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## Outlawed desires: punishing “homosexuals” in annexed Alsace (1940-1945)

*Désirs condamnés. Punir les « homosexuels » en Alsace annexée (1940-1945)*

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## Outlawed desires: punishing “homosexuals” in annexed Alsace (1940-1945)

Régis SCHLAGDENHAUFFEN<sup>1</sup>

On 23 June 1940, Alsace and the département of Moselle were de facto annexed by Nazi Germany. On 6 August, Adolf Hitler appointed Robert Wagner as civil administrator of Alsace and conferred full powers upon him, including the power to promulgate laws and issue his own decrees. As early as 7 August, the Reich’s Minister of Justice proposed introducing German law and the German judicial administration into the newly annexed territories.<sup>2</sup> But the Minister of the Interior opposed this, since he favoured not taking too strong a hand with the population in the short term, holding that:

insofar as it does not impede the transition of these regions to German administration, the French law now in force must be maintained until further notice.<sup>3</sup>

On 25 September, Hitler decided the matter: it was up to Wagner, now *Gauleiter*, to determine how and at what pace German laws were to be introduced, in keeping with political needs. In contrast to the case of Poland, French law, which did not punish homosexual relations, initially remained in force. Until 1942, courts thus dispensed justice in German, and “in the name of the people”, but on the basis of the French penal code. A fundamental change took place with the decree introducing German criminal law in Alsace on 30 January

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<sup>1</sup> I would like to thank the staff of the departmental archives of Bas-Rhin for their availability as well as Sara Maïka and Nicolas Eybalin for their help and expert advice.

<sup>2</sup> Kettenacker 1979: 119.

<sup>3</sup> 7 July 1940 letter from the *Reichskanzlei* to the *Reichsministerium des Innern* (quoted by Kettenacker 1979, Bundesarchiv, sub-series R 43 II / 1337a).

1942 (*Strafrechtsverordnung für das Elsass*). From that day onwards, sexual relations between men were punishable under Articles 175 and 175a of the German penal code.<sup>4</sup>

Inspired by the Prussian penal code, Article 175 had been introduced in Germany in 1872; it only condemned anal coitus between men (together with bestiality).<sup>5</sup> After being amended and expanded on 28 June 1934, it prescribed prison sentences for:

any man who commits a sexual act with another man or who allows himself to be used by him to this end. In the case of a participant who, at the time of the events, is still under twenty-one years of age, the court may, in the least severe cases, choose to forgo punishment. Article 175a for its part sentences to a punishment of forced labor of up to ten years duration and, in the event of extenuating circumstances, to a prison sentence of no less than three months, a man who obliges another man to commit a sexual act with him, or allows himself to be used by him to this end; a man who leads another man to commit a sexual act with him, or to allow himself to be used to this end, by exploiting a dependency based on a relationship of authority, labor or subordination; a man of more than twenty-one years of age who seduces a male minor of less than twenty-one years of age, so that he will commit a sexual act with him or allow himself to be used by men for the purposes of such an act or who offers himself to this end.<sup>6</sup>

Between 30 January 1942, when German criminal legislation was introduced in Alsace, and late 1944, 41 men were tried by the Strasbourg court for “sexual relations against nature” (*Gleichgeschlechtliche Unzucht*).<sup>7</sup> Denounced for their practices or caught by the police in flagrante delicto, all (with the exception of a single individual, who was acquitted) were condemned to sentences of between three months and life imprisonment (with one death sentence in the case of a police officer). Moreover, some were

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<sup>4</sup> Paragraph 175 was applied a first time in Alsace between 1872 and 1918. For a detailed analysis of the extent and forms of persecution of “homosexuals” under the Third Reich, see Schlagdenhauffen 2011.

<sup>5</sup> “Die widernatürliche Unzucht, welche zwischen Personen männlichen Geschlechts oder von Menschen mit Thieren begangen wird ist mit Gefängniß zu bestrafen; auch kann auf Verlust der bürgerlichen Ehrenrechte erkannt werden.”

<sup>6</sup> Tamagne 2000: 631.

<sup>7</sup> The files that supply the material for this article are held by the departmental archives of Bas-Rhin (ADBR) under call numbers 1243W242 to 1243W255.

immediately transferred to concentration camps after having completed their prison sentences, by virtue of a 1937 circular relating to the preventative fight against recidivism.<sup>8</sup>

The trial records of these men accused of having seduced, or allowed themselves to be seduced by, another man reveal the circumstances in which they met, and the type of sexual practices in which they engaged. In itself, each case file consists in a collection of admissions of sexual practices, accompanied by commentaries concerning, among other things, the physical and psychological aspects of the accused. Officers of the criminal (*Kripo*) or secret police (*Gestapo*) carried out these arrests and interrogated the suspects. In reconstructing the sexual careers of the accused, judges did not merely deliver a verdict on acts or practices, but ultimately were also passing sentence on personal trajectories. In introducing a biographical component into criminal proceedings, they made the criminal exist “before the crime and ultimately outside of it”.<sup>9</sup> As a consequence, it was precisely the individual’s *criminal nature* that was at stake, a question to which the judges constantly returned. At the intersection of a consideration of the gender and sexual orientation of the accused, Nazi courts speculated as to the nature of deviance and, by extension, that of the accused. Were the men who appeared in court masculine or feminine, heterosexual or homosexual? Were they real men, had they ever been men, could they once again become men? These were all matters that influenced the sentence that was ultimately handed down.

