CRIMES WITHOUT CRIMINALS

Witchcraft and its Control in Renaissance Europe

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THE SOCIOLOGICAL STUDY OF DEVIANT behavior has begun to focus less on the deviant and more on society's response to him.[1] One of several implications of this perspective is that a major concern of the sociology of deviance should be the identification and analysis of different kinds of systems of social control. Particularly important is the analysis of the impact of different kinds of control systems on the way deviant behavior is perceived and expressed in societies.

By playing down the importance of intrinsic differences between deviants and conventional people, and between the social situation of deviants and that of nondeviants, the focus on social response implies

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1. This approach is presented in the following works, among others; H. S. BECKER, OUTSIDERS (1963); K. T. ERIKSON, WAYWARD PURITANS (1966); J. I. Kitsuse, *Societal Response to Deviance; Some Problems of Theory and Method*, 9 SOCIAL PROBLEMS 247-56 (Winter 1962); E. GOFFMAN, STIGMA (1963); and ASYLUMS (1962). Earlier general statements in a similar vein can be found in E. M. LEMERT, SOCIAL PATHOLOGY (1951); and F. TANNENBAUM, CRIME AND THE COMMUNITY (1951).

much more than the commonplace idea that society defines the kinds of behavior that will be considered odd, disgusting, or criminal. It implies that many elements of the behavior system of a given kind of deviance, including such things as the rate of deviance and the kinds of people who are identified as a deviant, will be significantly affected by the kind of control system through which the behavior is defined and managed.

In this paper, I attempt to add to the rather small body of research on kinds of social control systems and their impact.[2] The subject is witchcraft in Renaissance Europe, and in particular, the way in which the phenomenon of witchcraft differed in England and in continental Europe,[3] as a result of differences in their legal systems. I will show that the English and the continental legal systems during this period represented the two ends of a continuum along which different social control systems may be placed, and I will suggest some general ways in which each kind of control system affects the deviant behavior systems in which it is involved. Along the way, however, I will also suggest that the *degree* to which a social control system can influence the character of a deviant behavior system is variable and depends in part on the *kind* of behavior involved and the particular way it is socially defined.

WITCHCRAFT AS DEVIANCE

Something labeled witchcraft can be found in many societies, but the particular definition of the crime of witchcraft which emerged in Renaissance Europe was unique. It consisted of the individual's making, for whatever reason and to whatever end, a pact or covenant with the Devil, thereby gaining the power to manipulate supernatural forces for anti-social and un-Christian ends. What was critical was the pact itself: not the assumption or use of the powers which it supposedly conferred, but the willful renunciation of the Faith implied by the act of Covenant with the Devil. Thus, on the Continent, witchcraft was usually prose-

2. One interesting study along these lines is E. M. SCHUR, NARCOTIC ADDICTION IN ENGLAND AND AMERICA; THE IMPACT OF PUBLIC POLICY (1963).

3. ERIKSON, *supra* note 1, discusses some aspects of witchcraft in America, which unfortunately cannot be discussed here without unduly lengthening the paper. For the curious, though, it should be noted that the American experience was in general much closer to the English than to the continental experience, particularly in terms of the small number of witches executed. For anyone interested in American witchcraft, Erikson's discussion and bibliography is a good place to start.

cuted as a form of heresy, and in England as a felony whose essence was primarily mental.[4] Witchcraft, then, came to be defined as a sort of thought-crime. It was not necessarily related to the practice of magic, which was widespread and had many legitimate forms. There were statutes forbidding witchcraft before the Renaissance, but the new conception of witchcraft involved important changes in both the nature and the seriousness of the crime. Early legislation, throughout Europe, had tended to lump witchcraft and magic in the same category, and to deal with them as minor offenses. In ninth-century England, the Law of the Northumbrian Priests held that if anyone " . . . in any way love witchcraft, or worship idols, if he be a king's thane, let him pay X half-marks; half to Christ, half to the king. We are all to love and worship one God, and strictly hold one Christianity, and renounce all heathenship." [5]

Similar mildness is characteristic of other early English legislation, while the Catholic Church itself, in the 13th century, explicitly took the position that the belief in witchcraft was an illusion.[6] In no sense were witches considered by ecclesiastical or secular authorities to be a serious problem, until the 15th century.

I cannot speculate here on the process through which the early conception of witchcraft as, essentially, the witch's delusion evolved to the point where the witch was believed to have actual powers. Suffice it to say that such a shift in definition did take place;[7] that during the

4. Elizabeth's statute of 1563 made witchcraft punishable by death only if it resulted in the death of the bewitched; witchcraft unconnected with death was a lesser offense. However, in 1604 James I revised the statute to invoke the death penalty for witchcraft regardless of result. On this point see R. T. DAVIES, FOUR CENTURIES OF WITCH BELIEFS 15, 41-42 (1947).

5. Quoted in M. MURRAY, THE WITCH-CULT IN WESTERN EUROPE 22 (1962). Other early legislation is also quoted by Murray, and can also be found in C. L'ESTRANGE EWEN, WITCH HUNTING AND WITCH TRIALS 1-5 (1929).

6. This position was formulated in a document known as the CAPITULUM EPISCOPI, apparently written in 1215, which molded Church policy for over 200 years. It reads in part as follows:

> Some wicked women . . . seduced by the illusions and phantasms of demons, believe and profess that they ride at night with Diana on certain beasts with an innumerable company of women, passing over immense distances . . . priests everywhere should preach that they know this to be false, and that such phantasms are sent by the Evil Spirit, who deludes them in dreams . . .

Quoted in 3 H. C. LEA, A HISTORY OF THE INQUISITION IN THE MIDDLE AGES 493 (1888), and in MURRAY, *supra* note 5, at 22.

7. The shift, however, did not take place all at once, nor did it take place without important ideological struggles both within and beyond the Church; a number of important figures remained skeptical throughout. Interesting materials on this process can be found in 1 H. C. LEA, MATERIALS TOWARD A HISTORY OF WITCHCRAFT (1939).

15th and 16th centuries a new theological and legal conception of witchcraft emerged, which amounted to an official recognition of a hitherto unknown form of deviance. In 1484, Pope Innocent IV issued a Bull recognizing the seriousness of the crime of witchcraft, affirming its reality, and authorizing the use of the Holy Inquisition to prosecute it with full force. As an indication of the state of thinking on witchcraft at this time, this document serves admirably.

