

Disgust, compassion or tolerance

Law and emotions in the debate on § 175 in West Germany

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Introduction

Nineteen sixty-three was a liminal year. On the one hand, Konrad Adenauer resigned from the Chancellery, symbolically ending the reconstruction era. On the other hand, the premiere of Rolf Hochhuth's *Der Stellvertreter* (*The Deputy*, directed by Erwin Piscator) on the Vatican's stance toward the deportation of Roman Jews as well as the beginning of the Auschwitz trial in Frankfurt exposed Nazi crimes to a level of scrutiny not seen since the Nuremberg Trials. In the debates surrounding the reform of the penal code, the two questions for German society implicit in these two strands came together: What kind of society should West Germany be in the future, and in what way should this future be connected to its past? Within the reform process, the debate was most passionate as regards the decriminalization of homosexuality.¹ And in that debate, the question of the relative importance of past, present, and future emotions was paramount.

The role of emotions has seen a recent upsurge in interest, originating in anthropology and sociology and spreading to neuroscience, history, and legal studies. The history of emotions in particular stresses that emotions not only have a history, but also shape history. Emotions are historically contingent and they and the ideas about their source, role, and legitimacy mold the behavior of historical actors. They thus necessarily also shape

1 »Homosexuality« refers here always to male homosexuality. Female homosexuality was not criminalized in Germany.

the law and ideas about the role of the same in society (on history, see for example Gammerl and Hitzer 2013; Frevert 2011; Eitler and Scheer 2009; Rosenwein 2006; for law, Bandes and Blumenthal 2012; Abrams and Keren 2010; Karstedt 2002).²

Within the discourse on decriminalization, emotions played a role on several levels. First, the government as well as defenders of the status quo invoked the supposedly »natural feelings« of the majority, namely disgust, to defend the criminalization of homosexuality. Second, it contrasted these »natural feelings« with the deviant desires of homosexual men. Third, homosexual men used their own feelings to defend themselves against accusations of deviance and to integrate themselves into an accepted discourse. And fourth, reformers either posited divergent moral sentiments, such as shame or compassion, or argued for the complete separation of feelings and law, emphasizing emotions' nefarious influence on law. Both sides used emotions descriptively as well as normatively. To proponents as well as opponents of § 175, the law governing homosexual conduct in the German Penal Code (*StGB Strafgesetzbuch*), could, for better or worse, stir emotions.

The article at hand focuses on the intersection of the first and the fourth levels, and thus concerns itself with emotions on the societal plane. It is of course impossible to detach these levels completely from the emotions of those involved in the debate and the emotions felt by or supposedly expressed by homosexual men. However investigating these fully would exceed the scope of this article. Instead it analyzes the place of disgust and compassion in the debate sparked by Hans-Joachim Schoeps' article of December 1962, »Soll Homosexualität strafbar bleiben?« (Should homosexuality remain a crime?) (Schoeps 1962a).³ Schoeps, a Jewish

2 The section History of Emotions at the Max Planck Institute for Human Development in Berlin founded a working group on »Law and Emotions« in 2014. See <https://www.mpib-berlin.mpg.de/en/research/history-of-emotions/projects/law-and-emotions>. Accessed November 5, 2015.

3 Despite their different semantic histories, in current discourse on emotions in politics, compassion, sympathy, and even empathy are mostly used

German *rémigré* and closet homosexual, published this piece in the liberal monthly *Der Monat*. By connecting the discrimination of homosexuals to the persecution of Jews in the Third Reich, he broadened the focus of the discussion. Rather than being narrowly concerned with § 175 alone, Schoeps turned the debate into one about the desired connection between Germany's past and the country's future as prescribed by law. He also reopened a link between homosexuals and Jews as both sexually deviant and disgusting that had been made repeatedly in National Socialist ideology and praxis. Officially, of course, the discourse on Jews had changed in postwar West Germany. However public responses to Schoeps' writing brought to light sentiments towards Jews and homosexual men that demonstrated both the malleability of public feeling as well as its resistance to change. Within this article, these sentiments come to bear only on the construction of disgust and compassion by the participants of the debate.

The protagonists: How personal histories position people in public discourse

Schoeps' article not only provoked reactions from the readership of *Der Monat*. He also found a direct sparring partner in Rudolf Krämer-Badoni, a Catholic conservative writer invited in January 1963 to pen a rejoinder by the Protestant newspaper *Christ und Welt*. Schoeps, a regular contributor to *Christ und Welt*, Germany's most popular weekly at the time, was then allowed to respond in its pages and the exchange ended, much to Schoeps' chagrin, with a final statement by Krämer-Badoni on January 25, 1963.

It was remarkable that a Jewish *rémigré* intervened so forcefully on a topic as controversial as § 175, and with direct reference to the Holocaust. Usually, *rémigrés* kept a low profile in postwar public debates (Diner 2012, 50–51). They were viewed with suspicion by the German public, who still harbored not only antisemitic feelings but also lingering National

interchangeably. This article follows that custom with regard to compassion and sympathy.

