Culture & History Digital Journal 7(2)
December 2018, e021
eISSN 2253-797X
doi: https://doi.org/10.3989/chdj.2018.021

Legislating the witch: a genealogy of juridical thought

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Submitted: 9 December 2017. Accepted: 23 June 2018

ABSTRACT: Long before the prosecution of individuals for witchcraft was rendered a legal impossibility in the states of modern Europe, the judicial and executive institutions of those states and their precursors were decisive in both legitimating and moderating, facilitating and constraining the detection, trial, and execution of alleged witches. If we are to impute more than unresolved cognitive dissonance to this paradoxical relationship of the apparatus of state to the perceived reality and threat of witchcraft, then the preconditions and contextual factors predicating that relationship bear investigation. This paper identifies genealogical traces of criminological, political, social, and religious thought embedded within several pivotal bodies of early-modern law pertaining to witchcraft, and attempts to infer the cultural, institutional, and textual sources and conditions from which they derive.

KEYWORDS: Early modernity; Germany, Intellectual history; Law, State institutions; Witchcraft

Citation / Cómo citar este artículo: Johnson, Brian Warren (2018) "Legislating the witch: a genealogy of juridical thought." Data Modeling and Digital Approach for the Legal History of Ibero-America". *Culture & History Digital Journal*, 7 (2): e021. https://doi.org/10.3989/chdj.2018.21

RESUMEN: *Legislación de la bruja: una genealogía del pensamiento jurídico.*- Mucho antes de que la persecución de los individuos por brujería se convirtiera en una imposibilidad jurídica en los Estados de la Europa moderna, las instituciones judiciales y ejecutivas de esos Estados y sus precursores fueron decisivas para legitimar y moderar, facilitar y restringir la detección, el juicio y la ejecución de supuestas brujas. Si hemos de imputar más que una disonancia cognitiva no resuelta a esta relación paradójica del aparato del estado con la realidad percibida y la amenaza de la brujería, entonces las precondiciones y los factores contextuales que predican esa relación llevan a la investigación. Este artículo identifica huellas genealógicas de pensamiento criminológico, político, social y religioso incrustado dentro de varios cuerpos fundamentales del derecho temprano-moderno relacionados con la brujería, e intenta inferir las fuentes y condiciones culturales, institucionales y textuales de las cuales derivan.

PALABRAS CLAVE: Modernidad temprana; Alemania; Historia intelectual; Ley; Instituciones estatales; Brujería

INTRODUCTION

It has been convincingly argued that, in many instances, it was in fact the institutions of the centralized state that moderated and restrained the prosecution of witchcraft in early modern Europe, even long before the legal grounds for such trials were ultimately and decisively rescinded (Behringer. 1996: 89; Bever, 2008: 392-7; Levack, 1996: 101-3). History frequently bears witness to the truth of this contention: Even in the midst of the Thirty Years War, the Bavarian government was able to not only restrain its army from conducting *ad hoc* witch trials after an outbreak of illness decimated its horses, but indeed to muster institutional legitimacy sufficient that the army's officers had actually sought its permission to do so in the first place (Midelfort, 1972: 76). Moreover, the sheer bureaucratic inertia introduced by consultative processes such as these no doubt had something of a rational-

izing effect upon the interpretation of evidence and exercise of justice. In Württemberg for instance, by the middle of the seventeenth century the state, in the institution of the *Oberrat*, was attempting to closely monitor and regulate, through a relay of reports and instructions, how district courts conducted their criminal cases, and in witch trials actually reserving the right of final judgment for itself (Bever, 2008: 351, 394).

However, these observations are immediately confronted with the fact that it was the legislative bodies of state who were responsible for producing the very laws which legitimated the witch trials and made them – at least sometimes – possible. The question posed by this apparent paradox, then, is: what made those laws possible? How did ordinances prescribing the torture and execution of individuals for sorcery fit into a legal framework integral to the rational, bureaucratic – even skeptical – apparatus of early modern governmentality? What kind of intellectual culture determined and legitimized the legislative and jurisprudential response to witchcraft? This paper will seek to explore the ideological, social, and political contexts that produced some of early-modern Europe's most influential, or at least most representative, legal texts relating to witchcraft. Methodologically, it will proceed by discerning the genealogical traces of demonological, criminological, and political thought embedded in these texts, and following these back to their originary sources. The substance of the question at hand, and the available evidence salient to its solution, will draw the primary focus of investigation to the German imperial territories of the early sixteenth century, though occasionally processes and trends continuing into the seventeenth century or later, as well as analogous contexts elsewhere in Europe, will be referenced for comparison. Ian Bostridge (1996: 310) has suggested that "...the belief of an individual is often... conditioned by the discursive resources available to that individual." If the historical evidence of witchcraft legislation can be interpreted to recover, to some extent, the beliefs of the legislators – what they believed was best for the commonwealth, as much as what they believed to be true and pertinent about witches – then an examination of their discursive environment – the normative literature with which they may have been familiar and the particular socio-historical situations in which they lived: their texts and contexts – may permit some understanding of the relation between the laws and the discursive corpus that conditioned them.