> It has recently come to our attention, not without bitter sorrow, that . . . many persons of both sexes, unmindful of their own salvation and straying from the Catholic Faith, have abandoned themselves to devils . . . and by their . . . accursed charms and crafts, enormities and horrid offenses, have slain unborn infants and the offspring of cattle, have blasted the produce of the earth . . . these wretches furthermore afflict and torment men and women . . . with terrible and piteous pains. . . . Over and above this they blasphemously renounce the Faith which is theirs by the Sacrament of Baptism, and do not shrink from committing and perpetrating the foulest abominations and filthiest excesses . . . [8]

A few years later, the new conception of witchcraft was given practical impetus with the publication of a manual known as the *Malleus Maleficarum*, or Witch-Hammer, written by two German Inquistors under Papal authorization, which set forth in systematic form the heretofore diffuse beliefs on the nature and habits of witches, means for their discovery, and guidelines for their trial and execution.[9] At this point, the witch persecutions in continental Europe entered a peak phase which lasted into the 18th century. Estimates of the number of witches executed in Western Europe vary, but half a million is an average count.[10] Although there were consistently dissident voices both within and outside of the Church, the prevalence of witches was a fact widely accepted by the majority, including a number of the most powerful intellects of the time. Luther and Calvin were believers, as was Jean Bodin, who wrote an extremely influential book on witches in which he argued, among other things, that those who scoffed at the reality of witches were usually witches themselves.[11] Witchcraft was used as an explanation for virtually everything drastic or unpleasant that occurred; leading

8. Quoted in DAVIES, *supra* note 4, at 4.

9. This remarkable work has been translated. J. SPRENGER & H. KRAMER, MALLEUS MALEFICARUM (M. Summers transl. 1948).

10. This estimate is from G. L. KITTREDGE, NOTES ON WITCHCRAFT 59 (1907).

11. DAVIES, *supra* note 4, at 25, 5-9.

one Jesuit critic of the persecutions to declare: "God and Nature no longer do anything; witches, everything."[12] In the 15th century, a delayed winter in the province of Treves brought over a hundred people to the stake as witches.[13]

Once officially recognized, the crime of witchcraft presented serious problems for those systems of control through which it was to be hunted down and suppressed. The fact that no one had ever been seen making a pact with the Devil made ordinary sources of evidence rather worthless. Ordinary people, indeed, were in theory unable to see the Devil at all; as an eminent jurist, Sinistrari, phrased the problem, "There can be no witness of that crime, since the Devil, visible to the witch, escapes the sight of all beside."[14] The attendant acts—flying by night, attending witches' Sabbaths, and so on—were of such nature that little reliable evidence of their occurrence could be gathered through normal procedures. The difficulty of proving that the crime had ever taken place severely taxed the competence of European legal institutions, and two different responses emerged. In England, the response to witchcraft took place within a framework of effective limitations on the suppressive power of the legal order and a relatively advanced conception of due process of law; on the Continent, the response took place within a framework of minimal limitations on the activity of the legal system, in which due process and legal restraint tended to go by the board.

CONTINENTAL EUROPE: REPRESSIVE CONTROL

In continental Europe, people accused of witchcraft were brought before the elaborate machinery of a specialized bureaucratic agency with unusual powers and what amounted to a nearly complete absence of institutional restraints on its activity. Originally, the control of witchcraft was the responsibility of the Inquisition. After the disappearance, for practical purposes, of the Inquisition in most of Western Europe in the 16th century, witches were tried before secular courts which retained for the most part the methods which the Inquisition had pioneered.[15] This was as true of the Protestant sectors of Europe—England excepted—

12. Father Friedrich Spee, quoted in KITTREDGE, *supra* note 10, at 47.
13. LEA, *supra* note 6, at 549.
14. Quoted in G. PARRINDER, WITCHCRAFT: EUROPEAN AND AFRICAN 76 (1958).
15. LEA, *supra* note 7, at 244.

as it was of those which remained Catholic.[16] The methods were effective and extreme.

Ordinary continental criminal procedure approximated the "inquisitorial" process, in which accusation, detection, prosecution and judgment are all in the hands of the official control system, rather than in those of private persons; and all of these functions reside basically in one individual.[17] The trial was not, as it was in the "accusatorial" procedure of English law, a confrontative combat between the accuser and the accused, but an attack by the judge and his staff upon the suspect, who carried with him a heavy presumption of guilt. Litigation was played down or rejected.[18]

> The system of procedure called inquisitorial is more scientific and more complex than the accusatory system. It is better adapted to the needs of social repression. Its two predominant features are the secret inquiry to discover the culprit, and the employment of torture to obtain his confession.[19]

Above and beyond the tendencies to repressive control visible in the inquisitorial process generally, the establishment of the Holy Inquisition in the 13th century as a weapon against heresy ushered in a broadening of the powers of the control system vis-à-vis the accused. Ecclesiastical criminal procedure had always been willing to invoke extraordinary methods in particularly heinous crimes, especially those committed in secret.[20] With the coming of the Inquisition a good many procedural safeguards were systematically cast aside, on the ground that the Inquisition was to be seen as "an impartial spiritual father, whose functions in the salvation of souls should be fettered by no rules."[21] Thus, in the interest of maintaining the ideological purity of Christendom, the legal process became conceived as a tool of the moral order, whose use and limits were almost entirely contingent on the needs of that order.

Nevertheless, certain powerful safeguards existed, in theory, for the accused. Chief among these was a rigorous conception of proof, espe-

16. G. L. BURR, THE FATE OF DIETRICH FLADE, PAPERS OF THE AMERICAN HISTORICAL ASSOCIATION, pt. 3, 11 (July 1891).

17. *See* A. ESMEIN, A HISTORY OF CONTINENTAL CRIMINAL PROCEDURE 8 *passim* (1913).

18. *Id.* at 9.

19. *Id.* at 8.

20. *Id.* at 128.

21. 1 H. C. LEA, A HISTORY OF THE INQUISITION IN THE MIDDLE AGES 405 (1958).

cially in the case of capital crimes. In general, continental criminal procedure, at least from the 15th century onward, demanded a "complete proof" as warrant for capital punishment. "Complete proof" generally implied evidence on the order of testimony of two eyewitnesses to the criminal act or, in the case of certain crimes which otherwise would be difficult to establish, like heresy or conspiracy against the Prince, written proofs bound by rigorous standards of authenticity.[22] In most cases of heresy and of witchcraft generally, proof of this order was hard, if not impossible, to come by, for obvious reasons. As a result, it was necessary to form a complete proof through combining confession, which was strong but not complete evidence, with another indication, such as testimony by one witness.[23] The result was tremendous pressure for confession at all costs, as well as a pressure for the relaxation of standards for witnesses and other sources of lesser evidence. The pressure for confession put a premium on the regular and systematic use of torture. In this manner, the procedural safeguard of rigorous proof broke down in practice through the allowance of extraordinary procedures which became necessary to circumvent it.[24]

In theory, there were some restraints on the use of torture, but not many. One 16th century German jurist argued that it could not be used without sufficient indication of guilt, that it could not be used "immoderately," and that it should be tempered according to the strength, age, sex and condition of the offender. German officials, when approving the use of torture, usually added the phrase *Doch Mensch-oder-Christlicher*

22. ESMEIN, *supra* note 17, at 622-23.

23. *Id.* at 625. It would still, of course, have been difficult to get even one reliable witness to an act of witchcraft; in practice, the testimony of one accused, under torture, was used for this purpose.