Socialist accusations of treason and abandoning the *Volksgemeinschaft* (Bergmann 2008, 20–22). Yet Schoeps was not the only *rémigré* to argue publicly for the decriminalization of homosexuality. Another important force in the reform debates was Fritz Bauer, the Social Democratic State Attorney General of Hesse since 1956 who instigated the Auschwitz Trial. Bauer himself made little of the fact that he had had to leave Germany not only because of his Social Democratic convictions, but also because of his Jewish ancestry. He received enough hostile reactions for his investigation of National Socialist crimes as it was. The state prosecutor once remarked that he still felt as if he were in hostile territory as soon as he left his office (Steinke 2013, 257).

Like Bauer, Hans-Joachim Schoeps had escaped the Holocaust in Swedish exile. He had also returned to Germany at the earliest opportunity. However, he differed from the state attorney general markedly not only in demeanor, but also in opinion. Schoeps initially spent most of his public efforts not on German accountability for the Holocaust, but on the rehabilitation of Prussian history in the postwar period. Following his return to Germany in 1946, as professor of the history of ideas he became one of the most visible champions of the re-establishment of the Hohenzollern monarchy in West Germany (*Der Spiegel* 1954). If his Jewishness had been a hindrance in monarchist circles in the Weimar Republic, in postwar West Germany it became an asset; he conferred legitimacy on the cause in a way that no one else could have done. The former imperial family recognized his efforts in 1955, when Schoeps became one of the last recipients of the Knight's Cross of the House Order of Hohenzollern (*Der Spiegel* 1955). Throughout the 1950s, he traveled conservative lecture circuits, and his books on Prussia sold briskly.⁴

4 Hans-Joachim Schoeps' *Das andere Preussen: Konservative Gestalten im Zeitalter Friedrich Wilhelms IV.*, first published in 1952, came out in a second edition in 1957 and a third in 1964; his anthology *Das war Preußen: Zeugnisse der Jahrhunderte—Eine Anthologie*, first published in 1955, also had a second edition in 1964, a third in 1968.

But in »Should Homosexuality Remain a Crime?«, Schoeps took a sharp turn from the apologetic to the accusatory. He argued that, above all, the German persecution of the Jews created an obligation for the Federal Republic to provide special protection for minorities, which would necessarily include homosexuals, who were still subject to National Socialist laws. Schoeps, who actively if secretly engaged in relationships with mostly younger men and who would come into conflict with § 175a himself less than two years later, for good reason never invoked his own homosexual identity, but stressed his Jewish identity instead.⁵ He concluded his article with an attempt to evoke shame and guilt in German legislators, hoping to motivate them to action in light of the legacy of Majdanek and Auschwitz: »for homosexuals the Third Reich [was] not yet over« (Schoeps 1962a, 22).⁶

Schoeps tried to draw on his cachet as a defender of Prussia to legitimize his argument. Just as he had stood up for Prussia when it was delegitimized after the war, he was now standing up for another persecuted group. The fact that he also referred to his defense of Jews in postwar Germany showed that by that point they had, at least in his mind, been firmly established as a group deserving of the sympathy of the wider population (Schoeps 1962b; 1962a, 24). Yet few readers of *Der Monat* were willing to follow this line of argument; and neither was Krämer-Badoni in his piece for *Christ und Welt* (1963b, 10).

Krämer-Badoni, a veteran of the Second World War, was a conservative and an anti-Communist, but he had also distinguished himself as someone invested in Germany's democratic re-education and he was irreverent towards conservative authorities (*Der Spiegel* 1972). First an editor at the monthly *Die Wandlung* and later a longtime cultural critic for the right-of-center daily newspaper *Frankfurter Allgemeine Zeitung*, he switched to the

5 See Oberstaatsanwaltschaft Flensburg 239 to Hans-Joachim Schoeps, August 21, 1964, StaBi Berlin, Nachlass 148—Schoeps: Folder 106; and the folder in general for his contacts with other homosexual men.

6 All translations from German to English by the author and by Laura Radosh.

significantly more conservative *Welt* in the year of the debate. Why *Christ und Welt* chose him remains unclear. But as undogmatic as he might have been in other respects, his opposition to the decriminalization of homosexuality was completely in accordance with public opinion as posited by the draft law, based as it was on »revulsion against homosexuals« (Krämer-Badoni 1963b, 10).

Disgust and the *Sittengesetze* in Germany before the debate

Disgust, as Aurel Kolnai wrote in 1929, is an emotion tied closely to moral judgment. It »is characterized by a spontaneity and originality, an intimacy of feeling [...], and thus is invaluable for the consolidation of an ethical orientation« (Kolnai 2004, 83). More recently, Dan Kahan and Martha Nussbaum have taken up the role of disgust in morality and law. While Kahan argued that disgust has an important role in translating social rules into legal norms, Nussbaum condemned disgust for demarcating in-groups and out-groups along power lines, thus discriminating against minorities (Nussbaum 1999, 19–62; Kahan 1999, 63–79). Their argument can be illustrated by the German debates on the decriminalization of homosexuality, although these were permeated by another aim, namely the complete separation of the law and moral sentiments.

