

# CAN LAW AND LITERATURE BE PRACTICAL? *THE CRUCIBLE* AND THE FEDERAL RULES OF EVIDENCE

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## ABSTRACT

Counter-intuitively, one of the best ways to learn the practice-oriented topic of evidence may be by studying a work of fiction—specifically, Arthur Miller’s *The Crucible*, which dramatizes the seventeenth-century Salem witch trials. The play puts the reader in the position of legal advocate, and invites strategic analysis of evidentiary issues. A close analysis of the dialogue presents an opportunity to explore both the doctrinal nuances of and policy considerations underlying the most important topics covered by the Federal Rules of Evidence, including the mode and order of interrogation, relevance, character evidence and impeachment, opinion testimony, and hearsay.

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## I. INTRODUCTION

*Pick up a copy of any law review that you see, and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in eighteenth-century Bulgaria, or something, which I'm sure was of great interest to the academic that wrote it, but isn't of much help to the bar.*

—Chief Justice John G. Roberts Jr.<sup>1</sup>

Chief Justice Roberts's remarks touched off a firestorm of commentary regarding the relevance of law review articles to the current practice of law.<sup>2</sup> Although his remarks were not directed *per se* at evidence law, at interdisciplinary scholarship, or at the relation between centuries old sources and modern legal practice, the instant Article takes up the gauntlet laid down by the Chief Justice on its own terms. I aim to demonstrate the following deliberately counterintuitive proposition: because evidence law is so grounded in practical reality, one of the best ways for budding practitioners to learn it is through studying a work of fiction set in the seventeenth century.<sup>3</sup>

Evidence law is, by its nature, a heavily rule-based, practice-oriented topic. The rules of evidence are the “rules of the road” for trials; and a trial lawyer must not only make her objections in a timely manner—usually a matter of seconds—but also articulate the correct basis for her objection.<sup>4</sup>

In such an environment, there is little room for the niceties of “policy” teased out through the deconstruction of appellate opinions, which is what occurs in the case-based approach often utilized in law school classrooms.

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<sup>1</sup> Chief Justice John G. Roberts Jr., *Annual Fourth Circuit Court of Appeals Conference*, C-SPAN.ORG (June 25, 2011), <http://www.c-span.org/Events/Annual-Fourth-Circuit-Court-of-Appeals-Conference/10737422476-1/> (a video of his remarks at the Annual Fourth Circuit Court of Appeals Conference).

<sup>2</sup> See, e.g., vmerton, *ABA Journal Generates Massive Commentary on C.J. Roberts' Critique of Academic Legal Scholarship*, A PLACE TO DISCUSS BEST PRACTICES FOR LEGAL EDUCATION BLOG (July 9, 2011), <http://bestpracticeslegaled.albanylawblogs.org/2011/07/09/aba-journal-generates-massive-commentary-on-c-j-roberts-critique-of-academic-legal-scholarship>.

<sup>3</sup> Not everyone would agree that this statement is counterintuitive. See, e.g., Lenora Ledwon, *The Poetics of Evidence: Some Applications from Law & Literature*, 21 QUINNIPAC L. REV. 1145, 1162 (2003) (“The objection that literature is the realm of the aesthetic and law is the realm of the real, is far too pat.”).

<sup>4</sup> See FED. R. EVID. 103(a)(i) (A claimed error in admitting evidence is waived unless the party “(1) timely objects or moves to strike; and (2) states the specific ground, unless it was apparent from the context.”).

Rather, students want and need to be able to recognize an objectionable question or answer when they see it.<sup>5</sup>

In light of this, utilizing hypothetical problems, so as to require students to role play as litigators who argue about the admissibility of testimonial or other evidence, might seem preferable to reading cases. But both the problem-based approach and the case-based approach suffer from a common flaw: they usually do not provide the *context* that is critical to evidentiary analysis.

In many instances, whether evidence is admissible depends on the *purpose* for which it is offered. A good trial lawyer has to understand *why* every question is being asked, *why* every piece of evidence is being offered. In order to do so, she must understand how the evidence fits into her overall theory of the case. Judicial opinions, more so than short hypotheticals, typically lay out the relevant facts and procedural history of the case, thereby lending some context to the evidentiary issues addressed therein. But such opinions are often heavily redacted and edited for law school casebooks, and even full opinions offer only a brief summary of what went on at the trial.

To really get a feel for how the rules of evidence work, the student or attorney would ideally work an entire case from the ground up: interview the client, propound discovery, review documents, conduct depositions, and do all the pre-trial preparation.

Of course, even in full-blown litigation, the lawyer is still mediating between the “real” reality and the version of reality to be presented at trial. A lawyer rarely has all of the potentially relevant contextual information. She was not there when the underlying events occurred. The best she can do is amass facts from client and third-party interviews, informal investigation, and formal discovery, and attempt to construct a coherent narrative representation of reality—and obviously one that is favorable for her client.

In doing so, the rules of evidence shape how the story is presented to the fact finder at trial. They will influence which facts can be heard by the jury at all (relevance and admissibility generally); which facts must originate from the witnesses versus those that can be suggested by the lawyers (leading and non-leading questions); and which facts can be adduced through documents versus those that must be obtained through live witness testimony (the rules of hearsay and the confrontation clause and the best evidence rule).

The trial lawyer, knowing what story she wants to tell, has turned over in her mind the various ways she might get a key piece of evidence admitted. Is it a party-opponent admission? A statement against interest? An excited utterance? Can I use this bad fact about the opposing witness’s history as character evidence? If not, what about for impeachment? She is also in the best position to make the necessary split-second decisions about whether she wants

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<sup>5</sup> Cf. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (stating, with regard to obscenity, that “I know it when I see it”).

to try to exclude evidence proffered by her opponent, and about how to “translate” that strategic impulse into a doctrinally legitimate basis for exclusion that would be persuasive to the judge.<sup>6</sup>

In short, because evidence is the *lingua franca* of a case presented in a courtroom, the best way for students to learn the language is to immerse themselves in a trial. I would further posit that one of the best ways for students to simulate immersion in the full “story” of a trial, at least in a traditional classroom setting,<sup>7</sup> is to read and analyze a stage play.

Plays are narratives that, due to the finite duration of live performances, offer heightened and distilled versions of “reality.” As such, they can present the types of “fact patterns” that are the fodder for legal cases. In order to create interest for the audience, the plot of a play will typically focus on some form of conflict between characters; trials, of course, are necessarily about the resolution of conflict. Plays can also illustrate ideas or issues, but are much more than just a discussion of them;<sup>8</sup> ideally, they will provide dramatic richness and psychological and social context to the conflicts presented therein.

I propose that one play in particular—Arthur Miller’s *The Crucible*, which is based on the Salem witch trials of the late seventeenth century—presents a powerful opportunity for students to learn about and apply both the policies underlying *and* the doctrinal nuances of evidence law, and to develop many of the critical analytical functions in which a trial lawyer engages.

Invoking the utility of analyzing a play in understanding the rules of evidence obviously implicates the “law and literature” movement.<sup>9</sup> Evidence

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<sup>6</sup> Cf. James Boyd White, *What Can a Lawyer Learn from Literature?*, 102 HARV. L. REV. 2014, 2022 (1989) (reviewing RICHARD POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1988)) (“The text [the lawyer] makes, for example, might weave together psychiatric and economic testimony, the client’s own story in his own words, appeals to common understandings, all transformed as they are put to work together in a way that is regulated by the rules of evidence and shaped by her desire to persuade her audience.”).

<sup>7</sup> In my view, students learn evidence better by taking simulated trial advocacy classes, or by actually working on real trials—be it through clinical offerings, externships, or some other form of apprenticeship—than they do from taking a traditionally structured course in evidence law. (I say this as someone who has taken evidence and trial advocacy courses as a law student, taught both types of courses as a professor, and participated in real trials as a practitioner.) But the purpose of this Article is not to advocate more mock trial training or clinical offerings for students, beneficial as they are. Instead, I am interested in exploring ways to strengthen the pedagogical utility of a traditional class on evidence.

<sup>8</sup> See, e.g., David R. Samuelson, *Hart, Devlin, and Arthur Miller on the Legal Enforcement of Morality*, 76 DENV. U. L. REV. 189, 190 (1998) (“*The Crucible* propels one far beyond Hart’s descriptions and explanations which are hobbled, along with Devlin’s, by the boundaries of ordinary discourse. Miller, by contrast, illustrates and animates these principles through setting, plot, character, dialogue, feeling, and color, thereby giving them human texture.”).

<sup>9</sup> A fair amount has been written about the different strands that exist within the movement, and whether it can even fairly be characterized as a “movement” at all. See, e.g., Jane D. Baron,

law has received scant treatment within that movement,<sup>10</sup> despite the fact that trials are inherently dramatic.<sup>11</sup> The limited extant scholarship tends to focus more on “law as literature,” applying different “interpretive modes” to the rules of evidence themselves,<sup>12</sup> than on “law *in* literature.”<sup>13</sup> This is understandable: in order for “law in literature” to say much about evidence, the work in question would seemingly have to focus around a courtroom drama, and the vast majority of great literature has nothing to do with litigation. But *The Crucible*, while arguably not a “courtroom” drama at all, is—in structure, theme, and subject matter—a work that is particularly well-suited to evidentiary analysis.

This Article will proceed as follows. Part II argues why analyzing *The Crucible* can be a useful endeavor for the student of evidence law. Part III provides a brief synopsis of the plot of *The Crucible*, for those unfamiliar with the play. Part IV, the bulk of the Article, analyzes passages from the play and discusses how they relate to the policies and doctrinal operation of the Federal Rules of Evidence (the “Rules”). I first take up frequently-encountered issues relating to the regulation of witness examinations, including form of the question objections and witness sequestration. I then take up the most important substantive evidentiary doctrines covered by the Federal Rules of Evidence, including relevance, character evidence and impeachment, personal knowledge and opinion, and hearsay. Part V concludes.

## II. SUITABILITY OF *THE CRUCIBLE* FOR EVIDENTIARY ANALYSIS

### A. *Features Well-Suited to Evidentiary Analysis*

In a sense, by virtue of the medium, *any* stageplay lends itself to the sort of evidentiary analysis undertaken by a trial lawyer. Evidentiary objections arise in the context of in-court examination of witnesses—questions and

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*Law, Literature, and the Problems of Interdisciplinarity*, 108 YALE L.J. 1059, 1062–66 n.11 (1999).

<sup>10</sup> Ledwon, *supra* note 3, at 1150; see also Roger C. Park, *Evidence Scholarship, Old and New*, 75 MINN. L. REV. 849, 850 (1991).

<sup>11</sup> See, e.g., Milner S. Ball, *The Play’s the Thing: An Unscientific Reflection on Courts Under the Rubric of Theater*, 28 STAN. L. REV. 81 (1975); Ledwon, *supra* note 3, at 1149 (“Evidence law, in particular, has strong affinities with the idea of poetics as a shaping with words, or the creating of stories, for evidence is the area of law perhaps most closely tied to story[telling].”).

<sup>12</sup> See, e.g., Ledwon, *supra* note 3, at 1152–60 (identifying no less than ten different sub-categories of law and literature scholarship relating to evidence law, only one of which involves “evidence in literature.”).

<sup>13</sup> Baron, *supra* note 9, at 1071–72; see also Ledwon, *supra* note 3, at 1155–56 (utilizing “evidence *in* literature” and “evidence as literature” categories, and referencing “‘law in literature’ approaches (such as examining a novel or Shakespeare play for its use of legal themes)”).

answers. During the course of such “dialogue,” one or more pieces of documentary or other “real” evidence may be introduced. So, too, a stage play, circumscribed by the medium of a fixed stage and other technological limitations of live performance, relies primarily on dialogue between actors, as well as their interaction with scenery and props.<sup>14</sup>

Much as a trial transcript is a linear written representation of the live unfolding of in-court proceeding, a stage play is the “transcript” or the live unfolding of an on-stage performance. Moreover, just as one could read a “transcript” style evidence question, and hone in on the appropriate objections and responses regarding a given question or answer, one could pinpoint evidentiary issues in much the same way in a stage play, focusing on a particular line or exchange of dialogue.<sup>15</sup> However, there are at least three features of *The Crucible* that makes its study a particularly beneficial exercise to the student of evidence.

First, on a technical level, so much of the play involves not merely dialogue, but dialogue in the form of interrogation. Thus, more so than most plays, the dialogue in *The Crucible* raises specific issues regarding the appropriate form of questioning. It is also more likely to raise substantive evidentiary issues that can arise during an interrogation, because the information sought by the interrogator may be irrelevant, unreliable, or inflammatory if heard by a fact finder, and thus may be of a type that would be excluded by one or more rules of evidence.

Second, *The Crucible* is structured to engage the reader<sup>16</sup> in the fact-finding role. As noted above, when a lawyer takes on a case, she invariably has no percipient knowledge. Instead, she tries to reconstruct the underlying events post-hoc from various sources. So, too, in *The Crucible*, the key percipient “event” that is at the heart of the dramatic conflict—the girls dancing and conjuring spirits with the slave Tituba in the woods<sup>17</sup>—has already happened when the first lines of dialogue are spoken in Act One.<sup>18</sup> As the play unfolds,

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<sup>14</sup> Contrast this with a motion picture, which—depending on the production budget and genre—can have an endless number and variety of settings, and can focus as much or more on action and visual representation than on actors’ dialogue.

<sup>15</sup> Admittedly, reading the text of a play does not allow the student to practice making split-second decisions regarding whether make objections during live testimony, as participating in a real trial would. Indeed, nothing short of live or video-based exercises can offer that sense of immediacy. Nevertheless, reading the text enables the student to immerse herself in the give-and-take dialogue between lawyer and witness. In any event, reviewing deposition or trial transcripts for evidentiary issues is a function in which practicing lawyers frequently engage.

<sup>16</sup> The term “reader” herein includes, where applicable, a viewer of a live performance of the play.

<sup>17</sup> For a summary of the plot of *The Crucible*, see discussion *infra* Part III.

<sup>18</sup> Prior to those first lines of dialogue, and in various other places in the written text of Act One, Miller provides rather extensive background information regarding the community dynamic in Salem as well as the backstory regarding and relationships between on-stage characters. This information is, in part, useful to the actors to understand the motivation and personalities of their

we learn more of those events through different people's accounts, including those who had firsthand knowledge of them (Abigail, Tituba, Mary Warren), and others who heard of or had other knowledge of the events (Parris, Proctor, Mrs. Putnam). Similarly, the other events which may bear on people's credibility and their motives to fabricate claims of witchcraft—such as John Proctor's illicit activities with Abigail; the property disputes between neighbors; or the multiple deaths of the Putnam children in childbirth, which makes the Putnams eager to indict the midwife Goody Osburn<sup>19</sup>—are “out there” already. The reader tries to piece together the “truth” from the competing snippets of testimony and evidence.

Third, the play engages the reader in the advocacy role, over and above the fact-finding role. After all, there are many different kinds of fact finders. One could be a judge or juror, resolving facts in order to decide a dispute. But the reader of *The Crucible* does not have a say in the outcome. At the same time, the reader is not a mere passive spectator, for she seeks to make sense of, and make her own judgments regarding, the information being presented to her. Specifically, the reader is invited to pass negative judgment on the hypocrisy and inefficacy of the legal system presented therein.<sup>20</sup>

Thus, the reader is drawn into the role of the lawyer-advocate.<sup>21</sup> Part of the obvious power of the play is that the reader—unlike the judges or almost everyone else in the play—“knows” that witchcraft is not real, and so is “rooting” for those who stand accused. Moreover, even accepting the possibility of the supernatural, the reader is privy to conversations that reveal that the séance in the woods that is at the heart of the story was motivated by banal drives—Mrs. Putnam’s desire to rationalize her misfortune in having lost so many children; Abigail’s desire to recapture the heart of her erstwhile paramour, Proctor; and the other girls’ desire to participate in risky or deviant behavior out of sheer boredom or peer pressure—and not from the “compulsion” of evil spirits or witches.

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onstage personae, but it goes well beyond that. It provides historical context, and even offers Miller’s own perspectives. As the play would have been performed on stage, however, this information would have been unavailable to the audience.

<sup>19</sup> ARTHUR MILLER, *THE CRUCIBLE* 47 (Viking Press 1953).

<sup>20</sup> *But see* David R. Samuelson, “*I Quit This Court*”: Is Justice Denied in Arthur Miller’s *The Crucible*?, 2 U. CHI. L. SCH. ROUNDTABLE 619, 638 (1995) (“The play . . . appears to tempt us to mock Salem justice. But mockery would be useless, since it is an irritating, frustrating, and often agonizing fact that legal logic does not require the truth.”); *id.* at 620 (“My thesis is that the legal decisions depicted in *The Crucible*, however monumentally unfair and unwelcomed, are not necessarily unjust. Rather, from the standpoint of legal positivism, one can regard them as almost compelled.”).

<sup>21</sup> To be clear, the play itself is far more than a mere advocacy piece. It is not merely didactic, nor can it be simply written off as an allegory for the anti-Communist “witch hunts” that had swept the nation—and affected Miller personally—just a few years prior to its being written. *See, e.g.*, Samuelson, *supra* note 8, at 203 (noting that Miller was making a broader commentary than a mere condemnation of McCarthyism).