24. *See* ESMEIN, *supra* note 17, at 625. In a study of the criminal process in China, Cohen relates, in a similar vein, that the requirement of confession for conviction in Manchu China reinforced the temptation to use torture on the accused. *See* J. A. Cohen, *The Criminal Process in the People's Republic of China; an Introduction*, 79 HARV. L. REV. 473 (1966). It should be noted that the employment of torture by the Inquisition was a retrograde step in continental criminal procedure. The Church explicitly condemned torture; after it had been used by the Romans, torture was not again a standard procedure in Western Europe until it was reactivated in the 1200s in the offensive against heresy. *See* ESMEIN, *supra* note 17, at 9. It was early laid down as an accepted rule of Canon Law that no confession should be extracted by torment; but the elimination of trials by ordeal in the 13th century, coupled with the rise of powerful heretical movements, put strong pressure on the Church to modify its approach. Originally, torture was left to the secular authorities to carry out, but a Bull of Pope Alexander IV in 1256 authorized Inquisitors to absolve each other for using it directly, and to grant each other dispensation for irregularities in its use. *See* LEA, *supra* note 1, at 421.

Weise,—roughly, "In humane or Christian fashion." [25] In theory, confessions under torture had to be reaffirmed afterward by the accused; but torture, though it could not lawfully be repeated, could be "continued" indefinitely after interruption, and few accused witches could maintain a denial of their confession after several sessions.[26]

Besides being virtually required for the death penalty, confession was useful in two other important ways, which consequently increased the usefulness of torture. First, confession involved the denunciation of accomplices, which assured a steady flow of accused witches into the courts.[27] Secondly, confessions were publicly read at executions, and distributed to the populace at large, which reinforced the logitimacy of the trials themselves and recreated in the public mind the reality of witchcraft itself. If people *said* they flew by night to dance with the devil, then surely there was evil in the land, and the authorities were more than justified in their zeal to root it out. In extorting confessions from accused witches, the court also made use of means other than torture. Confession was usually required if the accused were to receive the last sacraments and avoid damnation,[28] and the accused, further, were frequently promised pardon if they confessed, a promise which was rarely kept.[29]

In line with the tendency to relax other standards of evidence, there was a considerable weakening of safeguards regarding testimony of witnesses. Heretics could testify, which went against established ecclesiastical policy; so could excommunicates, perjurors, harlots, children and others who ordinarily were not allowed to bear witness. Witnesses themselves were liable to torture if they equivocated or appeared unwilling to testify; and, contrary to established procedure in ordinary continental courts, names of witnesses were withheld from the accused.[30]

25. 2 LEA, *supra* note 7, at 854-55.

26. LEA, *supra* note 1, at 427-28; ESMEIN, *supra* note 17, at 113-14.

27. 2 LEA, *supra* note 7, at 885.

28. 3 LEA, *supra* note 6, at 506.

29. *Id.* at 514; 2 LEA, *supra* note 7, at 895. Deception by the court in witchcraft cases was widely approved. Bodin argued that the court should use lying and deception of the accused whenever possible; the authors of the MALLEUS MALEFICARUM felt that it was a good idea for the courts to promise life to the accused, since the fear of execution often prevented confession.

30. ESMEIN, *supra* note 17, at 91-94; LEA, *supra* note 21, at 434-37.

In general, prisoners were not provided with information on their case.[31] Most of the proceedings were held in secret.[32] The stubborn prisoner who managed to hold to a denial of guilt was almost never released from custody[33] and frequently spent years in prison.[34] Acquittal, in witchcraft and heresy cases, was virtually impossible. Lacking enough evidence for conviction, the court could hold an accused in prison indefinitely at its discretion. In general, innocence was virtually never the verdict in such cases; the best one could hope for was "not proven."[35]

Legal counsel for the accused under the Inquisition was often prohibited again contrary to ordinary continental procedure.[36] Where counsel was allowed, it was with the disturbing understanding that successful or overly eager defense laid the counsel himself open to charges of heresy or of conspiracy to aid heretics.[37] Moreover, counsel was appointed by the court, was warned not to assume a defense he "knew to be unjust," and could be summoned by the court as a witness and made to turn over all his information to the court.[38]

Lesser indications of guilt were supplied through the court's use of impossible dilemmas. If the accused was found to be in good repute among the populace, he or she was clearly a witch, since witches invariably sought to be highly thought of; if in bad repute, then he or she was also clearly a witch, since no one approves of witches. If the accused was especially regular in worship or morals, it was argued that the worst witches made the greatest show of piety.[39] Stubborness in

31. ESMEIN, *supra* note 17, at 129.

32. LEA, *supra* note 21, at 406.

33. *Id.* at 419.

34. *Id.* at 419.

35. *Id.* at 453. The following quote from the period shows one important motive behind the absence of outright release:

> If by torture he will say nothing nor confess, and is not convicted by witnesses . . . he should be released at the discretion of the judge on pain of being attainted and convicted of the matters with which he is charged and of which he is presumed guilty . . . for if he be freed absolutely, *it would seem that he had been held prisoner without charge.*

Quoted in ESMEIN, *supra* note 17, at 130 (emphasis added).

36. ESMEIN, *supra* note 17, at 91-94. This was particularly critical in continental procedure, where presumption of guilt made the defense difficult in any case; it was less critical in England, where the burden of proof was on the court. The Church well knew the vital importance of counsel in criminal trials; *free* counsel was provided, in many kinds of ordinary cases, to those unable to afford it. *See* LEA, *supra* note 21, at 444-45.

37. SORENGER & KRAMER, *supra* note 9, at 218; LEA, *supra* note 21, at 444-45.

38. 2 LEA, *supra* note 21, at 517-18.

39. 2 LEA, *supra* note 7, at 858.

refusing to confess was considered a sure sign of alliance with the Devil, who was known to be taciturn.[40] Virtually the only defense available to accused witches was in disabling hostile witnesses on the grounds of violent enmity; this provision was rendered almost useless through the assumption that witches were naturally odious to everyone, so that an exceptionally great degree of enmity was required.[41]

A final and highly significant characteristic of the continental witch trial was the power of the court to confiscate the property of the accused, whether or not he was led to confess.[42] The chief consequence of this practice was to join to a system of virtually unlimited power a powerful motive for persecution. This coincidence of power and vested interest put an indelible stamp on every aspect of witchcraft in continental Europe.

All things considered, the continental procedure in the witch trials was an enormously effective machine for the systematic and massive production of confessed deviants. As such, it approximates a type of deviance-management which may be called repressive control. Three main characteristics of such a system may be noted, all of which were present in the continental legal order's handling of the witch trials:

1. Invulnerability to restraint from other social institutions;
2. Systematic establishment of extraordinary powers for suppressing deviance, with a concomitant lack of internal restraints;
3. A high degree of structured interest in the apprehension and processing of deviants.

