A Matter of Life, Death, and Legal Procedure

What every Texas lawyer should know about the European witch hunts.

BY PETER S. POLAND

Salem—over centuries the word has become sweet like Halloween candy. Twenty people were judicially executed there for witchcraft in 1692, a figure that is small enough to companion with tourism and hocus pocus revelry. But not all places associated with witch hunts can be commercialized. Take Bamberg in present-day Germany, for instance, where hundreds were incinerated for witchcraft. Or, lands currently encompassing the tiny country of Liechtenstein, which judicially executed one-tenth of its population for allegedly being witches. These atrocities did not occur in the era of the Visigoth sack of Rome, the plundering Vikings, or the religious zeal of the Crusades—they took place in the era of William Shakespeare, Isaac Newton, and John Locke.
During the early modern period of Europe from 1450-1750, approximately 45,000 people—75 percent women—were executed in public spectacles of rope, flame, and agony for the crime of witchcraft. But while these European witch hunts produced an arresting death toll, they diverge from orchestrated massacres and pogroms of the recent past in a significant way: the European witch hunts were an exclusively judicial phenomenon conducted in public. Rarely were alleged witches rounded up at night, carried off to a hidden place, and executed extrajudicially. In fact, from the initial accusal, to physical examination by a magistrate, to jail, to trial, and to hangman’s noose (in England) or blazing stake (on the continent), the alleged witch’s journey was conducted exclusively by the state’s judicial system.

What, as Texas judges and lawyers, may we learn from the European witch hunts? Doubtless, the subject is rich with information for anthropologists, historians, and sociologists. But does this terrible period in the legal history of Europe offer information particularly concerning our profession, the profession most patently implicated in its perpetration? It does. Because of our legal training, we are uniquely equipped to understand one of the largest judicial persecutions of a perceived minority in history. We must acknowledge that our cherished Western legal system can dispense injustice as readily as justice in certain historical and social contexts. By recognizing the potential for this inversion, we may reduce its incidence in years to come.

STATUTORY WITCHCRAFT

Ancient Precedent. Since deep antiquity, humanity has ascribed magical powers to certain members of society, often women. To the ancients, witchcraft constituted harm to others by supernatural means—a concept embodied in the Latin term for such actions, maleficia. The first criminalization of witchcraft is traced to the Code of Hammurabi. By the period of the Roman Empire, maleficium was a crime punished by incineration. English legislation criminalizing witchcraft traces to the seventh century and designated a female witch as a wicce and a male witch as a wicca.

Early Modern Criminal Codes. During the 14th century, some criminal trials for maleficia in Ireland and Switzerland took an unprecedented turn. Specifically, the defendants were charged not only with performing harmful magic but also with worshiping Satan at nocturnal, communal gatherings (sabbats), where they enacted a blasphemous liturgy of ritual murder. Theological and judicial elites soon began pondering the origin of a witch’s supernatural powers, and all fingers pointed to one source: Satan. Strongly contributing to notions of diabolic witchcraft was the publication, in 1486, of the Malleus Maleficarum (“Hammer of Witches”). Authored by two Dominican inquisitors, the Malleus helped crystallize the beliefs that witches obtained their powers from Satan and that it was the judicial system’s duty to effect their eradication. For European elites during the early modern period, witchcraft was a “cumulative” crime encompassing both maleficia and diabolism. In short, witchcraft had become a heresy because of its new satanic component.

European legislation on witchcraft soon embraced the idea of the diabolic witch who perpetrated her maleficia through, and in honor of, the devil. Sir Edward Coke, England’s attorney general, helped draft King James I’s witchcraft statute of 1604, which punished both maleficia and consultation with evil spirits with death. In 1532, Emperor Charles V implemented Constitutio Criminalis Carolina, a remarkable legal code that governed the vast territories of the Holy Roman Empire. Notably, only a small paragraph, Article 109, was devoted to witchcraft, and provided in part: “When someone harms people or brings them trouble by witchcraft, one should punish him with death, and one should use the punishment of death by fire.” Avid witch hunters were displeased with the Carolina’s failure to explicitly criminalize commerce with the devil. Within the same century as its passage, many German territories had begun disregarding Article 109, while others, like Saxony, passed their own witchcraft statutes with diabolism codified prominently. For example, the Saxon statute provided: “If anyone, forgetting his Christian faith, sets up a pact with the Devil or has anything to do with him, regardless of whether he has harmed anyone by magic, he should be condemned to death by fire.”