The “sexual annexation” of Alsace – that is, the process of bringing Alsatian sexuality into line with that of the Reich – renders the commonly drawn distinction between annexed and occupied France crystal clear. In order to examine how the Germans sought to use the law to reestablish a gendered order in annexed Alsace, this article brings three approaches to bear in analyzing the trial minutes of men judged for “homosexual deviance”. It begins with a socio-

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<sup>8</sup> Decree of 14 December 1937 governing the “preventive fight against criminality” and ordering the prophylactic internment in concentration camps of any man found guilty of seducing more than one man (Schlagdenhauffen 2011: 27).

<sup>9</sup> Foucault 1975: 255-256.

demographic analysis, which makes it possible to more clearly delimit the social and professional categories to which the individuals on trial belonged. Next, an approach through discourse analysis, based on the confessions of the accused and the value judgments expressed by judges offers access to a universe of understanding that will allow us to grasp how Nazi law constructed "crimes against nature". Finally, by exploring what underlies expressions such as "being of homosexual nature", "to homosexually abuse" and "to behave in a homosexual manner", I hope to shed light on the process by which the law hierarchized masculinities and essentialized deviants. This leads me to argue that it was identities – much more than practices – that were being punished.

### **The sexual annexation of deviant masculinities**

The files of the accused vouch for the fact that they belonged to all age groups but not all social classes. Though their ages run from 17 to 69 years old, the largest number were between 21 and 30 years of age. This group represents a third of the accused (13 cases).<sup>10</sup> The vast majority were born in Alsace, with only a few being natives of "France de l'Intérieur" or Germany (four were born in Baden, two in Lorraine, one in Prussia). Half were natives of Strasbourg, the others came from small villages in the Bas-Rhin countryside. Two-thirds of these men, moreover, were single (65%, or 28 cases).<sup>11</sup> An examination of their stated professions shows that the larger part of the accused were from the working class and exercised trades typical of what in 2005 were described as "subaltern masculinities".<sup>12</sup> With the exception of a pharmacist, all of the other accused came from modest backgrounds. Some were factory workers (winders, metal workers, warehousemen: 21%), others were domestics, chauffeurs, doormen or waiters (35%). A few exercised an intermediary profession; they were accounts clerks, nurses, office workers (18%).

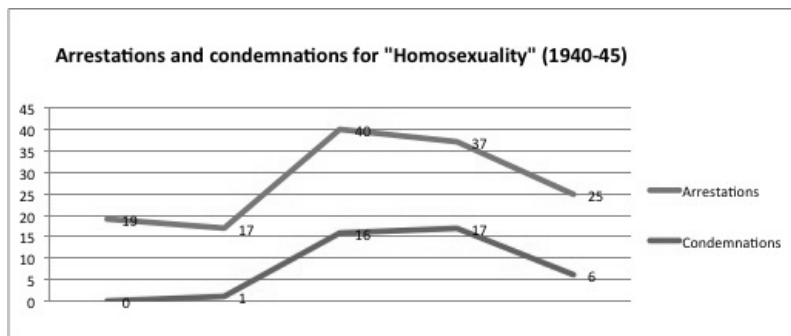
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<sup>10</sup> Two were under 21 years of age (7%), thirteen between 21 and 30 (32.5%), eight between 31 and 40 (18.5%), ten between 41 and 50 (23%), four between 51 and 60 (9.5%) and four between 61 and 69 (9.5%). The median age was 33 years old.

<sup>11</sup> Ten were married (23%), three widowers (7%), one was divorced.

<sup>12</sup> Connell 2005.

Others, finally, were self-employed: bakers, hairdressers or tailors (12%). In other words, two major socio-professional categories were absent: farmers and members of the upper classes.



Throughout the period under investigation, sentences were handed down with some regularity. 16 defendants appeared before the court in 1942, 17 in 1943, six in 1944. Three types of jurisdiction had the authority to handle charges of sexual relations against nature. These were the district courts attached to the Strasbourg tribunal (18 cases), the juvenile court whenever it involved an individual under the age of 21 (18 cases), and the *Sondergericht*, a special court (5 cases).<sup>13</sup> The distribution of sentences, however, does not seem to have had a direct relationship with the jurisdiction to which cases were referred. Rather, it seems to have depended much more on the particular acts concerned and, above all, on the deviants' identity.<sup>14</sup> Finally, the lengths of sentences were distributed in a relatively disparate way: exonerated, 1 case; from 2 to 6 months imprisonment, 4 cases; from 7

<sup>13</sup> A case of contraband to which several cases of homosexuality were added was referred to the *Sondergericht*. The *Sondergerichte* were established in Germany in 1933. They operated alongside ordinary jurisdictions and were first and foremost responsible for crimes and misdemeanors of a political nature.