The question at hand is what the effects of this type of control structure are on the rate of deviance, the kinds of people who become defined as deviant, and other aspects of the system of behavior that it is designed to control. This will be considered after a description of the English approach to the control of witchcraft, which, having a very different character, led to very different results.

40. LEA, *supra* note 6, at 509.

41. *Id.* at 517.

42. 2 LEA, *supra* note 7, at 808-11; LEA, *supra* note 21, at 529.

ENGLAND: RESTRAINED CONTROL

There was no Inquisition in Renaissance England, and the common law tradition provided a variety of institutional restraints on the conduct of the witch trials. As a consequence, there were fewer witches in England, vastly fewer executions, and the rise of a fundamentally different set of activities around the control of witchcraft.

Witchcraft was apparently never prosecuted as a heresy in England, but after a statute of Elizabeth in 1563 it was prosecuted as a felony in secular courts.[43] The relatively monolithic ecclesiastical apparatus, so crucial in the determination of the shape of witch trials on the Continent, did not exist in England; the new definition of witchcraft came to England late and under rather different circumstances.[44] English laws making witchcraft a capital crime, however, were on the books until 1736 although executions for witchcraft ceased around the end of the 17th century.[45] Nevertheless, the English laws were enforced in a relatively restrained fashion through a system of primarily local courts of limited power, accountable to higher courts and characterized by a high degree of internal restraint.

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43. The statute is 5 Eliz., c. 16 (1563); *see* DAVIES, *supra* note 4, at 15, for a partial quote of this statute; and p. 42, for a quote from James I's 1604 statute making witchcraft per se, without involving the death of another person, a capital offense.

An earlier statute (33 Hen. 8, c. 8 [1541]) made witchcraft a felony, but was repealed in 1547 and probably used only sporadically and for largely political purposes. Before that, too, there were occasional trials for witchcraft or sorcery, and witchcraft of a sort, as I have shown, appears in the earliest English law. But this was the older conception of witchcraft, blurring into that of magic; and it was not until Elizabeth's statute that witch trials began in earnest. *See* W. NOTESTEIN, A HISTORY OF WITCHCRAFT IN ENGLAND ch. 1 (1911).

44. Two of these circumstances may be mentioned. One was the general atmosphere of social and political turmoil surrounding the accession of Elizabeth to the throne; another was the return to England, with Elizabeth's crowning, of a number of exiled Protestant leaders who had been exposed to the witch trials in Geneva and elsewhere and had absorbed the continental attitudes toward witchcraft. One of these, Bishop John Jewel of Salisbury, argued before the Queen that

> This kind of people (I mean witches and sorcerers) within the last few years are marvelously increased within your Grace's realm. These eyes have seen the most evident and manifest marks of their wickedness. Your Grace's subjects pine away even unto death, their color fadeth, their speech is benumbed, their senses are berefit. Wherefore your poor subject's most humble petition to your Highness is, that the laws touching such malefactors may be put in due execution." DAVIES, *supra* note 4, at 17; *cf.* NOTESTEIN, *supra* note 43.

45. *See* EWEN, *supra* note 5, at 43. On the repeal of the witch laws, *see* 2 Sir J. F. STEPHEN, HISTORY OF THE CRIMINAL LAW IN ENGLAND 436 (1883).

With a few exceptions, notably the Star Chamber, English courts operated primarily on the accusatory principle, stressing above all the separation of the functions of prosecution and judgment, trial by jury, and the presumption of the innocence of the accused.[46] Accuser and accused assumed the role of equal combatants before the judge and jury; prosecution of offenses generally required a private accuser.[47] The English trial was confrontative and public, and the English judge did not take the initiative in investigation or prosecution of the case.[48] Again unlike the situation on the Continent, the accused witch could appeal to higher authority from a lower court, and could sue an accuser for defamation; such actions frequently took place in the Star Chamber.[49] Reprieves were often granted.[50] From the middle of the 17th century, the accused in capital cases could call witnesses in their defense.[51] In general, the English courts managed to remain relatively autonomous and to avoid degeneration into a tool of ideological or moral interests: Voltaire was to remark, in the 18th century, that "In France the Criminal Code seems framed purposely for the destruction of the people; in England it is their safeguard." [52]

There were, nevertheless, important limitations to this picture of the English courts as defenders of the accused. Accusatory ideals were not always met in practice, and many elements of a developed adversary system were only latent. Defendants were not allowed counsel until 1836.[53] In general, since the defendant entered court with a presumption of innocence, the English courts did not demand such rigorous proofs for conviction as did the continental courts. Testimony of one witness was usually sufficient for conviction in felony cases; children were frequently allowed to testify.[54] In practice, however, this worked out differently than might be expected. The lack of complex, rigid standards of proof in English courts meant that there was little pressure

46. *See* ESMEIN, *supra* note 17, at Introduction. Esmein notes the similarity between the politically-oriented Star Chamber and the typical continental court. A few cases of witchcraft, notably those with political overtones, were processed there; *see* C. L'ESTRANGE EWEN, WITCHCRAFT IN THE STAR CHAMBER esp. 11 (1938).

47. ESMEIN, *supra* note 17, at 107, 336.

48. *Id.* at 3, 6.

49. *Cf.* EWEN, *supra* note 46.

50. EWEN, *supra* note 5, at 32.

51. ESMEIN, *supra* note 17, at 342.

52. Quoted in ESMEIN, *supra* note 17, at 361.

53. *Id.* at 342.

54. EWEN, *supra* note 5, at 58.

to subvert the series of safeguards surrounding the accused through granting the court extraordinary powers of interrogation, and it went hand-in-hand with a certain care on the part of the courts for the rights of the defendant. Torture, except in highly limited circumstances as an act of Royal prerogative, was illegal in England, and was never lawfully or systematically used on accused witches in the lower courts.[55]

Given the nature of the crime of witchcraft, witnesses were not always easily found; given the illegality of torture, confessions were also relatively rare. In this difficult situation, alternative methods of obtaining evidence were required. As a consequence, a variety of external evidence emerged.

Three sources of external evidence became especially significant in English witch trials. These are pricking, swimming, and watching.[56] Pricking was based on the theory that witches invariably possessed a "Devil's Mark," which was insensitive to pain. Hence, the discovery of witches involved searching the accused for unusual marks on the skin and pricking such marks with an instrument designed for that purpose. If the accused did not feel pain, guilt was indicated. Often, pricking alone was considered sufficient evidence for conviction.