THE POPULAR CONSTITUTION OF STATE POWERS

It is beyond the scope of this study to trace the precise documentary transmissions and biographical etiologies which culminated in the authorship of any particular municipal, territorial, or imperial statute. In any case, as Bostridge (1996: 334) also argues, "...the history of the fate of the elite discourse of witchcraft is largely the history of an official point of view and its transformations... effected both by specific, and contingent, political events, and by longer-term shifts in the structure of ideology." Formulation of legislation at the state level was integrated within multiple feedback loops comprising local representatives, territorial princes, government functionaries, and public petitions. By formally recognizing village-level statutes drafted by local officials, as well as providing a venue for appeals from those otherwise excluded from the regulatory process, centralized government legitimated itself as ultimate arbitrative authority (Warde, 2006: 174, 327-8). Legislation and juridical interpretation evolved in a reciprocal balance, and responsibility for both was increasingly concentrated at the state level. The ecclesiastical hierarchy also played a role in this information feedback relay by which provinces like Württemberg were governed. Pastoral surveillance and exhortation of parishioners, exercised through educational and medical institutions as well as churches, constituted the local terminus of a recursive command structure which ultimately answered – via the state *Kirchenrat* – to the duke (Bever, 2008: 356-61).

The convergence of secular and religious criminality, of ecclesiastical and judicial authority, had been essential to the Papal Inquisition's *modus operandi*, and would be equally so to the legitimacy of municipal and imperial laws addressing witchcraft. Indeed, as late as 1695 the law faculty at Tübingen sustained the opinion that penalties valid under Mosaic law were equally available to secular justice (von Bar, 1916: 228 n. 12). But this characteristic cooperation, if not always identification, of spiritual and secular powers was itself at odds with the ineluctably political apocalypticism inherent within Christianity. As Adam Kotsko (2017: 71) observes of Irenaeus's attempt at rhetorical rapprochement with the Roman Empire in the second century, "[p]eace with the ruling authorities therefore comes at the price of *displacing* the demonic apocalyptic role of earthly rulers onto some other group...". By the late fifteenth century, that group comprised individuals identifiable along a spectrum of definitions, all corresponding to the lexeme 'witch', all of whom were potential victims of "...a reactionary and paranoid politics that views marginal populations as oppressors..." (Kotsko, 2017: 163-4).

A recurring theme in the rhetoric of state powers, governmental interventions, and the expansion thereof in the sixteenth and seventeenth centuries was the legitimating notion of the "common good". By appealing to this final cause of all public morality in justifying its policies, the state came to define public morality as adherence to its policies. By appropriating an irreproachable basis for its orders, the legitimacy of those orders was placed beyond question (Warde, 2006: 166, 203-4, 346). This reasoning was assimilated by urban administrative bodies as much as by provincial princes and the Imperial Diet, and was manifest in *Polizeiordnungen* aimed at regulating almost every aspect of public life, especially those with some bearing upon the economy (Krodel, 1982: 75; Wiesner, 1986: 15). It was under this guiding ideology that the 1530 Diet of Augsburg undertook (not for the first or, as it would turn out, last time) the drafting of a common crimi-

nal code which would apply across the Empire. This draft was based extensively upon Johann von Schwarzenberg's 1507 *Bambergische Peinliche Halsgerichtsordnung*, or *Bambergensis*, which made just a few, relatively concise statements concerning the prosecution of sorcery. Those clauses, nonetheless, would go on to have an influential and hermeneutically fraught history within German jurisprudence, beginning with their near-verbatim adoption in the 1532 *Constitutio Criminalis Carolina* of Emperor Charles V.

Johann von Schwarzenberg is, fortuitously, one of the relatively few individuals with a direct influence upon legal doctrine in this period of whom we have even the outline of a biography. He was the scion of a noble family, a former soldier, and as of 1501, *Hofmeister* of Bamberg (von Bar, 1916: 208 n. 9). The *Bambergensis* itself, particularly in its penal prescriptions based upon extant Bamberg law or left to customary discretion, sought to introduce neither novelty nor reformation to legal practice, but rather a synthesis of prevailing systems of Roman and Germanic jurisprudence (von Bar, 1916: 211). Indeed, it was likely the author's deference to custom which facilitated the text's adoption by inferior courts in a number of other German territories, as well as its substantive reproduction in similar legal synopses (von Bar, 1916: 214-5). Notwithstanding von Schwarzenberg's interest in contemporary humanist learning, his code betrays a conception of earthly justice still based upon divine commandments, retaining proscriptions of blasphemy, heresy, and unchastity in addition to sorcery (von Bar, 1916: 208 n. 9, 214). While a somewhat more unequivocal segregation of spiritual and secular law may be apparent in the omission of article 130 concerning religious nonconformity when much of the *Bambergensis* was transcribed wholesale in drafting the *Carolina* (von Bar, 1916: 218), the latter made no such compromise in respect to sorcery. Article 109 of the *Carolina* unhesitatingly prescribed death by fire for those convicted of harmful sorcery, yet silently excluded the clause "... gleych der ketzerey..." appearing in the analogous article 131 of the *Bambergensis*, where it had served to liken the method of execution to that employed for heretics (Kohler and Scheel, 1900: 50-1; von Schwarzenberg, 1507). Witchcraft was a crime *sui generis*.

It seems plausible to infer that von Schwarzenberg's criterion delegating adjudication to local custom in cases where precedent is ill-defined or lacking encompassed those articles in his text addressing sorcery as well. Article 55, for example, concerning sufficient evidence of sorcery with which to subject an alleged sorcerer to questioning under torture, asks the prosecution to rely upon the ability of a suspect's peer-accusers to recognize certain stereotyped behaviors constituting grounds for suspicion:

> "So yemant sich erpeüt andre menschen Zauberey zu lernen oder yemant zu bezaubern drohet Auch sunderliche gemeinschafft vnd geselschafft mit zauberen oder zauberin hat / oder mit solchen verdechtlichen dingen geperden / worten vnd weysen vmbgeth / die zauberey vff Ine tragen das gibt ein redlich anzeygung der zauberey" (von Schwarzenberg, 1507).[1]

