. The chief medic’s ears perked up; no, they were not. The NCO spokesperson filed a report in December. One witness statement has a seaman saying that he had not found out other crew members had been “examined” until the day before, leading him to make his own report.

The investigations brought four other cases to light. One petty officer second class explained his failure to report on account of taking the officer’s behavior for a “gaffe,” that and the embarrassing nature of the goings-on. Another petty officer second class the officer in question had pursued with particular doggedness over a longer period of time, and had finally given in on one occasion, told the investigator he was happy that “the matter was out now.”¹⁸⁷ The very day before his deposition, the accused had warned the petty officer against reporting anything with the words “You’ll see what you get from that!”¹⁸⁸ The accused officer was detached from the crew and given a staff assignment. The investigating officer filed to open disciplinary proceedings, as simple disciplinary action did not seem sufficient.¹⁸⁹ At the same time, the commander leading the investigation passed the case on to the public prosecutor’s office on suspicion of abuse of authority for improper ends (a crime under §32 of the Military Criminal Code).

In early February 1990 the fleet commander temporarily suspended the officer from service and forbade him from wearing his uniform. In the course of the military prosecutor’s investigation three witnesses added details to their initial state-

¹⁸⁶ BArch, Pers 12/46028, Military Service Court North, 10th Division, Case files Az N10 VL 9/90, transcript of a witness examination, 12 December 1989.

¹⁸⁷ Ibid., transcript of a witness examination, 13 December 1989.

¹⁸⁸ Ibid.

¹⁸⁹ BArch, Pers 12/46028, Military Service Court North, 10th Division, case files Az N10 VL 9/90, Request to initiate disciplinary proceedings, 18 December 1989.

ments, further incriminating the accused. The incomplete nature of their first statements, they explained, owed to the great deal of shame they felt; what had happened was still “extraordinarily embarrassing.”¹⁹⁰ “Aboard a warship nobody dares to contradict a superior just like that.”¹⁹¹ The main hearing was conducted in closed court before Military Service Court North in Hamburg in June 1990, and upheld the charges brought concerning the supposed “hygienic examination” of seven soldiers, involving touching in the genital area, mutual sexual contact with a direct subordinate, and a further attempt at sexual contact that had been rebuffed. There was no doubt in the court’s mind that the officer had exploited his position and abused his authority to achieve his ends; in certain cases he had ordered the soldiers to him via the ship loudspeaker system. “A soldier who violates the human rights of his subordinates so grossly is no longer tenable for the armed forces.”¹⁹² The court decided to remove the career officer from service; he never appealed.

Disciplinary judges’ ability to impose drastic measures is also shown in another case from the 1990s that can only be sketched here in the abstract, given its relative proximity to the present and the prominent position of the accused. Over a period of just under two years, a high-ranking commander repeatedly sought out intimate contact with a nonrated soldier under his direct command. In a detailed letter of accusation, the military prosecutor charged the commander among other things with four concrete counts of sexually motivated attempts and actual instances of touching the soldier’s genital area. The soldier had resisted in every case except one, to which he had agreed and participated actively in. In hearing the evidence, the court determined that the initiative lay entirely with the soldier in this particular instance, holding it in favor of the accused.¹⁹³

The case of the love-drunk commander recalls similar incidents in the annals of armies and fleets past, which often found their way into literature. In Max Ren  Hesse’s novel *Partenau*, a first lieutenant from the Reichswehr whose passion for a cadet sets him on the road to ruin confesses to his company commander that “I can’t live without the boy anymore. I have to hear the boy, see him [...] It’s the most potent, the most bewitching drink life has on offer. That’s the magic. I can’t

190 “I was embarrassed during the [initial] round of questioning to state it so clearly.” BArch, Pers, 12/46028, Fleet Disciplinary Prosecutor for Military Service Court North, witness interviews from 14 March 1990.

191 *Ibid.*, Fleet Disciplinary Prosecutor for Military Service Court North, witness interviews from 19 March 1990.

192 *Ibid.*, Military Service Court North, 10th Division, decided 27 June 1990.

193 10th Division of Military Service Court North, ruling on 16 January 1998, cited in BVerwG, 2 WD 15/98: Federal Administrative Court, 2nd Military Service Senate, decided 23 February 1999. Found on www.jurion.de.

[...]”¹⁹⁴ Similar, if more modern words of passion could be found coming from the commander as he stood before the military service court in 1998. He had been “crazy about the private, emotionally.”¹⁹⁵ In the novel the company commander advises, or rather impels his first lieutenant to marry a lady from the area as a way out. Such an arrangement was neither possible or permissible in the Bundeswehr of the 1990s. A common soldier had been pursued by his commanding officer for months; the evidence pointed toward repeated sexual harassment of a subordinate, not some innocent love dream; nor was it the only accusation. Further charges of “seven separate, documented instances of sexual harassment against three non-rated soldiers belonging to his own crew, in part completed, in part attempted” weighed heavily against the commander. The accused had repeatedly visited the common soldiers’ sleeping quarters aboard ship and tried to touch their genitals as they slept.

The judges found the senior officer guilty and sentenced him to be removed from service. The court that heard the appeal considered the allegations to be proven and upheld the first decision, issuing an unambiguous ruling:

Article 1 (1) of the Basic Law makes a person’s dignity inviolable. Respecting and protecting it is the duty of all state power. This dictate cannot be approached differently inside the armed forces than it is outside them. It also provides the basis for the military constitution of the Federal Republic of Germany (§6 SG), even demanding particular observance in the military realm. Homosexual advances, intrusions and activity regularly constitute dishonorable treatment of one’s comrades, and thus undermine the sense of camaraderie upon which the cohesion of the Bundeswehr is essentially based as per §12 (1) SG; destroys the superior’s authority; and diminishes subordinates’ readiness to obey.