As such, in observing the progress of the proceedings from initial accusation to formal trials to conviction and execution, the tragic impact of the play lies in large part in the fact that we know that justice—in the sense of the “truth” being affirmed and the “correct” result obtaining—is wanting.<sup>22</sup> The girls’ accusations are false, the trier or fact is foolish for believing them, and innocent people are being wrongfully condemned.

We are thus in the role of lawyers in the sense that we are far from neutral, but rather we are “zealous advocates” for certain participants in the legal proceedings. We want one version of the truth—that the girls are liars, and that Elizabeth and the other defendants are not guilty of witchcraft—to prevail.

To be sure, lawyers representing the parties in litigation do not have the benefit of full information, as the reader does when a playwright like Miller employs the technique of dramatic irony. But litigators often come to have a similar sense of certainty as to what the “right” outcome is based on their understanding of what the underlying “truth” is.

Thus, in analyzing the evidentiary issues raised in the play, the student can adopt the role of one of the adversaries in the battle over competing versions of the truth—in most cases, the defense lawyer representing Elizabeth Proctor against the accusations of witchcraft. Viewing the facts from this perspective, the “student-lawyer” has an intuitive sense of what evidence she does or does not want admitted. Then, she must be able to “translate” that strategic impulse into legal arguments that would persuade a judge. At the same time, the student-lawyer needs to maintain objectivity and identify, articulate, and weigh the best arguments on the other side, in order to determine the likely outcome of the various evidentiary disputes. This is precisely what real trial lawyers do all the time.

#### B. *Features Ill-Suited to Evidentiary Analysis*

There are several features of *The Crucible* that admittedly present obstacles to analyzing the exchanges of dialogue contained therein in light of a codified system of evidence such as the Federal Rules. Before proceeding with an evidentiary analysis of the play, it is worth pointing out these obstacles and noting why they are not insurmountable.

First, although the play revolves around the Salem witch trials, it is *not* a “courtroom drama” per se. In fact, none of the four acts is set in a courtroom itself. Act Three is set in the anteroom just outside the meeting hall which is

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<sup>22</sup> *Contra* Samuelson, *supra* note 20, at 620–21 (“To regard [Proctor] as a victim of legal injustice renders him a pathetic, as opposed to a tragic, figure. . . . Instead, as in all great tragedies, the best lessons flow from viewing a heroic figure confronting, and then conquering, the feebly understood self.” (internal citation omitted)).

serving as a courtroom,<sup>23</sup> and although it opens with a brief exchange of in-court dialogue being heard just off stage, the courtroom itself is never seen.<sup>24</sup>

Second, the play is set in the late 1600s—not only hundreds of years before the Federal Rules of Evidence were first enacted in 1975,<sup>25</sup> but even a century before the republic itself was founded. Indeed, Miller *wrote* the play two decades before the Rules were enacted. It is undeniably anachronistic to scrutinize fictional proceedings that predate our modern legal institutions according to ex-post rules developed for those very institutions.

Third, the narrative proceeds from the premise that witchcraft is a real phenomenon—an “invisible crime”<sup>26</sup> that could nevertheless be proven through testimony and other circumstantial evidence. David Samuelson has argued that, given such a premise, *The Crucible* is actually a tale of justice upheld, not denied, when viewed through the lens of legal positivism.<sup>27</sup>

Regarding each of these objections, there is both an omnibus response and an individually tailored response. The omnibus response is: let the student suspend disbelief.

Thus, as to the concern that the play is not a “courtroom” drama, it is a simple matter for the student to ask: supposing the exchange *were* taking place in a courtroom, how would it affect the admissibility of the testimony and other evidence offered as “proof”? Moreover, in the middle of Act Three, when Giles Corey asserts that Danforth lacks authority to declare him in contempt for refusing to reveal certain information, Judge Danforth purports to “declare the court in full session” in the anteroom to the courtroom.<sup>28</sup> It is unclear whether this “session” continues for the duration of the Act, but it appears that at least a portion of the action does take place “in court,” if not in the courtroom proper.

Similarly, in response to the anachronism objection, one can say: let the student ask what the outcome would be assuming that the various interrogations *were* governed by the Federal Rules of Evidence. Furthermore,

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<sup>23</sup> MILLER, *supra* note 19, at 83 (describing the setting as “[t]he vestry room of the Salem meeting house, now serving as the anteroom of the General Court,” and noting that “[a]t the right are two doors leading into the meeting house proper, where the court is being held”).

<sup>24</sup> *Id.* at 83–84.

<sup>25</sup> See Pub. L. No. 93-595, 88 Stat. 1926 (Jan. 2, 1975) (codified as amended at 28 U.S.C. appendix, Federal Rules of Evidence (2006 & Supp. V 2011)).

<sup>26</sup> MILLER, *supra* note 19, at 100.

<sup>27</sup> Samuelson, *supra* note 20, at 620.

<sup>28</sup> MILLER, *supra* note 19, at 97.

those Rules<sup>29</sup> are largely a codification of common law principles or rulings that had existed for decades or centuries prior to their enactment.<sup>30</sup>

Finally, as to the objection that evidentiary analysis is meaningless in the context of a narrative that supposes witchcraft could be genuine, there is, again, the suspension of disbelief argument: let the student consider—even assuming witchcraft were possible—what the evidentiary rulings should be. There is at least one other retort: who says we do not today have our own “invisible crimes”?<sup>31</sup> For example, given that a conspiracy—a “meeting of the minds”—can be proven with regard to two people who have never met or spoken,<sup>32</sup> purely on the basis of circumstantial evidence, we should be hesitant to brand the early colonists as naïve or of a qualitatively different stripe than us. Indeed, that was precisely Miller’s point in drawing the analogy to the McCarthy-era “witch hunts” of suspected Communist sympathizers.

In the next Section, I summarize the plot of *The Crucible*, in order to provide sufficient background, for those unfamiliar with the play to understand the evidentiary analysis that follows. Readers familiar with the play’s plot may wish to proceed directly to Section IV.

### III. SUMMARY OF THE PLOT OF *THE CRUCIBLE*

Act One takes place in the spring of 1692 in Salem, Massachusetts.<sup>33</sup> The setting is the inside of the house of the Reverend Samuel Parris, the minister of Salem, where his daughter, Betty, is lying unconscious and apparently ill.<sup>34</sup> The night before, Parris caught his daughter and his niece, Abigail Williams, along with other teenage girls, dancing in the woods possibly naked and participating in some sort of séance.<sup>35</sup> We also learn that Ruth Putnam, the daughter of Thomas Putnam, a prominent landowner, has likewise been struck catatonic.<sup>36</sup> Although there are rumors about town that the girls’ condition is the result of witchcraft, Abigail insists that the girls were engaged

<sup>29</sup> “Rules” refers herein to the Federal Rules of Evidence, and “Rule” refers to a particular Rule of Evidence.

<sup>30</sup> I utilize the Rules in particular, as opposed to any other codification of evidence law, because they are the ones most commonly taught in law schools and are utilized by the broadest array of practitioners.

<sup>31</sup> E.g., Samuelson, *supra* note 20, at 630 (“Our present legal system deals on a daily basis with such invisible crimes—crimes known only to the accuser and to the accused.”).

<sup>32</sup> E.g., United States v. Browne, 505 F.3d 1229, 1274 (11th Cir. 2007) (“[T]he Government need not prove that each conspirator agreed with every other conspirator, [or] knew of his fellow conspirators . . .”).

<sup>33</sup> MILLER, *supra* note 19, at 3.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 10–11.

<sup>36</sup> *Id.* at 13–14.

in nothing untoward, and were merely shocked and fainted when they were discovered.<sup>37</sup> Parris is concerned that the rumors will tarnish his name in the community, and although he has his doubts about Abigail's own reputation and credibility, he is eager to believe her account.<sup>38</sup> Nevertheless, as a precaution, he has sent for Reverend John Hale, an expert in matters supernatural, from a nearby town to investigate.<sup>39</sup>

We then learn more about how the incident in the woods came about. Thomas Putnam's wife, who had seven children die shortly after birth, believed that Tituba, Parris's slave from Barbados, "knows how to speak to the dead."<sup>40</sup> Accordingly, Mrs. Putnam induced Ruth to engage Tituba to conduct a séance to determine "what person murder[ed] [her] babies,"<sup>41</sup> and Ruth invited her friends to join in. Parris bemoans that Abigail's involvement with all this will spell his ruin, but Putnam encourages him to get out ahead of the rumors: "Wait for no one to charge you—declare it yourself."<sup>42</sup>

When Abigail is alone with some of the other girls, we learn that Abigail drank blood at the séance as a "charm to kill John Proctor's wife."<sup>43</sup> Abigail threatens the girls to not reveal that they did anything other than dance or that anyone other than Tituba conjured spirits.<sup>44</sup>

Next, when Abigail is alone with Proctor, another local landowner, we learn that Proctor had previously committed adultery with Abigail while she was in his employ and that she was fired when the matter was discovered by Proctor's wife, Elizabeth.<sup>45</sup> Abigail confides to Proctor that the girls were dancing in the woods and were discovered by her uncle Parris.<sup>46</sup> Abigail expresses her hatred for Elizabeth and her desire to continue her relationship with Proctor, who rebuffs her.<sup>47</sup>

Hale then appears, learns of the girls having danced in the woods, and interrogates Abigail.<sup>48</sup> At first, Abigail denies everything. But under Hale's intense questioning, she admits to having drunk blood at the nighttime encounter—yet claims Tituba induced her to do so.<sup>49</sup> Tituba, in turn, insists that

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<sup>37</sup> *Id.* at 9–11.

<sup>38</sup> *Id.* at 11–12.

<sup>39</sup> *Id.* at 9, 13–14.

<sup>40</sup> *Id.* at 15.

<sup>41</sup> *Id.* at 16.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 19.

<sup>44</sup> *Id.* at 20.

<sup>45</sup> *Id.* at 21–24.

<sup>46</sup> *Id.* at 22.

<sup>47</sup> *Id.* at 23–24.

<sup>48</sup> *Id.* at 36–38, 42–43.

<sup>49</sup> *Id.* at 42–43.

everything that was done was harmless and was done at Abigail's instigation.<sup>50</sup> But when threatened with hanging, Tituba blames the devil, and, when pressured to identify others she has seen with the devil, names two disreputable Salemites suggested by the Putnams.<sup>51</sup> Abigail, mirroring Tituba's move, admits to cavorting with the devil and names yet another accomplice.<sup>52</sup> Betty then "revives" from her stupor and names several other local citizens as well.<sup>53</sup>

Act Two is set in Proctor's farmhouse eight days later.<sup>54</sup> The relationship between Proctor and his wife Elizabeth is strained, as the wounds from his prior infidelity are not yet healed.<sup>55</sup> Since the girls named names in Act One, a court has been set up in Salem, with Governor Danforth presiding.<sup>56</sup> Abigail is the star witness of that court, and anyone accused who refuses to confess will be hanged.<sup>57</sup> Proctor's current maid servant, Mary Warren—one of Abigail's fellow accusers—arrives from court and informs the Proctors that thirty-nine people have been arrested for witchcraft.<sup>58</sup> The court apparently invests full confidence in the girls' testimony.<sup>59</sup> Mary Warren also reveals that Elizabeth's name was "[s]omewhat mentioned" in the proceedings.<sup>60</sup> The Proctors both know that Abigail hopes to take Elizabeth's place as John's wife.<sup>61</sup>

Hale, apparently troubled by the recent implication of more prominent townsfolk such as the Proctors, arrives to inquire into the couple's "Christian character."<sup>62</sup> Elizabeth urges Proctor to reveal Abigail's confession that the dancing in the woods had nothing to do with witchcraft.<sup>63</sup> Cheever, the clerk of the court, then comes to take Elizabeth, who has by now been formally accused of witchcraft, into custody based in part on the evidence of a "puppet," or doll, that Mary Warren had brought home from court that day.<sup>64</sup> Proctor forcefully

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<sup>50</sup> *Id.* at 43–44.

<sup>51</sup> *Id.* at 44–47.

<sup>52</sup> *Id.* at 48.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 49.

<sup>55</sup> *Id.* at 50–51, 53–55.

<sup>56</sup> *Id.* at 52.

<sup>57</sup> *Id.* at 52–53.

<sup>58</sup> *Id.* at 55–56.

<sup>59</sup> *Id.* at 52–53, 58–60.

<sup>60</sup> *Id.* at 59.

<sup>61</sup> *Id.* at 60–61.

<sup>62</sup> *Id.* at 63–64.

<sup>63</sup> *Id.* at 53, 68–69.

<sup>64</sup> *Id.* at 72–76.

demands that Mary Warren go with him to court to expose the girls' empty accusations.<sup>65</sup>

Act Three is set in the anteroom of Judge Danforth's court on the following day.<sup>66</sup> Proctor, bent on saving his wife—as well as other friends of his who have been accused—brings Mary Warren before Danforth and compels her to admit that the girls' accusations of witchcraft were fabricated.<sup>67</sup> Danforth is reluctant to question the girls' credibility, but is willing to consider Proctor's evidence.<sup>68</sup>

Proctor first presents a written “deposition” from ninety-one townspeople vouching for the character of Elizabeth Proctor, Rebecca Nurse, and Martha Corey.<sup>69</sup> Danforth issues warrants for “arrest for examination” for each of the declarants, despite Francis Nurse’s protestation that he had assured them that “no harm would come to them for signing” it.<sup>70</sup>

Proctor next presents the deposition of Giles Corey, Martha’s husband, asserting that Thomas Putnam induced his daughter Ruth to falsely accuse their neighbor George Jacobs of witchcraft in order to obtain Jacob’s property.<sup>71</sup> Giles refuses to reveal the third-party source of his information, and so is put in jail for contempt.<sup>72</sup>

Proctor then presents Mary Warren’s own deposition.<sup>73</sup> She resists Danforth’s suggestion that Proctor threatened her into making the written statement, and under questioning she reaffirms what is alleged therein, i.e., that the girls’ accusations of witchcraft have been fabricated.<sup>74</sup> Danforth then has some of the accusing girls brought in and confronts them with Mary Warren’s charge.<sup>75</sup> Abigail will not back down from her prior testimony, nor will Mary Warren retreat from her current assertion.<sup>76</sup>

Proctor then tries to get Mary Warren to testify that the girls were dancing in the woods, and that they were discovered by Parris.<sup>77</sup> Parris is unable to deny this much.<sup>78</sup> Mary Warren’s explanation for how the girls were

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<sup>65</sup> *Id.* at 79–81.

<sup>66</sup> *Id.* at 83.

<sup>67</sup> *Id.* at 87–89, 92.

<sup>68</sup> *Id.* at 92.

<sup>69</sup> *Id.* at 93.

<sup>70</sup> *Id.* at 94.

<sup>71</sup> *Id.* at 95–96.

<sup>72</sup> *Id.* at 96–98.

<sup>73</sup> *Id.* at 99–100.

<sup>74</sup> *Id.* at 101–02.

<sup>75</sup> *Id.* at 102.

<sup>76</sup> *Id.* at 102–03.

<sup>77</sup> *Id.* at 105.

<sup>78</sup> *Id.* at 105.

able to faint in court, in the absence of genuine witchcraft, was that it was “pretense.”<sup>79</sup> Parris then seeks to test this proposition by seeing if she can faint on the spot. However, she is unable to do so, as she has “no sense of it now.”<sup>80</sup>

Danforth appears to offer the girls the option of adopting a middle ground: that their accounts of having seen spirits were not deliberately fabricated, but were, instead, the result of a genuinely held yet mistaken belief at the time.<sup>81</sup> Abigail, perhaps sensing that the tide is turning against her, suddenly claims to be experiencing some demonic presence.<sup>82</sup> The other girls, taking up her lead, do the same.<sup>83</sup>

Proctor, desperate and determined not to let Abigail derail the proceedings in this manner, openly admits to having committed adultery with Abigail, and accuses her of seeking to unseat Elizabeth through her false accusation.<sup>84</sup> He also asserts that Elizabeth discovered the affair, which is what prompted Abigail’s firing.<sup>85</sup> To test this, Danforth calls Elizabeth before him and—without giving her an opportunity to look at or communicate with Proctor or anyone else—asks her to confirm or deny her knowledge of Proctor’s infidelity.<sup>86</sup> Elizabeth, not knowing what has transpired to this point, covers for her husband and denies any knowledge of the affair.<sup>87</sup>

Danforth deems Elizabeth’s denial to be conclusive evidence of the falsity of Proctor’s claim, but Hale asserts that Elizabeth’s lie is a “natural [one] to tell,” and that he believes Proctor, not Abigail.<sup>88</sup> Abigail and the other girls again purport to be experiencing the manifestation of spirits.<sup>89</sup> Mary Warren, no longer able to resist the tide, turns on Proctor and claims that he is “the Devil’s man,” who has sought to “overthrow the court.”<sup>90</sup>

Danforth demands that Proctor confess.<sup>91</sup> Proctor, his mind turned by the absurdity of the situation, shouts that “God is dead.”<sup>92</sup> Yet he hardly accedes to the veracity of the girls’ account: in his last line in the Act, he tells

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<sup>79</sup> *Id.* at 106.