At no point is "sorcery" defined, nor its "words and signs" described. The guidance assumes that such details will be common knowledge amongst those people immediately concerned with the threat of *maleficium*, or otherwise self-evident. Such an assumption was probably a safe one; every community has its personified fears, the violators of its norms, and knows the signs by which to recognize them. Moreover, and of particular relevance to the devolution of policing to the particular populations being policed, no two communities have precisely the same anxieties or reify them into quite the same characters. It should be noted in this connection that the authors of the witch-hunting manual *Malleus Maleficarum*, Heinrich Institoris and Jacob Sprenger, were themselves practicing inquisitors of the Dominican order, and drew extensively upon their years of extracting testimony from defendants and witnesses in heresy trials across southern Germany when constructing the chimerical composite that is the witch of the *Malleus* (Broedel, 2003: 6). The quasi-ethnographic nature of their work produced a definition of the witch that would broadly conform with the experiences and presuppositions of their readership. That readership included, beginning within the authors' own lifetimes, officials responsible for interpreting and applying the law, and who took the initiative in seeking out Institoris and Sprenger as authorities on the prosecution of witches (Broedel, 2003: 9 n. 9). At the same time, and in much the same way, the broader genre of cautionary literature on witchcraft, including the illustrations which made its discourse accessible to an audience undifferentiated by literacy, also synthesized elite demonological and social doctrine with popular belief and folklore, and proceeded to retransmit and amplify these ideas whose very familiarity primed the public to assimilate them (Zika, 1989: 21).

POLICING MORALITY

The witchcraft ordinances of the *Bambergensis* and its successors were disciplinary in the Foucaltian sense that they prescribed interventions by which to diagnose, arrest, and penalize a particular form of disturbance in the public order which manifests itself in the behavior, or in the very persons, of particular individuals. The ordinances were neither the preemptive prohibitions of the legalistic mode of governmentality, nor yet the mechanistically responsive regulations of the security state.[2] They were, moreover, very much acts concerned with not merely ruling, but governing, locating their final cause in the social, moral, and spiritual purgation and redemption of the governed. Reflecting similar preoccupations, Scotland's 1563 witchcraft statute was pushed through parliament not by a political initiative to appropriate an expedient instrument of domination, but at the behest of a national Church pressing for a campaign of general moral

rectification (Levack, 1996: 101). It is in just this kind of individual and collective moral salvation, Foucault (2004: 137, 222-5) suggests, that the Christian pastoral form of governance, predicating the emergence of the modern western state at this very same historical juncture, finds its *raison d'être*.[3] At the same time, the articles concerning witchcraft reflect a centralizing program of radical social controls responding to a situation of social and economic conflict which, by the end of the fifteenth century, had become increasingly generalized as well as class-orientated (Federici, 2004: 49). In the sixteenth century, gender was incorporated into this matrix of tensions, as women who were perceived to stand in defiance of the patriarchal model of householding were increasingly classed among other unregulated, potentially disruptive social elements, and municipalities proscribed their independent residence. To the same end, public support was often withheld from children born outside of legally recognized unions (Wiesner, 1986: 6, 70). This moral panic over an imagined counter-culture of "masterless", sexually liberated women found artistic expression in contemporary depictions of witches' gatherings, often illustrating literature codifying the demonological discourse that was gradually finding its coherence at that same time (Zika, 1989: 34-5).

Anti-witchcraft legislation in the German states of the sixteenth century, then, was a means of regulating both public morality and public order, under an epistemological regime in which these fields were more or less identified with one another. As Paul Warde (2006: 165) notes, the early-modern "...state emerged in a moralised universe and from the very beginning (and well before the Reformation) spoke of the social order in moralised terms." And the governing authorities were well-equipped to enact this regulatory program, with jurisdiction to monitor and correct personal conduct extending into the confines of the private household (Warde, 2006: 43-4). Policing draws into the public sphere those particular practices and behaviors which it targets, and makes their domains of operation into public space. The generalization of state powers at this time was partially a result of subsistence instability drawing communities dependent upon agriculture into the sphere of central government. As populations were rapidly expanding in the sixteenth century, their survival increasingly relied upon, and became subject to, "...a broader political economy of market controls, poor relief and moralistic 'disciplining'"(Warde, 2006: 97). The conflation of moral and economic status entailed by such a regime can be seen in the rhetoric used by parties to disputes appealed to state authorities, wherein the less materially well-off disputants could be described as "unholy" and trouble-makers (Warde, 2006: 324).

The fundamentally sexual, in addition to economic and moral, bases of witchcraft legislation, and of the political crises to which it was partially responding, are evident in the "...continuity between the practices targeted by the witch-hunt and those banned by the new legislation...", also introduced in the sixteenth century, concerning adultery, prostitution, births outside of wedlock, and infanticide (Federici, 2004: 186). These statutes appear side-by-side with those concerning witchcraft in the law codes, drafted by the very same individuals. For instance, in the *Bambergensis*, articles 55, 64, and 131 address respectively the detection, interrogation, and execution of sorcerers, while article 156 delineates the punishment for infanticide, and 158 gives that for abortion (von Schwarzenberg, 1507). It is interesting to note in this regard that, in contrast to their English counterparts, the German ordinances addressing the practice of midwives during this period make no mention of witchcraft or superstition in justifying regulatory intervention in their practice, and the authorities seem to have generally appreciated the vital role these women played in public health (Wiesner, 1986: 64, 69). While the *Bambergensis* is vague as to what specific forms *maleficium* may take, the model established in 1487 by the *Malleus* – the intellectual standard of demonological discourse in the sixteenth century, the influence of which was already apparent in both learned and popular works within a decade of its publication (Broedel, 2003: 7; Zika, 1989: 27) – was overwhelmingly concerned with the threat that it posed to male reproductive potency and sexual dominance over women. For Institoris and Sprenger, witchcraft is born of women's uncontrollable carnal lust, and most typically manifest

> "...on the basis of seven different sorts of sorcery, by means of the tainting of the sexual act and fetuses in the womb with various acts of sorcery.... First, by diverting the minds of men to irregular love and so on. Second, by impeding the procreative force. Third, by taking away the limbs appropriate for this act. Fourth, by changing men into the shape of beasts through the art of conjuring. Fifth, by destroying the procreative force with reference to females. Sixth, by causing a miscarriage. Seventh, by offering babies to demons" (Mackay, 2009: 170-2).