“Through his overall misconduct, [the senior officer] has inflicted lasting damage to his reputation as a superior and suffered considerable loss of authority.” The unrest had damaged the internal cohesion of the area under his command and jeopardized operational readiness, and thus ultimately fighting power.

It gives the author of this study pause to consider here how it was that such a high-ranking officer’s behavior – which had not escaped notice within the scope of his authority – could go on for nearly two years without anybody intervening. One possible answer lies in the officer’s high standing and range of authority. The court opinion mentions among other things that the soldiers who were subject to

¹⁹⁴ Hesse, *Partenau*, 242–43.

¹⁹⁵ Here and in what follows, 10th Division of Military Service Court North, ruling on 16 January 1998, cited in BVerwG, 2 WD 15/98: Federal Administrative Court, 2nd Military Service Senate, decided 23 February 1999.

the nocturnal assaults had “expressed confidence” in the officer in the presence of his deputy “and requested he not be [released] from his command post ‘because he was actually a good commander.’”

This in turn recalls a previously discussed treatise about homosexuality in the military from 1908 written by an “expert on the field” under the pseudonym Karl Franz von Leexow. When asked “whether sexual things that inverted officers may have committed while drunk were not easily divulged by the enlisted men,” an NCO replied, “But we wouldn’t betray the best.”¹⁹⁶

A legal journal had the following to say about the judgement in 1999: “A soldier who as ship commander and disciplinary superior shows a definite tendency toward homosexuality through homosexual activities toward his subordinates has become untenable in the troops and must be removed from service.”¹⁹⁷

10. Statistics in Summary

The sources only give reliable statistical surveys on the number of soldiers punished in criminal and/or disciplinary court for homosexual acts in isolated instances, limited by time, place and organizational branch.

a.) 1956 to 1966

In 1966, a colonel from the personnel department at the BMVg reported the Bundeswehr as having brought disciplinary proceedings against thirty-six officers for homosexual activity between the years 1956 and 1965. He did not note how the proceedings ended. His department noted a further 182 disciplinary cases against NCOs and common soldiers in 1964 and 1965 for incidents of the same kind.¹⁹⁸ Given a total personnel count of 450,000 soldiers, such numbers were cause “neither for alarm nor concern.”¹⁹⁹ One medical officer considered such a low number for disciplinary proceedings of the sort “impressive” given that an estimated four percent of the total male population was homosexual, and questioned “whether the other

¹⁹⁶ Leexow, *Armee und Homosexualität*, 109–11. Also cited in Hirschfeld, *Von einst bis jetzt*, 150.

¹⁹⁷ Neue Zeitschrift für Verwaltungsrecht – Rechtsprechungs-Report Verwaltungsrecht (NVwZ-RR), 11+12/1999, 513–14.

¹⁹⁸ The paper doesn’t mention whether these involved only court (i.e. criminal) cases or only disciplinary proceedings, or both.

¹⁹⁹ Here and in what follows, BArch, BW 24/3736: BMVg, InSan: “Arbeitstagung zur Beurteilung der Wehrdiensttauglichkeit und Dienstfähigkeit Homosexueller,” 1966, here sheet 94.

homosexual soldiers who had not been found out would otherwise perform their duties inconspicuously.” A psychologist involved with the topic sought to explain away the seeming contradiction by conjecturing that the assumption of four percent was wrong. Entrance examinations would find “consistent homosexuality in significantly fewer men.” The explanation that immediately suggests itself from today’s perspective – that the majority of men with homosexual tendencies would have behaved inconspicuously during their military service – seemed unlikely, even impossible, to the professor in 1966, as it was “impossible for the majority of consistent homosexuals.”

An internal Navy statistic from 1963 reveals fifty-six soldiers sentenced for violations under §175 StGB, four the following year, and another thirteen in 1965.²⁰⁰ The annual fluctuations are noteworthy, as is the comparatively high number of convictions for 1963. The paper ventures one explanation for the surprising figure: the inclusion of sexual acts or “silly games” among comrades where no consistent homosexuality was present. The Navy jurist argued that the cases should “in all fairness” be removed from the statistics, citing the example of a seaman on a coast guard ship who “tried to see for himself whether two comrades he suspected were homosexually inclined” and became sexually involved supposedly for that reason alone. Yet “all three soldiers weighed down the statistics,” just like four other Navy soldiers in Wilhelmshaven who “had hired themselves out for dollars to an English sailor while inebriated and [let] themselves be abused.” Though none were homosexually inclined, all four soldiers were sentenced under §175 StGB.²⁰¹ The Navy further explained the number of convictions dropping as significantly as it had in the following years on account of its policy of removing soldiers from service. “Word had gotten round” that Navy headquarters was “generous” in its dismissal policies where instances of homosexuality were suspected. Not a few soldiers made use of this to exit the Navy.²⁰² Unspoken, this probably meant to say that if one were no longer a soldier, any subsequent convictions would no longer weigh on the statistics.

In 1963 the Navy had an overall personnel strength of 26,000, putting the share of soldiers convicted under §175 StGB at 0.2%. In 1965, with a total staff size of 31,000, that number was 0.04%. These calculations supported jurists’ contention in 1966 that “there was no sign in the Navy [...] that homosexuality threatened to

²⁰⁰ In each of the three years, sources note four acquittals or proceedings being suspended. BArch, BW 24/3736: “Erfahrungen mit homosexuellen Soldaten in der Marine.” In: BMVg, InSan: “Beurteilung der Wehrdiensttauglichkeit und Dienstfähigkeit Homosexueller,” 1966, sheets 64–77, here 73.

²⁰¹ *Ibid.*, 76.