Cumulative notions of witchcraft were the primary catalyst of the European witch hunts. There was a profound fear among the European judiciary and nobility that a clandestine, satanic cult was attempting to overthrow Christendom. This fear is perhaps best exemplified in the following account of the persecutions at Würzburg in 1629, at the peak of the Empire’s Hexenwahn (“witch craze”):

It is true that, of the people of my Gracious Prince here, some out of all offices and faculties must be executed: clergymen, electoral councilors and doctors, city officials, court assessors, several of whom Your Grace knows. There are law students to be arrested. … The notary of our Church consistory, a very learned man, was yesterday arrested and put to the torture. In a word, a third part of the city is surely involved. The richest, most attractive, most prominent of the clergy are already executed. … I have seen put to death children of seven, promising students of ten, twelve, fourteen, and fifteen.
LEGAL OBSERVATIONS

Some three-quarters of all individuals executed for witchcraft in Europe in the early modern period lived in districts of the Empire that presently encompass much of Germany.16 England contributed a disproportionately low number of witch executions, while the lands constituting present-day France, Italy, and Switzerland yielded respectively increasing contributions. The disparate percentage of guilty verdicts between England and the European continent is primarily attributable to their radically different criminal law systems: accusatorial law and inquisitorial law, respectively.

In the 13th century, a judicial metamorphosis occurred across Europe. The irrational standards of trial by ordeal were abandoned for the logical, evidence-driven systems of jurisprudence that still operate, in refined forms, to this day. Unlike contemporary Western criminal procedure where the state prosecutes criminals on behalf of society, private individuals were required to both initiate and prosecute criminal actions in early modern England under accusatorial law. The accuser, who also was the prosecutor, was responsible for gathering and setting forth evidence against the alleged criminal before judge and jury. Thus, oddly, the Crown relied upon the forensic rhetoric of a man or woman untrained in lawyering to successfully prosecute the deadliest criminals of the realm. In the vast majority of English criminal cases, neither the accuser nor the defendant was represented by counsel.17

Unlike the accusatorial procedure of early modern England, continental courts applying inquisitorial law relied upon the state to prosecute crime, and judges had a judicial duty to personally develop evidence in prosecutorial fashion.18 However, much like their English counterparts, criminal defendants in German secular courts were not permitted counsel. The following are observations concerning the role of legal procedure during the European witch hunts.

Judicial Torture. While alien to members of the legal profession of our era, judicial torture frequently was used in early modern Europe to extract confessions. English common law forbade the use of torture, except in cases of treason.19 In contrast, Pope Innocent IV introduced torture into inquisitorial procedure in 1254, and the legal codes of continental Europe later codified its use. According to the Carolina, torture was to be applied when “the weight of suspicion [was] greater than the weight of exculpation.”20

Confessions to communal, diabolic witchcraft were a product of judicial torture.21 Specifically, judicial officials would construct a diabolic narrative during the torture session of an alleged witch and ask her to name accomplices.22 This process exponentially expanded the scope of a hunt with each torture session. In court proceedings that did not implement torture, confessions to communal satanic worship and the murderous sabbat nearly were nonexistent. In assessing the disparity between the English and German rates of witch convictions, the words of historian Norman Cohn are on point: “Massive witch-hunts occurred only where the concept of witchcraft included the sabbat and where judicial procedure included torture.”23 For the most part, England lacked both of these criteria. In England, the witch often was perceived to perform her maleficia alone, for spite, envy, or revenge, and without the devil’s aid. But on the continent, elites believed the witch worked maleficia in furtherance of her communal religion of satanism.

Suspension of Centralized Rule of Law. For a spell, during the English civil war in the 1640s, England endured its most virulent episode of witch hunting, made possible by judicial torture. In wartime chaos, English Assize courts, the typical forum for witch trials, ceased to operate. During this brief period, opportunists, like infamous witch-hunter Matthew Hopkins, prospered. Inexperienced judges oversaw ad hoc witch trials and ordered the torture of alleged perpetrators to obtain confessions. For the first time in English witch confessions, the devil appeared prominently.24 However, with the resumption of the Assizes and restoration of order, England returned to its relatively restrained conviction rate.