The idea that morality and emotions are connected at all goes back at the very least to Adam Smith and his 1759 *Theory of Moral Sentiment*. For Smith, morality was rooted chiefly in the feeling of sympathy. Though Smith did not analyze disgust, he frequently refers to the feeling in his account. Disgust is elicited mostly either by situations in which we cannot empathize with another due to too great a difference in circumstances or in which propriety is transgressed. Yet according to Smith, these are exactly the instances in which we have to exercise our capacity for sympathy (Smith 2009, 45). Unlike Kolnai, for Smith the visceral nature of disgust does not qualify it as an orientation for moral judgment. Smith instead hinted at the way in which sentiment and morality can be in conflict.

That conflict made it a logical if not necessarily small step to call for the separation of law and morality. That was precisely what Anselm von Feuerbach implemented in his 1813 penal code for Bavaria. Among other

things, the code legalized all consensual sexual relations between adults, including those between men. Yet no other German state followed the Bavarian example and in 1871 the German Penal Code for the newly united German Empire contained *Sittengesetze* or moral laws that governed sexual behavior—besides homosexuality they also covered adultery, divorce, abortion, and procuration. The moral sentiments of the people became the yardstick for the law. From the beginning this more restrictive stance was controversial, and after debates begun in the Empire, serious efforts were undertaken to revise the code in the Weimar Republic. Gustav Radbruch, a Social Democrat and for a short time Minister of Justice in Weimar, and others criticized the entire category of *Sittengesetze* and demanded that morality and law be separated. Only clearly defined legally protected goods, rights, and interests (*Rechtsgüter*) should inform penal law, not the sentiments of the purported people (Goltsche 2010, 206–7; Sommer 1998, 209–10).

The collapse of the Weimar Republic put a preliminary end to these efforts. Instead, in the Third Reich the laws governing homosexuality were expanded to include acts that went beyond those resembling intercourse (*beischlafähnlich*), the limit that had previously formed the boundary of prosecution. The reform went into effect in 1935, exactly two weeks after the Nuremberg Laws (Friedländer 1997, 176; Sommer 1998, 314–15). In addition, the National Socialists established a parallel system of justice predicated entirely on National Socialist sentiments: the *Volksgerichtshof* (People's Court) (Rachlin 2013, 65, 70; Marxen 1994, 72–75). After 1945, the Allies originally meant to cleanse the German Penal Code of its National Socialist paragraphs. But as with other reforms, these efforts were cut short by the onset of the Cold War and § 175 remained on the books in the version of 1935 (Stümke and Finkler 1981, 357).

While the *Sittengesetze* thus stayed in force unchanged, the West German constitution generally upheld the rights and dignity of the individual rather than the people, another morally charged stance. This created a legal conflict of individual versus collective that the German Basic Law dealt with under article 2(1): the *Sittengesetze* should mark the limits of the freedom of the individual. On this basis, in 1957 the German Constitutional Court

ruled that the criminalization of male homosexuality was in line with »the moral sensibility of the people.« »Same-sex activities clearly transgressed the moral law« (cited in Stümke and Finkler 1981, 358–59). The decision of the German Constitutional Court affirmed the validity of the exception made in 2(1) for the supremacy of collective feelings over individual rights. »[T]he people's« moral sensibility was taken as natural and self-evident.

The German Penal Code itself, however, was deemed worthy of reform in the Federal Republic, and this reform process reopened the question of homosexuality and the role of moral sentiments in law. The process was initiated by Federal Minister of Justice Fritz Neumayer in 1954, resulting in a first draft in 1959 (E1959) that offered two different options for § 175. However by that time, the liberal Neumayer had been replaced by the Catholic conservative Fritz Schäffer. Together with his state secretary Josef Schafheutle, Schäffer adopted the more restrictive version of § 175. After further consultation with the German federal states, the new draft E1962 confirmed § 175 and § 175a, combining them into a new § 216. Both homosexual acts between adults and minors and between adult men were to remain illegal. However § 216 did return to the pre-1935 formulation that restricted punishable acts to those resembling intercourse. With regard to the role of the public, the new draft paragraph did not represent a break in legal continuity. Instead, in keeping with the constitutional court's 1957 verdict, the draft law argued that the continued criminalization of homosexuality was in line with the »views of the overwhelming majority of the people.« The statement went on to claim that homosexuality had the tendency to spread and where that happened, »the moral decay of the *Volk*« was soon to follow (cited in Schäfer 2006, 171).⁷

The question of homosexuality within the reform process was commented on noisily by Richard Gatzweiler of the Catholic *Volkswartbund*.

7 On the language of the decision and the legal precedent it referred to, see also Moeller 1996, 404; for conservative criticism at the time, see Gerhard E. Gründler, »Recht und Unrecht—was ist das?«, *Die Welt*, July 28, 1962.