<sup>14</sup> For example, among the three cases resulting in sentences for the accused of between 5 and 8 years imprisonment, one was judged by the *Sondergericht*, the other by the 2<sup>nd</sup> correctional court and the third by the minors' court.

to 11 months imprisonment, 5 cases; from 1 to 2 years imprisonment, 12 cases; from 2 to 5 years, 14 cases; from 5 to 8 years, 3 cases; life imprisonment, 1 case.

In order to better understand the sentences that were handed down, one must examine how the offenses were the result of a social construction of deviance and, more generally, the harm that they were understood to have caused society (and for which the sentences were meant to atone).

The 41 men sentenced for homosexuality by the Strasbourg court constitute the visible portion of a policy of disciplining deviance in annexed Alsace that unfolded over several phases.<sup>15</sup> According to the archives of the occupation police and the Strasbourg prison register, 208 men were arrested for homosexuality between 1940 and 1945.<sup>16</sup> Their police records bear the note "homosexual," "§175" or "*wid. Unzucht*" (sexual relation against nature). Between 1940 and 1942, the occupier brought repressive measures to bear upon men who were considered to be sexually unworthy of becoming Germans.<sup>17</sup> Initially incarcerated at the rue du Fil prison, these "homosexuals" were not put on trial at all but rather directly transferred to Schirmeck, a special camp established on the edge of the Alsatian Vosges, before being expelled to "France de l'Intérieur".<sup>18</sup>

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<sup>15</sup> The present article only takes into consideration the minutes of judgments handed down in Strasbourg between 1941 and 1944. For a more global view of the wartime criminal sentencing of homosexuals in annexed France, judgments handed down by other courts in Alsace (Colmar, Mulhouse, Saverne) and even Moselle should also be taken into consideration.

<sup>16</sup> The anthropometric records of men arrested by the police for homosexuality between 1940 and 1945 are held in the ADBR: 757D80 to 107. Among the 3774 men for whom records are available, 149 concern "homosexuals" (or 3.94%). For the same period, the registers of the Rue du Fil prison in Strasbourg are held in the ADBR: 1349W1 to 108.

<sup>17</sup> Three men were tried and sentenced before January 1942 by virtue of the French penal code (ADBR 1243 W240-41). Moreover, until November 1940, the Strasbourg court was relocated to Saverne. In the course of 1941, a transition took place in the court proceedings, which were henceforth minuted in German (ADBR 1243W238).

<sup>18</sup> "Erfassung zur Abschiebung. Verfügung des Befehlshabers der Sicherheitspolizei Straßburg vom 18. November 1940. Betr.: Berufsverbrecher, Asoziale,

The use of this extralegal procedure partly explains why the majority of these men did not appear before a judge. The French penal code, in force until 29 January 1942, did not punish homosexual relations. Only public offenses against decency were condemned by French law (art. 330). Between 1940 and 1942, this article was rarely used in Alsace. However, a case judged on 30 September 1941 specifically referred to it. Antoine C., a 33-year-old tailor, was accused of having solicited a police officer (in plain clothes). During his trial, he admitted “to having had sexual relations with men with whom he masturbated under a bridge or in the open air on at least three occasions in the last two months”.<sup>19</sup> Due to the acts of which he was accused, Antoine C. was condemned to a sentence of one month’s imprisonment for a public offense against decency.

Following the introduction of the German penal code, it became much easier to bring people suspected of homosexuality before a court. There was a significant increase in the number of sentences, and the manner in which criminal judgments were produced was radically transformed,<sup>20</sup> partly reflecting the need to administer the law in wartime.

### **The arbitrary effects of annexation**

The introduction of a retrospective principle into criminal law constituted one of the particularities of the 30 January 1942 *Strafrechtsverordnung für das Elsass* (art. 9). This measure was similar to that noted in the case of the annexed Sudetenland by Florence Tamagne in her *Histoire de l’homosexualité en Europe*. There, she recounts the case of one Anton Purkl, who was prosecuted in 1939 for acts committed in the period 1934-1936.<sup>21</sup> In Alsace, even if the judges only

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Homosexuelle, usw.”; “Interne Statistik über Deportationen. Statistik über die polizeiliche vorbeugende Tätigkeit im Oberelsass vom 27.6.1940 bis zum 27.4.1942”. Grau 2004: 271-274.

<sup>19</sup> ADBR 1243W241.

<sup>20</sup> Faget 2008.

<sup>21</sup> “It is specified that the fact that the acts took place in the Sudetenland and prior to 28 February 1939 in no way prevents the sentence from being carried out.” Tamagne 2000: 559.



explicitly referred to this measure in two cases, all of the cases studied here nevertheless shed light on the *arbitrary effects of annexation*.

A sentence handed down on 6 March 1942 against Albert F., a married 39-year-old manual worker and the father of a 11-year-old girl, who was found guilty of a “crime under Article §175a”,<sup>22</sup> sheds light on this system. Arrested on 9 January, that is three weeks before the introduction to Alsace of the German penal code, and charged with an offense against public decency, Albert F. would normally have been given a sentence of no more than a few weeks imprisonment, like Antoine C. (see above). But by using Article 9 of the *Strafrechtsverordnung*, the court condemned him to an entirely different trajectory. After having served a one-year sentence (with no allowance made for his pre-trial detention), on 17 March 1943 he was transferred to the camp of Schirmeck, passed from there through Natzweiler and was finally registered at Buchenwald on 17 May 1943.<sup>23</sup> This trajectory was the result of a measure that had been in force in Germany since the 12 July 1940 decree. This ordered that any man who had seduced more than one other man be interned in a concentration camp, and was the consequence of the 14 December 1937 decree governing the preventative fight against criminality.<sup>24</sup>

The case tried on 6 March 1942 casts light on the specific manner in which Nazi criminal justice *constructed narratives*. One January night as Albert F. walked home from work, he crossed the path of André H., a young apprentice hairdresser, who was fourteen and a half years old at the time.