²⁰² *Ibid.*, 70.

assume worrisome proportions.”²⁰³ The Navy lawyer stressed the strict line he and his colleagues pursued in punishing incidents of the sort, heedless of the negligible percentages. Today one might speak of a “zero tolerance strategy”; in 1966, that sounded as follows:

It is simply a matter of keeping relationships between men free from sexual influences. Experience has shown that it is especially easy for those who are homosexually inclined and susceptible to come into contact during longer stays aboard ship as a result of the close living quarters, in many cases leading to a relationship of sexual dependence (nesting). These relationships of unfreedom and dependency, which may also form between superiors and subordinates, not only destroy camaraderie within the close-knit living community aboard ship but also a sense of manly self-control [Manneszucht], in the truest sense of the term.²⁰⁴

The lawyer cited the example of a minehunter aboard which multiple soldiers had taken advantage of a petty officer’s homosexual tendencies to “free themselves from watch duty in exchange for relevant favors.”²⁰⁵ While it did not occur to the lawyer in this case to pass the incident, which had occurred while on duty or within the line of duty, on to the public prosecutor’s office, he did bemoan the inconsistency of soldiers and superiors alike in reporting. Over the course of his investigations as a military prosecutor he had seen “the great reluctance of some soldiers to report a comrade’s attempted homosexual advances out of a false understanding of camaraderie.”²⁰⁶ Higher-ranking superiors similarly often shied away from passing incidents on to the public prosecutor. The lawyer estimated the number of unreported cases in the Navy at around 25%, whereas in the civilian sphere this number amounts to around 99% for offenses under §175 StGB.²⁰⁷

Numbers from 1964 also exist for Military District I, which included all the branches of the armed forces for the states of Schleswig-Holstein and Hamburg. Nine soldiers were sentenced under §175 and another five under §175a StGB.²⁰⁸

BMVg lawyers further created an overview of the number of soldiers convicted for sexual offenses in 1965 and 1966 in the course of the debate surrounding the reform of §175. Thirty-eight soldiers were convicted under §175 in 1965 (two officers, four NCOs and thirty-two nonrated soldiers) and eight acquitted, while one had his case suspended. Six additional convictions (four NCOs and two nonrated

²⁰³ Ibid., 76.

²⁰⁴ Ibid., 65.

²⁰⁵ Ibid.

²⁰⁶ Ibid., 74.

²⁰⁷ Ibid.

²⁰⁸ Ibid., 56–63, in this case 57.

soldiers) and two acquittals came under §175a StGB (aggravated illicit sexual acts between men). 1966 saw thirty-nine convictions (one officer, ten NCOs and twenty-eight nonrated soldiers), three acquittals and two suspended cases under §175; and eight convictions (five NCOs and three nonrated soldiers) and one acquittal under §175a.²⁰⁹ Deviating slightly, the numbers for 1965 and 1966 show an average of around forty-five convictions annually.

Even if criminal courts acquitted them by law, gay soldiers still stood under the threat of the Bundeswehr's internal disciplinary mechanisms. The Navy jurist commented on this in 1966, noting that "the Navy has taken strict disciplinary measures in every instance of immoral behavior between men, drawing professional legal consequences in the case of regular acquittal during criminal proceedings, or their suspension on account of the trivial nature [of the case]."²¹⁰ The jurist grew more concrete: Both the "active participant" as well as the "other who let himself be misused for illicit acts" would be dismissed; what was more, this was "regardless of whether it could be proved that the offenders had homosexual tendencies or not."²¹¹

b.) 1976 to 1991–92

Here too, the information sources provide about internal Bundeswehr measures or court disciplinary action is sporadic and limited to narrow windows of time. Reliable figures exist for the period between 1981 and 1992. In advance of a Bundestag Defense Committee meeting, in September 1982 the BMVg requested the numbers as they stood within each branch of the armed forces. The Navy had "no identified or reported cases of homosexuality" for 1981 and two cases for the first half year of 1982. "Overall, however, the problem of 'homosexuality' does not exist in the Navy."²¹² The air force reported one conscript sentenced under §175 StGB in 1981 for homosexual activity with a minor. Legal personnel measures for 1980 and 1981 included one dismissal under §55 (5) SG, another under §29 (1) of the Compulsory Military Service Act and two further cases of disciplinary action in the

²⁰⁹ BArch, BW 1/187212, "Abgeurteilte Soldaten nach §§172, 175, 175a und 175b 1965/1966," no author, no date.

²¹⁰ BArch, BW 24/3736: "Erfahrungen mit homosexuellen Soldaten in der Marine," in BMVg, InSan: "Beurteilung der Wehrdiensttauglichkeit und Dienstfähigkeit Homosexueller," 1966, sheets 64–77, here 67.

²¹¹ Ibid.

²¹² BArch, BW 2/31225: BMVg FÜM I 3, 4 August 1982.

form of twenty-one days' and seven days' arrest, respectively.²¹³ Army Staff had no numbers to report, but once again took the opportunity to put fundamental principles to writ.²¹⁴

In October 1991 the BMVg requested statistical data from the three military service courts about convictions from the past ten years related to "homosexuality in the armed forces," as the subject heading read.²¹⁵ Between 1981 and 1991 Military Service Court North in Münster/Westphalia registered twenty-eight cases, with another three added in handwriting for 1992. In 1981 a captain serving as company commander and two sergeants first class had been convicted in disciplinary proceedings. The company commander was charged with misconduct against two common soldiers in his unit; the resulting disciplinary action took the form of a two-year ban on promotion and a one-year reduction in pay by one-twentieth, quite a light punishment by comparison. One company sergeant had sexually assaulted a total of seven soldiers in his company and was demoted by two ranks to plain sergeant. The other had also been brought in on seven counts of sexual assault, in this case against soldiers in his platoon, direct subordinates of his. He was banned from promotion for two years and had his pay reduced by one-tenth for a year – again, a light punishment. The statistics do not reveal the specific charges on which the captain and sergeant first class were arraigned.