Though the *Volkswartbund*'s pamphlets were not necessarily widely read, due to religious and geographical affinity, the association had considerable influence on politicians in the governing Christian Democratic Union under Chancellor Adenauer (Steinbacher 2011, 293–94; Heineman 2011, 27–28). Between 1950 and 1961, Gatzweiler published six pamphlets defending the criminalization of homosexuality. Gatzweiler's running commentary on the reform of § 175 is interesting in regard to the changing role of disgust in his argument against decriminalization. In 1953, he deemed the argument sufficient that if »that which is worthy of disgust«—*das Verabscheuenswerte*, i.e. homosexuality—was allowed to spread, it would compromise the health and strength of the entire nation (Gatzweiler 1953, 8). This line of argument was however plagued by inconsistency: if homosexuality was so disgusting, how could it also be so alluring that seduction by homosexuals was the greatest danger? To be sure, from Plato to Susan Sontag (Sontag 2003, 95–99), arguments have been made for the allure of the shocking. But these are primarily concerned with the appeal of suffering and bodily mutilation inflicted on people clearly worthy of our empathy, not with the attraction of morally deviant behavior. Gatzweiler's thinking seems much closer to descriptions of the temptation of sin, not least in Christian scripture and theology. Without acknowledging the inherent appeal of homosexual acts, this was a hard argument to substantiate.

Gatzweiler was an unlikely candidate to provide such substantiating evidence, even if the issue of seduction would reappear later in the debate. Instead—an important sign that by 1961 the terms of the legal debate had begun to shift—Gatzweiler later argued in favor of the »objective treatment« of the matter. According to him, the dynamics of the debate had »slipped from the scientific plane to the emotional.« This obscured the debate as »emotional judgments failed to address the real questions« (Gatzweiler 1961, 3). However in contradiction to his self-professed disinterest and objective rationality, throughout the text Gatzweiler repeatedly referred to homosexual acts as »worthy of disgust« and subtly or not so subtly added that the majority of the population felt the same in order to support his claim that these acts were unnatural and worthy of punishment

(Gatzweiler 1961, 6, 55). The fact that the majority population abhorred homosexuals only made them more dangerous: shunned by society, homosexual men withdrew into secretive and conspiratorial circles. If legalized, this behavior would only worsen. The feelings of the majority would not change, but homosexuals' separatist societies could be formed legally and from this platform they could become even greater seducers. Again, the contradiction between unwavering disgust and the increasing potential of seduction was not resolved (Gatzweiler 1961, 56–57).

It was clear to Gatzweiler that decriminalizing homosexuality would open the door to a *Sittenpfluhl*, a moral cesspit. »The moral strength of our *Volk*« was in danger (Gatzweiler 1961, 60). He saw the only solution in spatial isolation. Homosexuals should be concentrated in remote, completely separated facilities—all voluntarily of course—to save them from their own inclinations and the *Volk* from their polluting influence (Gatzweiler 1961, 67).

Disgust in the debate

Both the reform law and Gatzweiler referred to the disgust supposedly felt by the majority to support their conclusions; and opinion polls conducted in the early Federal Republic seemed to justify this stance. In a representative survey of September 1963, 46 percent considered homosexuality a vice, 40 percent a disease, 13 percent a habit and only 4 percent called it natural (Noelle and Neumann 1965, 591).⁸ That represented almost no change from fourteen years earlier. In 1949, 48 percent of those queried had considered homosexuality a vice, 39 percent a disease, 15 percent a habit, and 4 percent natural. That year, the question of whether male homosexuality should be decriminalized was not even asked (Friedeburg 1953, 87). In 1963, no matter if moral failure or disease were seen as the cause of homosexuality, 61 percent of men and 70 percent of women thought that homosexual acts between men should be illegal—incidentally 51 percent and 66 percent of men and women respectively

8 Men and women were polled separately and these are the average numbers for both groups. Multiple entries were possible.

thought the same about female homosexuality, which was not criminalized. The stricter stance of women parallels their general attitude towards questions of sexuality (Noelle and Neumann 1965, 591).

These numbers, however, tell us little about emotions, while the letters to the editors of *Der Monat* and *Christ und Welt* do. *Der Monat* printed three batches of letters in its February, March, and April issues; *Christ und Welt* kept tighter reigns on the debate and limited response to Krämer-Badoni's rebuttals. Instead, the paper forwarded correspondence it received directly to Schoeps. Written with the intent to be published, these letters sent to the Protestant newspaper are no less revealing about what Germans thought they could legitimately say and feel than those sent to *Der Monat*. They are a fascinating source for openly displayed political emotions of a citizenry that for so long has been described in the literature as private and reluctant to express its feeling in a postwar state committed to *Nüchternheit*, the tamping down of emotions.⁹ They also reveal that in 1963, Germans were far from silent in extolling the alleged virtues of the National Socialist regime.

The opening letter in response to Schoeps' article in *Der Monat* came from Bernd Muthig, a student of pedagogy from Würzburg. Muthig praised the solidity of the population's moral instinct and sentiment. This natural and instinctive opposition to homosexuality—he did not explicate what kind of feeling this sentiment might be—was the only thing that kept misguided liberal reform efforts in check. Strikingly, Muthig had no qualms defending the National Socialist persecution of homosexuals and accordingly did not believe the idea of a *gesundes Volksempfinden* or »healthy popular sentiment« was tainted. It was not obvious to him, why an »unjust state would not be able to pass a just verdict on questions of morality«—an argument that the German Constitutional Court had also made in its 1957 decision (Moeller 1996, 404). Muthig played a sly argumentative game here, invoking the darker side of the »natural feelings« the National Socialists had fostered:

9 For a recent challenge of that view, see Anna Parkinson (2015); and for an alternative take, see Till van Rahden (2011).