On the way and despite the fact that the accused realized he was dealing with a youth, he entered into an immoral discussion with him inasmuch as he spoke of “jerking off” and of “making babies” and this in the clear intention of getting what he wanted by awakening the sensual desires of André H. [...] The next day, the accused once again crossed the young man’s path, and again started talking to him about immoral things, asking him to follow him behind a bush. André K., who is an inexperienced

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<sup>22</sup> Minutes of the trial of Albert F.: 6.3.1942, p. 1, ADBR 1243W244.

<sup>23</sup> The date of Albert F.’s liberation cannot be determined. However, he did survive deportation. The births register of his native commune shows that he died in 1965 at the age of 62.

<sup>24</sup> Schlagdenhauffen 2011: 27.

young man and who had absolutely no experience in sexual matters, followed him. Once there, the accused exposed his sexual organ and massaged it to ejaculation. He got young André K. to do the same, opened his pants for him, took out his member and massaged it until ejaculation. He then left on his bicycle in the direction of Geispolsheim and encouraged André to try this experience again and to go out with girls, promising to bring him a book that explained everything the next time they saw one another. [...] André K. told his grandmother about his adventure. The latter informed the police, who arrested the accused. He has been in police custody since 9 January 1942.<sup>25</sup>

From a legal point of view, the court considered it established that the accused, a man over the age of 21, had seduced a minor under the age of 21. For this reason and in virtue of Article 9 of the 30 January 1942 criminal edict, Albert F. was guilty of a crime against §175a. However, Albert F. was charged with having permanently corrupted André K., who was described as:

an apparently inexperienced young man for whom the encounter with the accused represented his very first sexual experience. [...] In an exceptionally sordid manner, the accused awakened the young man's imagination and even sought to incite him to masturbate regularly and practice coitus with young women. In such conditions, no attenuating circumstance may be granted to the accused.<sup>26</sup>

In the framework of another case, this one tried in mid-1944, the court explicitly referred to the principle of retrospective justice applicable in Alsace, in order to bring all possible evidence against Robert K., a 29-year-old employee of Strasbourg's civilian hospital, charged with "relations against nature with men". The events go back to 6 April 1944. That evening, Robert K. dined with his parents at the *Maison Kammerzell*, a Strasbourg restaurant. They shared a table with Wehrmacht officers, among whom was staff corporal Hans L. (married, 24 years old). At the end of the dinner, Robert K. offered to see Hans L. again. That very evening, he wrote him a letter beginning with "Dear Hans" and ending with "Your Robert". Several days passed before they saw one another again. They first took two glasses of red wine at the *Zuem Strissel* restaurant and from there headed to the *Bourse aux vins*. On the way, Robert K. wanted to take Hans L. by

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<sup>25</sup> ADBR 1243W244.

<sup>26</sup> ADBR 1243W244.

the arm "like a young woman". He then spoke to him about his friendship with someone named P. and the discussion turned to love between men. Hans L. pretended to be interested in this sort of thing. Robert K. next passed his hand several times over his pants at the level of his genitals. Finally, Hans L. discreetly had the police called from the restaurant and ordered that Robert K be arrested.<sup>27</sup>

During his interrogation, Robert K. denied having wanted to see Hans L. again for sexual purposes. The court was nevertheless persuaded that Robert K. had approached him with a "homosexual intention"<sup>28</sup> for he had admitted during his interrogation to having already masturbated on at most two or three occasions with a certain P., before the German criminal code was introduced in Alsace. However, by virtue of Article 9 of the criminal edict of 30 January 1942, the acts in question could now be condemned.<sup>29</sup> Moreover – and this doubtless played a decisive role – the court held that, "in view of his external appearance and his manners, the accused is an individual whom one can believe capable of homosexual actions."<sup>30</sup> For all of these reasons:

During the calculation of the length of sentence, the court was mindful of the need to take rigorous action against the vice of homosexual activity. To the degree that Robert K.'s infringements had only a limited influence and did not result in particular damage, the court ordered a sentence of 3 months in the first case (that is, the confession) and of one month in the second. But insofar as the accused only partly confessed to the acts of which he is accused, his previous time in custody is only partly deducted [from his sentence].

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<sup>27</sup> ADBR 1243W251.

<sup>28</sup> "Für das Gericht steh es jedoch fest, dass [Robert] K. sich dem Soldaten in homosexueller Absicht genähert hat."