Swimming was based on the notion that the Devil's agents could not sink in water, and was related to the "ordeal by water" common in early European law.[57]

> The victim was stripped naked and bound with her right thumb to her right toe, and her left thumb to her right toe, and was then cast into the pond or river. If she sank, she was frequently drowned; if she swam she was declared guilty without any further evidence being required.[58]

The third source of evidence, watching, reflected the theory that the Devil provided witches with imps or familiars which performed useful services, and which the witch was charged with suckling. The familiars

55. Torture may have been used on some witches in the Star Chamber. NOTESTEIN, *supra* note 43, at 167, 204 suggests that it may have been used illegally in a number of cases; nevertheless, torture was not an established part of English criminal procedure, except in the limited sense noted above. *See* STEPHEN, *supra* note 45, at 434; EWEN, *supra* note 5, at 65. It was allowed in Scotland, where, predictably, there were more executions; several thousand witches were burned there during this period. *See* G. F. BLACK, A CALENDAR OF CASES OF WITCHCRAFT IN SCOTLAND, *1510-1727*, 13-18 (1938); NOTESTEIN, *supra* note 43, at 95-96.

56. This discussion is taken from EWEN, *supra* note 5, at 60-71, and from remarks at various places in NOTESTEIN, *supra* note 43.

57. *See* M. HOPKINS, THE DISCOVERY OF WITCHES 38 (1928).

58. Quoted in EWEN, *supra* note 5, at 68; Ewen argues, though, that swimming alone was probably not usually sufficient evidence for the death penalty.

could therefore be expected to appear at some point during the detention of the suspected witch, who was therefore placed in a cell, usually on a stool, and watched for a number of hours or days, until the appointed watchers' observed familiars in the room.

A number of other kinds of evidence were accepted in the English trials. Besides the testimony of witnesses, especially those who claimed to have been bewitched, these included the discovery of familiars, waxen or clay images, or other implements in the suspect's home, and of extra teats on the body, presumably used for suckling familiars.[59]

These methods were called for by the lack of more coercive techniques of obtaining evidence within the ambit of English law. In general, the discovery and trial of English witches was an unsystematic and inefficient process, resembling the well-oiled machinery of the continental trial only remotely. The English trial tended to have an ad hoc aspect in which new practices, techniques and theories were continually being evolved or sought out.

Finally, the confiscation of the property of suspected witches did not occur in England, although forfeiture for felony was part of English law until 1870.[60] As a consequence, unlike the continental authorities, the English officials had no continuous vested interest in the discovery and conviction of witches. Thus, they had neither the power nor the motive for large-scale persecution. The English control system, then, was of a "restrained" type, involving the following main characteristics:

1. Accountability to, and restraint by, other social institutions;
2. A high degree of internal restraint, precluding the assumption of extraordinary powers;
3. A low degree of structured interest in the apprehension and processing of deviants.

The English and continental systems, then, were located at nearly opposite ends of a continuum from restrained to repressive control of deviance. We may now look at the effects of these differing control systems on the character of witchcraft in the two regions.

59. *Id.* at 68.

60. Forfeiture grew out of the feudal relation between tenant and lord. A felon's lands escheated to the lord, and his property also was forfeited to the lord. A later development made the King the recipient of forfeited goods in the special case of treason; this was struck down in the Forfeiture Act of 1870. *See* 1 F. POLLACK & W. MAITLAND, A HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 332 (1895). This is, of course, a very different matter from the direct confiscation of property for the court treasury which was characteristic of the Continent.

WITCHCRAFT CONTROL AS INDUSTRY: THE CONTINENT

On the Continent, the convergence of a repressive control system with a powerful economic motive created something very much like a large-scale industry based on the mass stigmatization of witches and the confiscation of their property. This gave distinct character to the *rate* of witchcraft in Europe, the kinds of people who were convicted as witches, and the entire complex of activities which grew up around witchcraft.

The Inquisition, as well as the secular courts, were largely self-sustaining; each convicted witch, therefore, was a source of financial benefit through confiscation.[61] "Persecution," writes an historian of the Inquisition, "as a steady and continuous policy, rested, after all, upon confiscation. It was this which supplied the fuel to keep up the fires of zeal, and when it was lacking the business of defending the faith languished lamentably." [62]

The witchcraft industry in continental Europe was a large and complex business which created and sustained the livelihoods of a sizable number of people. As such, it required a substantial income to keep it going at all, As a rule, prisoners were required to pay for trial expenses and even for the use of instruments of torture.[63] Watchmen, executioners, torturers and others, as well as priests and judges, were paid high wages and generally lived well.[64] A witch-judge in 17th-century Germany boasted of having caused 700 executions in three years, and earning over 5,000 gulden on a per-capita basis.[65] A partial account of costs for a single trial in Germany reads as follows:[66]

	Florins	Batzen	Pfennige
For the Executioner	14	7	10
For the Entertainment and Banquet of the Judges, Priests and Advocate	32	6	3
For Maintenance of the Convicts and Watchmen	33	6	6

61. Self-sustaining control systems often view presumptive deviants as a source of profit. On a smaller scale, it has been noted that some jurisdictions in the American south have been known to make a practice of arresting Negroes en masse in order to collect fees. *See* G. B. Johnson, *The Negro and Crime*, in THE SOCIOLOGY OF CRIME AND DELINQUENCY (M. Wolfgang, L. Savitz, & N. Johnson, 1962).

62. LEA, *supra* note 21, at 529.

63. LEA, *supra* note 6, at 524; 3 LEA, *supra* note 7, at 1080.

64. LEA, *supra* note 7, at 1080.

65. *Id.* at 1075.

66. *Id.* at 1162.

A total of 720,000 florins were taken from accused witches in Bamberg, Germany, in a single year.[67] Usually, the goods of suspected witches were sold after confiscation to secular and ecclesiastical officials at low prices.[68] Of the prosecutions at Trier, a witness wrote that: "Notaries, copyists, and innkeepers grew rich. The executioner rode on a blooded horse, like a courtier, clad in gold and silver; his wife vied with noble dames in the richness of her array . . . not till suddenly, as in war, the money gave out, did the zeal of the Inquisitors flag." [69] During a period of intense witch-hunting activity at Trier, secular officials were forced to issue an edict to prevent impoverishment of local subjects through the activities of the Inquisitors.[70]

Like any large enterprise, the witchcraft industry was subject to the need for continual expansion in order to maintain its level of gain. A mechanism for increasing profit was built into the structure of the trials, whereby, through the use of torture to extract names of accomplices from the accused, legitimate new suspects became available.

The creation of a new kind of deviant behavior was the basis for the emergence of a profit-making industry run on bureaucratic lines, which combined nearly unlimited power with pecuniary motive and which gave distinct form to the deviant behavior system in which it was involved.

Its effect on the scope or rate of the deviance is the most striking at first glance. Several hundred thousand witches were burned in continental Europe during the main period of activity, creating a picture of the tremendous extent of witchcraft in Europe. The large number of witches frightened the population and legitimized ever more stringent suppression. Thus, a cycle developed in which rigorous control brought about the appearance of high rates of deviance, which were the basis for more extreme control, which in turn sent the rates even higher, and so on

A second major effect was the selection of particular categories of people for accusation and conviction. A significant proportion of continental witches were men, and an even more significant proportion of men and women were people of wealth and/or property. This is not surprising, given the material advantages to the official control apparatus of attributing the crime to heads of prosperous households.