1982 likewise saw the conviction of three company commanders, among them a captain who was removed from service for showing sexual aggression toward seven soldiers in his company. One major was demoted to the rank of captain based on one incident, while another major received a pay cut and was banned from promotion for four years. In 1984 a sergeant was demoted to the rank of private first class for nine counts of sexual assault against soldiers in his barracks who were not his immediate subordinates. That same year, another sergeant was charged with assaulting six soldiers who stood directly beneath him in his position as a mess sergeant for the officers' club at the barracks. Disciplinary action banned him from promotion for four years and reduced his pay by one-tenth for a year. The BMVg

²¹³ Ibid.

²¹⁴ "Homosexuals' deviant sexual behavior cannot be tolerated within the purview of the army in the event that it disrupts the camaraderie and cohesion of the military community [...] and troop discipline. So long as homoerotic tendencies are limited to the extra-official private sphere, they [...] will be tolerated." BArch, BW 2/31225: BMVg, FÜH I 3, 6 August 1982.

²¹⁵ The precipitating event for the request was an inquiry the BMVg received from the British defence attaché in Bonn on 9 September 1991. The BMVg's reply came on 5 November 1991, asking for the attaché's understanding as to the delay; the requested numbers first had to be asked for at the military service courts. BMVg, VR I 5 to the British defence attaché, 5 November 1991, BArch, BW 1/531592.

overview includes one case already discussed at length, that of an officer dismissed from service in 1990 for assaulting seven members on his crew. One company commander in the rank of major was acquitted of the charges against him in 1984, as was a sergeant in 1987.²¹⁶ The acquittals do not indicate consensual sex, however, which itself constituted an official violation. The leniency in the disciplinary measures mentioned above sooner point to consensual contact.

The number of soldiers that were sexually assaulted in each case deserves attention; as a rule, these were not isolated events. Multiple soldiers were attacked in nearly every instance, seven at a time on multiple occasions and as many as nine in one case. These numbers in turn point out another difficulty: The first victims apparently did not report the incident, possibly covering it up completely, whether out of uncertainty, shame or some other reason. This in turn enabled the superior to renew or repeat his attacks before any report came to be, along with the ensuing investigations and potential disciplinary measures. It was usually the latest offense in a series that (finally) drew attention, which then brought similar previous, as yet unreported incidents to light. The common reticence to “blow the whistle” held a variety of motivations, and suggests a high number of unreported cases; we have already seen a Navy jurist pointing out soldiers’ and superiors’ inconsistent reporting in 1966. The number of (homo)sexually motivated attacks was in all likelihood significantly higher than the number of cases heard in military service courts. Coming on top of all the reports that are presumably missing were cases that resulted in the immediate dismissal of the accused under §55 (5) SG, and therefore were not included in the statistics.

Military Service Court Center in Koblenz heard nineteen cases for the period between 1981 and 1991, fourteen of which resulted in disciplinary action, four in acquittal and one in trial suspension. The highest-ranking soldiers convicted were a major and a senior staff physician, who were demoted to captain and staff physician respectively. The harshest disciplinary action was taken against a company commander in 1982, and again in 1990 against a platoon commander in the rank of staff sergeant – both were removed from service. The captain had assaulted two privates in the company he was leading, the staff sergeant an airman in his platoon.²¹⁷

Military Service Court South in Ulm reported nine cases during the same period of time, with five completed and one ongoing for 1992 added in writing.

²¹⁶ BArch, BW 1/531592, President of Military Service Court North, Az 25-01-30, to BMVg, VR I 5, dated 17 October 1991.

²¹⁷ BArch, BW 1/531592, Military Service Court Center Headquarters, Az 25-01-10 to BMVg, VR I 5, dated 14 October 1991.

Differentiated by rank, seven of the accused were captains, one a first lieutenant, five were staff sergeants and one a sergeant. In terms of their relative position, five had assaulted soldiers directly under their command, two had otherwise been in a position of authority and three of the accused were superiors based on rank. The cases reported for 1992 were not differentiated in the same way. Three of the captains and the first lieutenant had been dismissed from service. Another captain was acquitted in 1982. The remaining disciplinary measures either took the form of demotion in rank, promotion bans or a reduction in pay.²¹⁸

Comparing the three service courts shows thirty-one sets of disciplinary measures taken in the north and fourteen each in the central and southern courts. The greater number for Military Service Court North in Münster is ultimately traceable to the larger area for which it was responsible, and thus the considerably higher number of units under its jurisdiction. The areas for which the Koblenz and Ulm courts held responsibility were much smaller, making it impossible to draw any definite conclusions about the comparative frequency of reporting between north and south, or the harshness or clemency with which the courts treated those cases that were reported.

It may also be of some interest to break the reports down by military branch. Court statistics do not differentiate according to army, air force and navy, nor do rank designations allow for distinguishing between the army and air force. The navy, however, does stand out with its own service ranks. Out of a total of thirty-one convictions Military Service Court North lists five disciplinary court actions taken against navy officers, petty officers and crew members. Given the limited number of naval personnel stationed in the area under the jurisdictions of the two southern courts, it is unsurprising that neither lists any disciplinary actions against Navy members. Out of sixty-three total cases tried in the armed forces between 1981 and 1992, five involved the Navy, with four ending in final disciplinary action. That makes up 8% of cases, surprisingly close to an exact match for the navy's share of personnel in the Bundeswehr at large, just under 9%.²¹⁹ Contrary to certain assumptions or prejudices, the Navy was thus right in line statistically speaking, i.e. it had no more or fewer cases onboard ship than what was average for any other branch.