The men responsible for formulating penal superstructures like that outlined in the *Bambergensis*, as well as actually conducting prosecutions on the basis thereof, were of a political class whose mercantilist ideology placed a premium on population growth as the material basis for international economic and military competitiveness (Federici, 2004: 181). In practice, these priorities meant, for example, that a criminal charge of infanticide was sometimes even more likely than one of witchcraft to be punished by execution: in Geneva between 1595 and 1712, over eighty percent of infanticide charges resulted in a death sentence, in contrast to only some fifteen percent of charges pressed for witchcraft (Wiesner, 1986: 71). In the German territories generally, the rate of executions for infanticide saw a particularly precipitous rise following the Thirty Years War, during which some districts had lost more than half their populace (Roper, 1996: 233-4; Warde, 2006: 30).

As Silvia Federici (2004: 17) contends in her analysis of the role of the witch hunts in the historical and structural

foundations of the modern western-global economic system, "...capitalism must justify and mystify the contradictions built into its social relations... by denigrating the 'nature' of those it exploits...", and nowhere would the processes of primitive accumulation find a model more conducive to suborning a population than in the specifically misogynistic demonization undertaken by the *Malleus*, its publication coeval with the most primordial stage of capitalism's genesis. Indeed, this book was an exemplar of "...the learned and popular literature on the nature of female virtues and vices..." through which women's social position was degraded to the point that their labor could be disengaged from the proletarian economy, stripped of market value, and "naturalized" (Federici, 2004: 100).

The bases for Institoris and Sprenger's highly gendered concept of the witch are complex, cutting across folk-knowledge and the conventional wisdom of clerical discourse, superstition and quasi-biological essentialism (Broedel, 2003: 167 ff.), but at least one element in its formation may lie within a confluence of popular movements arising from the social and economic turmoil of their era. As the commutation of feudal labor services with money payments, and the concomitant commercialization of the economy, reduced women's customary use-rights to common property, they would come to make up a disproportionately large percentage of those individuals who, between the thirteenth and fifteenth centuries, migrated to towns and cities in order to take advantage of the relatively greater scope for personal and professional autonomy that an urban socio-economy offered. At the same time, popular heretical movements, alongside their advocacy of spiritual renewal, were expressing resistance to both traditional and emerging economic relations of exploitation (Federici, 2004: 30-2). In the minds of the inquisitors, conditioned as they were to perceive the Devil's pervasive conspiracy behind disruptive worldly phenomena, an efflorescence of economically-informed religious heresy and a largely female population of masterless economic migrants could easily have become conflated in a singular diabolic hypostasis.

Sexual anxiety of a rather different kind may have been a defining influence upon another cohort of witch-hunting clerics. The German bishops responsible for the most extensive mass burnings of the early seventeenth century have been characterized as militant exponents of the Counter-Reformation, driven by a puritanical asceticism which they sought to impose upon a decadent world. As heirs to the Council of Trent, they were also among the first men forced to come to terms with the reality of clerical celibacy, and Wolfgang Behringer (1996: 87-8) has suggested that "...we should locate the proclivity for radical solutions among the first generation of bishops in the development of new personality traits, the spirit of fanatical severity with which they were brought up to treat themselves and others", an intensified moral consciousness that was experienced and acted upon by at least some of Germany's provincial princes as well.

The often explicit gynophobia that suffused, contextualized, and rationalized early-modern theories of witchcraft can also be detected in a more tacit form within some of the penal ordinances dealing with its prosecution. Returning to the *Bambergensis*, although article 55 explicitly mentions "fellowship and company with male or female sorcerers" (*...gemeinschafft vnd geselschafft mit zauberen oder zauberin...*), article 64 proceeds to uniformly refer to the suspect under interrogation using the third-person singular feminine pronoun *sie* (von Schwarzenberg, 1507). Von Schwarzenberg's unspoken assumption that the witch will be female is spelled out in the very grammar of his text.

THE TEXTUAL CONSTRUCTION OF PROSECUTION

The systematization of municipal and federal systems of law in early modern Germany saw the adoption of Roman legal theory, as well as prosecutorial procedure based upon judicial inquisition. With the advent of the latter, prosecution came to be based upon publicly-revealed information – knowledge available to discovery and action by the state – rather than depending upon individual accusation and judicial fiat. Likewise, under the influence of Roman law refracted through Italian jurisprudential thought, criminal penalties came to be determined by codified procedures, rather than the personal satisfaction of plaintiffs (von Bar, 1916: 207). While this rationalization of criminal justice should have notionally improved the demonstrative rigor of prosecutors and the equity appertaining to defendants, the activist orientation of inquisitorial investigation, combined with the courts' arrogation of responsibility for the public sphere, established the preconditions for mass witch-hunts circumscribed only by the limits of state jurisdiction (Midelfort, 1972: 68-9). The epistemological premises and inherent logic of inquisitorial procedure mechanistically reproduced a potentially endless cycle of interrogation and accusation. Often, only when the exponentially-expanding circle of implication touched the magistracy itself did cognitive dissonance and incredulity intervene to halt the process (Midelfort, 1972: 137, 158). The procedural premises and evidentiary standards introduced with these new methodologies would also have a formative influence upon the very textual structure and internal logic of the witchcraft statutes themselves.