67. *Id.* at 1177-78.

68. *Id.* at 1080.

69. BURR, *supra* note 16, at 55.

70. *Id.* at 55, fn.

In trials of Offenburg, Germany, in 1628, witnesses noted that care was taken to select for accusation "women of property." [71] A document from Bamberg at about the same time lists the names and estimated wealth of twenty-two prisoners, nearly all of whom are propertied, most male, and one a burgher worth 100,000 florins.[72] In early French trials, a pattern developed which began with the conviction of a group of ordinary people, and then moved into a second stage in which the wealthy were especially singled out for prosecution.[73] In German trials, the search for accomplices was directed against the wealthy, with names of wealthy individuals often supplied to the accused under torture.[74] At Trier, a number of burgomasters, officials, and managers of large farms were executed as witches.[75] An eyewitness to the trials there in the late 16th century was moved to lament the fact that "[b]oth rich and poor, of every rank, age and sex, sought a share in the accursed crime." [76] Apparently, resistance or dissent, or even insufficient zeal, could open powerful officials to accusation and almost certain conviction.[77]

Thus, though it was not the case that all continental witches were well-to-do or male, a substantial number were. The witch population in England, to be considered shortly, was strikingly different.

The mass nature of the witchcraft industry, the high number of witches in Europe, and the upper-income character of a sufficient proportion of them,[78] were all due to the lack of restraints on court procedure—especially, of the systematic use of torture—coupled with the legal authority to confiscate property, which added material interest to unrestrained control. That the prevalence of witches in continental Europe was a reflection of the peculiar structure of legal control is further implied by the fact that when torture and/or confiscation became from time to time unlawful, the number of witches decreased drastically

71. 3 LEA, *supra* note 7, at 1163.

72. *Id.* at 1177-78.

73. LEA, *supra* note 21, at 523-27.

74. LEA, *supra* note 7, at 235.

75. BURR, *supra* note 16, at 29, 34.

76. *Id.* at 19.

77. This fact is graphically presented in Burr's chronicle of Dietrich Flade, a powerful court official at Trier whose ultimate execution for witchcraft was apparently in part the result of his failure to zealously prosecute witches in his district.

78. That a greater percentage of wealthy witches did not appear is due in part to the fact that wealthy families often paid a kind of "protection" to local officials to insure that they would not be arrested. *See* 3 LEA, *supra* note 7, at 1080.

or disappeared altogether. In Hesse, Phillip the Magnificent forbade torture in 1526 and, according to one witness, "nothing more was heard of witchcraft till the half-century was passed." [79] In Bamberg, pressure from the Holy Roman Emperor to abandon confiscation resulted in the disappearance of witchcraft arrests in 1630.[80] The Spanish Inquisitor Salazar Frias issued instructions in 1614 requiring external evidence and forbidding confiscation; this move marked the virtual end of witchcraft in Spain.[81] It was not until criminal law reform began in earnest in the 18th century that witches disappeared, for official purposes, from continental Europe.

A form of deviance had been created and sustained largely through the efforts of a self-sustaining bureaucratic organization dedicated to its discovery and punishment, and granted unusual powers which, when removed, dealt a final blow to that entire conception of deviant behavior. In England too, witches existed through the efforts of interested parties,[82] but the parties were of a different sort.

WITCHCRAFT CONTROL AS RACKET: ENGLAND

The restrained nature of the English legal system precluded the rise of the kind of mass witchcraft industry which grew up on the Continent. What the structure of that system did provide was a context in which individual entrepreneurs, acting from below, were able to profit through the discovery of witches. Hence, in England, there developed a series of rackets through which individuals manipulated the general climate

79. *Id.* at 1081.

80. *Id.* at 1173-79. In part, also, the decrease in arrests was due to the occupation of the area by an invasion of the somewhat less zealous Swedes.

81. PARRINDER, *supra* note 14, at 79.

82. It should be stressed that quite probably, a number of people, both in England and on the Continent, did in fact believe themselves to be witches, capable of doing all the things witches were supposed to be able to do. Some of them, probably, had the intent to inflict injury or unpleasantness on their fellows, and probably some of these were included in the executions. This does not alter the fact that the designation of witches proceeded independently of such beliefs, according to the interests of the control systems. Some students of witchcraft have suggested that the promotion of witch beliefs by the official control systems provided a kind of readymade identity, or role, into which some already disturbed people could fit themselves. This is a more subtle aspect of the creation of deviance by control structures, and has, I think, applicability to certain contemporary phenomena. The images of deviance provided by newspapers and police may provide a structured pattern of behavior and an organized system of deviant attitudes which can serve as an orienting principle for the otherwise diffusely dissatisfied.

of distrust, within the framework of a control structure which was frequently reluctant to approve of their activities. Because of its accusatorial character, the English court could not systematically initiate the prosecution of witches; because of its limited character generally, it could not have processed masses of presumed witches even had it had the power to initiate such prosecutions; and because of the absence of authority to confiscate witches' property, it had no interest in doing so even had it been able to. Witch prosecutions in England were initiated by private persons who stood to make a small profit in a rather precarious enterprise. As a result, there were fewer witches in England than on the Continent, and their sex and status tended to be different as well.

Given the lack of torture and the consequent need to circumvent the difficulty of obtaining confessions, a number of kinds of external evidence, some of which were noted above, became recognized. Around these sources of evidence there grew up a number of trades, in which men who claimed to be expert in the various arts of witchfinding—pricking, watching, and so on—found a ready field of profit. They were paid by a credulous populace, and often credulous officials, for their expertise in ferreting out witches. In the 17th century, the best-known of the witchfinders was one Matthew Hopkins, who became so successful that he was able to hire several assistants.[83] Hopkins, and many others, were generalists at the witchfinding art; others were specialists in one or another technique. Professional prickers flourished. A Scottish expert who regularly advertised his skill was called to Newcastle-upon-Tyne in 1649 to deal with the local witch problem, with payment guaranteed at twenty shillings per convicted witch. His technique of selecting potential witches was ingenious and rather efficient, and indicates how the general climate of fear and mistrust could be manipulated for profit. He sent bell-ringers through the streets of Newcastle to inquire if anyone had a complaint to enter against someone they suspected of witchcraft. This provided a legitimate outlet for grievances, both public and private, against the socially marginal, disapproved, or simply disliked, and was predictably successful; thirty witches were discovered, most of whom were convicted.[84] Several devices were used by prickers to increase the probability of discovery and conviction. One was the use of pricking knives with retractable blades and hollow handles, which could be

83. *See* HOPKINS, *supra* note 57. This is a reproduction of Matthew Hopkins' own manual for the discovery of witches.