Finally something else should be mentioned: the warm advocacy of the author for the minority of homosexuals, which he connects to the relationship between Nazis and Jews, could well re-awaken in the older generation Nazi slogans about the relationship of Jews to sexuality. This would neither serve the author's people nor the »minority« defended by him, something which was certainly not the author's intention. (Muthig 1963, 84)

Muthig's barely veiled threat hinged on the assumption that the emotional rejection of homosexuality would also revive antisemitic sentiments. The word »warm,« colloquially used to mean homosexual, was moreover a hint that Muthig suspected Schoeps of being homosexual himself, which would be enough to taint his argument as morally questionable. Not only syntactically was Schoeps thus a double outsider to the collective of natural sentiment (Muthig 1963, 84).

Muthig revealed the close connection between homophobia and anti-semitism in the Third Reich, a connection that reached farther back in history. The lacking masculinity of Jews as well as their sexuality more generally had been a well-established part of antisemitic discourse in the 19th century (Mosse 1996, 151–53; Hoberman 1996, 141–53; Harrowitz and Hyams 1995, 3–4, 8–9; Gilman 1991, 43–44). The National Socialists had only made explicit the link between Jews and homosexuals as sexually abnormal and predatory. In March 1937 for example, the SS propaganda paper *Schwarze Korps* declared the danger posed by homosexuals to be part of the »Jewish question« (Falk 2008, 55).

There was no »Jewish question« in Wilhelm Haas' argument, yet it also powerfully demonstrated that the positive valence of National Socialism was still deemed fit to print (at least by Haas), at least as long as it was coupled with the criminalization of homosexuality. Homosexual men in the early 1960s could, like the construction of the *Autobahn*, serve as an »it wasn't all bad« argument, albeit one played on a moral and not a material plane. Haas' letter to *Christ und Welt*, in which he openly and positively referenced the Third Reich, exemplifies Nussbaum's arguments about the connection of disgust to the body, as the body is both its object and its means of expression (Nussbaum 1999, 22–25). Haas

mentioned that the SA leadership murdered during the »Night of the Long Knives« in 1934 under the pretext of planning a coup had been a clique of homosexuals. He then quoted a supposedly popular expression of the time (that rhymes in German): »Take the girls to fuck and not the SA's butts!« His letter ended with the stark aesthetic argument that Schoeps need only look at »the male member after normal coitus and then look at one when it is taken out of a friend's ass!« Then Schoeps would see what normal and abnormal meant.¹⁰

Compassion and its pitfalls

Haas' letter demonstrates not only the physical nature of disgust, but also the way in which it enforces borders between groups and between the natural and the unnatural—a function that both Kahan and Nussbaum agree on, but evaluate differently (Kahan 1999, 64–65; Nussbaum 1999, 22). Haas had placed homosexuals in the unnatural camp, a view supported by a plurality of Germans. Muthig's open linkage of Jews to homosexuals and thus »abnormals« had by 1961 become less common, however. While in a 1961 survey 54 percent of the population said they would not marry a Jew and only 14 percent said they would, in another survey two years later only 18 percent claimed that Germany was better off without Jews, against 37 percent in 1952. Nevertheless the high percentage of undecided individuals, 43 percent in 1952 and 42 percent in 1963, is probably indicative not only of uncertainty of opinion but also of what people felt could be said (Noelle and Neumann 1965, 217–18).

Waltraud Totzeck's letter to the editors of *Christ und Welt* reveals this shift and demonstrates the selectivity of compassion as regards its objects. This is of some interest as the potential reach of compassion has been one of the enduring issues in the debate on the viability of emotions for social ends (see Nussbaum 1996, 48). Totzeck did not begin her letter with compassion. Schoeps' contribution to *Christ und Welt* had enraged her (*in Harnisch gebracht*) as rarely before. She was »full of the deepest

10 Wilhelm Haas to *Christ und Welt*, January 13, 1963, StaBi Berlin, Nachlass 148—Schoeps: Box 39, Folder 6.

disgust over Schoeps'« response to the »normal« Krämer-Badoni. She felt that all of Schoeps' previous, and supposedly »normal,« writing in *Christ und Welt* could have only been meant to taint and mock.¹¹

Despite her complete disdain and disgust for Schoeps, Totzeck had otherwise internalized an attitude that historian Dagmar Herzog, in connection with homophobia, has described as »superficial philosemitism« (Herzog 2005, 88–89).¹² Totzeck complained that it was an insult to »our dear fellow Jewish citizens« to compare them with those »pathologically abnormal people.« Jews were included into her circle of sympathy, and she felt offended on their behalf, while homosexuals did not deserve such an emotional embrace, but remained objects of disgust. Totzeck apparently failed to realize that Schoeps was indeed among those »dear fellow citizens,« something he admittedly had not stressed in *Christ und Welt* as pointedly as in *Der Monat*. What gave Totzeck confidence in face of this onslaught of immorality was her certainty that the »normal and sound moral sense of the people would support the side of normal, healthy morality.«¹³