<sup>80</sup> *Id.* at 107.

<sup>81</sup> *Id.* at 108.

<sup>82</sup> *Id.* at 108–09.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 109–10.

<sup>85</sup> *Id.* at 110–11.

<sup>86</sup> *Id.* at 111–13.

<sup>87</sup> *Id.* at 113.

<sup>88</sup> *Id.* at 113–14.

<sup>89</sup> *Id.* at 114–18.

<sup>90</sup> *Id.* at 118–19.

<sup>91</sup> *Id.* at 119.

<sup>92</sup> *Id.* at 120.

Danforth, “[y]ou are pulling Heaven down and raising up a whore!”<sup>93</sup> Danforth orders Proctor’s arrest, while Hale denounces the proceedings.<sup>94</sup>

Act Four is set in the Salem jail on the day set for Proctor’s execution.<sup>95</sup> Although the contagion of claims of witchcraft has spread far and wide, leaving in its wake a parade of corpses, orphaned children, and untended fields, there are signs that it is running its course.<sup>96</sup> Abigail has absconded to Boston with all of Parris’s savings.<sup>97</sup> The people of nearby Andover have reportedly sought to rebel against the court there.<sup>98</sup> Parris fears that the townspeople will not countenance the execution of prominent citizens like Francis Nurse or Proctor, and that rebellion will soon reach Salem as well.<sup>99</sup> Hale is reduced to pleading with prisoners to confess their “crimes” rather than hang.<sup>100</sup> Not all are willing to do so: Rebecca Nurse calmly awaits the noose, and Giles Corey chooses to be pressed to death rather than give in.<sup>101</sup> Danforth, for his part, will countenance no wavering regarding the rightness of his cause.<sup>102</sup>

Hale makes an impassioned plea with Elizabeth—who will not face execution at least until her pregnancy has come to term—to convince Proctor to confess.<sup>103</sup> In a private meeting with Elizabeth, Proctor concedes that he “want[s] his life.”<sup>104</sup> He is willing to “confess” to Danforth his association with the Devil, but is unwilling to implicate anyone else, even those who have already been found guilty by the court.<sup>105</sup> Hale, seeking to avoid a prolonged exchange about the matter, urges Danforth to have Proctor sign his written confession and be done with the matter.<sup>106</sup> However, Proctor finds himself unable to sign: “I have given you my soul; leave me my name!”<sup>107</sup> He tears up the paper and crumples it, ensuring his execution.<sup>108</sup> Hale desperately entreats

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 121.

<sup>96</sup> *Id.* at 125, 127, 130–31.

<sup>97</sup> *Id.* at 126.

<sup>98</sup> *Id.* at 127.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 129–32.

<sup>101</sup> *Id.* at 134–35, 140.

<sup>102</sup> *Id.* at 129–30.

<sup>103</sup> *Id.* at 131–32.

<sup>104</sup> *Id.* at 137.

<sup>105</sup> *Id.* at 138–41.

<sup>106</sup> *Id.* at 141.

<sup>107</sup> *Id.* at 143.

<sup>108</sup> *Id.* at 144.

Elizabeth to convince Proctor to relent, but she will not: “He have his goodness now. God forbid I should take it from him!”<sup>109</sup>

#### IV. ANALYSIS OF EVIDENTIARY ISSUES IN *THE CRUCIBLE*

In this Section, I endeavor to show that insights about important evidentiary doctrines can be gleaned from an analysis of passages from *The Crucible*. The goal is to be illustrative, not exhaustive. However, because one of the primary benefits of analyzing the play is the richness of context it provides, many of the vignettes selected will relate to each other, and the analysis of certain passages will depend on, and will be deepened by, the analysis of others.

##### A. *Order and Mode of Presentation of Evidence (Rules 611–615)*

The numerous interrogation scenes in *The Crucible* provide an opportunity for the student-lawyer to appreciate the subtleties regarding not only the substantive matters inquired into, but also the form and mode of the questioning. The Rules give the presiding judge broad discretion to regulate witness examinations, with some general guidelines as to the policy considerations at stake:

The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures effective for determining the truth; (2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment.<sup>110</sup>

The Rules guide a judge in deciding what questions can be asked of a witness, as well as the circumstances under which examinations will take place. These issues loom large in a variety of contexts in *The Crucible*. Below, we will take up three notable scenes in particular.

###### 1. The Interrogation of Tituba

Let us first consider the interrogation of Parris’s slave, Tituba, in Act One, in light of the guidelines laid down by the Rules. When Parris admits that he saw Abigail and the other girls dancing in the woods, Abigail immediately shifts the blame to Tituba, who is promptly summoned into the room for questioning by Hale and others.<sup>111</sup> This, of course, is not a courtroom setting, but one can still analyze the *effect* of the modes of questioning employed, and

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<sup>109</sup> *Id.* at 145.

<sup>110</sup> FED. R. EVID. 611(a).

<sup>111</sup> MILLER, *supra* note 19, at 43.

consider whether there *would be* grounds to object to the questions if asked in court.

a. Form of the Question Objections

At first, Hale's questioning of Tituba is firm, but technically non-leading, as it does not suggest the answer in the question itself:

HALE: Woman, have you enlisted these children for the Devil?

TITUBA: No, no, sir, I don't truck with no Devil!<sup>112</sup>

Hale's next questions transition into a more overtly leading form of interrogation. They are also, like many of his questions, compound:

HALE: Why can she not wake? Are you silencing this child?

TITUBA: I love me Betty!

HALE: You have sent your spirit out upon this child, have you not? Are you gathering souls for the Devil?<sup>113</sup>

The potential dangers of asking such a rapid-fire succession of leading, compound questions are obvious. The witness, hardly protected from "harassment or undue embarrassment," may feel pressured to falsely confess, thus making the questioning a far from "effective [procedure] for determining the truth."<sup>114</sup> She also may easily become confused, as the questions broaden from her conduct vis-à-vis Betty ("[y]ou have sent your spirit out upon *this child*") to dealings with others ("[a]re you gathering souls . . . ?") before she has a chance to answer.<sup>115</sup> Moreover, compound questioning may not be effective in exposing the truth, even assuming the witness does *not* feel put upon. For example, if a witness is asked whether she saw the defendant hit and kick the victim, but she only saw him kick the victim, she could honestly answer "no" to that question, even though the response is misleading.

After additional accusations by Abigail, Hale quickly shifts further into a more inquisitorial mode:

HALE, *resolved now*: Tituba, I want you to wake this child.

TITUBA: I have no power on this child, Sir.

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<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 44.

<sup>114</sup> FED. R. EVID. 611(a).

<sup>115</sup> MILLER, *supra* note 19, at 44.

HALE: You most certainly do, and you will free her from it now! When did you compact with the Devil?<sup>116</sup>

Hale is now unmistakably leading the witness. In fact, in line with textbook cross-examination technique, he is not even really asking a question at all. He is *asserting* the fact that she has power over the child, and is simply seeking her agreement with his statement.

The second part of his statement—“When did you compact with the Devil?”—is also an example of a question that assumes facts not in evidence.<sup>117</sup> One cannot fairly ask *when* someone compacted with the Devil until it has been established that they *have* compacted with the Devil. This is almost identical to the classic law school illustration of a question assuming facts not in evidence, “When did you stop beating your wife?,” which assumes the witness *started* beating his wife at some point. If a judge were present, such questioning should not be permitted.

#### b. Coerced Confessions

Despite Hale’s harsh tone and the improper form of his questions, Tituba stands up even to this intense cross-examination—that is, until she is threatened with death, at which point she suddenly, and not surprisingly, changes her tune:

TITUBA: I don’t compact with no devil!

PARRIS: You will confess yourself or I will take you out and whip you to your death, Tituba!

PUTNAM: This woman must be hanged! She must be taken and hanged!

TITUBA, *terrified, falls to her knees*: No, no, don’t hang Tituba. I tell him I don’t desire to work for him, sir.

PARRIS: The Devil?

HALE: Then you saw him! *Tituba weeps*. Now, Tituba, I know that when we bind ourselves to Hell it is very hard to break with it. We are going to help you tear yourself free—

TITUBA, *frightened by the coming process*: Mister Reverend, I do believe somebody else be witchin’ these children.

HALE: Who?

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

TITUBA: I don't know, sir, but the Devil got him numerous witches.<sup>118</sup>

Once Tituba starts to go down this path, the remainder of the interrogation process consists largely of her adopting whatever facts are suggested to her:

HALE: When the devil comes to you does he ever come—with another person? *She stares up into his face.* Perhaps another person in the village? Someone you know.

PARRIS: Who came with him?

PUTNAM: Sarah Good? Did you ever see Sarah Good with him? Or Osburn? . . .

HALE, *kindly*: Who came to you with the Devil? Two? Three? Four? How many?

TITUBA: There was four. There was four.

PARRIS, *pressing in on her*: Who? Who? Their names, their names!

TITUBA, *suddenly bursting out*: Oh, how many times he bid me kill you, Mr. Parris!

PARRIS: Kill me!

TITUBA, *in a fury*: He say Mister Parris must be kill! . . . And I look—and there was Goody Good.

PARRIS: Sarah Good!

TITUBA, *rocking and weeping*: Aye, sir, and Goody Osburn.

MRS. PUTNAM: I knew it! Goody Osburn were midwife to me three times. I begged you, Thomas, did I not? I begged him not to call Osburn because I feared her. My babies always shriveled in her hands!<sup>119</sup>

To the student-lawyer, Tituba's act of "naming names" is obviously the result of coercion. The exchange neatly illustrates the evils of coercing confessions or otherwise extracting information through "enhanced" interrogation techniques: not only does it deprive the one being interrogated of the dignity to which they are entitled, but the information obtained is unlikely

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<sup>118</sup> *Id.* at 44–45.

<sup>119</sup> *Id.* at 45–47.

to be accurate or reliable.<sup>120</sup> When asked how many people accompanied the Devil when he visited her, Tituba simply adopts the last number suggested—four.<sup>121</sup> And despite saying that four individuals visited her, the only two she is able to identify by name—Goody Good and Goody Osburn—are the very same two individuals that were just suggested to her by Putnam.<sup>122</sup>

If this were a courtroom setting and the student-lawyer were defending Tituba (or Goody Good or Osburn, for that matter), she would object to these leading, compound and argumentative questions.<sup>123</sup> If exclusion of the testimony were denied, the student-lawyer's fallback option would be to argue to the fact finder that Tituba's confession and accusations of Good and Osburn should be given virtually no weight because of the coercive circumstances under which the evidence was obtained.

### c. Sequestration of Witnesses

This exchange between Hale and Tituba illustrates not only the impact of asking leading questions, but also the importance of sequestration of witnesses. Rule 615 provides that, with limited exceptions, “[a]t a party’s request, the court must order witnesses excluded so that they cannot hear other witnesses’ testimony. Or the court may do so on its own.”<sup>124</sup> The policy rationale for sequestering witnesses is to help ensure that testimony is untainted: a witness should testify without knowing what other witnesses have testified to, so that they cannot “collude” to give consistent testimony (or know how to contradict adverse witnesses).<sup>125</sup>

Here, Mrs. Putnam (and in all likelihood, Mr. Putnam as well) *wants* Goody Osburn to be exposed as a witch, as this confirms her pre-existing belief, and allows her to reconcile for herself why so many of her children died in childbirth: “I knew it! Goody Osburn were midwife to me three times. . . .

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<sup>120</sup> In response to Hale’s assertion that the claims of witchcraft must be genuine because people have confessed to the crimes, Proctor responds: “And why not [confess], if they must hang for denyin’ it? There are them that will swear to anything before they’ll hang; have you never thought of that.” *Id.* at 69.

<sup>121</sup> MILLER, *supra* note 19, at 45.

<sup>122</sup> *Id.* at 46–47.

<sup>123</sup> Alternatively, if Tituba’s statements were deemed a coerced pre-trial confession, the student-lawyer could argue that its admission would violate due process of law. See *Payne v. Arkansas*, 356 U.S. 560, 561–62 n.1 (1958) (citing cases illustrating that “the settled view of this Court [is] that the admission in evidence over objection of a coerced confession vitiates a judgment of conviction”).

<sup>124</sup> FED. R. EVID. 615.

<sup>125</sup> See FED. R. EVID. 615 advisory committee’s note (“The efficacy of excluding or sequestering witnesses has long been recognized as a means of discouraging and exposing fabrication, inaccuracy, and collusion.”).

My babies always shivered in her hands!”<sup>126</sup> Putnam suggests Osburn’s name to Tituba—with no apparent basis, at the time, for doing so—and Tituba takes up his invitation to indict Osburn.<sup>127</sup> Had Hale questioned Tituba outside the Putnams’ presence, it is unlikely Tituba would have known to select Osburn as her scapegoat. She probably would not have felt comfortable naming anyone at all, lending less credence to her claims of witchcraft in the first place.

## 2. The Examination of Mary Warren

There are other sequences that raise issues regarding leading questions, sequestration, and the mode and order of examination. Consider the scene in Act Three where Proctor brings Mary Warren before Danforth in an effort to clear Elizabeth and the others. Danforth’s initial concern, ironically, is whether her present recantation of her prior testimony has been coerced:

DANFORTH: Has Mr. Proctor threatened you for this deposition?

MARY WARREN: No, sir.

DANFORTH: Has he ever threatened you?

MARY WARREN, *weaker*: No, sir.

DANFORTH, *sensing a weakening*: Has he threatened you?

MARY WARREN: No, sir.<sup>128</sup>

Danforth’s questions are “asked and answered”: Danforth asks the same question repeatedly, sensing (and hoping) that he will get a different answer.<sup>129</sup> The irony of this exchange is that Danforth’s instinct is correct. At the end of Act Two, Proctor had physically grabbed Mary Warren and forced her to come to court and confess to her prior fabrication: “[Y]ou will tell the court what you know. . . . My wife will never die for me! I will bring your guts into your mouth but that goodness will not die for me!”<sup>130</sup> She is honest, though, in the sense that the *substance* of her testimony, if not the reason why she is now willing to provide it, was free from coercion. Nevertheless, asking the same question repeatedly to elicit preferred testimony is improper.

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<sup>126</sup> MILLER, *supra* note 19, at 47.

<sup>127</sup> *Id.* at 46–47.

<sup>128</sup> *Id.* at 101.

<sup>129</sup> That Danforth, as judge, examines Mary Warren is not itself objectionable. See FED. R. EVID. 614(b) (“The court may examine a witness regardless of who calls the witness.”).

<sup>130</sup> MILLER, *supra* note 19, at 80.

Interestingly, Mary Warren withstands the harsh cross-examination of Danforth, but cannot hold up to the scrutiny of Abigail and the other girls. Just before the girls are brought in, Mary Warren sticks to her story that the earlier testimony was perjured, however reluctantly:

DANFORTH: Then you tell me that you sat in my court, callously lying, when you knew that people would hang by your evidence? *She does not answer.* Answer me!

MARY WARREN, *almost inaudibly*: I did, sir.<sup>131</sup>

But as soon as the other girls are brought in, Mary Warren is frozen in terror. Proctor is the questioner who is on “direct” examination, but because Mary Warren is so terrified of the girls, he has no choice but to lead her—indeed, he essentially crams her testimony down her throat:

PROCTOR: Mary. Now tell the Governor how you danced in the woods. . . .

MARY WARREN: I—*she glances at Abigail, who is staring down at her remorselessly. Then, appealing to Proctor*: Mr. Proctor—

PROCTOR, *taking it right up*: Abigail leads the girls to the woods, Your Honor, and they have danced there naked—.<sup>132</sup>

This would actually be permissible in court: a vulnerable witness, such as a child or a victim of trauma, or who is otherwise reluctant to testify out of fear, may be asked leading questions even on direct examination.<sup>133</sup>

Of course, such leading questioning would not be necessary if the other girls were not present in the first place. Arguably, forcing Mary Warren to confront face to face those she is accusing is an ideal test of her veracity. But Abigail is not the criminal defendant with a right to confront her accuser, and even this bedrock principle may yield to considerations of witness protection.<sup>134</sup>

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<sup>131</sup> *Id.* at 101.

<sup>132</sup> *Id.* at 104–05.

<sup>133</sup> FED. R. EVID. 611(c)(2) (“Ordinarily, the court should allow leading questions except as necessary to develop the witness’s testimony. Ordinarily, the court should allow leading questions . . . when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.”); *see also* FED. R. EVID. 611(c) advisory committee’s notes (“[N]umerous exceptions have achieved recognition: The witness who is hostile, unwilling, or biased[, or] the child witness or the adult with communication problems . . .”).

<sup>134</sup> *See, e.g.*, CAL. PENAL CODE § 1347 (West 2006) (providing that children may testify via closed-circuit television regarding certain sexual or other violent offenses).