<sup>29</sup> "Insoweit eine Handlung vor der Einführung des deutschen Strafrechts im Elsass durch die Strafrechts VO vom 30.1.1942 fällt, ist sie gemäss §9 dieser VO. Strafbar, die der Einführung einen Rückwirkenden Charakter verlieh". Sentence passed on Robert K, 5.7.1944, p. 3 (ADBR 1243W251).

<sup>30</sup> "Der Angeklagte ist – seinem äusseren Erscheinungsbild und seinem Gehabe nach – ein Mensch, dem eine gleichgeschlechtliche Betätigung durchaus zuzutrauen ist."

A particularly interesting aspect of Robert K.'s case is the role played by “victimless crime”,<sup>31</sup> which the application of retrospective justice made possible, since the defendant had confessed to having already masturbated in the past with a certain P. But what is perhaps more interesting yet is the particularly noticeable shift that took place between crime and criminal. Much more was on trial here than a set of particular acts; above all, what was on trial was a deviant identity.

### **Proving practices in order to punish identities**

What to think of these confessions of homosexuality extracted by the police? They allowed police officers to catch other homosexuals. For the case of Germany, Stefan Micheler *et al.*<sup>32</sup> have shown that, following the expanded range of §175, a third of all arrests of homosexuals were carried out thanks to the “snowball” technique. Moreover, these confessions allowed the prosecution’s case against the accused to be strengthened and served to confirm a homosexual *nature*, the irrefutable proof of which was said to be sexual pleasure. Whatever practices were involved – whether mutual caresses, kissing (with the tongue), masturbation, oral-genital relations, intercrural coitus or anal penetration – the judges wanted to know whether the accused reached orgasm.<sup>33</sup>

What Nazi courts were punishing here was the “use of the pleasures”.<sup>34</sup> This is no doubt why the judges sought to discover by way of the confessions extracted from the accused whether they had reached orgasm. In this way, the wartime denunciation of male homosexual practices set the issue of conviction and sentencing in the context of broader concerns directly relating to the preservation of the race. The semen thereby wasted by “homosexuals” was said to contribute to the annihilation of the German people.<sup>35</sup> When it had not been established that orgasm had taken place, by contrast, the court sought to determine who was the active and who the passive

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<sup>31</sup> Schur 1965.

<sup>32</sup> Micheler, Müller & Fretzel 2002.

<sup>33</sup> Virgili 2009.

<sup>34</sup> Foucault 1984.

<sup>35</sup> Jellonnek 1990: 31 ff.

partner, in order to confirm the claim of seduction understood in its etymological sense, that is, "to lead astray" (*verführen*). Strictly speaking, the issue of nature only arose later, during the sentencing phase. In this respect, a case tried in April 1943 sheds particular light on the manner in which deviation relative to the norms of the dominant masculinity correlates with the severity of the sentence incurred. Four men were accused of relations against nature: Ferdinand H. (office worker, 25 years old), Marcel S. (apprentice waiter, 22 years old), Roger E. (waiter, 43 years old) and Paul K. (apprentice waiter, 17 years old).

The deeds for which the four men who appeared in court stood accused may be summarized as follows. Two of the defendants, Ferdinand H. and Marcel S., became acquainted with one another at the Strasbourg public baths in late 1940. From that point on, they met twice a week to practice mutual masturbation until ejaculation, in Ferdinand H.'s room. Then, in April 1942, Ferdinand H. met a certain L., a warrant officer in the Hitler Youth. Although married and the father of two children, this 33-year-old man "behaved in a homosexual manner".<sup>36</sup> Ferdinand H. confessed to having practiced mutual masturbation with him at least once. One month later, he got to know Paul K. (through the warrant officer in question), invited him to his home that very evening, "took his clothes off, pulled down his [Paul K.'s] pants, laid on top of him and imitated coitus until ejaculation". In May or June 1942, Paul K. got to know Marcel S. (through Ferdinand H). Both had homosexual relations (on between 10 and 12 occasions) until their arrest. They practiced mutual masturbation. But "on several occasions Marcel S. sucked the member of Paul K. until ejaculation and then swallowed his semen."<sup>37</sup> Starting in September 1942, Paul K. seduced new partners, including Roger E., whom he met at his workplace. He twice invited him to his home (mid-December 1942 and mid-January 1943), where they mainly practiced mutual masturbation. But "Roger E. sometimes

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<sup>36</sup> "L. der obwohl verheiratet und Vater von zwei Kinder betätigte sich ebenfalls homosexuell" (ADBR 1243W247).

<sup>37</sup> "Es kam auch mehrfach vor, dass S. am Glied des K. bis zum Samenerguss lutschte und den Samen dann herunterschluckte."

introduced his member – after having coated it with cream – into Paul K.’s anus.”<sup>38</sup>

The remainder of the prosecution was mainly directed against Ferdinand H. and Paul K. Both were accused of having seduced, corrupted and led astray other men. Only Paul K. admitted to having had penetrative relations (oral-genital with Marcel S. and anal with Roger E.). Ferdinand H. confessed on the witness stand to having practiced mutual masturbation in his youth. He admitted to having had sexual relations with women on several occasions but stated that, in the preceding two years, he had no longer felt attracted to them. He claimed that his penchant for men was a source of much suffering and that he did not know how to be rid of it. Paul K., for his part, stated that he had discovered onanism as soon as he left elementary school, had acquired a taste for it, and had given himself over to it twice a week. He claimed that it was the Hitler Youth warrant officer who had initiated him into homosexuality and that he then gave in to Ferdinand H.’s advances. By contrast, he admitted to having corrupted Roger E. and even conceded that he had been aware of the illicit nature of his practices. Roger E., by contrast, declared that he “was not of a homosexual nature”. He had, it is true, practiced mutual masturbation when he was 20 or 21 years old, but claimed to have observed a “normal sexual relations” with his wife ever since he turned 27. Marcel S., for his part, also claimed to be of a “normal nature”, even if he had once, around age 16, had sexual relations with a French officer.