Notwithstanding the autonomous investigative powers ceded to the state with the adoption of Roman legal practice in the German territories, the personal denunciation or accusation of an individual by a plaintiff or witness to criminal activity was still the essential axis upon which the prosecutorial process turned. The grounds for torture defined by article 55 of the *Bambergensis*, the commencement and cause from which depended the entire sequence culminating in execution – ideally after further denouncements had been extracted from the accused – only existed insofar as there was a volume of individual "suspicions" and antagonisms sufficient to comprise more than the sum of its constituents, to reflect and embody a public "repute" that could be ascribed to the ac-

cused (von Schwarzenberg, 1507). This kind of epistemological confidence in the evidentiary soundness of rumor underpinned the investigative methodology of the *Malleus* itself, dictating the standards by which its model inquisitorial process should be initiated (Broedel, 2003: 99). Indeed, Institoris and Sprenger imagine the witch to be pathologically, constitutionally disposed to incite antagonism and suspicion against herself, all but ensuring the legitimacy of popular censure as an index of guilt (Broedel, 2003: 143). It was for precisely this reason that the accumulation of a critical mass of coinciding denunciations was both chief pretext and key object of inquisitorial interrogative procedure (Midelfort, 1972: 148). This basis for the construction of guilt is further emphasized and augmented in the analogous article 44 of the *Carolina*, appending the further condition that "the same person is otherwise also infamous" (*...dieselbig persone dieselbenn sunst auch beruchtiget...*) (Kohler and Scheel, 1900: 25-6), tying attribution of the specific crime of witchcraft even more explicitly to public perception of moral character. Whereas texts like the *Malleus* effect a theoretical criminalization of individuals' internal dispositions and interpersonal conflicts, the witchcraft ordinances subjected community discourse, in the form of rumor and gossip, to the scrutiny and manipulation of the public prosecutor.

Just as the dictates of legal theory were reflected in the procedures prescribed in penal ordinances, the precise terminology of the statutes could itself, in turn, determine the specific contours of the charges brought against a suspect, as well as the strategy of a prosecutor in arguing the case. For example, the 1563 English Parliamentary Act "against conjurations enchantments and witchcrafts" specifically calls out, in addition to magical homicide, "...any invocations or conjurations of evil and wicked spirits, to or for any intent or purpose..." as subject to the death penalty upon the first offense (Rosen, 1970: 55). Then, in 1586 Joan Carson of Kent was charged with murdering a child by means of evil spirits she had invoked. Although she was acquitted on the charge of malefic murder *per se*, a prosecuting lawyer successfully argued that she was still culpable for invoking a spirit, and she was put to death (Gaskill, 1996: 265-6). The textual delineation of just what the crime of witchcraft could comprise provided the opening by which a prosecution committed to winning a conviction could press its case.

THEOLOGICAL AND PRAGMATIC CONSTRUCTIONS OF THE WITCH

One of the few changes introduced to the language of the articles treating sorcery in the *Carolina*, compared with that of its prototype in the *Bambergensis*, is the addition in article 52 of clauses, absent in the analogous *Bambergensis* article 64, directing the interrogator to ask from whom, and how, the suspect came to learn sorcery (*sy soll auch zu fragenn sein, Von weme sy solliche zauberey gelernet, Vnnd wie sy daran konen sey...*) (Kohler and Scheel, 1900: 29; von Schwarzenberg, 1507). This pursuit of further individuals indirectly culpable for the present suspect's crime – indeed, responsible for the very fact that she is a witch – seems to hint at the kind of paranoid hunt for a sprawling diabolic conspiracy, with demands that the accused provide further denunciations, that would characterize the worst mass panics of the sixteenth and seventeenth centuries. The presumption that such collaborators existed, entailing a direct role for witches in producing further witches, resonates with the model of witchcraft postulated by the *Malleus*, wherein human agency is key and "...the devil is strangely detached from the business of finding new recruits, preferring to delegate this sordid business to the witches themselves" (Broedel, 2003: 30). A question not often made explicit, however, is why the prosecutors, and the Church inquisitors before them, should have expected a witch to have been inducted into her avocation by some third party. The answer may lie in a structural analogy between the feudal oath of fealty, the ritual of Christian baptism, and the diabolic pact as depicted in its earliest folkloric sources. Jeffrey Burton Russell (1984: 81-2 n. 40) has demonstrated the derivation and reproduction of the pact concept from the legend of Theophilus of Cilicia, originating in the sixth century and entering the Latin west in the ninth, and popularized through the dramatic works of Gautier de Coinci and Rutebeuf in the twelfth and thirteenth respectively. In this original form, the sinner is introduced to the Devil by a sorcerer acting as intermediary. Likewise, in baptism the child is conveyed to the officiating priest by a godparent, and in the feudal contract the would-be vassal is introduced to the lord by a person already so enfeodiated (van Nuffel, 1966: 40-1, cit. in Russell, 1984: 82 n. 40). Thus, all three forms of pledge assume that the contracting parties are introduced by a third party already complicit in a covenant of the same type. This parallel may underlie the principle of conspiracy in the logic of the inquisitors' investigative strategy.