Suspension of Rules of Procedure. Several procedural safeguards governed torture under the Carolina. First, the utterances of a defendant, including confessions of guilt and accusations against accomplices, could not be recorded during torture and had no probative value.25 Immediately following torture, however, the defendant would be given a chance to provide a recorded and legally admissible confession. Additionally, if the defendant did not initially confess, a second application of torture could not be given unless new inculpatory evidence emerged.26 These protections regularly were disregarded, however. In numerous lands, local criminal procedure superseded Imperial law. Additionally, German courts perceived witchcraft as crimen exceptum (“extraordinary crime”), justifying divergence from ordinary procedure, such as unrestricted torture with regard to duration and severity.27

Judicial Education, Quality, and Jurisdiction. Those prosecuted for witchcraft in England had a higher acquisitual rate than in nearly every other Western European country.28 This is attributable to England’s judicial system, which—in addition to the absence of judicial torture—was superior to that of the Empire’s for several reasons. First, English judges were professionally trained in the law, while German judges often were laymen. Second, English judges ruled with relative autonomy, whereas German judges, as directed by the Carolina and tradition, usually deferred to the decisions of university professors—often exponents of cumulative notions of witchcraft and
perpetuators of witch hysteria—when resolving issues of moderate to high complexity. Third, the centralized courts of England assured both judicial consistency and enforceability of rulings. In contrast, the German courts applied competing Imperial and local laws, and enforcement of rulings was problematic outside of individual territories. Moreover, the Imperial Reichstag lacked means of enforcement, and the highest court lacked jurisdiction over much of the Empire.

**The Jury System.** Perhaps contrary to expectation, England's relatively restrained judicial treatment of alleged witches does not appear to be the result of its jury system. While jurors sometimes acquitted a defendant charged with witchcraft who was guilty in the eyes of the judge, “more commonly, it would seem, jurors were likely to be hostile.” In high profile witchcraft cases, some judges were reluctant to grant reprieve to the defendant following a jury's conviction for fear of riot.

**Appellate Review.** Unlike most countries in Western Europe, England lacked a formal felony appeals procedure until the 19th century. The Empire possessed an appellate system, but its highest court, the Reichskammergericht, was ineffective because the privileges granted by German kings in earlier eras exempted many citizens from the high court's jurisdiction and because it could be hyperbolically slow (it once deliberated more than 40 years in a witchcraft case in the mid-16th century). Jurists seeking an equitable appellate model need have looked no further than France. At the height of a witch panic in Montgaillard, the appellate Parlement of Toulouse affirmed fewer than one in 10 capital sentences against alleged witches. And the Parlement of Paris, the most highly regarded among France's appellate courts, affirmed only 12 sentences of execution after 1610 and reversed them by the hundreds.

**CONCLUSION**

Those prosecuted for the capital crime of witchcraft in the early modern period of Europe lacked most of the defenses that are current fixtures within modern Western law. Alleged witches were tortured and lacked counsel and, with some French exceptions, lacked effective appellate review.

The Malleus concludes with a “prayer” that is consistent with the disturbing spirit of the treatise: “Praise be to God, extermination to heretics, peace to the living, and eternal repose to the dead. Amen.” The zealous authors of the Malleus have their counterparts in every region of the world, in every generation, and heresies continue to flourish, theologially and secularly, in every era. But the European witch hunts are unique because, to a degree unrivaled in history, the judiciaries of Europe adopted the guiding compass of history’s radical theologians, warlords, and dictators—extermination to heretics.

**NOTES**

3. Id. at 1.
4. Id. at 74.
10. Behringer, supra note 1 at 57.
12. Long before its unification in 1871, the “Germany” of early modern Europe was a patchwork of more than 300 territories, each somewhat autonomous, but nominally under the banner of the Holy Roman Empire.
14. Id. at 103-04.
17. Durston, supra note 11 at 374.
21. Lyndal Roper, Witch Craze 69 (Yale University Press, 2004); Cohn, supra note 8 at 231.
23. Cohn, supra note 8 at 233.
25. Constitutio Criminalis Carolina § 58, reprinted in Langbein, supra note 18 at 283 (“And what the tortured person says shall not be taken down or transcribed while he is being tortured, rather he shall make his statement when he is released from the torture.”).
27. Id. at 193-94.
30. Sharpe, supra note 24 at 217.
31. Durston, supra note 11 at 628.
32. Behringer, supra note 1 at 85.

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