84. EWEN, *supra* note 5, at 62.

counted on to produce no pain while appearing to be embodied in the flesh—thus demonstrating the presence of an insensible "Devil's Mark." [85]

Professional "watchers," too, thrived in this climate. A voucher from a Scottish trial in 1649 is indicative:[86]

	Pounds	Shillings
Item: In the first, to Wm. Currie and Andrew Gray, for the watching of her the space of 30 days, each day 30 shillings—	45	0
Item: More to John Kincaid for brodding (pricking) of her—	6	0
More for meat and drink and wine for him and his men	4	0

An essential characteristic of all these rackets was their precariousness. To profess special knowledge of the demonic and its agents opened the entrepreneur to charges of fraud or witchcraft; money could be made, but one could also be hanged, depending on the prevailing climate of opinion. The Scottish pricker of Newcastle was hanged, and many other prickers were imprisoned;[87] the witchfinder Hopkins continually had to defend himself against charges of wizardry and/or fraud, and may have been drowned while undergoing the "swimming" test.[88] People who professed to be able to practice magic—often known as "cunning folk"—frequently doubled as witchfinders, and were especially open to the charge of witchcraft.[89]

The peculiar and restrained character of the English control of witches led to characteristic features of the behavior system of English witchcraft. The lack of vested interest from above, coupled with the absence of torture and other extraordinary procedures, was largely responsible for the small number of witches executed in England from

85. *Id.* at 62.

86. Quoted in BLACK, *supra* note 55, at 59. This is apparently unusual for a Scottish trial, since these methods of evidence were less crucial, given the frequent use of torture.

87. EWEN, *supra* note 5, at 63.

88. HOPKINS, *supra* note 57, at 45. Summers, the editor of Hopkins' work, denies that Hopkins was drowned in this fashion. Hopkins' pamphlet includes a lengthy question-and-answer defense of his trade, part of which reads as follows: "Certaine queries answered, which have been and are likely to be objected against Matthew Hopkins, in his way of finding out Witches. Querie 1. That hee must needs be the greatest Witch, Sorcerer, and Wizzard himselfe, else hee could not doe it. Answer: If Satan's Kingdome be divided against itselfe, how shall it stand?" *Id.* at 49.

89. On "cunning folk" generally, *see* NOTESTEIN, *supra* note 43, at ch. 1.

1563 to 1736.[90] Of those indicted for witchcraft, a relatively small percentage was actually executed—again in contrast to the inexorable machinery of prosecution in continental Europe. In the courts of the Home Circuit, from 1558 to 1736, only 513 indictments were brought for witchcraft; of these, only 112, or about 22 per cent, resulted in execution.[91]

Further, English witches were usually women and usually lower class. Again, this was a consequence of the nature of the control structure. English courts did not have the power or the motive to systematically stigmatize the wealthy and propertied; the accusations came from below, specifically from the lower and more credulous strata or those who manipulated them, and were directed against socially marginal and undesirable individuals who were powerless to defend themselves. The process through which the witch was brought to justice involved the often reluctant capitulation of the courts to popular sentiment fueled by the activities of the witchfinders; the witches were usually borderline deviants already in disfavor with their neighbors. Household servants, poor tenants, and others of lower status predominated. Women who worked as midwives were especially singled out, particularly when it became necessary to explain stillbirths. Women who lived by the practice of magic—cunning women—were extremely susceptible to accusation. Not infrequently, the accused witch was a "cunning woman" whose accusation was the combined work of a witchfinder and a rival "cunning woman." In the prevailing atmosphere, there was little defense against such internecine combat, and the "cunning" trade developed a heavy turnover.[92] In general, of convicted witches in the Home Circuit from 1564-1663, only 16 of a total of 204 were men,[93] and there is no indication that any of these were wealthy or solid citizens.

The decline of witchcraft in England, too, was the result of a different process from that on the Continent, where the decline of witchcraft was closely related to the imposition of restraints on court procedure. In England, the decline was related to a general shift of opinion, in which the belief in witchcraft itself waned, particularly in the upper strata, as a result of which the courts began to treat witchcraft as illu-

90. *Cf.* EWEN, *supra* note 5, at 112; KITTREDGE, *supra* note 10, at 59.

91. EWEN, *supra* note 5, at 100.

92. NOTESTEIN, *supra* note 43, at 82.

93. EWEN, *supra* note 5, at 102-108. Also, *cf.* the list of English witches in MURRAY, *supra* note 5, at 255-70.

sory or at best unprovable. English judges began refusing to execute witches well before the witch laws were repealed in 1736; and although there were occasional popular lynchings of witches into the 18th century, the legal system had effectively relinquished the attempt to control witchcraft.[94] With this shift of opinion, the entire structure of witchcraft collapsed, for all practical purposes, at the end of the 17th century.[95]

CONCLUSION

If one broad conclusion emerges from this discussion, it is that the phenomenon of witchcraft in Renaissance Europe strongly reinforces on one level the argument that deviance is what officials say it is, and deviants are those so designated by officials. Where the deviant act is nonexistent, it is necessarily true that the criteria for designating people as deviant do not lie in the deviant act itself, but in the interests, needs, and capacities of the relevant official and unofficial agencies of control, and their relation to extraneous characteristics of the presumptive deviant. Witchcraft was invented in continental Europe, and it was sustained there through the vigorous efforts of a system of repressive control; in England it was sustained, far less effectively, through the semi-official efforts of relatively small-time entrepreneurs. In both cases, witchcraft as a deviant behavior system took its character directly from the nature of the respective systems of legal control. On the Continent, the system found itself both capable of and interested in defining large numbers of people, many of whom were well-to-do, as witches; therefore, there *were* many witches on the Continent and many of these were wealthy and/or powerful. In England, the control system had little interest in defining anyone as a witch, and consequently the English witches were those few individuals who were powerless to fend off the definition supplied by witchfinders on a base of popular credulity. Witches were, then, what the control system defined them to be, and variation in the behavior system of witchcraft in the two regions may be traced directly to the different legal systems through which that definition was implemented.

94. *See* DAVIES, *supra* note 4, at 182-203.

95. An incident supposedly involving the anatomist, William Harvey, is indicative of this change of opinion. Harvey, on hearing that a local woman was reputed to be a witch, took it upon himself to dissect one of her familiars, which took the shape of a toad; he found it to be exactly like any other toad, and a minor blow was struck for the Enlightenment. *See* NOTESTEIN, *supra* note 43, at 111.