### 3. The Sequestration of Elizabeth Proctor

A comparison of the above questioning of Mary Warren with Danforth's examination of Proctor's wife, Elizabeth, is irresistible. When Proctor sees that Abigail refuses to confess to having lied, and that Danforth still finds her credible, he discloses that he had previously slept with Abigail, hoping that doing so will expose her motive to see his wife convicted. Proctor further admits that Elizabeth became aware of the affair, and that is why she fired Abigail. Danforth calls in Elizabeth to test the veracity of this assertion. But to ensure that her testimony is untainted, Danforth insists—this time—on sequestration:

DANFORTH: *He calls to the door. Hold! To Abigail.* Turn your back. Turn your back. *To Proctor:* Do likewise. . . . Now let neither of you turn to face Goody Proctor. No one in this room is to speak one word, or raise a gesture aye or nay. *He turns toward the door, calls:* Enter! *The door opens. Elizabeth enters* . . . Come here, woman. *Elizabeth comes to him, glancing at Proctor's back.* Look at me only, not at your husband. In my eyes only. . . . You will look in my eyes only and not at your husband. The answer is in your memory and you need no help to give it to me.<sup>135</sup>

Elizabeth ultimately lies and denies knowledge of the affair.<sup>136</sup> Although she understandably does this to spare her husband's reputation, Danforth takes this as conclusive proof that she is a liar, and that Proctor's accusation against Abigail is baseless.<sup>137</sup>

In one sense, Danforth's sequestration "worked": Elizabeth didn't know what answer she "should" give to help her position, thus lending credibility to the answer she did give. However, as Hale recognizes, in the absence of knowing the "correct" answer, it is "natural" for a wife to lie about her husband's indiscretion, thus undermining the probative value of her denial of knowledge of it.<sup>138</sup>

At first glance, Danforth's insistence on sequestering Elizabeth—and in taking her sequestered testimony at face value—cannot easily be squared with his treatment of Mary Warren. Out of the presence of the other girls, Mary Warren admitted their collective claims of witchcraft were pretense.<sup>139</sup> Under the scrutiny of Abigail's stares, however, Mary Warren was unable to hold her

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<sup>135</sup> MILLER, *supra* note 19, at 112.

<sup>136</sup> *Id.* at 113.

<sup>137</sup> *See id.* at 113–114.

<sup>138</sup> *Id.* at 114.

<sup>139</sup> *Id.* at 101–02.

ground.<sup>140</sup> Yet Danforth chose not to accept her testimony in their private exchange, and failed to give any weight to the influence that the other girls had on her testimony.<sup>141</sup> By contrast, with Elizabeth, Danforth found her sequestered testimony to be definitive.<sup>142</sup> Seemingly, the court has applied the rules of sequestration inconsistently and unfairly.

However, the “prosecution” could probably justify Danforth’s differential treatment of the two witnesses. Mary Warren had just admitted to lying, so her credibility was already impaired, and it needed to be further tested; whereas Elizabeth had not previously offered testimony, so there was no reason *not* to credit her answer. On a more basic level, because Mary Warren had already provided testimony, the likelihood of ferreting out the truth was increased by subsequently confronting her with the witnesses whose veracity she was impugning.<sup>143</sup> In other words, it is easier to badmouth someone behind their back than in front of their face. But with Elizabeth, who had not yet testified, the facial expressions or statements of friendly and unfriendly witnesses (Proctor and Abigail, respectively) could have signaled to her which answer would favor her position, and those signals would have tainted her response. Thus, sequestration, not confrontation, was the technique more likely to generate truthful answers in that instance.<sup>144</sup> In this view, Danforth utilized whichever techniques maximized truth-telling, and so acted properly.

Even if Danforth were found to have improperly applied the rules of sequestration, it is far from clear that this would amount to reversible error on appeal. It may be that the most the defense lawyer could hope for is to argue to the fact finder that the differential treatment of the witnesses should be given great weight in assessing their credibility—an unlikely prospect, unfortunately,

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<sup>140</sup> *Id.* at 104–05, 118–19.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 113–14.

<sup>143</sup> See *id.* at 96. Upon reading Giles Corey’s written accusation that Thomas Putnam induced false charges to be issued against Putnam’s neighbor, Danforth immediately confronts Putnam with the accusation and, when Putnam denies it, demands that Corey back up the accusation with proof. *Id.*

<sup>144</sup> There is another explanation suggested by the text itself. Early in Act Three, Danforth reveals to Proctor that Elizabeth, now in custody, has claimed that she is pregnant. See discussion *infra* Part IV.D (discussing that Elizabeth’s pregnancy would provide her at least temporary clemency). But Danforth asserts that a physical examination of Elizabeth has shown no sign of pregnancy, to which Proctor responds:

PROCTOR: But if she say she is pregnant, then she must be! That woman will never lie, Mr. Danforth.

DANFORTH: She will not?

PROCTOR: Never, sir, never.

MILLER, *supra* note 19, at 92. However, during the sequestration scene later in Act Three, there is no indication from Danforth that he credits Elizabeth’s denial of knowledge of Proctor’s affair as a result of Proctor’s having previously vouched for her veracity. *Id.* at 112–14.

in a bench trial such as this one. This shows how a trial lawyer must have one eye on winning at trial, while at the same focusing on potential grounds for appeal in the event of an unsuccessful verdict. It also reinforces the limited power of the rules of evidence themselves to ensure a “fair” trial.

B. *Relevance (Rules 401–402)*

Relevance is perhaps the single most important foundational substantive concept for the student of evidence to master, not only because it is the initial threshold for admissibility,<sup>145</sup> but because the admissibility of evidence will often turn on the *purpose* for which it is offered. For example, only an out-of-court statement offered “to prove the truth of the matter asserted” is hearsay;<sup>146</sup> if offered for some other purpose, the statement is not hearsay. Similarly, character evidence is generally inadmissible when offered “to prove that on a particular occasion the person acted in accordance with the character or trait,”<sup>147</sup> but it may be admitted if offered circumstantially to prove some other proposition.<sup>148</sup>

At the same time, students sometimes have difficulty grasping relevance precisely because it is so fundamental that no rule can be looked to as guidance in assessing it. Although Rule 401 provides the test for relevance—evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence”<sup>149</sup>—this does not give any guidance as to whether any *particular* category or item of evidence should be deemed relevant. In this regard, it has been said that “[t]he law furnishes no test of relevancy.”<sup>150</sup> Rather, relevance must be assessed “in the light of logic, experience, and accepted assumptions concerning human behavior”<sup>151</sup> and “[t]he court . . . must exercise broad discretion in drawing on its own

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<sup>145</sup> See FED. R. EVID. 402 (“Relevant evidence is admissible” unless otherwise provided by the federal Constitution, laws, or rules, and “irrelevant evidence is not admissible.”).

<sup>146</sup> *Id.* at 801(c).

<sup>147</sup> *Id.* at 404(a)(1).

<sup>148</sup> *Id.* at 404(b)(2).

<sup>149</sup> *Id.* at 401.

<sup>150</sup> 2 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 401:1, at 486 (7th ed. 2012) (quoting JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 265 (1898)) (internal quotation marks omitted).

<sup>151</sup> *Id.* § 401:1, at 484.

experience in the affairs of mankind in evaluating the probabilities upon which relevancy depends.”<sup>152</sup>

### 1. The Relevance of the Poppet

*The Crucible* presents a variety of scenarios in which the relevance of evidence is called into question. For example, in Act Two, Ezekiel Cheever, the recently appointed clerk of the court, comes to the Proctors’ home bearing an arrest warrant for Elizabeth, and asks if she possesses any “poppets.”<sup>153</sup> Elizabeth, forgetting the rag doll that her maid servant Mary Warren had brought to her earlier in the Act,<sup>154</sup> denies owning any, but Cheever notices the doll sitting on the shelf.

Hale and Proctor initially fail to grasp the supposed relevance of the poppet to the formal accusation of witchcraft lodged against Elizabeth:

HALE: What signifies a poppet, Mister Cheever?

CHEEVER, *turning the poppet over in his hands*: Why, they say it may signify that she—*He has lifted the poppet’s skirt, and his eyes widen in astonished fear*. Why, this, this—

PROCTOR, *reaching for the poppet*: What’s there?

CHEEVER: Why—*He draws out a long needle from the poppet*—it is a needle! . . .

PROCTOR, *angrily, bewildered*: And what signifies a needle? . . .

CHEEVER, *wide-eyed, trembling*: The girl, the Williams girl, Abigail Williams, sir. She sat to dinner in Reverend Parris’s house tonight, and without word nor warnin’ she falls to the floor. Like a struck beast, he says, and screamed a scream that a bull would weep to hear. And he goes to save her, and stuck two inches in the flesh of her belly he draw a needle out. And demandin’ of her how she come to be so stabbed, she—to Proctor now—testify it were your wife’s familiar spirit pushed it in.

PROCTOR: Why, she done it herself! *To Hale*: I hope you’re not takin’ this for proof, Mister!

<sup>152</sup> *Id.* § 401:1, at 486–87 (internal footnotes omitted); *see also* FED. R. EVID. 104(a) (stating that whether “evidence is admissible” is a “preliminary question” for the court, in connection with which it is “not bound by evidence rules, except those on privilege”).

<sup>153</sup> MILLER, *supra* note 19, at 72–73.

<sup>154</sup> *Id.* at 56.

*Hale, struck by the proof, is silent.*

CHEEVER: ‘Tis hard proof! *To Hale*: I find here a poppet Goody Proctor keeps. I have found it, sir. And in the belly of the poppet a needle stuck. I tell you true, Proctor, I never warranted to see such proof of Hell, . . .<sup>155</sup>

When the questioning about the possession of puppets is first posed, no foundation for its relevance had been laid, nor was its relevance “apparent from the context.”<sup>156</sup> Although the threshold for relevance is low—“a brick is not a wall,” as the famous saying goes<sup>157</sup>—in the ordinary course, one would not see *any* logical connection between the keeping of a poppet and the serious criminal accusation of witchcraft. As such, if Cheever were to have posed the question in court and a relevance objection were raised, in the absence of an “offer of proof,”<sup>158</sup> a court would likely sustain the objection, and rightly so.

When Cheever lifts the doll’s skirt and discovers the needle embedded in its belly, the relevance of the evidence becomes quite obvious—to him. But even at this point, unless and until he provides any additional context, a judge would rightly exclude the evidence.

However, once Cheever reveals Abigail’s allegation that Elizabeth’s spirit caused her sharp abdominal pains, the logical connection becomes clear: the doll is strong evidence corroborating Abigail’s account that Elizabeth’s “familiar spirit” pushed in the needle found in Abigail’s abdomen. What was murky and meaningless a moment earlier suddenly becomes fraught with meaning, demonstrating that relevance is entirely relative to the proposition for which evidence is offered.

To Cheever, this is as solid as evidence gets; there is no explanation other than witchcraft for how Elizabeth would possess a poppet with a needle in the belly, just as Abigail claimed. To Proctor, conversely, it is no evidence at all. From Proctor’s perspective, once he learns that Abigail, his wife’s rival for his affections, is the one claiming to have been harmed by his wife, there is only one possible explanation for Abigail’s injury: “she done it herself!”<sup>159</sup>

Of course, applying our modern Western sensibility that would dismiss witchcraft as superstition, or at the very least as something within the realm of theology and therefore not susceptible to serious judicial inquiry, we would not entertain the possibility that one’s “spirit” could drive a needle into someone,

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<sup>155</sup> *Id.* at 74–75.

<sup>156</sup> FED. R. EVID. 103(a)(2).

<sup>157</sup> CHARLES T. MCCORMICK ET AL., MCCORMICK ON EVIDENCE § 185, at 278 (abr. 5th ed. 1999); *see also* 2 GRAHAM, *supra* note 150, § 401:1, at 487.

<sup>158</sup> See FED. R. EVID. 103(a)(2) (“A party may claim error in a ruling only if the error affects a substantial right of the party and . . . if the ruling excludes evidence, the party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.”).

<sup>159</sup> MILLER, *supra* note 19, at 74.

or that this could be achieved through a voodoo-like mechanism of impaling a needle in a doll. Under this view, the only plausible explanations are that Abigail has engaged in either an innocent mistake or willful fabrication.

But this illustrates just how dependent a legal assessment of relevance turns on the judge's "logic, experience, and accepted assumptions concerning human behavior,"<sup>160</sup> and how those "accepted assumptions" are, in turn, dependent upon the time, place, and circumstances in which the judge lives. In the Salem of 1692 presented to us in *The Crucible*, both the existence of a divine Creator and the possibility of genuine witchcraft was not only given credence, but it was also effectively taken for granted.<sup>161</sup> While we may smirk at the naiveté or excessive religiosity of that society, a fair assessment of relevance must take those "accepted assumptions" into account.

When the evidence is considered in that light, neither Cheever nor Proctor are correct. The poppet is not conclusive evidence of witchcraft, as Cheever would insist; nor is it wholly irrelevant, as Proctor maintains.<sup>162</sup> Given the then-existing assumptions about the possibility of witchcraft, the poppet evidence had *some* tendency to make more plausible the assertion that Elizabeth was a witch, which is all that is required to pass the low threshold of relevance. The relevance objection would properly be denied.

## 2. The Impact of Contradictory Evidence

Proctor succumbs to a fallacy common among trial lawyers: he assumes that the existence of contradictory evidence negates the relevance of an item offered in evidence.<sup>163</sup> Immediately following the exchange quoted above, Elizabeth re-enters with Mary Warren, and Proctor grills the latter about the poppet:

PROCTOR: It is your poppet, is it not?

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<sup>160</sup> See 2 GRAHAM, *supra* note 150, § 401:1, at 484.

<sup>161</sup> Samuelson, *supra* note 20, at 634 ("[N]one of [Danforth's] listeners yields to a shred of doubt that God's word is the proper root of the community's law."); see also MILLER, *supra* note 19, at 6 ("It was . . . an autocracy by consent, for they were united from top to bottom by a commonly held ideology whose perpetuation was the reason and justification for all their sufferings.").

<sup>162</sup> See 2 GRAHAM, *supra* note 150, § 401:1, at 487 ("The concept of logical relevancy employed in Rule 401 must be kept separate from issues of sufficiency of evidence for any purpose such as to satisfy a burden of production." (footnote omitted)).

<sup>163</sup> To be fair, this exchange does not take place at trial. To draw an analogy to judicial proceedings, Proctor is arguably in the position of one seeking to have an indictment quashed, and so the sufficiency, and not merely the admissibility, of the evidence really is the central question. While this highlights the need to acknowledge the limitations of comparing a stage play to an actual courtroom proceeding, this should not hold the reader back from analyzing admissibility issues assuming it was a trial. See discussion *supra* Part II.

MARY WARREN, *not understanding the direction of this*: It—is, sir.

PROCTOR: And how did it come into this house?

MARY WARREN, *glancing about the avid faces*: Why—I made it in the court, sir, and—give it to Goody Proctor tonight.

PROCTOR, *to Hale*: Now, sir—do you have it?

HALE: Mary Warren, a needle have been found inside this poppet.

MARY WARREN, *bewildered*: Why, I meant no harm by it, sir.

PROCTOR, *quickly*: You stuck that needle in yourself?

MARY WARREN: I—I believe I did, sir, I—

PROCTOR, *to Hale*: What say you now?

HALE, *watching Mary Warren closely*: Child, you are certain this be your natural memory? May it be, perhaps, that someone conjures you even now to say this?

MARY WARREN: Conjures me? Why, no, sir, I am entirely myself, I think. Let you ask Susanna Walcott—she saw me sewin’ it in court. *Or better still*: Ask Abby, Abby sat beside me when I made it.

PROCTOR, *to Hale, of Cheever*: Bid him begone. Your mind is surely settled now. Bid him out, Mr. Hale.<sup>164</sup>

Mary Warren’s answers establish three things. First, they corroborate Elizabeth’s version of how the poppet came into the home. Second, they show that Mary Warren, not Elizabeth, caused the needle to be inserted in the doll. And third, they reveal that Abigail witnessed Mary Warren insert the needle and saw her do so *prior* to Abigail claiming that the needle in her own abdomen was caused by Elizabeth’s “spirit.” As Proctor establishes each proposition, he interrupts his interrogation of Mary Warren to see if Hale is sufficiently convinced. By the time Proctor has established the third proposition, the matter is settled in his view: he has shown not only that Elizabeth did not inflict Abigail’s injury, but that Abigail was in a position to inflict it herself with the knowledge that by so doing she could falsely implicate Elizabeth.

But Mary Warren’s revelations do not make the poppet evidence *irrelevant*. The existence of contradictory evidence, or evidence that attacks the

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<sup>164</sup> MILLER, *supra* note 19, at 75–76.

weight or credibility of the original evidence, typically should not affect the *admissibility* of the original evidence and thereby operate to prevent the fact finder from hearing or seeing the evidence. Rather, the fact finder should receive both the evidence and the contradictory or impeaching evidence. The issue of which of the competing items of evidence the fact finder should *credit* becomes an issue of weight, not admissibility.<sup>165</sup>

Thus, in the context of a judicial proceeding, although the student-lawyer would, like Proctor, wish to have the poppet evidence excluded, it is relevant and, in the absence of some other grounds for exclusion, should be admitted. Mary Warren's testimony should also be admitted as evidence to rebut the inference that the poppet connects Elizabeth to witchcraft, and perhaps more importantly, to undermine Abigail's credibility. It is thus to the rules regulating evidence pertaining to witness credibility that we turn to next.