The BMVg summarized the reports, breaking down fifty-five decisions at military service courts between the years 1981 and 1991 into nine removals from service, eighteen demotions in rank, eight temporary bans on promotion, two

²¹⁸ BAArch, BW 1/531592, President of Military Service Court South, Az 25-01-35/06-2 to BMVg, VR I 5, dated 22 October 1991.

²¹⁹ In 1985 the Bundeswehr had a total of 495,000 soldiers, 39,000 of which were in the Navy. See Federal Ministry of Defense, *Weißbuch 1985*, 238 and 240.

reductions in pay and ten combined punishments of a ban on promotion and reduction in pay. Seven trials had ended in acquittal, one in suspension. Nineteen officers were tried, thirty senior NCOs and six junior NCOs.²²⁰ Each year an average of close to five soldiers were sentenced to disciplinary measures.

A handwritten update added an additional eight cases for 1992 (one against an officer, five against senior NCOs and two against junior NCOs). Five had ended in disciplinary action – two demotions in rank and three bans on promotion – one set of proceedings had been suspended and two others were ongoing.²²¹ 1992 upheld the average calculated for the previous ten years of five court disciplinary actions per year. In summarizing the results, the director at the Bundeswehr Institute of Social Sciences commented that the annual number of “only 5.2” was “extraordinarily small,” concluding that “within day-to-day service operations, homosexuality [is] more of an academic topic.”²²²

The BMVg had calculated a similar annual average of five disciplinary court actions taken against homosexual activity in 1979 for the years previous.²²³ (Presumably it was disciplinary actions decided on by military service courts that were meant here, involving cases of both sexual assault and consensual sex.) The Ministry of Defense also shed some light on the number of soldiers convicted under §175 and §176 StGB: twenty-one in 1975, eighteen in 1976 and fifteen in 1977.²²⁴ These numbers included cases of both non-consensual and consensual sex, two fundamentally different scenarios that nonetheless both represented a violation of official duty in the thinking of the day. This makes the statistics from those years ill-fit to uncover the number of cases involving consensual homosexual activity that may be entitled to rehabilitation.

²²⁰ As of 31 October 1991, BArch, BW 1/531592: BMVg, Füs I 1 on 3 March 1993; also available in BW 24/14249 and BW 2/31224: BMVg, VR I 5 to Füs I 4, 16 December 1992 in the annex.

²²¹ BArch, BW 1/531592: BMVg, Füs I 1, 3 March 1993, also available in BW 1/32553: BMVg, VR I 5, March 1993 and Füs I 4, 3 February 1993.

²²² Fleckenstein, “Homosexuality and Military Service in Germany.” In a similar vein and appearing nearly at the same time is the article in *Der Spiegel*, “Versiegelte Briefe.”

²²³ BArch, BW 1/304284: BMVg, VR I 1, 15 February 1979, as well as BMVg, parliamentary state secretary to Deputy Herta Däubler-Gmelin (SPD), 23 February 1979.

²²⁴ BArch, BW 1/304284: BMVg, VR I 1, 15 February 1979. In evaluating these numbers, it is important to keep in mind that after its reform, §175 StGB no longer punished homosexual activity between men as such, but only when it involved minors under eighteen. §176 dealt with sexual activity involving children under fourteen.

11. Immediate Dismissal under §55 (5) of the Legal Status of Military Personnel Act

Service court documents have for the most part been preserved in their entirety, as have appeal rulings at military service senate. Between them, the sources offer a detailed and multifaceted picture of the cases tried before the two courts. In contrast, dismissals under §55 (5) of the Legal Status of Military Personnel Act (hereinafter: Soldier's Act; in German: Soldatengesetz, SG) constitute a blind spot. In the event of a breach of duty or serious threat to military discipline, the clause allows (to this day) for the possibility of rapidly dismissing a soldier still in the first four years of his service in a simplified procedure, without a disciplinary court hearing.²²⁵ A range of violations qualify under the clause; by no means is it limited to cases of homosexuality. Dismissal under §55 (5) was a routine matter in military life, usually at the instigation of platoon leaders and company commanders who knew their soldiers. As a rule, the decision was made by the division personnel office.²²⁶

In cases where the simple legal route of rapid dismissal under the clause existed, the impact of §55 (5) was to remove the need for a long, drawn-out trial before the military service courts – one whose outcome moreover was not guaranteed. Dismissal under the clause did not (nor does it today) require that the underlying violation of duty lead to removal in a court disciplinary hearing; it was a personnel decision, not a disciplinary action. Immediate dismissal under §55 (5) should also be distinguished from dismissal due to “unsuitability” under §55 (4) SG, both in terminology and substance. In 1984 the Bundeswehr personnel office referred explicitly to §55 (5) “for cases in which a fixed-term soldier is reprimanded or criminally convicted for homosexual acts [to order] his discharge during the first four years of service, if remaining in service would pose a serious risk to military discipline or the reputation of the Bundeswehr (§55 (5) SG).”²²⁷

The G1 memo draft discussed above from 1986 that sought to regulate all matters pertaining to homosexuality also included mention of dismissal within the first four years of service under §55 (5).²²⁸

²²⁵ http://www.gesetze-im-internet.de/sg/_55.html. Last accessed 31 March 2021.

²²⁶ Interview with a retired major general, Potsdam, 15 May 2018.

²²⁷ BMVg, P II 1, Az 16-02-05/2 (C) R 4/84 from 13 March 1984; nearly identical wording in BArch, BW 2/32553: BMVg, Füs I 4, 3 February 1993.