Witchcraft, however, is an extreme case. It is made extreme by virtue of the extent to which it is an *invented* form of deviance, whose definition lacks roots in concrete behavior. While it could be argued that all definitions of deviance, referring to whatever kinds of acts, contain a degree, however slight, of this element of invention, it is certainly true that the degree to which it is present is highly variable. There may be a large element of invention in current American definitions of mental illness, and perhaps drug addiction;[96] there is less in the definition of murder or battery. This means that variations in the behavior system of mental illness or drug addiction are more likely to result from differences in the control system through which they are managed than are variations in the behavior system of murder or battery. This is not to say that the definitions of the latter kinds of deviance are somehow fixed or inherent in the acts to which they refer, rather than being socially derived. Eskimos define murder differently from Englishmen, and present-day Englishmen define it differently from medieval Englishmen.[97] But the fact that the definition of murder is closely connected to a tangible, concrete and potentially highly visible act[98] means that its social derivation has minimal consequences, especially for variation in the behavior system of murder under different systems of legal control. Systems of control create the character of the deviance which they define and manage only to the extent that a gap between deviant definition and deviant act gives them the latitude to do so. Anyone could be called a witch in Renaissance Europe, given the fact that witchery could be neither proved nor disproved; and witches

96. On mental illness, see the various works of, among others, T. SZASZ. In the case of drugs it may be argued that the discrepancy between the legal and medical definitions of marijuana use bespeaks the existence of a sizeable element of official invention.

97. Strictly speaking, this discussion would have to be backed up by data throwing light on the treatment of murder under different control systems; it is therefore to be considered speculative. Common sense, though, suggests that there is something peculiar about crimes like witchcraft which probably makes for a profound impact on the character of social control.

98. By visibility I refer to consequences primarily, rather than commission. Proof of homicide generally requires a body, which is a highly visible thing. Offenses which, unlike witchcraft, have reference to an act which is real but of low visibility—such as heresy or thought—crimes generally, and some of the "victimless" crimes—create many of the same consequences for control systems as do invented offenses. Again, this is largely because their commission is so difficult to establish through ordinary means that extraordinary means may need to be invoked, and if that is done, not only does the character of the control system change, but the offense now become virtually impossible to *disprove*. As a consequence, the official incidence of the offense can vary greatly depending on the interests of the control system.

were therefore created according to the capacity of the relevant control systems to create them, and were created in the image of the interests of these systems. It is more difficult, however, to create murderers, and especially difficult to create more murderers than there are victims. Hence, the element of potential creativity of the control system and thus of variation in the deviant behavior system under different control systems is reduced.

This has more than academic relevance, for it speaks directly to the problem of the abuse of the function of social control by the officials and institutions charged with it. To the extent that the element of invention enters into a society's definition of deviance, there is an open invitation to potentially abusive creativity on the part of systems of control or, particularly in the case of societies with limited systems of control, on the part of individuals or groups peripheral to the control system.[99] The case of witchcraft in England shows that virtually no amount of limitation on the power of a control system can consistently and effectively protect individuals against such abuse, once an invented definition of deviance has become officially established. Beyond this, invented deviance undermines the ability of control agencies to maintain procedural intogrity. The inevitable inability of both continental and English legal systems to deal with witchcraft without straining normal standards of procedure illustrates this. It could be argued that a number of such definitions—or definitions which contain at least a large element of invention—currently exist in this country, with the consequence of severely straining standards of due process of law in the institutions charged with controlling them.[100] It would be profitable to study some of these with an eye to establishing relations between degree of "invention" and degree of strain on established standards of legal procedure.

Different kinds of deviance, then, vary in the degree to which they can be creatively imputed to people, and hence in the degree of variability in their behavior systems which may occur across different control systems. Keeping this in mind, some generalizations can be suggested about the effects of the two kinds of control systems—repressive and restrained—which have been defined above.

99. The remarks above apply here as well. This, of course, is an important factor in the rejection of legal control of mental acts by democratically inclined people.

100. As indicated above, I believe this may be at least partially true of definitions of mental illness and of drug addiction. It is also perhaps relevant to certain kinds of political offenses built on the notion of "subversion," and on certain peculiar categories of juvenile justice, such as the notion of "incorrigibility," among others.

Repressive control systems, by virtue of their superior power to accuse, convict, and certify deviants, tend to create a higher official incidence of a given kind of deviance than do systems of restrained control.[101] This is reflected both in a higher rate of accusation or stigmatization and in a higher ratio of conviction to accusation. A system of repressive control will uncover and successfully prosecute an exceptionally high amount of deviance; further, it may do so more or less independently of the actual incidence of the deviance—through, among other things, its ability to systematically produce confessions from, if necessary, the innocent. A system of restrained control, on the other hand, produces a relatively low rate of official deviance and is restricted in its ability to create deviance independently of its actual incidence. Restrained systems may, and generally do, process *less* deviance than actually exists; rarely, however, can they successfully or consistently process *more*.

Systems of repressive control, in the nature of things, tend to develop a greater vested interest in the successful prosecution of deviants than do restrained systems. This tends to increase the effect of creating an exceptionally large deviant population under systems of repressive control. Repressive systems combine the power to successfully prosecute masses of deviants with a structured motive for doing so, both of which are lacking in the restrained system. The ability of continental witch-courts to confiscate the property of witches is but one example of this kind of vested interest. Similarly, vested interests in deviance may be political, religious, or psychic, rather than economic; in any case, even lacking such specific interests, systems of repressive control tend to foster the growth of an "industry" geared to the official creation of deviance, with a complex organizational structure which strains toward self-perpetuation.[102] They support a division of labor whose personnel depend for their livelihood on the continued supply of confirmed deviants. Even at best, therefore, there is a degree of tension between organizational interests and the security of individuals which is not found in the restrained system, and a powerful strain toward arbitrariness and the relaxation of procedural standards.

101. Under the system of expanded control during the politically harsh years 1949-1953 in Communist China, approximately 800,000 political deviants—"counterrevolutionaries," "class enemies," and so on—were liquidated. *See* COHEN, *supra* note 24, at 477-78.

102. Special agencies of enforcement or prosecution within the context of a generally restrained system may, of course, develop vested interests of this kind, but their effect is limited by the nature of the larger system. For an example of this, see discussion of the enforcement of marijuana laws, in BECKER, *supra* note 1, at 121-46.

Restrained systems, on the other hand, may be vulnerable to abuse from below. This is particularly true where the community generates definitions of deviance which include a large amount of invention, putting a strain on the ability of the system to handle deviance while keeping its procedural standards intact. Under these circumstances especially, restrained systems tend to foster the development of a system of "rackets" around the deviant activity, involving officials, deviants themselves, and private or semi-official entrepreneurs operating on the precarious borderline between licit and illicit behavior.

Because of their combination of power and interest, repressive control systems tend to concentrate most heavily on stigmatizing people whose successful prosecution will be most useful in terms of the system's own needs and goals. This is true whether the goal is economic profit or the elimination of sources of moral or political dissent, or a combination of these. Consequently, the deviant population under a system of repressive control will contain an unusually large number of relatively wealthy and/or powerful people, and of solid citizens generally. Under a restrained control system, on the other hand, the typical deviant will be lower-class; the deviant population will be most heavily represented by the relatively powerless, who lack the resources necessary to make successful use of those safeguards which the restrained system provides, and who are particularly vulnerable to abuse.