The separation made by Totzeck into »normal« Jews and »abnormal« homosexuals was a postwar development. Even in the Federal Republic, this distinction was more tenuous than she claimed. As recently as 1957, Veit Harlan, the director of the infamous Goebbels' propaganda film *Jud Süss* (1941) in which »the Jew« was the ultimate seducer of pure German girls, had directed a large-scale and star-studded postwar feature film warning of the seduction of German youth by predatory homosexual men, *Das dritte Geschlecht* (The Third Sex) (Falk 2008, 84–88; Fehrenbach 1995,

11 Waltraud Totzeck to the editors of *Christ und Welt*, January 20, 1963, StaBi Berlin, Nachlass 148—Schoeps: Box 39, Folder 6.

12 On philosemitism, see also Stern (1993, 717–35).

13 Waltraud Totzeck to the »Verlag der Wochenzeitung *Christ und Welt* Stuttgart,« January 20, 1963, StaBi Berlin, Nachlass 148—Schoeps: Box 39, Folder 6.

195–202).¹⁴ In a sign of how ingrained National Socialist codes remained in postwar German audiences, the trope of the »internationalist homosexual« in *Das Dritte Geschlecht* brought one reviewer to speculate that Harlan had meant to make the older seducer a Jewish character (Falk 2008, 39; Fehrenbach 1995, 200).

However, official sentiment about Jews had changed and disgust was supposed to be replaced by sympathy. Jews were, just barely, included in the general population as *Mitbürger* or »fellow« citizens. Looking at the readers' reactions, Schoeps' attempt to utilize the acceptance of Jews to expand sympathy to homosexuals failed. Considering the shaky foundations of the regard for Jews, amply demonstrated in the letters cited above, that should be of little surprise. If readers acknowledged Schoeps' reference to the Third Reich at all, they either did not consider its treatment of homosexuals a crime or they rejected the analogy between Jews and homosexuals, or both. There was only one person who embraced the entire analogy in her letter to Schoeps, Monika Wyss, daughter »of an old Prussian officers' family« who now lived in Zurich with her Swiss husband.¹⁵ A Prussian who purportedly had Jewish friends before 1933 and homosexual friends at the time of writing, she thanked Schoeps effusively for speaking up for all the three groups.¹⁶

But even here, or in other instances where understanding of the »tragic condition of the homosexual« led not to calls for isolation, but to calls for shifting responsibility for treatment of that condition from the court to the church, this sympathy remained problematic. Though its importance for law and justice is much discussed today, not least by Martha Nussbaum in her most recent book on *Political Emotions* (Nussbaum 2014, 113),

14 Under pressure from the FSK or »voluntary self-regulation« board, which ironically deemed the film too homosexual-friendly, it did not go into wider release in Germany until 1962 and then with the title *Anders als Du und ich* (Different from you and me).

15 Monika Wyss to Schoeps, March 20, 1963, StaBi Berlin, Nachlass 148—Schoeps: Box 39, Folder 6.

16 Ibid.

compassion carries a whiff of the patronizing. Moreover, it always originates from a preconceived mental framework. This is a problem distinct from the »narrowness of sympathy« acknowledged by Nussbaum and visible in Totzeck's letter (Nussbaum 2014, 3). It was in the name of compassion that Gatzweiler favored the isolation of homosexuals over their castration (Gatzweiler 1961, 67). Compassion did not lead him to question the purported dangerous nature of their acts. In the 1963 debate, sympathy for suffering from persecution all too quickly and easily turned into sympathy for the »tragedy« of *being* homosexual (Krämer-Badoni 1963b, 10).

Suddenly it was not the persecution thereof, but homosexuality itself that was tragic. At times, Schoeps himself seemed to move in this direction, as when he described homosexuality as a »tragedy« (Schoeps 1962a, 23). This stance was most obvious however in the arguments of the churches in favor of decriminalization, the only institution to base their argument on an emotion, namely compassion. In England, the Anglican Church, but also the Catholic Church, had recently come out in support of the decriminalization of homosexuality (Whisnant 2012, 186–87). In Germany, leading German Protestants such as Helmut Thielicke, member of the Protestant Working Committee of the CDU and professor of theology in Hamburg, had taken up the issue in the *Zeitschrift für evangelische Ethik* (Journal for Protestant Ethics) in 1962 (Thielicke 1962). For Thielicke, pastoral care rather than criminal prosecution was the right response to homosexuality. He believed homosexuality had to be accepted as »suffering« that deserved treatment by a »compassionate« pastor.« Compassion was doubly necessary, as the public's »ineradicable« »natural aversion« to homosexuality needed to be neutralized. Contrary to Gatzweiler, Thielicke here accepted the full logic of this claim to natural aversion: since repulsion was so strong, the threat of »infection« was limited and did not warrant criminal indictment (Thielicke 1962, 164).