### **What it means to punish a “nature”**

The confessions of the accused concerning their own “nature” allowed the court to determine their *nature*. Ferdinand H. was described as a psychopath. “In his physical constitution as well as his psychic attitude,” he displayed “slightly feminine traits and seems of all the accused to be the one who most possesses a homosexual nature”. Paul K., by contrast, is a “young man who was led to have homosexual relations and who has ever since been mired in in moral decadence”. As for Marcel S., “it is difficult to claim with certainty

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<sup>38</sup> “Es kamm dazu, dass [Roger] E. sein Glied – nach vorherigen Einreiben mit einer Salbe – in den After des [Paul] K. einführte.”

whether he is a particular feminine type or whether he is normal. But due to his involvement in repeated homosexual relations, he must be considered as having gone irretrievably to the bad."<sup>39</sup> Finally, Roger E. was declared to be bisexual.

The nature to which the judges refer is a notion that particularly raises questions when it is thought of as a *habitus*, that is, as a collection of lasting dispositions.<sup>40</sup> Understood through the twofold prism of deviance and gender identities, this notion calls into question the possibility of transforming internalized dispositions by means of incarceration. In the cases of Ferdinand H. and Marcel S., the court for this reason held that a prison sentence might cure them of their addiction: the former received a sentence of 3 years and 6 months,<sup>41</sup> the latter a sentence of 4 years and 6 months.<sup>42</sup> Roger E., described as bisexual, was condemned for having deviated from the straight and narrow to a sentence of 1 year and 6 months. In the case of Paul K., the court held that he had allowed himself to be "homosexually exploited" and that this pernicious disposition had become so deeply rooted in him that there was no way to remedy it. For this reason, he was given a sentence of life imprisonment "in order to durably protect society".<sup>43</sup>

Of the four defendants, Paul K. received the heaviest sentence. The only minor in the group, he was also the only one to have admitted to accepting a sexually passive role. In this respect, he is representative of the most deviant form of masculinity. Conversely, the defendant who played a sexually active role (described as bisexual) received the lightest sentence.

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<sup>39</sup> "[...] in folge häufiger gleichgeschlechtlicher Betätigung völlig verwahrloster Mensch ausgesprochen werden muss."

<sup>40</sup> Bourdieu 1986.

<sup>41</sup> Against Ferdinand H. for seducing a young man (2 years of prison), for relations with Paul K. and another man (twice 1 year and 3 months), for relations with Marcel S. and Lang (twice 1 year), or 3 years and 6 months in prison.

<sup>42</sup> Against Marcel S. for seducing two men (twice one year of prison), for relations with Paul K. and another man (twice 1 year and 3 months), for relations with Ferdinand H. (1 year), or 4 years and 6 months

<sup>43</sup> "Er war daher zur Strafe von unbestimmter Dauer zu verurteilen."

A distinction solely based on degrees of deviance relative to norms of masculinity could not be clearer. At the conclusion of a case tried in July 1942, however, the passive role of Joseph W. (office worker, single, 19 years old) played in his favor. He appeared in court at the same time as his lover, Alfred H. (coal merchant, single, 46 years old), who had already been condemned to a fine of 60 reichsmarks in 1933 for sexual relations against nature.<sup>44</sup> Alfred H. was accused of having gradually seduced Joseph W. He was said to have begun by explaining to him that men could also have sexual relations among themselves. To judge by the minutes of the trial, he subsequently initiated him into masturbation and inter-femoral coitus. “Joseph W. even swallowed Alfred H.’s semen and that twice a week between 1940 and 1942.” On the witness stand, Alfred H. claimed to not have been aware that some of the acts he had committed were against the law. But the court was not of this opinion, for no one was supposed to be ignorant of the law. Alfred H.:

ought to have known through the press and the homosexual circles he had long frequented that German criminal justice worked in Alsace in the interest of preserving the vigor of the people and the purity of youth.<sup>45</sup>

Ultimately, Alfred H. was condemned to 1 year and 6 months of prison while Joseph W. was acquitted. One factor allows one to understand the leniency shown by the court – which here relied on paragraph 1 of §175 – towards Joseph W.<sup>46</sup> True he was guilty of having repeatedly fornicated with another man, but “his penis is abnormally small, he was passive most of the time, and he had difficulty becoming homosexually excited.”<sup>47</sup>

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<sup>44</sup> Until §175 made sentencing more severe in 1935, the sentences incurred were much less severe and only targeted sexual relations where penetration had occurred.

<sup>45</sup> ADBR 1243W246.