However, notably absent from the early witchcraft legislation in England as well as on the continent is any explicit reference to that very element which virtually defined the theoretical model of witchcraft espoused by theologically-informed inquisitors: the Devil. As John Bossy has argued, in fact, it was not until at least the late sixteenth century that witchcraft would come to be widely understood amongst the laity in terms of Devil worship. Only with the accession of the Decalogue around that time as the recognized standard model for Christian ethics did monolatry come to be conceived of as the essential foundation of the entire moral system, entailing the Devil's corresponding elevation as "...the anti-type of the Father, the source and object of idolatry...", with the willful violation of any Commandment – as the *maleficium* of witches undoubtedly was – therefore constituting implicit diabolatry (Bossy, 1988: 215, 229-30). As late as the English witch trials conducted by Matthew Hopkins in the 1640s, testimonial descriptions of the Devil assimilated to the learned theological model appear still conflated with more traditional manifestations of animal familiars, and Jim Sharpe (1996: 247-8) has argued that the

presence of more uniformly demonological elements is largely attributable to the interrogative interpolations of the witch-finders themselves. Even the *Malleus*, whose authors certainly embraced the theoretical model of witchcraft as a species of heresy, makes the witch's acts of *maleficium* the manifest sign of that heresy, and thus the concrete form of evidence required by an inquisitor or prosecutor (Broedel, 2003: 146).

Thus, while the idea of the diabolic pact was the defining element of the theologically construed understanding of what witchcraft was, and as such provided the rationale which impelled inquisitors, and perhaps public prosecutors, to presuppose and insist upon rooting out the conspirators who were the necessary corollary of a structure based upon such a pact, it was rather the need to deal with the perceived threat posed by concrete acts of *maleficium* performed by witches that primarily informed the thinking of public officials concerned with securing the "common good" – and whose legislative interventions were at least partially in response to the immediate concerns of their constituents. It was the "injury or disadvantage" inflicted through sorcery (*...durch Zauberey schaden oder nachteyl zufüget...*), not any act of illicit worship, for which article 131 of the *Bambergensis* ordered the penalty of death by fire (von Schwarzenberg, 1507). Material harm, not implicit heresy, constituted the witchcraft of the legislators. This was a witchcraft situated within a theodicy not, in fact, unlike that of the *Malleus*, in which both God and the Devil have largely ceded direct intervention in the cosmos and human affairs to their respective mortal agents, and the witch is the active mediator of Satan's will (Broedel, 2003: 5, 19).

The scholastic understanding that the crime of witchcraft was essentially one of heresy did, however, predicate the scope of penal law in its prosecution. For example, the electoral Saxon criminal constitutions of 1572, with their fundamental basis in the prescriptions of the *Carolina*, depended upon the logic of the scholastics in allocating the application of capital punishment for witchcraft. By ordering the death penalty for making a diabolic pact, regardless of whether any material harm was committed – the same punishment as for palpable *maleficium* – the Saxon constitutions in no way contradicted the *Carolina*'s injunction that victimless witchcraft be punished "according to the custom of the case", because the *Carolina* itself also made spiritual crimes capital offenses (Midelfort, 1972: 23). Likewise, the Württemberg *Landesordnung* of 1567, against a literal reading of the *Carolina* but in conformity with an interpretation by then becoming widespread, made its distinction not between magic with or without harm, but rather between magic that was or was not demonic in nature (Midelfort, 1972: 51, 117). The seeming ambivalence of these penal codes about magic as a physical, in addition to moral, threat reflects a theological position and witchcraft theory that had in fact become the prevailing orthodoxy across Württemberg in the second half of the sixteenth century. Developing at the University of Tübingen earlier in that century under the influence of the Lutheran reformer Johann Brenz, this school of thought adduced divine providence as the final cause of worldly misfortune and adversity, but maintained a possible role for human agency in this cosmic moral drama. While witches had no real power to magically cause harm, so the argument went, they could be deluded by the Devil into believing that the disasters which occurred providentially by God's will were in fact their own doing. Thus, witches remained morally culpable for the evils they willed, however impotently, while divine omnipotence and the chastising function of suffering were preserved (Midelfort, 1972: 36-9). Nonetheless, and despite – or perhaps because of – this theory's more or less explicit expression in dramatic works and popular pamphlets relating "news" of witchcraft, writers in the early seventeenth century still had cause to complain of the common people's ascription of misfortune to the activity of witches. This is unsurprising, given the confusion over the matter evinced by many learned writers themselves, whose inability to grasp the providentialist doctrine's nuances caused them to produce rather incoherent accounts of it (Midelfort, 1972: 46-9). In fact, the very logic of the theory harbored potential contradictions and a sharp polarization of conclusions to be drawn regarding not only the actual guilt of witches, but the appropriate degree of punishment for witchcraft as well (Midelfort, 1972: 52-3). For example, in contrast to the Saxon interpretation mentioned above, views similar to those of the Tübingen school influenced Friedrich III, Elector of the Palatinate from 1559 to 1576, to ban the prosecution of witchcraft outright (Midelfort, 1972: 57). But then, in a diametric reversal, the code promulgated by the new Elector in 1582 followed Saxony in construing witchcraft as a form of heresy, and therefore punishable with the same severity as *maleficium* (Midelfort, 1972: 69). Or again, in 1631 the Strasbourg law faculty, in a parsing of article 109 of the *Carolina* that was either hopelessly confused or else an inspired effort of biopolitical expediency,[4] concluded that witchcraft not resulting in material harm still warranted execution – albeit only by means other than burning (Midelfort, 1972: 136).