### C. Character Evidence and Impeachment (Rules 404–405, 607–610)

In many trials, most of what the fact finder learns about the case comes from the mouths of witnesses. But witness testimony is hardly a perfect reproduction of the facts or events testified to. Rather, testimony is a reconstruction of those facts, one that is mediated by the witness's perceptions of events through her senses; by the storage and recollection of those perceived events in the witness's memory; and by the witness's communication of those memories, which she may deliberately or inadvertently alter. Because the fact finder must decide how closely the witness's version of reality tracks reality and which competing versions to believe,<sup>166</sup> it is said that evidence supporting or attacking a witness's credibility is always material.<sup>167</sup>

Yet whether evidence that bears on credibility is *admissible* is another matter entirely. Such evidence, while "material," may have little or nothing to do with the underlying facts of the case. Thus, the evidence may unduly

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<sup>165</sup> See FED. R. EVID. 104(a)–(b), (e).

<sup>166</sup> See MIGUEL A. MENDEZ, EVIDENCE: THE CALIFORNIA CODE AND THE FEDERAL RULES: A PROBLEM APPROACH 32 (4th ed. 2008) ("[O]ften a trial's outcome will depend on which of two conflicting versions of an event a jury believes. Accordingly, evidence of the veracity or mendacity of the witness may be of special consequence to the determination of the action.").

<sup>167</sup> The recent stylistic revisions to the Federal Rules of Evidence use the phrase "fact is of consequence in determining the action" in lieu of the arguably more ambiguous term "material." 2 GRAHAM, *supra* note 150, § 401:1, at 473. I use the term "material" or "materiality" herein for the sake of brevity, and because it is a term with which many judges and practitioners are familiar. In any event, whatever the terminology employed, the concept includes within it "facts bearing circumstantially upon the evaluation of the probative value to be given to other evidence in the case, including demonstrative evidence and the credibility of witnesses." *Id.* § 401:1, at 495 (footnotes omitted).

consume time or distract the fact finder from the central issues.<sup>168</sup> There is also the risk that the jury will give undue weight to impeachment evidence, or utilize it for improper purposes such as the propensity inference.<sup>169</sup> The Rules include numerous limitations on the circumstances under which evidence may be introduced for impeachment and/or propensity purposes, while also carefully regulating the mode and types of evidence.<sup>170</sup> As in a trial, issues of witness credibility are at the core of *The Crucible*: whether or not to believe that the girls have been the victims of witches, or whether they have simply fabricated the whole thing in order to cover up their having been caught dancing in the woods or because they have been swept up by the tide of their peers' hysteria. *The Crucible* offers a prime opportunity to explore how an individual's bias, reputation, and other characteristics are utilized in assessing their credibility, and to consider how the admissibility of such matters would be handled under the Rules. In fact, the flow of Act Three is essentially one big credibility contest, in which the stakes are continually raised. It is useful to examine some of the applicable passages in depth, for the distinctions between character and impeachment evidence, and the relationship between these doctrines and other bedrock evidentiary concepts, are subtle and often lost not only on students but on practitioners as well.

### 1. The Credibility Contest Between Mary Warren and Abigail Williams

Mary Warren has the potential to be the star witness in Elizabeth's favor, as Mary has been among the chief accusers of those facing charges of witchcraft. When Proctor shows Judge Danforth Mary Warren's written deposition disavowing her (and the other girls') earlier accusations of witchcraft, Danforth assails her credibility on the basis of her having made inconsistent statements.<sup>171</sup>

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<sup>168</sup> MENDEZ, *supra* note 166, at 514 ("Despite the unquestioned relevance of such evidence, the rules proceed on the assumption that the unrestrained use of evidence on witness credibility may distract from and confuse jurors about the issues to be decided.").

<sup>169</sup> For example, the fact that a defendant on trial for bank robbery has been convicted of robbing three banks in the past is probative of the fact that he may not respect the oath to tell the truth under penalty of perjury, and so may bear on his credibility as a witness. See FED. R. EVID. 609(a)(1)(B). But the jury is at least as likely to use the evidence for the impermissible inference that he is the "type" of person who robs banks, and so likely robbed the one in question. See *id.* at 404(a)(1) ("Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.").

<sup>170</sup> See, e.g., *id.* at 404–06, 412–15, 608–10.

<sup>171</sup> See MILLER, *supra* note 19, at 101–02 ("DANFORTH: Then you tell me that you sat in my court, callously lying when you knew that people would hang by your evidence? . . . [Y]ou are either lying now, or you were lying in the court, and in either case you have committed perjury and you will go to jail for it. You cannot lightly say you lied, Mary.").

Proctor tries to defend Mary Warren's credibility, pointing out: "Mr. Danforth, what profit this girl to turn herself about? What may Mary Warren gain but hard questioning and worse?"<sup>172</sup> But just as Proctor could not earlier use Abigail's impaired credibility to neutralize her testimony against Elizabeth about the needle in the doll, he cannot now convince the judge that Mary Warren's about-face should negate her prior accusations simply because her braving the severe consequences of coming clean bolsters her credibility.

a. Distinguishing Between Impeachment Evidence,  
Character Evidence, and Circumstantial Evidence

Danforth next confronts Abigail and the other girls with the general substance of the assertions in Mary Warren's deposition.<sup>173</sup> When neither Mary Warren nor Abigail is willing to back down from their positions, Danforth confronts Abigail with Mary Warren's specific contention that Abigail's story about Elizabeth "stabbing" her via the poppet was false:

DANFORTH, *turning to Abigail*: A poppet were discovered in Mister Proctor's house, stabbed by a needle. Mary Warren claims that you sat beside her in the court when she made it, and that you saw her make it, and witnessed how she herself stuck her needle into it for safe-keeping. What say you to that?

ABIGAIL, *with a slight note of indignation*: It is a lie, sir.<sup>174</sup>

Since Abigail still will not relent, Danforth seeks corroborating details that will either support or contradict one of the girls' versions of events:

DANFORTH, *after a slight pause*: While you worked for Mister Proctor, did you see poppets in that house?

ABIGAIL: Goody Proctor always kept poppets.<sup>175</sup>

It is not clear what exactly Danforth seeks to establish by his question. It may be that if Elizabeth kept poppets previously, it is more likely that she keeps poppets now. If so, this would support Abigail's credibility (and undermine Mary Warren's). But it would also arguably run afoul of the ban on character evidence under Rule 404(a)(1), as it relies on the impermissible propensity inference: that because Elizabeth is the "type" of woman who kept poppets in the past, it is more likely she kept poppets in connection with the events in question. Conversely, the evidence may be used circumstantially to

<sup>172</sup> *Id.* at 104.

<sup>173</sup> *Id.* at 102–03.

<sup>174</sup> *Id.* at 103.

<sup>175</sup> *Id.*

show that Elizabeth had the *opportunity* to possess and use a poppet in aid of witchcraft on the event in question itself. This, too, would help resolve the credibility contest between the two girls. If offered for this purpose, it arguably would not violate the ban on character evidence because it would fall within the limitation under Rule 404(b), which allows specific instances of prior conduct to be used to establish “another purpose” besides propensity, such as “opportunity.”<sup>176</sup> This illustrates the nuanced distinctions that the student-lawyer must make in articulating permissible and impermissible purposes for introducing evidence.

b. The Interplay of Impeachment Evidence and the Hearsay Rule

Proctor then jumps into the fray, not only personally contradicting Abigail’s account but invoking Mary Warren’s conflicting testimony. Cheever, the clerk, also offers his input:

PROCTOR: Your Honor, my wife never kept no poppets. Mary Warren confesses it was her poppet.<sup>177</sup>

CHEEVER: When I spoke with Goody Proctor in that house, she said she never kept no poppets. But she said she did keep poppets when she were a girl.<sup>178</sup>

Cheever’s “testimony” raises some interesting issues regarding the common interaction between the rules governing impeachment evidence and the rules regarding hearsay.<sup>179</sup>

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<sup>176</sup> FED. R. EVID. 404(b)(2) (evidence of a crime, wrong, or other act “may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.”). The Rule further provides that notice of intent to use past acts evidence for such a purpose must be given to a criminal defendant beforehand, in most instances prior to trial. *Id.*

<sup>177</sup> MILLER, *supra* note 19, at 103.

<sup>178</sup> *Id.* at 103.

<sup>179</sup> It also raises a possible issue regarding the propriety of Cheever, a “clerk of the court,” providing testimony against a defendant. *Id.* at 72. Rule 605 provides an automatic rule of incompetency for presiding judges. See FED. R. EVID. 605 (“The presiding judge may not testify as a witness at the trial. A Party need not object to preserve the issue.”). Although the rule does not expressly address the competency of judicial staff to testify, case law has held that testimony by a judge’s law clerk impermissibly taints the jury’s verdict. See *Kennedy v. Great Atl. & Pac. Tea Co.*, 551 F.2d 593 (5th Cir. 1977). However, given that Cheever personally delivered the arrest warrant for Elizabeth, his role may be more akin to that of a law enforcement officer than a judicial officer, and so Rule 605 may not be implicated. But elsewhere in Act Three, when he disclosed to Danforth that Proctor has engaged in farm work on Sundays, Cheever, says, apologetically, “I think it be evidence, John. I am on official of the court, I cannot keep it.” MILLER, *supra* note 19, at 91.

Hearsay statements are often offered to support or attack someone's character or credibility; to be admissible, they must not only satisfy character evidence or impeachment rules, but also the hearsay rule.<sup>180</sup> When Cheever offers Elizabeth's out-of-court statement corroborating both Proctor's and Mary Warren's assertions that Elizabeth never kept puppets, it appears to be hearsay not falling within the exemption for party-opponent admissions under Rule 801(d)(2)(A). That Rule excludes from the definition of hearsay statements "made by the party," but only if they are "offered against an opposing party."<sup>181</sup> Here, Elizabeth's out-of-court statement is arguably a statement by the party *proponent* because it is being offered by Cheever to *assist* Elizabeth. Nor should the statement be admitted as a prior consistent statement under Rule 801(d)(1)(B), which allows a statement that "is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying."<sup>182</sup> Although Elizabeth's veracity on the issue of keeping puppets has been at attacked, the statement is not consistent with *her* testimony, as she has not yet testified in the proceeding.

However, if the statement is being offered merely to contradict Abigail, and thereby impeach her credibility, it is arguably not being offered for the truth of the matter asserted, and so is admissible non-hearsay.<sup>183</sup> A prior inconsistent statement is relevant regardless of the truth of the matter asserted therein, and so is non-hearsay, because the mere *fact* that someone has made contradictory statements is relevant to their credibility, regardless which version is "correct."<sup>184</sup>

The "prosecution" would respond that the out-of-court statement is Elizabeth's statement, not Abigail's: it does not show that Abigail has spoken out of both sides of her mouth. Elizabeth's statement only undermines Abigail's credibility because it contradicts her testimony, but the statement can only operate to contradict her testimony if it is true. As such, the hearsay problem remains.

Even if a judge accepted the impeachment rationale to admit Cheever's first statement (that Elizabeth does not currently keep puppets) over a hearsay objection, Cheever's second statement (that Elizabeth admitted that she used to keep puppets as a girl) supports, rather than impeaches Abigail's testimony. Thus, the non-hearsay purpose of impeaching Abigail's testimony clearly cannot be relied upon. But to the same extent that Cheever's first statement could not be admitted as a party opponent admission against Elizabeth, this

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<sup>180</sup> See FED. R. EVID. 801.

<sup>181</sup> *Id.* at 801(d)(2)(A).

<sup>182</sup> *Id.* at 801(d)(1)(B).

<sup>183</sup> See *id.* at 801(c)(2).

<sup>184</sup> See *id.* at 401.

statement *should* overcome a hearsay objection under that same theory, as Cheever is volunteering testimony that is *adverse* to Elizabeth.

Thus, if either or both of Cheever's statements are admitted, it would likely be for quite different reasons: the former would be admitted only because it is *not* used for the truth, and the latter even though it *is* used for the truth. The student-lawyer must be sensitive to the subtle distinctions between the applicable hearsay and impeachment doctrines so that the student-lawyer can persuasively advocate for the exclusion of harmful evidence and the admission of helpful evidence.

### c. Impeachment Evidence and Undue Prejudice

Proctor, seeking to shut down any contrary evidence, argues the tenuous probity of Cheever's latter statement, and the ensuing exchange nicely illustrates how easily—to use McCormick's terminology—the “sideshow” about witness credibility can overtake the “circus” on the disputed issues.<sup>185</sup> (Cheever's last lines of dialogue are repeated here for context):

CHEEVER: When I spoke with Goody Proctor in that house, she said she never kept no poppets. But she said she did keep poppets when she were a girl.<sup>186</sup>

PROCTOR: She has not been a girl these fifteen years, your Honor.

HATHORNE: But a poppet will keep fifteen years, will it not?

PROCTOR: It will keep if it is kept, but Mary Warren swears she never saw no poppets in my house, nor anywhere else.

PARRIS: Why could there not have been poppets hid where no one ever saw them?

PROCTOR, *furious*: there might also be a dragon with five legs in my house, but no one has ever seen it.

PARRIS: We are here, Your Honor, precisely to discover what no one has ever seen.<sup>187</sup>

Proctor points out the absurdity of trying to disprove a negative. In his view, the lack of affirmative evidence of poppets (or of witchcraft, or of anything else, for that matter) should be sufficient for an acquittal. But to

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<sup>185</sup> CHARLES McCORMICK ET AL., MCCORMICK ON EVIDENCE § 40, at 81 (2d ed. 1972).

<sup>186</sup> MILLER, *supra* note 19, at 103.

<sup>187</sup> *Id.* at 103–04.

Parris, the absence of affirmative evidence is endemic to the supernatural, invisible nature of the crime, and is hardly indicative of innocence.<sup>188</sup>

Setting aside the larger epistemological issues, the parties are arguing over an issue—whether Elizabeth Proctor *ever* kept puppets at any point in her life—that is at best tangentially related to the central issue of whether she is guilty of the instant crime of witchcraft. Proctor attacks the probative value of Cheever's retelling of Elizabeth's admission that she once kept puppets. That admission only partly contradicts Proctor's statement that she *never* kept puppets. Proctor's statement itself contradicts Abigail's assertion that Elizabeth kept puppets while Abigail was in her employ. Abigail's assertion, in turn, was seemingly brought up merely to corroborate one of the girls' accounts of how Elizabeth came to be in possession of the poppet in question. The inquiry regarding how the poppet came to be there was only raised in order to resolve the issue of the two girls' comparative credibility. And ultimately, the girls' credibility is not an ultimate issue in itself, but rather aids the fact finder in determining whether to believe in Elizabeth's guilt or innocence.

The student-lawyer should realize that, although she, like Proctor, may be eager to defend Mary Warren's credibility and undermine Abigail's (in an effort to defend Elizabeth), many judges would have cut off this line of questioning well before it reached this point, due to it being a waste of time or confusing and misleading.<sup>189</sup>

## 2. The Attack on Abigail Williams's Credibility

### a. Character Evidence Used to Attack Credibility

Proctor's defense of Mary Warren's credibility is viewed by Danforth as an attack on Abigail. Proctor does not disabuse Danforth of that notion, and

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<sup>188</sup> A related phenomenon occurs when Parris, noting that Mary Warren's prior accusations of witchcraft—which she now claims were fabricated—were accompanied by fainting, challenges Mary Warren to faint on command. Mary Warren tries, but is unable to do so because of the stress of the situation:

I have no sense of it now . . . I heard the other girls screaming, and you, your Honor, you seemed to believe them and I—It were only sport in the beginning, sir, but then the whole world cried spirits, spirits, and I—I promise you, Mister Danforth, I only thought I saw them but I did not.

*Id.* at 106. Much like the infamous “if it doesn't fit you must acquit” in-court demonstration in the O.J. Simpson murder trial, Mary Warren's inability to feign fainting is hardly conclusive evidence that her prior spells were the genuine product of witchcraft. But once the evidence is presented, it is up to the fact finder to determine the weight to accord it vis-à-vis the witness's credibility.

<sup>189</sup> For example, Rule 403 provides: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” FED. R. EVID. 403.

promptly switches from defense to offense, overtly impugning Abigail's character:

DANFORTH: You are charging Abigail Williams with a marvelous cool plot to murder, do you understand that?

PROCTOR: I do, sir. I believe she means to murder.

DANFORTH, *pointing at Abigail, incredulously*: This child would murder your wife?

PROCTOR: It is not a child, sir. Now hear me, sir. In the sight of the congregation she were twice this year put out of this meetin' house for laughter during prayer.

DANFORTH, *shocked, turning to Abigail*: What's this? Laughter during—!

PARRIS: Excellency, she were under Tituba's power at that time, but she is solemn now.

COREY: Ay, now she is solemn and goes to hang people!

DANFORTH: Quiet, man.

HATHORNE: Surely it have no bearing on the question, sir. He charges contemplation of murder.