²²⁸ BArch, BW 2/31225: BMVg, Füs I 4 to the minister via the parliamentary state secretary, 22 October 1986, annex. Identical to BArch, BW 2/31224: BMVg, Füs I 4, July 1986.

Documents related to dismissal proceedings became part of soldiers' personnel files, subject to destruction after a set period of time under data protection law. Today, this means that only isolated, rather coincidental references to dismissal via that particular route exist.

One set involves a captain whose case has already been considered in detail. When he seduced a lieutenant in 1965 while massaging him after sports, the captain was quickly discharged under §55 (5). In another case that has also been looked at from 1969, disciplinary proceedings were opened against six soldiers, with four quickly dismissed from the Bundeswehr under §55 (5). The remaining two had their cases heard before court; they had done more than four years in service and simplified dismissal was no longer possible.

Chance finds and eyewitness interviews allowed a few other cases to be identified. In a previously described case from 1966 in which a first lieutenant and an NCO continued a consensual sexual relationship from their youth, a former officer filled in what could not be found in the court acts, namely that the NCO had been dismissed under §55 (5).²²⁹

The only instance of statistical surveys for this kind of dismissal comes in a 1966 report from a Navy jurist, according to which Navy headquarters dismissed one sergeant and three common soldiers under §55 (5) in 1964. The Navy dismissed seven rank-and-file soldiers under the same clause the following year; another set of dismissal proceedings had yet to be completed due to one soldier's appeal. Another three nonrated soldiers were dismissed for homosexual activity based on other legal provisions, namely §55 (2) SG for inability to serve and §54 (1) SG for unsuitability for fixed-term service at the end of a six-month probationary period.²³⁰ (§54 (1) SG governs the end of service once a set period of service has finished, in this case a "semi-annual review.") All the dismissals involved soldiers serving a fixed term. In 1965, another four conscripts were dismissed under §29 (1) No. 5 of the Compulsory Military Service Act.²³¹

In an interview for *Der Spiegel* in 1993, BMVg spokesperson First Lieutenant Ulrich Twrsnick explained that "no injunction to prosecute or witch burning" existed in the Bundeswehr.²³² The service was not interested in what soldiers "do off duty," nor did the BMVg see "any problems" if soldiers with the same service

²²⁹ Interview (anonymous), 19 June 2018.

²³⁰ BAArch, BW 24/3736: "Erfahrungen mit homosexuellen Soldaten in der Marine." In BMVg, InSan: "Beurteilung der Wehrdiensttauglichkeit und Dienstfähigkeit Homosexueller," 1966, sheets 64–77, here 73.

²³¹ Ibid.

²³² "Versiegelte Briefe," 54.

rank “were caught engaged in homosexual practices [...]’ Both are doing it voluntarily, both are eighteen and there’s no relationship of dependence.” It would be a different situation, Twrsnick continued, “if three or four, say, began to terrorize a bedroom.”²³³ The press officer’s statement that soldiers caught engaged in homosexual acts would not pose a problem allows one to infer that no disciplinary investigation would follow even if soldiers were discovered engaged in sexual activity in service accommodations or while on duty. Wisely, this applied only to common soldiers and, unmentioned here, only for conscripts. Twrsnick’s words could also be read in reverse: If it was not common soldiers but sergeants, staff sergeants or officers who were “caught,” there would be trouble.

Trouble was exactly what two sergeants ran into in 1994. An S2 officer responsible for military security in the battalion at the time, today a first lieutenant, recalled their immediate dismissal.

I learned that both sergeants had been dismissed before their four-year commitment expired due to sexual activity while on duty. At the time I was extremely angry about how the two men had been treated and asked them in my office why they had not appealed their dismissal [...] Both soldiers told me that they “would let the matter rest.” Their time in the service would have been over soon anyway, and they did not want to take any further action.²³⁴

In the period that followed, company members were mocked by other units as “the pink company.” “Yet I think I wasn’t the only one for whom the two soldiers’ dismissal went too far. To my knowledge it wasn’t talked about among the officers. But the commander at the time didn’t like to allow conversations about official decisions anyway.” Stationed in Baden-Württemberg at the time, the witness added that even back then he had been of the opinion “that a dismissal like that wouldn’t have occurred in northern Germany.”

In this respect the officer was likely mistaken. The same regulations obviously applied in northern Germany as well. Still, it depended on the person whether or not a company head turned around and reported what he had been told “upstairs,” and a commander then initiated dismissal proceedings. There was room for discretion. In classifying the disciplinary measures taken against the two sergeants, it should again be pointed out that any sort of sexual activity was prohibited within official quarters and facilities. That included while off duty, and obviously even more so while on duty, as the sergeants were when they were found out. The same

²³³ “Versiegelte Briefe,” 49.

²³⁴ Email from Lieutenant Colonel B. to the author, 24 January 2017, and in what follows.

applied for heterosexuals without exception.²³⁵ In early January 2000, a personnel department section reemphasized that the disciplinary relevance of homosexual activity should ultimately be assessed the same as heterosexual activity.²³⁶ (In 2004, revised departmental orders for “Handling Sexuality in the Bundeswehr” loosened the clauses governing “sexual activity” for free time spent in the barracks as well.²³⁷)

A further case of immediate dismissal was possible to reconstruct based on the personal memories and documents of Dierk Koch, a seaman apprentice in the Navy whose brief stint in the military is discussed at length in chapter 2. When he came under professional and sexual pressure from his direct superior, a petty officer second class, the seaman confided in the head of his company and requested a transfer.²³⁸ Searching the federal archives for documents related either to Koch’s dismissal or the petty officer’s own proved unsuccessful.²³⁹ To date only a small portion of the substantial archival material has been made accessible, unfortunately, leaving a subsequent find entirely possible. Original documents in the possession of the former seaman were partially able to fill existing gaps. It is nevertheless likely that the petty officer in the story was dismissed under §55 (5) SG without a hearing in service court. Internal Navy statistics for crimes under §175 StGB contain a minor reference, with the year 1964 listing three common soldiers and one NCO dismissed under §55 (5) SG.²⁴⁰ Aside from the seaman apprentice the petty officer could absolutely have been among those dismissed.