<sup>46</sup> “In the case of a participant who, at the time of the events, was still under 21 years of age, the court may forego punishment in the least serious cases.”

<sup>47</sup> “W. entschuldigt sich damit, dass er geschlechtlich nur sehr schwer in Erregung komme; da zudem sein Glied anomal klein sei, habe er sich meistens passiv verhalten” (ADBR 1243W246).



### **They have become typical homosexuals and constitute a public menace**

What was a typical homosexual in the eyes of Nazi justice?

In some cases, the simple fact of having a sexual life allowed the court to define the typicality of a deviant identity. In others, as we have glimpsed above, sexual roles allowed the court to argue in favor of a homosexual *nature*. Robert S. (domestic servant, single, 23 years old) and Lucien W. (chauffeur-delivery man, single, 28 years old) were arrested in bed together early one morning by the police. On 6 February 1942, they were respectively sentenced to 6 and 18 months of prison for oral-genital, intercrural and anal sexual relations. What was more, they practised a sort of marriage between men (*Männerehe*). The court moreover held that "as is often the case among homosexuals, Lucien W. made money like a husband and Robert S. looked after the house – in particular, the preparation of meals – like a wife. He played the role of the wife inasmuch as he allowed himself to be penetrated." For these reasons, Robert S. was considered "a man who, despite his young age, has fallen into complete decadence and deserves no clemency". As for the second protagonist, Lucien W.:

He has not yet totally fallen into degeneracy. What is more, according to police records, he is not known as a homosexual. For this reason, the court is of the opinion that he let himself be seduced by Robert S. and considers that a sentence of 6 months will suffice. Moreover, insofar as the facts have been admitted by the defendant, the period of 19 weeks of pre-trial custody will be subtracted from his sentence.<sup>48</sup>

Another case, tried on 4 November 1942, involved a chief warrant officer in the police force (from the *Altreich*). Sent to Strasbourg in late 1940 to bring Alsace into line with the rest of the Reich, he fell in love with a typical "homosexual".

One day, soon after his arrival in Strasbourg (his wife and daughter were still in Düsseldorf), the *Hauptwachtmeister der Schutzpolizei* Martus met Eugène E. in a Strasbourg restaurant. They became friends and regularly saw one another in Eugène E.'s apartment (rented from a certain Joseph R.). Their first sexual relations took place on 1 April 1941. They kissed and then each

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<sup>48</sup> ADBR 1243W240

masturbated. These acts were repeated nearly every week. In July, Martus' wife and daughter moved to Strasbourg, Martus however decided to abandon the conjugal home and move in with Eugène E. This caused some conflict. In mid-March 1942, Martus' wife denounced him. He was arrested with Eugène E. on 31 March and immediately placed in police custody. But Martus succeeded in escaping and that very evening went to the Strasbourg prison in search of his lover. As chief warrant officer of the security police, he demanded that Eugène E., who was to be submitted to interrogation at police headquarters, be immediately turned over to him. The two fugitives then went to the home of Joseph R., the home's owner and an old friend of Eugène E., who offered them food and shelter. The next morning, Joseph R. went to Eugène E.'s workplace to pick up an envelope containing 2000 francs and 275 reichsmarks. He was there arrested by the police.

During his interrogation, Joseph R. confessed to having engaged in homosexual relations for many years and having had relations against nature between 1940 and 1942. He said that he found his partners in the public lavatories next to the municipal theater or in those of Corbeau Bridge. This information would be used to charge Joseph R., who was accused, like Eugène E., of having repeatedly fornicated with other men. In this respect, both had "become typical homosexuals and consequently represent a public menace".<sup>49</sup> An extended prison sentence seemed called for, in order to turn them away from their "immoral conduct". At the end of the trial, Joseph R. (50 years old, salesman, single) and Eugène E. (30 years old, accountant, single) were sentenced to 2 and a half years and 2 years of prison, respectively. Chief warrant officer Martus, for his part, was sentenced to death by the SS and by court martial, for desertion and homosexuality (the sentence was carried out).

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<sup>49</sup> "[...] sämtliche Angeklagten durch langjährige Beziehungen typische Homosexuelle geworden sind und daher eine Gefahr für die Öffentlichkeit bilden." (ADBR 1243W246).

### **A condemnation for sexual initiation?**

A single case among those tried by the Strasbourg court involved a member of the better-off classes. By inverting the terms of the trial in this respect, it allows us to better understand the role played by class and identity in the production of criminal judgments. On 3 May 1943, Alfred W. (pharmacist, 42 years old, married, father of a 13-year-old child) was sentenced to 8 months in prison<sup>50</sup> for having twice seduced a young man.

The activities for which he was prosecuted took place in the bunk room of a holiday hostel he had long frequented with his wife and child. While there, he met Michel M. (18 years old). One Saturday night, after having drunk several hot toddies, the two protagonists found themselves in beds in the same room. There, Alfred W. slid his hand into Michel M.'s pajamas at the level of his thighs and crotch. He then guided Michel M.'s hand towards his now erect organ. This excited the latter but he did not want to do anything more and turned away. The same scenario took place another evening. During the trial, Michel M., appearing in court as a witness, denied the facts as they were related. The medical expert then established that "Alfred W. is a man of rather feeble temperament, a talented musician inclined to a religious vision of the world, but who lacks any very developed sexual instinct."<sup>51</sup> According to the doctor who examined him, he did not correspond to the homosexual type. His behavior was rather to be explained as an isolated mistake – the product of his rather weak nature – resulting from finding himself in such close quarters with a young person.