DANFORTH: Aye. *He studies Abigail for a moment, then*: Continue, Mr. Proctor.<sup>190</sup>

The student-lawyer, knowing that Abigail is duplicitous, would like any evidence unfavorable to her to be considered and credited. Danforth's instruction to Proctor to proceed with his presentation suggests that, to Danforth, Abigail's prior misconduct—being expelled from church for laughing during prayer—*does* “have bearing on the question” of whether she has engaged in a “marvelous cool plot to murder,” as Proctor “charges.”

But in trying to defend the *admissibility* of this evidence, the student-defense lawyer must now consider at least the following two questions: *how* is Abigail's prior misconduct probative of a relevant proposition in the instant proceeding? And if it is probative of a relevant proposition, is the evidence being offered in the proper *form*? A careful deconstruction of the potentially relevant evidentiary rules is in order.

It may be thought that Abigail's prior conduct is being offered as evidence of her character. Rule 404(a)(1) states the general ban on propensity evidence: “Evidence of a person's character or character trait is not admissible

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<sup>190</sup> MILLER, *supra* note 19, at 104.

*to prove that on a particular occasion* the person acted in accordance with the character or trait.”<sup>191</sup> But although Proctor is said to be “charging” Abigail with a plot to murder his wife through fabricated testimony, Abigail is not presently a defendant on trial for perjury or attempted murder. Rather, she is the star witness in Elizabeth’s trial for witchcraft. As such, it is Elizabeth’s conduct “on a particular occasion” (i.e., her alleged use of witchcraft against Abigail) that is being adjudicated, not Abigail’s, and so Rule 404(a)(1) would not apply to this testimony.

Nevertheless, it can be argued that whether Abigail acted dishonestly in the past bears on whether she is acting “in accordance with” that character trait on the particular occasion *of her testifying against Elizabeth*. To resolve this frequently occurring ambiguity as to whether such evidence falls within the general prohibition of propensity evidence in Rule 404, subsection (a)(3) of that Rule provides an explicit carve-out for evidence bearing on the character for truthfulness or untruthfulness of a testifying witness: “Evidence of a witness’s character may be admitted under Rules 607, 608, and 609.”<sup>192</sup> In other words, the admissibility of character evidence used to impeach the credibility of a testifying witness is governed by the rules for impeachment, *not* the rules for propensity evidence. Thus, it is to the impeachment rules that we must now turn.

Rule 607 simply states the general principle that “[a]ny party, including the party that called the witness, may attack the witness’s credibility.”<sup>193</sup> Rules 608 and 609 address the issue of when *character evidence* may be used to attack or support a witness’s credibility (as opposed to impeachment of credibility for other reasons, such as inability to perceive or recollect the events testified to, bias, and so on).<sup>194</sup>

Rule 609 is inapplicable to the present facts because it deals with impeachment by prior wrongdoing that resulted in a criminal conviction.<sup>195</sup> This form of impeachment is permitted under the theory that, when a witness has been convicted of a crime involving dishonesty, false statements, or other serious crimes, then the jury may consider that fact as an indication that the witness may have little regard for the oath to tell the truth even when he is under the penalty of perjury.<sup>196</sup>

Rule 608, by contrast, deals with other instances in which evidence of a person’s “character” for truthfulness or untruthfulness may be admitted. That Rule provides:

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<sup>191</sup> FED. R. EVID. 404(a)(1) (emphasis added).

<sup>192</sup> *Id.* at 404(a)(3).

<sup>193</sup> *Id.* at 607.

<sup>194</sup> See *id.* at 608–609.

<sup>195</sup> See *id.* at 609.

<sup>196</sup> *Id.*

(a) *Reputation or Opinion Evidence.* A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

(b) *Specific Instances of Conduct.* Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of: (1) the witness; or (2) another witness whose character the witness being cross-examined has testified about.<sup>197</sup>

The first thing we see from Rule 608 is that only certain *forms* of character evidence are admissible when used to impeach a witness's credibility. Under subsection (a), character evidence offered in the form of testimony from witnesses other than the witness whose credibility is in question is limited to reputation or opinion evidence.<sup>198</sup> Those witnesses are prohibited from testifying on direct examination to specific instances of conduct that bear on the subject witness's credibility.<sup>199</sup>

If a party wants to raise specific instances of a conduct regarding a witness's character for truthfulness or untruthfulness, such instances can *only* be inquired into, at the judge's discretion, on cross examination.<sup>200</sup> The cross-examiner must also take the witness at her answer: if she denies the prior conduct or knowledge thereof, the questioner may not "prove it up" with "extrinsic evidence" (i.e., testimony from other witnesses or documentary evidence). These Rules seek to strike a balance between admitting evidence relevant to witness credibility, while at the same time preventing secondary

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<sup>197</sup> *Id.* at 608.

<sup>198</sup> *Id.* at 608(a).

<sup>199</sup> Thus, for example, a witness can testify, "I've known John for ten years, and in my opinion, he is an honest person"; but a witness cannot testify, "I know John is honest because six years ago, he found a wallet with ten thousand dollars in it and turned it into the police, even though he was desperate for money at the time."

<sup>200</sup> This would occur either during cross-examination of the witness herself, or of another witness who offered *good* reputation or opinion testimony on direct examination, for the purpose of testing or undermining that reputation or opinion testimony. FED. R. EVID. 608(b). For example, the cross-examiner might ask the witness from the example in the prior footnote: "You think John is such an honest guy? Were you aware that he stole the life savings of a little old lady through an Internet scam?"

questions of credibility<sup>201</sup> from overwhelming the trial and distracting the fact finder from the primary task of deciding the disputed issues in the case.

The second thing we see is that the only character trait that may be utilized for the purposes of attacking or supporting witness credibility is the trait of *truthfulness* or *untruthfulness*.<sup>202</sup> Other character traits—such as violence or peacefulness, negligence or carefulness, drunkenness or temperance—are not admissible under this Rule to suggest that the witness is or is not being dishonest on the stand.<sup>203</sup>

With this background, the student-lawyer, in the role of the defense, can now apply these Rules to the line of questioning at hand. As to the “admissibility” of Proctor’s claim that Abigail was thrown out of church for laughing during prayer, the first potential difficulty the defense lawyer must reckon with is whether it was introduced in an admissible form. Although Abigail is in the room, and although she is later questioned about related matters, when Proctor first introduces the alleged wrongdoing, he effectively does so through his own direct “testimony,” not through “cross-examination” of Abigail. Under Rule 608(b), his testimony would be “extrinsic evidence” of Abigail’s misconduct, and so it would be inadmissible.<sup>204</sup>

The second difficulty the defense lawyer faces is whether the accusation regarding Abigail’s prior conduct goes to “truthfulness or untruthfulness,” as is required by the Rule.<sup>205</sup> Laughing during prayer is a specific instance of conduct that arguably bears on the character trait of religiosity or secularism, *not* truthfulness or untruthfulness. Alternatively, being expelled from church for disruption, for whatever reason, may bear on the traits (particularly in a minor) of lack of discipline, disobedience, or frivolity, but it is not necessarily indicative of whether the witness is likely to be a *truth teller*.

Thus, it appears that it would be difficult to convince a judge to admit Abigail’s prior misconduct in church to impeach Abigail’s testimony by character for untruthfulness.

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<sup>201</sup> For example, “Did John really return the wallet? Did he really defraud the little old lady?”

<sup>202</sup> See FED. R. EVID. 608(b).

<sup>203</sup> Such evidence might be relevant to a witness’s credibility under *other* theories—e.g., someone’s chronic alcoholism may have impaired their ability to perceive or recollect the events testified to—but they are not admissible as *character evidence* used to impeach credibility.

<sup>204</sup> For that matter, Parris’s attempt to “rehabilitate” Abigail’s credibility—by asserting that when she engaged in the misconduct, she was “under Tituba’s power at that time”—appears to be extrinsic evidence that is likewise inadmissible. MILLER, *supra* note 19, at 104. Parris’s statement, however, may be characterized as argument, not an attempt to present factual evidence to the court.

<sup>205</sup> See FED. R. EVID. 608(b).

b. Limitations on Using Character to Attack Credibility

The defense lawyer, not wanting to give up on admitting this damaging fact against Abigail, would argue that disregarding the solemnity of church services is indicative of a disregard for the solemnity of court, and so bears on the credibility of Abigail's testimony. She could argue that Abigail's disrespect for prayer shows that she is not a "good Christian," and therefore is more likely both to perjure herself and to attempt to secure a baseless conviction for a capital crime against Elizabeth. If it is a sin to lie and falsely accuse, and devotion to God protects one from such sin, then one's religiosity is directly probative of one's truthfulness. Thus, laughing during prayer is a specific instance of conduct that is relevant to a witness's character for "truthfulness or untruthfulness" under Rule 608(b).

The argument is discomfiting because it flies directly in the face of our modern American sensibilities regarding the separation of church and state. Doctrinally speaking, it also flies in the face of the controlling rule of evidence, Rule 610: "Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility."<sup>206</sup> Under Rule 610, the fact that one is a "good" Christian (or a Christian at all) is deemed irrelevant as a matter of law to the question of whether one is an honest witness, and so Abigail's conduct in church should be inadmissible as evidence bearing on her credibility.

Obviously, *The Crucible* is set well before the adoption of the Bill of Rights and its protections regarding freedom of religion. In the socio-legal context of the events in the play, one's religiosity and honesty/goodness are inextricably bound up. Indeed, the entire notion of having witchcraft as a "crime" punishable by the courts could only exist in a society that did not recognize a separation of church and state. Although the student-lawyer must, of course, know when a rule of law is directly on point, the analysis is more nuanced and, frankly, more interesting if one visualizes the evidentiary landscape as if Rule 610 had not yet been enacted and as if Abigail's church misconduct is at least potentially admissible.<sup>207</sup>

The student-lawyer thus finds herself in an interesting ethical dilemma. Substantively, she seeks to prevent religious hysteria from holding sway and generating an empirically dubious legal outcome in the witchcraft trials, and so may be reluctant to emphasize the relevance of one's religious devotion to the legal proceedings. At the same time, if she is operating under an evidentiary

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<sup>206</sup> *Id.* at 610.

<sup>207</sup> This is not that different from what occurs in a modern Evidence class. For example, I have asked my students to consider what the outcome of a disputed evidentiary issue in a sexual assault or molestation case would be under the default character evidence principles in Rules 404 and 405, without regard to the effect that Rules 412–415, which permit admission of the defendant's prior acts in sex offense cases, would have.

rubric in which the religion-credibility connection is fair game, she arguably should try to use it to her advantage to impair the credibility of Elizabeth's chief accuser, Abigail. Thus, in one brief passage, *The Crucible* illustrates the interplay between substance, procedure, strategy, and ethics—the four dimensions that are present in every decision a trial lawyer makes.

### 3. The Proctors' Credibility

#### a. Impeachment by Character Versus Impeachment for Bias

The connection between religious devotion and credibility that is prohibited by Rule 610, yet is essentially taken for granted throughout the play, does not only impact Abigail. In Act Two, Hale interrogates the Proctors, in an apparent attempt to satisfy himself, prior to formal judicial intervention, regarding the rumors and allegations about them. Hale asks Proctor point blank: "I thought, sir, to put some questions as to the Christian character of this house, if you'll permit me."<sup>208</sup> Among other things, Hale seeks to determine whether the Proctors believe in witches, or whether they "fly against the Gospel":

HALE: Proctor, let you open with me now, for I have heard a thing that troubles me. It's said you hold no belief that there may even be witches in the world. Is that true, sir?

PROCTOR, *he knows this is critical, and is striving against his disgust with Hale and with himself for even answering*: I know not what I have said, I may have said it. I have wondered if there be witches in the world—although I cannot believe they come among us now.

HALE: Then you do not believe—

PROCTOR: I have no knowledge of it; the Bible speaks of witches, and I will not deny them.

HALE: And you, woman?

ELIZABETH: I—I cannot believe it.

HALE, *shocked*: You cannot!

ELIZABETH: I cannot think the Devil may own a woman's soul, Mister Hale, when she keeps an upright way, as I have. I am a good woman, I know it; and if you believe I may do only good

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<sup>208</sup> MILLER, *supra* note 19, at 64.

work in the world, and yet be secretly bound to Satan, then I must tell you, sir, I do not believe it.

HALE: But, woman, you do believe there are witches in—

ELIZABETH: If you think I am one, then I say there are none.

HALE: You surely do not fly against the Gospel, the Gospel—

PROCTOR: She believe in the Gospel, every word!<sup>209</sup>

This line of questioning, if asked in court, would clearly run afoul of Rule 610. But this does not mean that any mention of religion would be forbidden even under the current Rule. As the advisory committee's note to Rule 610 state:

[w]hile the rule forecloses inquiry into the religious beliefs or opinions of a witness for the purpose of showing that his character for truthfulness is affected by their nature, an inquiry for the purpose of showing interest or bias because of them is not within the prohibition. Thus disclosure of affiliation with a church which is a party to the litigation would be allowable under the rule.<sup>210</sup>

In an interesting inversion, Proctor himself relies on the distinction between using religion for credibility and using it for other purposes. As he is being cross-examined by Hale on the basis of his spotty church attendance record and seemingly inadequate devotion to Christian practices, he tries to recast the issue as one of personal animus against the reverend Parris:

HALE: In the book of record that Mister Parris keeps, I note that you are rarely in the church on Sabbath Day. . . .

PROCTOR: I surely did come when I could, and when I could not I prayed in this house.

HALE: Mister Proctor, your house is not a church; your theology must tell you that.

PROCTOR: It does, sir, it does; and it tells me that a minister may pray to God without he have golden candlesticks upon the altar.

HALE: What golden candlesticks?

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<sup>209</sup> *Id.* at 69–70.

<sup>210</sup> FED. R. EVID. 610 advisory committee's note.

PROCTOR: Since we built the church there were pewter candlesticks upon the altar; Francis Nurse made them, y'know, and a sweeter hand never touched the metal. But Parris came, and for twenty weeks he preached nothin' but golden candlesticks until he had them. I labor the earth from dawn of day to blink of night, and I tell you true, when I look to heaven and see my money glaring at his elbows—it hurt my prayer, sir, it hurt my prayer. I think, sometimes, the man dreams cathedrals, not clapboard meetin' houses.

HALE, *thinks, then*: And yet, Mister, a Christian on Sabbath Day must be in church. *Pause*. Tell me—you have three children.

PROCTOR: Aye. Boys.

HALE: How come it that only two are baptized?

PROCTOR, *starts to speak, then stops, then, as though unable to restrain this*: I like it not that Mister Parris should lay his hand upon my baby. I see no light of God in that man. I'll not conceal it.<sup>211</sup>

Although Proctor would rather not have his religiosity injected into the proceedings, if it is going to be so injected, he (or his lawyer) would actually emphasize his dislike of Parris, which would be less damaging in the eyes of the law than a perceived dislike of the Lord. This illustrates another important lesson for the student-lawyer: the evidentiary positions that the parties stake out in litigation are not intrinsic, but rather are contingent on the context and the strategic advantages conferred thereby.

#### b. Character at Issue

As noted above, the character evidence rules limit both the circumstances and the forms in which character evidence is admissible. These limitations often interact. For example, under Rule 405(a), in the relatively narrow exception to the general ban on propensity evidence, such evidence is usually limited to the form of reputation or opinion, not specific instances of conduct.<sup>212</sup> However, under Rule 405(b), when character or a character trait is itself at issue in the case, evidence of specific instances bearing on the relevant trait is also admissible.<sup>213</sup>

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<sup>211</sup> MILLER, *supra* note 19, at 64–65.

<sup>212</sup> See FED. R. EVID. 405(a).

<sup>213</sup> For example, in a civil action for negligence, the issue is whether the defendant drove negligently on the event in question, not whether he is a bad driver generally, so character is not

Under the Salemite legal system, the issue of the “Christian character” of Proctor’s house is arguably not only one of credibility, but also goes to the issue of susceptibility to the forces of the Devil himself—the root source of witchcraft—and so really does become an issue of propensity. As Hale states, “the Devil is a wily one,”<sup>214</sup> and utmost fidelity to the Bible and Christian principles is apparently essential to shielding oneself from the Devil’s influence: “Theology, sir, is a fortress; no crack in a fortress may be accounted small.”<sup>215</sup> Thus, the less loyal one is to the Bible generally, the more likely it is that one may have been practicing witchcraft on a particular occasion.

This view—that religiosity affects not only credibility but also the merits of the substantive allegations of witchcraft—can impact the forms of character evidence that may be admitted. In his interrogation of Proctor, Hale inquires into Proctor’s church attendance record, his decision not to have his youngest child baptized, and his ability to recite the Ten Commandments.<sup>216</sup> These are specific instances bearing on Proctor’s “Christian character.” If character is not at issue in a witchcraft trial, such questions would not be permitted if offered in court for the propensity inference.<sup>217</sup> But if one’s “Christian-ness” is inextricably bound up with the likelihood that one could fall under the power of the Devil and thus engage in witchcraft, character *could* be deemed to be at issue.