Yet the seaman’s demotion in rank and dismissal from service did not mean the matter was finished for the Navy. Rather, Navy lawyers brought the public prosecutor on board, so to speak. In 1965, the young man found himself back before Cuxhaven local court, with the petty officer sitting next to him in the dock. As Koch recalls, the judge showed a clear liberal bent and excused himself before the two accused for having to sentence them under §175 StGB, albeit only to a fine of 100 DM for Koch and a somewhat higher fine (500 DM in Koch’s memory) for the

²³⁵ For a full account see Lutze, “Sexuelle Beziehungen und die Truppe.”

²³⁶ BAArch, BW 1/502107, no pagination: BMVg, PSZ III 1, May 1 2000.

²³⁷ For a full account, see chapter 4, section 7.

²³⁸ See chapter 2, section 4.a.

²³⁹ An inspection instigated at Koch’s request to the BMVg proved similarly unsuccessful on account of incomplete documentation “due to the passage of time.” The personnel files that had been preserved were located, as was the private’s health card, but they don’t contain any mention of homosexuality or its justifying immediate dismissal. BMVg, P II 1 to Dierk Koch, 26 February 2019.

²⁴⁰ BAArch, BW 24/3736: “Erfahrungen mit homosexuellen Soldaten in der Marine.” In BMVg, InSan: “Beurteilung der Wehrdiensttauglichkeit und Dienstfähigkeit Homosexueller,” 1966, sheets 64–77, here 73.

petty officer.²⁴¹ The judge was bound to the applicable laws, and he could not rule for acquittal in favor of the accused as the facts of the case were undisputed. He was only able to use his discretion in deciding the extent of punishment so as to impose the absolute minimum. The verdict in Cuxhaven thus takes its place among the handful of symbolic guilty verdicts against gay men that progressive judges would hand down from time to time, although these tended to remain the exception.²⁴²

12. The Matter of Rehabilitation

In 2017, at Dierk Koch's request, the verdict reached in 1965 by Cuxhaven local court was rescinded.²⁴³ In June of 2017, the Bundestag passed the Act to Criminally Rehabilitate Persons Who Have Been Convicted of Performing Consensual Homosexual Acts After 8 May 1945 (StrRehaHomG). The law took effect on 22 July 2017, rendering null and void criminal decisions and court orders issued for consensual homosexual activity under the previous versions of §175 and §175a StGB in West Germany, or §151 in the East German criminal code.

By today's standards, the ban on consensual homosexual activity under criminal law and the resulting prosecution contravene the Basic Law and human rights to a special degree. It is the goal of the [present] law to remove the stigma of punishment based on those convictions with which affected parties have had to live until now.²⁴⁴

"It is a delayed act of justice. But it is never too late for justice," then Federal Minister of Justice Heiko Maas said while addressing the act's adoption in parliament. "The state greatly incriminated itself with §175 StGB by making the lives of innumerable people more difficult. The law caused unimaginable suffering. This law allows us to rehabilitate the victims. Convicted homosexuals no longer have to live with the stigma of conviction."²⁴⁵

²⁴¹ Interview with Dierk Koch, Hamburg, on 22 February 2018, and an email from Dierk Koch to the author on 6 September 2019, as well as a further interview by phone on 7 September 2019. Also mentioned in Scheck and Utess, "Was wir damals gemacht haben, war kein Verbrechen."

²⁴² In 1961, the press reported on a "three mark sentence": in an appellate hearing on 22 July 1961 the Hamburg District Court sentenced two men to a fine of three marks each for consensual sex.

²⁴³ Decision of the State public prosecutor's office, 19 September 2017.

²⁴⁴ Statement by the Federal Office of Justice

²⁴⁵ Statement to the press by the Federal Ministry of Justice and Consumer Protection on 21 July 2017. <https://www.bundesregierung.de/breg-de/aktuelles/pressekonferenzen/regierungspressekonferenz-vom-9-maerz-2018-848296> (last accessed 16 April 2018).

Dierk Koch saw it the same way. “The disgrace of having a criminal record that has weighed on me for decades now has fallen by the wayside [...] The conclusion of this process makes me proud and happy!”²⁴⁶ Koch puts it even more plainly in an interview with *Bild*: “I’ve turned seventy-seven in the meantime. I didn’t want to die a criminal. What we did back then wasn’t a crime.”²⁴⁷ Koch’s loss in rank and dismissal from the Navy, by contrast, were neither repealed nor canceled. Nor for that matter have any other cases of disciplinary action (or rather punishment) or dismissal from the Bundeswehr cited in this study received judicial reappraisal – not to mention the numerous instances of disciplinary measures or dismissal not considered here. Their legal force, and even more so their impact, live on in the memories of those who have been affected. The Federal Ministry of Defense had to take its own steps toward repeal or some other form of settlement. This is neither to advocate for the repeal of disciplinary action taken against cases of sexual assault nor to minimize those cases. Yet instances of disciplinary punishment or dismissal on account of consensual sexual activity between soldiers were still awaiting reappraisal, or at least some sort of gesture from the armed forces – up until 2020. That year, based in part on the research results published in this study, former Minister of Defense Annegret Kramp-Karrenbauer introduced a legal initiative to repeal the same disciplinary measures and verdicts under discussion here. At the same time, Kramp-Karrenbauer complied with the wish for a gesture shared by many who had suffered injustice: She requested official pardon.