MEDIA AND IMPEDIMENTS

Elizabeth Eisenstein has argued that print media played a decisive role in the witch trials of the sixteenth and seventeenth centuries by amplifying the concepts and preoccupations that motivated them. In particular, she suggests that the historical contingency of the mass panic phenomena characterizing many instances of intensified prosecution can be explained in terms of the specific timing of the publication and circulation of certain ideologically galvanizing works (Eisenstein, 1979: 433-9). That the textual dissemination of both a specifically demonological conception of witchcraft, and of concern about it as a real and present threat, influenced the juridical relationship with witchcraft allegations is evident from the situation in southwestern Germany in the latter half of the sixteenth century, where the first mass trials in the 1560s spawned a proliferation of pamphlets and treatises on the

topic. By the late 1580s, local administrators in nearby Württemberg, men already primed by the popular theological literature of the time to perceive the world and its inhabitants as perpetually threatened by spiritual influences inclining them to sin, had thoroughly absorbed the general atmosphere of panic generated by the witch-trial publications' descriptions of the literally diabolical crimes that were allegedly being committed all around them (Bever, 2008: 72-3, 384-6). The early-modern witch trials took place within a self-reinforcing media ecology of sensationalizing publications. With content derived from the trials themselves, these media were produced for, and reproduced by, the literate elites whose authority ultimately determined the scope and outcome of those trials.

As mentioned above, the formulation and implementation of new policy by the German states, including disciplinary policy addressing the supposed witchcraft phenomenon, was shaped by processes of consultation conveyed both vertically across multiple levels of government, and horizontally across jurisdictional boundaries. Upon a request in 1590 from Duke Wilhelm V of Bavaria for advice on combating witchcraft, the jurists of Ingolstadt resolved to study not only how the matter was practically dealt with in Augsburg and Eichstätt, but also the advice of the *Malleus* (Lea, 1939: 1125). The influence of this book as a source of methodological guidance, and the ramifications thereof for the prosecution of witchcraft from the early sixteenth century forward, are well established (Broedel, 2003: 7). Adoption of its theories, however, was not so universal or unambiguous as its infamy may seem to suggest. Indeed, neither the *Malleus* nor the *Summis desiderantes affectibus* of Innocent VIII, which Institoris and Sprenger adduced to justify their work, both literary and practical, introduced any legal or doctrinal innovations (Midelfort, 1972: 22). And in contrast to the very unspecific language actually used by ordinances like the *Bambergensis* and *Carolina* in characterizing witchcraft, Hans Peter Broedel (2003: 34) has observed that "...a witch-trial based upon the model in the *Malleus* is only practical if one accepts at the outset the conception of the witch and witchcraft that it has constructed."

While the law codes of the imperial government could serve as a model for provincial legislators, the independence and prerogatives so dear to the territorial princes and free cities meant that the promulgation and interpretation of criminal law was extremely heterogeneous. Actual implementation of ordinances with anything like consistency across an entire duchy, to say nothing of the inter-territorial pretensions of the *Carolina*, was always complicated by the relative autonomy of the larger towns, as well as the often very different values-systems operating at different levels of the social and political hierarchy. In sixteenth and early seventeenth-century Württemberg, for instance, while the Sixth Provincial Ordinance of 1567 finally followed the 1532 imperial *Carolina* in imposing the death penalty for injurious magic, replacing the relatively skeptical law code of 1552 (Bever, 2008: 352, 383), the state-level monopolization of executive and judicial functions in the office of the duke created an administrative bottleneck, leaving the communes and district governors relatively free to exercise those powers locally. This made the interpretation and implementation of laws subject to the interests of particular geographically and socioeconomically circumscribed demographic segments, to say nothing of the idiosyncratic discretion of particular officials, all of which overwhelmingly tended to favor adult male property-owners (Warde, 2006: 25, 99, 150, 156; Bever, 2008: 350-1).

Nor could local prosecution be expected to entirely cohere in practice with prevailing elite ideological trends; a destructive hailstorm around Stuttgart in 1562 led to the execution of several women, despite the preachers of Württemberg having long repudiated the ascription of natural disasters to witchcraft (Warde, 2006: 97). During the Thirty Years War, conditions of extreme privation and existential anxiety led to a proliferation of accusations, and the pandemic breakdown in constitutional legitimacy and effective authority often allowed prosecutions to proceed outside of any real judicial oversight (Wilson, 2009: 577). In any case, state administration, especially in the smaller territories where it was typically underdeveloped, had little effective recourse in the face of a recalcitrant communal consensus (Behringer, 1996: 89; Warde, 2006: 205). It would take three decades of social collapse and institutional failure in the first half of the seventeenth century to finally legitimize by force the idea of an interventionist sovereignty at both the intra- and inter-territorial levels (Wilson, 2009: 551-7). The extent to which the early modern state could delimit and moderate local prosecution of capital – and generally highly emotive – crimes like *maleficium* can be seen as a metric of its coalescing power.

As we have seen, legislation pertaining to witchcraft – and, more immediately, the interpretation and implementation of such laws – was never monolithic in its motives, intentions, or effects. Likewise, many of the higher legislative and juridical institutions of imperial Germany and elsewhere evinced a marked ambivalence toward prosecuting witches, even long before the general decline in frequency of trials for witchcraft. Skepticism, not necessarily of the reality of witchcraft, but of the possibility of reliably discerning its presence in any given case, came to ally with the very real political and disciplinary practicalities of territorial governance to discourage any especially zealous or concerted efforts toward general enforcement. And while the arms of the state may have recognized the latent power at hand in the authority to define and enforce social and doctrinal norms, they were all the more aware of "...the enormous financial implications of creating efficient agencies..." to do so (Briggs, 1996: 60). Any program of concrete political theology, any plan for realizing the "common good", was ultimately answerable to an arbiter more resolute than even the most severe conscience – the exchequer.