From a legal point of view, the court had to base its verdict on the degree of seduction. Was it ultimately a case of actual seduction or merely an attempt? To respond to this question, it had to be established whether Michel M. experienced any pleasure in allowing himself to be touched by Alfred W. The judges, however, found the case puzzling to the degree that Michel M. "is not attracted by this type of filth", claiming to have turned away and in this way put an end to their interaction. Finally, and to the degree that "the accused

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<sup>50</sup> ADBR 1243W247, 1243W250.

<sup>51</sup> ADBR 1243W247.

has up to the present led an irreproachable life, a 6 month sentence for each offence seems right”.

The case of Alfred W. and Michel M. certainly compares with that of Albert F. and André K., or Joseph W. and Alfred H. These three cases raise the question of convictions for sexual relations that, at another time or place, would doubtless be described as “episodes of sexual initiation”. The point of view adopted here by the judges was that of the defense of youth against adults capable of permanently corrupting the trajectory of these young men. In principle, such a vision of things was in no way exceptional. It was part and parcel of the advent of a new legal order in Europe over the course of the first half of the twentieth century, with the emergence of juvenile law.<sup>52</sup> In the Netherlands, for example, Article 248b of the penal code had since 1911 condemned homosexual relations between an adult and a minor over the age of 16 to a maximum sentence of four years imprisonment. This was in order to “avoid the propagation of homosexuality”. For similar reasons, Article 334 was introduced into the French criminal code in 1942. This article provided for a penalty of between six months and three years’ imprisonment for any adult who had committed one or more indecent acts or acts against nature with a minor of the same sex under the age of 21. When this measure was applied (in the same way as Article 330), however, the sentences never exceeded a few weeks.

The handful of cases that we have examined in detail here shed light on some characteristic aspects of the manner in which the Nazi criminal justice system dealt with male homosexual deviance in annexed Alsace. The trial records show that this system saw itself as having a mission in Alsace: “to endeavour to preserve youth, in the interest of promoting a vigorous people”. To this end, it employed a legislative apparatus which was exclusively applied to men, which judged actions prior to their criminalization on the basis of a principle of retroactivity, and which accorded a decisive place to bodily heixis [*well-being*]. In the eyes of the judges, there was thus little difference

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<sup>52</sup> Faget 2008.

between crimes and criminals, acts and identities. The accounts of practices obtained in the course of police interrogations and then reiterated before the court only reinforced this essentialist logic. Whether seducers or seduced, if they experienced orgasm, they were guilty. Those who confessed to having played the woman’s role (as the judges put it) were doubtless also those who were most severely punished. In this respect, and via a twofold mechanism of condemning practices and identities, Nazi justice merely extended a theory of social control that had its roots in late nineteenth-century criminal anthropology and pathological sexology.<sup>53</sup> The wartime process of asserting control over Alsace simply exacerbated the effects and expectations of this theory.

Further study of the issues raised by the sexual annexation of Alsace might benefit from three complementary types of analysis. Attention could be given, for example, to the mechanisms whereby “homosexuals” were arrested. Did the occupation police draw upon particular records in their possession? Another approach would consist in studying the defendants’ trajectories. How many, like Albert F., were interned in concentration camps once they had served their prison sentences?<sup>54</sup> Were those who were still incarcerated in 1945 liberated when Alsace was returned to France? Finally, a third approach might seek to reconstruct the careers of German judges serving in annexed Alsace. For some of them, this career began before 1935 – that is, prior to the revision of §175. For others, it extended well beyond the unconditional surrender of the National Socialist regime.

*Translated by Ethan RUNDELL*

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<sup>53</sup> Chaperon 2007.

<sup>54</sup> Work has recently been carried out on this question by the Fondation pour la mémoire de la Déportation. Boulligny 2011.

## Appendix

### *Breakdown by year of “homosexual” arrests*<sup>55</sup>

<b>Year</b>	<b>1940</b>	<b>1941</b>	<b>1942</b>	<b>1943</b>	<b>1944</b>	<b>Total</b>
<b>Total</b>	19	17	40	37	25	138
<b>Percentage</b>	13,7%	12,3%	28,9%	26,8%	18,1%	99,9%

### *Breakdown by year of “homosexual” convictions*<sup>56</sup>

<b>Year</b>	<b>1941</b>	<b>1942</b>	<b>1943</b>	<b>1944</b>	<b>Total</b>
<b>Total</b>	1	16	17	6	40
<b>Percentage</b>	2,5%	40%	42,5%	15%	100%

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<sup>55</sup> Distribution by year (between 1940 and 1945) of the “homosexuals” recorded by the Strasbourg occupation police established on the basis of 138 useable anthropometric forms.

<sup>56</sup> Distribution by year (between 1941 and 1945) of convictions for “homosexuality” established on the basis of 41 judgments handed down by the Strasbourg court (excluding acquittals).

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