To return to Koch, however: In 2019 the BMVg came back with a very different answer to his specific case. Even if archival finds did turn up evidence of dismissal due to homosexuality, the current laws did not offer him a chance for formal rehabilitation. The law on rehabilitation that had passed (StrRehaHomG) only targeted criminal verdicts, and had already been accomplished in the former seaman apprentice’s case. “We are aware that this is not a satisfactory state of affairs for the impacted parties. Based on the prevailing laws and orders during your service period, it is understandable that homosexual soldiers feared discrimination [during military service]. This is truly regrettable.”²⁴⁸ It is worth noting here that gay soldiers not only had to “fear” discrimination but actively experienced and suffered from it as well. From Koch’s point of view, the BMVg’s phrasing in this case is unsatisfactory, to say the least.

The Working Group for Homosexual Members of the Bundeswehr persisted on the issue in a letter from April 2018, specifically calling on the defense minister to

²⁴⁶ Koch, “Meine unvergessenen Freunde.”

²⁴⁷ Scheck and Utess, “Was wir damals gemacht haben, war kein Verbrechen.”

²⁴⁸ BMVg, P II, 1 to Dierk Koch, 26 February 2019.

annul “verdicts reached against soldiers of all ranks [by military service courts] on the basis of consensual homosexual activity alone.” To do so, the letter pushed for the existing law on criminal rehabilitation to be updated and expanded to include rulings in military service courts.²⁴⁹

The ministry responded that same month, underscoring the “great esteem” in which it and “especially the minister personally” held the working group’s engagement “on behalf of homosexual members of the Bundeswehr.” Yet the ministry demurred when it came to annulling service court decisions and financially compensating those who were left at a professional disadvantage. The argument used then is repeated today. The criminal rehabilitation act could not be applied to disciplinary rulings; such an act would require a new legal basis. The ministry had already approached the justice ministry to this end with a request to consider amending the law to include disciplinary rulings. To date, however, the justice ministry had replied in the negative. The rehabilitation act (StrRehaHomG) served “solely to remove the stigma of punishment suffered as a result of a criminal conviction [...] Other legal consequences resulting from conviction, especially when professional in nature (such as the loss of professional status or any consequences from a conviction under disciplinary law) were explicitly excluded.”²⁵⁰ While the justice ministry “in no way [failed to recognize] that affected parties were also subject to considerable discrimination and suffered disadvantages,” it was exactly those disadvantages that “did not inhere in the stigma of criminal conviction that alone holds relevance for StrRehaHomG.” As of 2018, the justice ministry thus had no intention of expanding the law to “bodies of evidence outside criminal law” such as military service court rulings. Despite the justice ministry’s position, the BMVg noted that its legal department would “keep an eye on the matter and explore other possibilities.”²⁵¹

Specialist legal journals came out in support of the BMVg’s position. The rehabilitation act expressly did not touch on past disciplinary measures but served “solely to remove the stigma of punishment suffered from prior conviction.”²⁵² It was emphasized explicitly that jurisprudence did not find any unconstitutionality present in the convictions.²⁵³ In 2019 a first ray of light seemed to appear as the Federal Ministry of Justice began to consider “in the meantime [...] whether also

249 Letter from the Working Group for Homosexual Members of the Bundeswehr to the Minister of Defense, 16 April 2018.

250 BMVg, R I 5 to the Working Group for Homosexual Members of the Bundeswehr, 16 August 2018.

251 Ibid.

252 Rampp, Johnson and Wilms, “Die seit Jahrzehnten belastende Schmach fällt von mir ab,” 1146.

253 See also the decisions at BVerfG from 1957 and 1973, already discussed at length in this study.

to provide for persons who were not criminally convicted but were persecuted for their homosexuality in other ways.”²⁵⁴

In closing, one farther-reaching thought: Anyone sentenced to longer than one year in prison automatically loses the legal status of a soldier. If this sort of conviction against homosexual soldiers were repealed by the criminal rehabilitation act, what implications would that hold for service law? Would that mean a loss of legal status under §48 and §54 (2) SG as well? Would the armed forces then have to make payments to fixed-term soldiers, say, even career soldiers to make up for missed salary? This remains a theoretical question at present.²⁵⁵ The research at hand did not turn up any cases where soldiers were sentenced to such a long prison term for consensual, same-sex activity. Any number of dismissals reviewed to date were without doubt based on convictions under §175 StGB and will have to be annulled now, but they all lay well under a year imprisonment. Cases uncovered so far in which fixed-term or career soldiers lost their legal status as soldiers for prison terms over one year exclusively followed on rulings that dealt with severe cases of sexual assault, which were expressly excluded from the rehabilitation act.

The convictions that Lüneberg regional court handed down to Sergeant K. and Private S. discussed at the outset of the chapter similarly fall under the category of rulings under §175 StGB in need of rehabilitation. The sergeant’s subsequent conviction by a military service senate occurred under disciplinary law, not criminal law. Additional, new steps were required to annul this and other rulings. This in turn paved the way for new legislation in 2020, with the Bundestag set to take up the “Act to Rehabilitate Persons Who Have Been Professionally Disadvantaged For Performing Consensual Homosexual Acts, For Their Homosexual Orientation, Or For Their Sexual Identity” in April and May 2021.

²⁵⁴ BMVg, P II 1 to Dierk Koch, 26 February 2019. The guidelines for compensating this group as well took effect on 13 March 2019.

²⁵⁵ As BMVg, R I 5 explained to the author, the question had already been answered. §1 (5) StrRehaHomG provides that the repeal of criminal convictions would have no legal effect outside the scope of the act, excluding “resuscitation” of a service position that had ended in criminal conviction. BMVg, R I 5, 27 April 2020.