NOTES

1 "If someone is reputed by other people to study sorcery or to threaten to ensorcell someone, and to have sinful fellowship and

company with male or female sorcerers, or to have used such suspicious things, behaviors, words, and signs, such as characterize sorcery, this gives a reliable indication of sorcery" (all translations are my own).

2 See Foucault, 2004: 20, 25, 69 on these modes of governmentality.

3 Nonetheless, ordinances establishing systematic regulation of public morality *per se* were not issued in Germany until some time after the conclusion of the Thirty Years War, under Lutheran initiative (Warde, 2006: p. 179).

4 See Foucault, 2003: 255-6 on the 'murderous function of the state' in eliminating its internal enemies.

REFERENCES

von Bar, C. L. (1916) *A History of Continental Criminal Law*. Translated by T. S. Bell. Little, Brown, and Co., Boston.

Bever, E. (2008) *The Realities of Witchcraft and Popular Magic in Early Modern Europe*. Palgrave, New York.

Behringer, W. (1996) "Witchcraft Studies in Austria, Germany and Switzerland". In *Witchcraft in Early Modern Europe: Studies in Culture and Belief*, edited by Barry, J., et al. Cambridge University Press, Cambridge: 64-95.

Bossy, J. (1988) "Moral Arithmetic: Seven Sins Into Ten Commandments". In *Conscience and Casuistry in Early Modern Europe*, edited by Leiters, E. Cambridge University Press, Cambridge: 214-34.

Bostridge, I. (1996) "Witchcraft Repealed". In *Witchcraft in Early Modern Europe: Studies in Culture and Belief*, edited by Barry, J., et al. Cambridge University Press, Cambridge: 309-34.

Briggs, R. (1996) "'Many Reasons Why': Witchcraft and the Problem of Multiple Explanation". In *Witchcraft in Early Modern Europe: Studies in Culture and Belief*, edited by Barry, J., et al. Cambridge University Press, Cambridge: 49-63.

Broedel, H. P. (2003) *The* Malleus Maleficarum *and the Construction of Witchcraft*. Manchester University Press, Manchester.

Federici, S. (2004) *Caliban and the Witch*. Autonomedia, Brooklyn.

Foucault, M. (2003) *Society Must Be Defended: Lectures at the Collège de France, 1975-1976*, edited by Bertani, M. and Fontana, A. Translated by D. Macey. Picador, New York.

Foucault, M. (2004) *Security, Territory, Population: Lectures at th Collège de France, 1977-1978*, edited by Senellart, M. Translated by G. Burchell. Palgrave Macmillan, New York.

Gaskill, M. (1996) "Witchcraft in Early Modern Kent: Stereotypesand the Background to Accusations". In *Witchcraft in Early Modern Europe: Studies in Culture and Belief*, edited by Barry, J., et al. Cambridge University Press, Cambridge: 257-87.

Kohler, J. and Scheel, W. (editors). (1900) [1532] *Die Peinliche Gerichtsordnung Kaiser Karls V: Constitutio Criminalis Carolina*. Verlag der Buchhandlung des Waisenhauses, Halle.

Kotsko, A. (2017) *The Prince of This World*. Stanford University Press, Stanford.

Krodel, G. G. (1982) "Law, Order, and the Almighty *Taler*: The Empire in Action at the 1530 Diet of Augsburg". *Sixteenth Century Journal*, 13: 75-106.

Levack, B. P. (1996) "State-Building and Witch Hunting in Early Modern Europe". In *Witchcraft in Early Modern Europe: Studies in Culture and Belief*, edited by Barry, J., et al. Cambridge University Press, Cambridge: 96-115.

Mackay, C. S. (2009) *The Hammer of Witches: A Complete Translation of the* Malleus Maleficarum. Cambridge University Press, Cambridge.

Midelfort, H. C. E. (1972) *Witch Hunting in Southwestern Germany 1562-1684*. Stanford University Press, Stanford.

van Nuffel, H. (1966) "Le pacte avec le diable dans la littérature médiévale". *Anciens pays et assemblées d'états*, 39: 27-43.

Roper, L. (1996) "Witchcraft and Fantasy in Early Modern Germany". In *Witchcraft in Early Modern Europe: Studies in Culture and Belief*, edited by Barry, J., et al. Cambridge University Press, Cambridge: 207-36.

Rosen, B. (editor). (1969) *Witchcraft*. Edward Arnold, London.

Russell, J. B. (1984) *Lucifer: The Devil in the Middle Ages*. Cornell University Press, Ithaca.

von Schwarzenberg, J. (1507) *Bambergische Peinliche Halsgerichtsordnung*. Bamberg: Hans Pfeil. http://www.uni-mannheim.de/mateo/desbillons/bambi.html. [accessed 15/September/2017]

Sharpe, J. (1996) "The Devil in East Anglia: the Matthew Hopkins Trials Reconsidered". In *Witchcraft in Early Modern Europe: Studies in Culture and Belief*, edited by Barry, J., et al. Cambridge University Press, Cambridge: 237-54.

Warde, P. (2006) *Ecology, Economy and State Formation in Early Modern Germany*. Cambridge University Press, New York.

Wiesner, M. E. (1986) *Working Women in Renaissance Germany*. Rutgers University Press, New Brunswick.

Wilson, P. H. (2009) *Europe's Tragedy: A History of the Thirty Years War*. Allen Lane, London.

Zika, C. (1989) "Fears of Flying: Representations of Witchcraft and Sexuality in Early Sixteenth-Century Germany". *Australian Journal of Art*, 8: 19-47.