As liberal as Thielicke's approach might have been concerning actual legal reform—his proposal was essentially to treat homosexuality no differently from heterosexuality—both his approach toward compassion and Schoeps' description of the tragedy inherent in any homosexual relationship raised objections within homophile circles. Schoeps' view (and

Gatzweiler's, though not Thielicke's) was predicated on the equation of homosexuality with pederasty. At some point in the life of a homosexual man he would part from his lover and look for a younger one. Aging together was not part of the homosexual inclination. Any relationship was thus »a continuous parting« as Schoeps wrote (Schoeps 1962a, 24). He outlined his position in a very personal letter to a homophile publication under the pseudonym »Jochen,« the name he had gone by in the youth movement.¹⁷ Yet even Rudolf Jung, staff-writer for *Der Kreis/The Circle/Le Circle*, probably Europe's most important homosexual publication, published in Zurich and trilingual—who had explicitly defended Schoeps' comparison of the persecution of Jews and homosexuals against Krämer-Badoni—rejected Schoeps' equation of homosexuality and pederasty, along with most of his magazine's readers (Jung 1963, 11–12). A few homosexual men also wrote anonymously to *Der Monat*, protesting Schoeps' accounts of tragic pederasty. One of them argued that homosexual relationships were in no way different from heterosexual relationships: committed, long-term, and equal.¹⁸ Compassion for their tragic fate was misdirected if it was not aimed at overcoming persecution.

17 In his letter he also worried how the older lover could distinguish between true love and the material attraction of the younger man; »Jochen,« »Nachdenkliches über Freundesliebe und ihre seelischen Probleme,« Letter to the editor, n.d., StaBi Berlin, Nachlass 148—Schoeps: Box 39, Folder 3. Schoeps was also a subscriber to *The Circle*, as demonstrated by surviving copies in his personal archive.

18 R. Sch., Berlin, to *Der Monat*, February 20, 1963, forwarded to Schoeps by *Der Monat* StaBi Berlin, Nachlass 148—Schoeps: Box 39, Folder 6. The argument on whether depicting homosexual men as »normal« or »exceptional« better served the achievement of homosexual rights, a debate also played out in responses to Schoeps, is interesting in its own right, yet would exceed the scope of this article. On this, see Griffith (2012) and Riechers (1999).

Democratic feelings: Tolerance and the separation of law and emotions

If readers like Haas and Totzeck expressed their disgust and natural aversion to homosexuality to justify its criminalization, and others like Friedrich Berg called for Christian compassion for this deviant behavior in a letter to *Der Monat* (Berg 1963, 88), yet another group proposed an altogether different emotional regime: tolerance. To someone like Alexander Rüstow, whose letter was published in the April 1963 issue of *Der Monat*, this was, in fact, something closely akin to a democratic feeling. It was potentially unpleasant to live with the difference that a heterogeneous and democratic society contained, since it meant experiencing things one »disliked, the abnormal and the undesirable.« Yet a multiplicity of aesthetic and moral judgments was the essence of the »Western concept of freedom« and Germans had to learn to accept this rather than call on the authorities to legislate away the displeasure resulting from this diversity (Rüstow 1963, 90–91). Eckart Prott, in a private letter to Schoeps, expressed a similar sentiment. He accorded the »aggressive tone« of the debate to a lack of true liberalism, of »fairness and kindness,« as a result of the harshness of sentiment propagated by the Third Reich.¹⁹

Rüstow and Prott acknowledged but hoped to neutralize the emotions that normatively underpinned the arguments of those invoking disgust or compassion and influenced their style of reasoning. Another approach was to separate emotions and law altogether, both on the level of discourse as well as on the level of legislation. Gatzweiler had already declared that emotions needed to be excluded from discussions about homosexuality, and that objectivity was key to finding an adequate response to the issue, though he himself failed to do so convincingly. Eduard Streit, in his letter to *Der Monat*, criticized the lack of objectivity and the overreliance on emotions in the debate around § 175—which he believed was a psychological response to everyone having some homosexual inclination, and thus a result of rejection and fear (Streit 1963, 92). Schoeps himself,

19 Eckart Prott to Schoeps, January 21, 1968, StaBi Berlin, Nachlass 148—Schoeps: Box 39, Folder 6.

despite his own argumentative reliance on emotions, tried to dismiss Krämer-Badoni's argument with the claim that the latter did not know how to argue objectively but always only countered fact with emotion. This alone should have been enough to disqualify him from writing the closing words to such a charged debate.²⁰

In fact though, Krämer-Badoni's final article was a perfect example of what Rüstow demanded (though his manner confirmed Protz's fears); the tone was aggressive, yet the author tried to separate his own feelings from his judgment. And Krämer-Badoni invoked liberalism as a justification for this stance. The title alone was a provocation: »*Sodoma bleibt Sodoma*« (Sodomy Remains Sodomy). Krämer-Badoni once more expressed his repulsion for homosexuality, arguing that lack of legal sanctions would only lead to more homosexual cliques. Above all he emphasized the danger of seduction that merited special protection for male youth from unwanted advances, and thus a higher legal age of consent than for heterosexual sex.²¹ Yet despite this language, Krämer-Badoni had actually changed his opinion. In this final piece he endorsed, though with a »heavy heart,« the decriminalization of homosexual sex above the age of 21. He admitted that in a democratic state, law and morality needed to be separated. Based on the assumption of the equality of citizens, whatever moral disapproval and disgust for homosexuals the population might feel, the state could not deny homosexual adult men the right to do with their bodies whatever they pleased, as long as it did not endanger others, particularly youths (Krämer-Badoni 1963a, 9). The natural and instinctive aversion to homosexuality, the disgust that »normal people« felt, could not be used as a standard for legislation.