The defense lawyer, looking to make whatever distinction would benefit her client, would want to argue that even if one’s religiosity were *relevant* to a charge of witchcraft,<sup>218</sup> it is not *at issue*, in the sense that it is not an essential element of a claim or defense that a party must prove to prevail. To

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at issue. By contrast, in an action against the car owner for negligently *entrusting* his car to the driver, the driver’s general trait or reputation for careless driving is relevant—not to proving that the driver negligently caused the accident, but to the owner’s own negligence in deciding to lend the car to the driver notwithstanding that he knew or should have known that the driver was unfit. Thus, the driver’s history of causing accidents—specific instances bearing on his carelessness—would be inadmissible in the negligence action, but would be admissible in the negligent entrustment action.

<sup>214</sup> MILLER, *supra* note 19, at 64.

<sup>215</sup> *Id.* at 69.

<sup>216</sup> *Id.* at 66–67; see also *id.* at 58 (Mary Warren recounts an incident at Sarah Good’s trial where her inability to recall her commandments is deemed to be “hard proof, hard as rock” of her guilt.).

<sup>217</sup> See FED. R. EVID. 404(a).

<sup>218</sup> Obviously, today, such evidence would be excluded on relevance grounds alone. We take for granted that there is no such thing as witchcraft—or at least, that if it exists, it is not a phenomenon capable of being proven in court. As such, we would also reject the notion that someone’s susceptibility to it could be inferred by their record of church attendance or other anecdotal evidence of religiosity. But again, the seventeenth-century Salemite legal system took the existence of witchcraft for granted just as much as we do its non-existence. Given that premise, its courts’ willingness to consider character evidence as probative in witchcraft cases cannot be so easily dismissed.

analogize: in a fraud case, the plaintiff must prove that the defendant lied on the event in question, not that he lied previously or tends to lie generally. Thus, a prior lie is a specific instance of dishonesty that would *not* be admissible under the theory that character is at issue. So, too, Proctor's weak observance of religious practices need not be established in order to prove that witchcraft occurred. It is a fine distinction that the judge may not accept, but the student-lawyer has to be prepared to articulate it forcefully to maximize her chances of success.

c. Particular Exceptions to the Ban on Character Evidence

One need not necessarily explain away the difference between the evidentiary treatment of witchcraft under the Salemite legal system and our own by pointing to social differences that have developed in the last two hundred years. Rather, it may be that even back then, the system treated witchcraft differently than it did other types of cases. The nature of such distinctions may have changed, but they have not disappeared. Indeed, the Rules themselves contain certain anomalous exceptions to the general ban on character evidence that treat certain types of cases differently from all others.

Consider, for example, that under the Rules, although character evidence is generally inadmissible when offered against a criminal defendant in the first instance,<sup>219</sup> and is generally inadmissible in civil cases, a very different regime exists in cases involving allegations of sexual assault or child molestation. Pursuant to Rules 413 through 415, so long as the prosecution or plaintiff, as applicable, provides adequate advance notice of intent to introduce evidence of the defendant's prior specific acts of sexual assault or molestation,<sup>220</sup> such evidence can "be considered for any matter to which it is relevant,"<sup>221</sup> including the propensity inference.

Why is propensity evidence permitted in these types of cases but not others? Because sex offense and molestation cases are determined to be "different."<sup>222</sup> In the words of the principal Congressional sponsor of the special rules:

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<sup>219</sup> Under the "mercy rule" and related doctrines, a criminal defendant may offer evidence of his good character or evidence of the witnesses' bad character, and the prosecution may only offer evidence of the defendant's bad character if the defendant "opens the door" by availing himself of these options. *See FED. R. EVID. 404(a)(2)(A)–(B).*

<sup>220</sup> *See id.* at 413(b), 414(b), 415(b).

<sup>221</sup> *Id.* at 413(a), 414(a), 415(a).

<sup>222</sup> Rules 413 through 415 were not a product of the usual procedure by which Federal Rules of Evidence are promulgated. They were added to the rules by Congress in the Violent Crime Control and Law Enforcement Act of 1994. Pub. L. No. 103-322, 108 Stat. 1796; *see also* FEDERAL RULES OF EVIDENCE HANDBOOK 134 (Matthew Bender & Co. 2011–12 ed.) [hereinafter Bender].

The proposed reform is . . . justified by the distinctive characteristics of the cases it will affect. In child molestation cases, for example, a history of similar acts tends to be exceptionally probative because it shows an unusual disposition of the defendant—a sexual or sadosexual interest in children that simply does not exist in ordinary people. . . . [Child molestation] cases require reliance on child victims whose credibility can readily be attacked in the absence of substantial corroboration.<sup>223</sup>

This statement sounds strikingly similar to Judge Danforth's assertion that witchcraft trials should not be governed by the ordinary procedures of adducing proof because witchcraft is not "an ordinary crime," and so we "must rely upon [the witch's] victims."<sup>224</sup> It also echoes Danforth's conflation of intrinsic moral failure with clear legal guilt:

DANFORTH: [A] person is either with this court or he must be counted against it, there be no road between. This is a sharp time, now, a precise time—we no longer live in the dusky afternoon when evil mixed itself with good and befuddled the world. Now, by God's grace, the shining sun is up, and them that fear not light will surely praise it. I hope you will be one of those.<sup>225</sup>

Both then and now, evidence law is, for better or worse, hardly immune from social and cultural tides. Rather, evidence law is a reflection of the types of "facts" that ought to be legitimately considered by a rational finder of fact, and so necessarily reflects, explicitly or implicitly, assumptions about what facts are "given" and what inferences are "fair" or "logical." The astute student-lawyer cannot be blind to this critical dynamic. Analyzing this phenomenon in a different culture, as in that portrayed in *The Crucible*, can help the student-lawyer better recognize it in her own. Honing this skill is not merely a matter of understanding policy for its own sake; it will facilitate the identification and articulation of arguments that will be persuasive to a judge or other decision maker.

#### d. Inconsistent Applications of Bias

One cannot address witness credibility issues in *The Crucible* without taking note of which biases the court will recognize as relevant to credibility,

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<sup>223</sup> 145 CONG. REC. H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Susan Molinari) (floor statement concerning the Prior Crimes Evidence Rules for Sexual Assault and Child Molestation Cases).

<sup>224</sup> MILLER, *supra* note 19, at 100.

<sup>225</sup> *Id.* at 94.

and which ones it will not. For example, early in Act Three, when Proctor first raises his intent to expose the falsity of the girls' accusation in order to clear Elizabeth's name, Danforth admonishes Proctor that his interest in the matter may cloud his objectivity:

DANFORTH: I understand well, a husband's tenderness may drive him to extravagance in defense of a wife. Are you certain in your conscience, Mister, that your evidence is the truth?<sup>226</sup>

Toward the end of the same Act, when Elizabeth denies knowledge of Proctor's affair with Abigail (which Proctor has just admitted), Danforth—rather than consider the possibility that she is simply trying to save her husband from public humiliation, as Hale does—views this as rock solid proof that Proctor is lying about the affair, and thus that he is lying about Abigail having fabricated the allegation of witchcraft:

DANFORTH, *reaches out and holds her face, then*: Look at me! To your own knowledge, has John Proctor ever committed the crime of lechery? *In a crisis of indecisions, she cannot speak.* Answer my question! Is your husband a lecher!

ELIZABETH, *faintly*: No, sir.

DANFORTH: Remove her, Marshal.

PROCTOR: Elizabeth, tell the truth!

DANFORTH: She has spoken. Remove her!

PROCTOR, *crying out*: Elizabeth, I have confessed it!

ELIZABETH: Oh, God! *The door closes behind her.*

PROCTOR: She only thought to save my name!

HALE: Excellency, it is a natural lie to tell . . . From the beginning this man has struck me true. By my oath to Heaven, I believe him now, and I pray you call back his wife before we—

DANFORTH: She spoke nothing of lechery, and this man lies!<sup>227</sup>

Thus, when Proctor testifies favorably for his wife, its probity is discounted by the judge as stemming from Proctor's affection for her. But when Elizabeth does the same—testifying in a manner that she believes favors

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<sup>226</sup> *Id.* at 89.

<sup>227</sup> *Id.* at 113–14.

her husband—the judge disregards her bias entirely and accepts her testimony as truth. A defense lawyer would likely want to rail against such hypocrisy.

But a sophisticated prosecutor could argue that Danforth's positions are not necessarily as inconsistent as they may seem. When Danforth admonishes Proctor about how his bias may affect his testimony, it is *before* Proctor has testified, as part of an attempt to dissuade him from doing so. Elizabeth, by contrast, does give affirmative testimony, and once she does she is charged with telling the truth and may be held to her answers, notwithstanding any potential biases.

In any event, assuming Danforth *does* exhibit hypocrisy in his rulings, this only highlights a major limitation of the Rules of Evidence: they govern *whether* the fact finder should receive certain evidence, and for what purpose(s), but they cannot control what the fact finder *does* with the evidence once received. The Rules of Evidence are designed to ensure that the information considered by the jury meets minimum thresholds of reliability and to ensure that certain prejudicial evidence is excluded. But if the fact finder deals inconsistently with the evidence, a party's only recourse is post-trial motions or appeal (assuming such an avenue exists), not exclusion of the evidence.<sup>228</sup> Here, Danforth considers Hale's argument that Elizabeth's bias explains her false testimony, and chooses to reject it. The Rules of Evidence are a hedge against injustice, not a guaranty.

#### D. Personal Knowledge and Opinion Testimony (Rules 602, 701–702)

One of the “most pervasive manifestation[s]” of the insistence upon “the most reliable sources of information” is the requirement that a witness (other than an expert witness) testify only to matters about which they possess personal knowledge.<sup>229</sup> If a witness testifies as to facts about which they lack personal knowledge, there is no reason to believe that the facts testified to are an accurate and reliable reflection of reality. Rule 602 provides, in pertinent part: “A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness’s own testimony.”<sup>230</sup> This Rule requires that “a witness who testified to a fact which can be perceived by the senses must have had an opportunity to observe, and must have actually observed the fact.”<sup>231</sup>

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<sup>228</sup> See FED. R. EVID. 102, 611.

<sup>229</sup> FED. R. EVID. 602 advisory committee’s note (quoting MCCORMICK ET AL., *supra* note 185, § 10, at 20).

<sup>230</sup> *Id.* at 602.

<sup>231</sup> *Id.* at 602 advisory committee’s note (quoting MCCORMICK ET AL., *supra* note 185, § 10, at 20).

Moreover, under Rule 701, although lay witnesses may testify in the form of an opinion, they may only do so if the opinion is “(a) rationally based on the witness’s perception; (b) helpful to clearly understanding the witness’s testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.”<sup>232</sup> The distinction between lay testimony and expert testimony is that lay testimony “results from a process of reasoning familiar in everyday life,” while expert testimony “results from a process of reasoning which can be mastered only by specialists in the field.”<sup>233</sup>

### 1. Mary Warren’s Personal Knowledge and Lay Opinion

*The Crucible* obviously implicates issues regarding what facts a witness can have “personal knowledge” of, as well as what opinions result from a “process of reasoning familiar in everyday life.” Consider Mary Warren’s remarks to the Proctors about her “discovery” that Sarah Good had tried to harm her through witchery:

MARY WARREN: [Sarah Good] tried to kill me many times,  
Goody Proctor!

ELIZABETH: Why, I never heard you mention that before.

MARY WARREN: I never knew it before. I never knew anything before. When she come into the court I say to myself, I must not accuse this woman, for she sleep in ditches, and so very old and poor. But then—then she sit there, denying and denying, and I feel a misty coldness climbin’ up my back, and the skin on my skull begin to creep, and I feel a clamp around my neck and I cannot breathe air; and then—*entranced*—I hear a voice, a screamin’ voice, and it were my voice—and all at once I remembered everything she done to me!

PROCTOR: Why? What did she do to you?

MARY WARREN, *like one awakened to a marvelous secret insight*: So many time, Mr. Proctor, she come to this very door beggin’ bread and a cup of cider—and mark this: whenever I turned her away empty, she *mumbled*. . . .

MARY WARREN: But *what* does she mumble? You must remember, Goody Proctor—last month—a Monday, I think—

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<sup>232</sup> *Id.* at 701.

<sup>233</sup> *Id.* at 701 advisory committee’s note (quoting State v. Brown, 836 S.W.2d 530, 549 (Tenn. 1992)).

she walked away and I thought my guts would burst for two days after. Do you remember it?<sup>234</sup>

Mary Warren may have personal knowledge through her senses of the “misty coldness climbin’ up [her] back,” the “skin on [her] skull begin to creep,” or the “clamp around [her] neck” while in court. She also would have personal knowledge of hearing Sarah Good “mumble” things. And she would be in a position to say whether she suffered a sensation of asphyxiation, or severe intestinal discomfort, shortly after hearing that mumbling. But she is not qualified to testify to a *causal* connection between any of her symptoms and any wrongdoing by Sarah Good, whom she never personally observed lay a finger on her. Indeed, in Act One, Hale seems to indicate that an understanding of the workings of witches and related supernatural beings is something reserved for the realm of experts, not lay people.<sup>235</sup>

Moreover, Mary Warren’s concession in response to Elizabeth’s remark that she had never previously mentioned Good’s attempts to kill her, that she “never knew it before,” simply confirms that her conclusion is just that—a conclusion, not “rationally based on the witness’s perception.”<sup>236</sup> Indeed, it was only her odd sensations in court while Good was testifying that led her to conclude for the first time that the prior instances of mumbling were attempts on her life.<sup>237</sup>

But in the play, this type of evidence is not simply dismissed as the speculations of an imaginative and impressionable young girl. In Act Three, Danforth himself endorses such evidence, given the “unique” nature of witchcraft:

DANFORTH: In an ordinary crime, how does one defend the accused? One calls up witnesses to prove his innocence. But witchcraft is *ipso facto*, on its face and by its nature, an invisible crime, is it not? Therefore, who may possibly be witness to it? The witch and the victim. None other. Now we cannot hope the witch will accuse herself; granted? Therefore, we must rely upon her victims . . . .<sup>238</sup>

Danforth’s logic is, on its own terms, ineluctable: the only possible proof of witchcraft is victim testimony. Hale quickly raises an obvious problem with this approach—if victim testimony is the sole basis for conviction, then victim credibility becomes pivotal: “But this child claims the girls are not

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<sup>234</sup> MILLER, *supra* note 19, at 57–58.

<sup>235</sup> *Id.* at 39.

<sup>236</sup> FED. R. EVID. 701.

<sup>237</sup> *E.g.*, CAL. EVID. CODE § 795 (West 2012) (imposing significant restrictions on “suppressed memory” evidence recollected under hypnosis).

<sup>238</sup> MILLER, *supra* note 19, at 100.

truthful, and if they are not . . . .”<sup>239</sup> Danforth responds that he *is* testing the girls’ credibility; although as discussed above, his “tests” are hardly what we would consider fair or sensible.

But the problem runs much deeper than one of mere credibility. It is not simply that an alleged victim may be lying: one confronts this issue, for example, with alleged claims of “date rape,” where the only witnesses with knowledge are the accused, who denies guilt, and the victim; although at least there, physical evidence may corroborate the victim’s claim.<sup>240</sup> Rather, the “victim” here cannot *possibly* have personal knowledge that any given symptom or happening is the direct result of witchcraft. It would be akin to a woman claiming she was raped while she was unconscious, by someone whom she never saw drug her. It is not merely that we think the witness may be disingenuous; it is that we know she could not know what she claims to know. If witchcraft is *ipso facto* an “invisible crime,” and thereby imperceptible to the senses, then it is *not*, as Danforth claims, a crime susceptible to proof by *any* witness testimony.

## 2. Hale’s Expert Qualifications

To qualify the immediately preceding statement: the invisible crime of witchcraft is not susceptible to proof by witness testimony, unless one considers witchcraft to be a proper subject of *expert* testimony. Hale purports to be well-versed in recognizing the signs of witchcraft, and in the taxonomy of evil spirits:

HALE: Now let me instruct you. We cannot look to superstition in this. The Devil is precise; the marks of his presence are definite as stone [referring to one of his texts] . . . . Here is all the invisible world, caught, defined, and calculated. In these books the Devil stands stripped of all his brute disguises. Here are all your familiar spirits—your incubi

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<sup>239</sup> *Id.*

<sup>240</sup> Notably, another primary rationale for the creation of Rules 413 through 415, which allow evidence of the defendant’s prior acts or crimes in sexual assault or child molestation cases, was that the cases would often turn on difficult credibility determinations of victims:

[Child molestation] cases require reliance on child victims whose credibility can readily be attacked in the absence of substantial corroboration. . . . Similarly, adult-victim sexual assault cases are distinctive, and often turn on difficult credibility determinations. Alleged consent by the victim is rarely an issue in prosecutions for other violent crimes . . . .