This might not have been Schoeps' preferred line of argument, not least because of his own preoccupation with pederasty, but even the editorial

20 Schoeps to Wirsing, January 24, 1963, StaBi Berlin, Nachlass 148—Schoeps: Box 39, Folder 6.

21 The fear of gay cliques and conspiracies in particular was widespread not only in Germany; see for example Johnson (2004, 106–15) on the »lavender scare« in the United States.

board of *Christ und Welt*—in effect Wirsing himself—followed Krämer-Badoni’s reasoning. Though they emphasized the negative aspect of the author’s conclusion, namely that the clauses of § 175 »protecting« underage men should stay in force, the board nonetheless accepted the idea that moral sentiment should no longer form the basis of criminal law (*Christ und Welt* Redaktion 1963, 9). The final statement of the board of *Der Monat* provided another demonstration of the close link between the separation of law and emotions and liberalism and democracy in the public mind. The editors not only claimed the label »liberal and forthright« for their paper, since they alone, and not others who invoked those descriptors, had been willing to break the taboo around talking publicly about homosexuality, they also defended their publication of Schoeps’ remarks about Majdanek, Auschwitz, and the legacy of the Third Reich, although they had caused considerable offense. Unease was insufficient reason to limit the freedom of expression (*Der Monat* Herausgeber 1963, 90).

Conclusion

The closing statement of *Der Monat* reveals much about the ambivalent status of the Nationalist Socialist past for the German public at the beginning of the 1960s. It was impossible to deny, but also not yet fully acknowledged, and the rules about what could be said and felt about this past were in flux. The editors started out by congratulating themselves for breaking the taboo surrounding homosexuality and ended with an acknowledgement that the real taboo might have been the mention of Auschwitz and Majdanek. And indeed, the invocation of the Holocaust led to greater resentment than the support for the decriminalization of homosexuality. Neither those in favor of nor those opposed to § 175 wanted to engage with the murder of European Jews, and especially not with the concrete implications of any woolly moral and sufficiently abstract empathetic statement regarding German responsibility. For homosexuality, the case was different. Here the relationship between »emotional« and »rational« arguments was a live issue; whether the instinctive aversion of the people, compassion, or dispassionate liberalism should determine the law was hotly debated. In this discussion, the pitfalls of disgust as well

as the problematic nature of compassion, with its tendency to obscure causes and symptoms, became obvious. The debate in 1963 is thus interesting not only for specific discourses in and on German history, but also more generally for the potential role played by sympathy and disgust in creating laws.

In the end, neither compassion nor disgust determined the future of § 175. In 1963, the reform process stalled, and nothing came of E1962 and § 216. When reform of the penal code was taken up again six years later in 1969, circumstances had changed. No longer the conservative Schäffer, but Gustav Heinemann, the first Social Democrat to head the Ministry of Justice, was now in charge. Though he endorsed the decriminalization of homosexual acts between adult men, Heinemann explicitly stressed that the reform was not to be confused with moral acceptance of homosexuality. He invoked Fritz Bauer's argument that the state should not be an arbiter in matters of morality that related entirely to the private sphere and caused no-one else harm (Treffe 2009, 179–81; Stümke and Finkler 1981, 353). It was an argument explicitly separated from emotions and the beginning of a shift towards a decrease in the importance of collectively held »moral emotions« for governing sexuality. In 1970, legal scholar Albin Eser observed that in the 1960s one could see the beginning of a transition »from a penal code for moral crimes directed more towards the *community* and concerned primarily with upholding sexual mores of decency and prudence, to a sexual criminal law directed specifically towards the *individual* and meant primarily to protect the individual and his or her right to sexual self-determination« (Eser 1970, 219; emphasis in the original).

In particular the letters to *Der Monat* and to *Christ und Welt* display a public on the cusp of that shift. Moreover, they reveal that members of the general population drew very different lessons from the Third Reich. Readers not only disagreed about these lessons in general, but also about what the National Socialist legacy should mean for different minorities, and about whether parts of the National Socialist past might still be salvaged. This debate was not led quietly or rationally, but passionately and in the open. Even if the feelings expressed did not have an immediate

impact on the matter at hand—the decriminalization of homosexuality—they are nonetheless important for an assessment of postwar West German history in these liminal years of the early 1960s. The debate anticipated emotions vis-à-vis homosexual men and vis-à-vis Jews that would soon become publicly enshrined (reluctant toleration and active remorse respectively), while displaying sentiments that had been legitimate only a short while ago and were still in wide circulation (unbridled disgust toward both) although the onset of discouragement could be discerned. Despite its inconclusive ending and largely forgotten participants, the 1963 debate sparked by Schoeps is thus relevant not only to the history of emotions in the narrow sense, but also to West German postwar political and legal history in general.

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