140 CONG. REC. H8991–92 (daily ed. Aug. 21, 1994) (statement of Rep. Susan Molinari) (floor statement concerning the Prior Crimes Evidence Rules for Sexual Assault and Child Molestation Cases).

and succubi; your witches that go by land, by air, by sea; your wizards of the night and of the day.<sup>241</sup>

The question is whether Hale would be permitted to provide expert opinion testimony on the subject of witchcraft. Rule 702 provides that

[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.<sup>242</sup>

Here, if anyone in Salem is qualified to detect a witch, it is Hale. Not only is he a reverend, a man of God, but unlike Parris, he is learned in the art of reading the signs and methods of sorcerers and the like. There is no serious doubt that he is applying his methods and principles reliably to the facts before him. The only question is whether his principles and methods are themselves reliable.

Given the state of knowledge and the prevailing beliefs at the time, Hale's methods of ferreting out witches would indeed have been deemed reliable, as opposed to "superstition." The notion that judges should serve as gatekeepers<sup>243</sup> to keep "junk" science out of the courtroom necessarily make the admissibility determination dependent on the judge's conception of what is junk and what is not.<sup>244</sup> In Salem in 1692, what we might call junk science today was the prevailing paradigm. That the "state of the art" was so

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<sup>241</sup> MILLER, *supra* note 19, at 38–39.

<sup>242</sup> FED. R. EVID. 702.

<sup>243</sup> See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993) ("[U]nder the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."); *id.* at 597 (referring to the "gatekeeping role for the judge").

<sup>244</sup> *Daubert* held that the Rules superseded the "general acceptance" test of *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923), and its progeny, utilized by the Ninth Circuit Court of Appeals. The *Daubert* standard ostensibly places a greater burden on federal judges to independently evaluate the scientific merits of the expert opinion. As Professor Mendez has written:

While *Daubert* forces federal judges to determine the scientific validity of all expert testimony grounded in science, [*Frye*] merely requires California judges to determine whether the contested principle or technique has been accepted as reliable by the relevant scientific community . . . . The head counting obligation [*Frye*] imposes on California judges is obviously much less onerous than the burden *Daubert* places on federal judges.

Mendez, *supra* note 166, §16.07, at 646.

rudimentary was a failing of science, not of a legal system that accepted the science as reliable.<sup>245</sup> Hale would have been deemed well-qualified to give expert opinion testimony.

Ironically, Hale's "expert" assessment of the evidence—that Proctor is telling the truth and Abigail is lying—is ultimately based on nothing more than his assessment of the witnesses' respective credibility.<sup>246</sup> And despite Hale's qualifications and relative sophistication, his opinion is roundly rejected by Danforth, who relies on Abigail's word until the end.<sup>247</sup>

### 3. Doctor Griggs's Examination of Sarah Good and "Junk Science"

It should be noted that whether judicial reception of junk science will result in an unfair or undesirable result is indeterminate *a priori*. For example, Mary Warren, in reporting further on the trial of Sarah Good, remarks that Good was discovered to be pregnant:

ELIZABETH: Pregnant! Are they mad?—the woman's near to sixty!

MARY WARREN: They had Doctor Griggs examine her, and she's full to the brim. And smokin' a pipe all these years, and no husband either! But she's safe, thank God, for they'll not hurt the innocent child.<sup>248</sup>

Doctor Griggs never appears onstage, and we know nothing about his qualifications; we only briefly hear second-hand from Mary Warren that he examined Sarah Good and concluded she was with child. We do not know how or under what circumstances he "examined" Good, and we do not know the basis for his conclusion that she is pregnant, other than that she was "full to the brim."<sup>249</sup> If "full to the brim" means she has a distended belly, it is probably a

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<sup>245</sup> Indeed, the now-discredited discipline of phrenology was accorded judicial legitimacy less than 200 years ago. *United States v. Freeman*, 357 F.2d 606, 616 (2d Cir. 1966) ("In the pre-M'Naghten period, the concepts of phrenology and monomania were being developed and had significant influence on the right and wrong test. . . . Of course, both phrenology and monomania are rejected today as meaningless medical concepts since the human personality is viewed as a fully integrated system. But, by an accident of history, the rule of M'Naghten's case froze these concepts into the common law just at a time when they were becoming obsolete."). The famous M'Naghten case took place in 1843.

<sup>246</sup> MILLER, *supra* note 19, at 114 ("HALE: From the beginning this man has struck me true. By my oath to Heaven, I believe him now . . . . Pointing at Abigail: This girl has always struck me false!").

<sup>247</sup> *Id.* at 120.

<sup>248</sup> *Id.* at 59.

<sup>249</sup> *Id.*

symptom of malnourishment or general ill health, not pregnancy. And Elizabeth's reaction—"Are they mad?—the woman's near to sixty"—indicates that his opinion would have been deemed facially implausible even to a lay person.

It may well be that Griggs, like Hale, was relying on the "state of the art" at the time, and thus his conclusions—no matter how implausible—would be deemed to be based on "sufficient facts or data," and was the "product of reliable principles and methods" that were "reliably applied" to those facts.<sup>250</sup> But unless and until that foundation is established, Griggs should not be permitted to offer his opinions.

What is notable about the court's apparent willingness to accept Griggs's conclusion is not the reliability of the conclusion itself, but the practical impact of accepting it. The prevailing norm was that the execution of pregnant witches would be delayed until birth, so that they would "not hurt the innocent child." The doctor's finding of post-menopausal conception is likely lunacy. But if that finding forestalls the lunacy of being executed for the "invisible crime" of witchcraft, then the court's receptivity to it may be an abomination of justice that the defense lawyer would be happy to live with. Once again, from the trial lawyer's perspective, strategy trumps substance in matters of evidence.

#### E. Hearsay and Its Exceptions (*Rules 801–807*)

The hearsay rule and its exceptions are an attempt to reconcile two fundamental competing concerns in the law of evidence. On the one hand, in order to evaluate a witness's perception, memory, ability to narrate, and sincerity, all testimony would ideally be given (1) under oath, (2) in the presence of the trier of fact, and (3) subject to cross-examination.<sup>251</sup> Conversely, to admit *only* evidence that satisfies all three conditions—which would mean excluding all out-of-court statements—would exclude much relevant evidence and would undermine the truth-seeking goal. "The solution evolved by the common law has been a general rule excluding hearsay but subject to numerous exceptions under circumstances supposed to furnish guarantees of trustworthiness."<sup>252</sup> The student-lawyer *must* have a good handle on the law of hearsay.<sup>253</sup>

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<sup>250</sup> FED. R. EVID. 702.

<sup>251</sup> Bender, *supra* note 222, at 206.

<sup>252</sup> *Id.* at 207.

<sup>253</sup> The definition of hearsay under the current Rules is "a [prior] statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted [by the declarant]." FED. R. EVID. 801(c).

### 1. The Neighbors' Good Character Statements

There are numerous instances in *The Crucible* where second-hand information is offered as evidence, raising hearsay concerns, and implicating one or more exceptions to the hearsay rule. When Proctor approaches Danforth early in Act Three to persuade him to free Proctor's wife and their friends, Proctor produces several documents. Among them is a written statement of ninety-one villagers: "It's sort of a testament. The people signing it declare their good opinion of Rebecca [Nurse], and my wife, and Martha Corey."<sup>254</sup>

Danforth does not reject the "testament" on the grounds that it is improper opinion or character testimony. A modern judge would not either because such opinion testimony squarely falls within the "mercy rule" that permit a criminal accused to offer good character testimony, limited to the form of reputation or opinion, to suggest that the defendant is not the 'type' of person that would commit the crime.<sup>255</sup> However, Danforth does adopt Parris's suggestion to have the declarants "summoned. . . . [f]or questioning[,] and issues warrants for their "arrest for examination."<sup>256</sup> While Danforth does not endorse Parris's view that their statements are "necessarily an attack" on the court, he does assert that if they are "all covenanted Christians"—and thus presumably honest—then "they have nothing to fear" from examination by the court.<sup>257</sup>

Would a hearsay exception apply to allow submission of this written "testimony"? The student-lawyer would hope to find one. Rule 803(21) provides a hearsay exception for "[a] reputation among a person's associates or in the community concerning a person's character."<sup>258</sup> But the out-of-court declarants here are offering testimony as to their respective *opinions* about the defendant's character, not *reputation* testimony. Furthermore, the advisory committee's note to Rule 803(21) makes clear that this hearsay exception was designed not to absolve character witnesses of the need to appear in court, but rather to ensure that the hearsay *inherent* in reputation testimony—the witness's retelling of the collective character assessments of *other* members of the community regarding an individual—is not excluded by the hearsay rule, when such testimony is otherwise allowed as character evidence under Rule

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<sup>254</sup> MILLER, *supra* note 19, at 93.

<sup>255</sup> See FED. R. EVID. 404(a)(2)(A) ("[I]n a criminal case . . . a defendant may offer evidence of the defendant's pertinent trait."); see also *id.* at 405(a) ("When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion.").

<sup>256</sup> MILLER, *supra* note 19, at 93–94; see *id.* at 88 ("I accept no depositions.").

<sup>257</sup> *Id.* at 94.

<sup>258</sup> FED. R. EVID. 803(21).

405(a).<sup>259</sup> Thus, Danforth's demand for live testimony is, unfortunately for the defense, in line with the modern Rules.

## 2. Giles Corey's Deposition and Multiple Hearsay

Giles Corey then spurs Proctor to provide Danforth with Corey's own written "deposition." Corey asserts therein that Thomas Putnam has induced his daughter, Ruth, to falsely accuse Putnam's neighbor, George Jacobs, of witchcraft, so that Jacobs would forfeit his land and Putnam might obtain ownership of it. (Presumably, if Corey can discredit the Putnams, then he can help discredit others accusers, including Susanna Walcott, who have testified against Corey's wife, Martha.) But Danforth is not satisfied with the written statement, and insists that the source of Corey's information be brought personally before the court:

DANFORTH: But proof, sir, proof.

GILES, *pointing at his deposition*: The proof is there! I have it from an honest man who heard Putnam say it! The day his daughter cried out on Jacobs, he said she'd given him a fair gift of land.

HATHORNE: And the name of this man? . . .

GILES: I will not give you no name. I mentioned my wife's name once and I'll burn in hell long enough for that. I stand mute. . . .

DANFORTH: Old man, if your informant tells the truth let him come here openly like a decent man. But if he hides in anonymity I must know why.<sup>260</sup>

From a hearsay perspective, Corey's written sworn statement is more problematic than the first one Proctor had offered, as it contains multiple levels of hearsay. First, the document itself was created out-of-court, and therefore must satisfy a hearsay exception if offered for the truth of the matter asserted therein.<sup>261</sup> Second, it contains substantive allegations against Putnam that Corey

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<sup>259</sup> See FED. R. EVID. 803 advisory committee's note to Exceptions (19), (20), and (21) ("Exception (21) recognizes the traditional acceptance of reputation evidence as a means of proving human character. The exception deals only with the hearsay aspect of this kind of evidence . . . . The exception is in effect a reiteration, in the context of hearsay, of Rule 405(a)."). Rule 405(a) provides that "[w]hen evidence of a person's character or character trait is admissible, it may be provided by testimony about the person's reputation or by testimony in the form of an opinion."

<sup>260</sup> MILLER, *supra* note 19, at 96–97.

<sup>261</sup> See FED. R. EVID. 801(c)(2).

heard from the unnamed “honest man.” And third, it records the statement that the honest man purportedly heard Putnam say, linking Ruth’s accusation against Jacobs to the acquisition of Jacobs’s land.

Pursuant to Rule 805, the proponent of an out-of-court statement must identify a hearsay exception—or non-hearsay purpose—for each level of hearsay in order for the full statement to be admitted.<sup>262</sup> Here, the first level of hearsay presents little difficulty, because Corey himself is present and subject to cross-examination and could testify to the same things he declares in his out-of-court deposition. So, too, the third level—Putnam’s statement to the effect that, by accusing Jacobs of witchcraft, his daughter had “given him a fair gift of land”—is not hearsay at all. It is not being offered for the truth of the matter therein—that Ruth did in fact make a gift of land to her father by accusing Jacobs—but rather is being offered circumstantially to show the bias, interest, or state of mind of Putnam in having the charges leveled against Jacobs (and by extension, goes to the credibility of his daughter, who appears to be the one who provided the in-court testimony against Jacobs, and who may well have done so at Putnam’s request or insistence).<sup>263</sup> However, Corey did not hear Putnam’s statement from Putnam directly; he heard it from his anonymous source. Corey’s recounting of what he heard the source tell him that Putnam admitted to is relevant to Putnam’s credibility only if it is true (i.e., the source really did hear Putnam make the admission). There is no plausible hearsay exception that would apply to the source’s statement.<sup>264</sup> Thus, a hearsay objection would be sustained, and rightly so.

Danforth’s position in both of these instances reflects a viewpoint that is at the heart of the hearsay rule: a preference for testimony under oath in the presence of the fact finder and subject to cross-examination. In the absence of a hearsay exception, Danforth would be right to exclude the evidence. The defense lawyer must find another way to make her case.

### 3. Abigail’s Revelation

Danforth is not the only one sensitive to the concerns about out-of-court statements. In Act One, before the hysteria regarding witchcraft has yet fully bloomed, Abigail confides to Proctor that the girls’ illness is not the result of witchcraft:

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<sup>262</sup> *Id.* at 805 (“Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.”).

<sup>263</sup> In order to resolve any doubt about whether statements regarding a declarant’s state of mind are admissible for their truth or because they are circumstantial evidence of some other relevant proposition, Rule 803(3) provides a hearsay exception for “[a] statement of the declarant’s then-existing state of mind (such as motive, intent, or plan).” *Id.* at 803(3).

<sup>264</sup> Putnam’s statement would not likely qualify as a “statement against interest” under Rule 803(b)(3), nor would it fit within the “residual exception” of Rule 807. For a more detailed treatment of these exceptions, see discussion *infra* Part IV.E.3.

PROCTOR: The road past my house is a pilgrimage to Salem all morning. The town's mumbling witchcraft.

ABIGAIL: Oh, posh! *Winningly she comes a little closer, with a confidential, wicked air.* We were dancin' in the woods last night, and my uncle leaped in on us. She took fright, is all.<sup>265</sup>

Then, in Act Two, Proctor reveals Abigail's confession to Hale, but acknowledges the difficulty he would face in having his account believed:

PROCTOR: I—I have no witness and cannot prove it, except my word be taken. But I know the children's sickness had naught to do with witchcraft.

HALE, *stopped, struck*: Naught to do—?

PROCTOR: Mr. Parris discovered them sportin' in the woods. They were startled, and took sick.

*Pause.*

HALE: Who told you this?

PROCTOR, *hesitates, then*: Abigail Williams. . . .

HALE: [W]ould you testify to this in court? . . .

PROCTOR: I may wonder if my story will be credited in such a court.<sup>266</sup>

Proctor realizes that repeating an out-of-court statement will not be given as much credence as having seen it personally, or as having the declarant with personal knowledge admit to the underlying facts herself. (He is also, of course, reluctant to reveal his own history with Abigail, and is skeptical given the seemingly infallible trust that the court has placed in the girls.)

But despite the challenges, getting the court to consider this evidence will be crucial to saving his wife and his friends. It is arguably the most important fact in the case. Thus, this is yet another opportunity for the student-lawyer to strategize about the possible ways to admit this statement. There could potentially be a number of hearsay exceptions—or non-hearsay purposes—for offering the statement in court, all of which the student-lawyer should consider as possibilities.

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<sup>265</sup> MILLER, *supra* note 19, at 21–22.

<sup>266</sup> *Id.* at 68.

### a. Non-Hearsay Impeachment

Assuming Abigail has already testified that the children's sickness was the result of witchcraft, her statement to Proctor that the sickness was fabricated would obviously contradict that statement. As such, the statement would be relevant to impeach Abigail's credibility: she was willing to tell the court one thing, yet told Proctor another. Technically, a statement offered purely for impeachment purposes is not offered for the "truth of the matter asserted," and so is not hearsay. According to this view, the statement could be used *not* to prove that the sickness was *in fact* invented, but rather merely to show that Abigail has talked out of both sides of her mouth, and thus her testimony generally should be given less weight. Of course, if the initial accusations were the result of a fabrication, this would cast serious doubt on the accusations that followed.

Rule 613(b) requires that if extrinsic evidence of a prior inconsistent statement (i.e., anything other than the witness's own admission on the stand) is offered to impeach the witness, the witness must be given an opportunity to explain or deny it.<sup>267</sup> Here, Abigail is not confronted with Proctor's specific statement, but she is given the opportunity to explain or deny the similar allegation by Mary Warren that the girls have fabricated the accusations of witchcraft.<sup>268</sup> The student-lawyer would argue that this is sufficient.

### b. Prior Inconsistent Statement

Ideally, the student-lawyer would want to offer Proctor's testimony about Abigail's revelation not *merely* for impeachment of her trial testimony, but also for the truth, i.e., as evidence that the girls' sickness was *not* the result of witchcraft. Rule 801(d)(1)(A) excludes from the definition of hearsay a statement of a witness that is "inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition."<sup>269</sup> Although the Rules treat such a statement as being *excluded* from the definition of hearsay,<sup>270</sup> rather than as falling within an *exception* to the hearsay rule,<sup>271</sup> the practical effect is exactly the same: the proponent may use the statement for the truth of the matter asserted. But here, Abigail's prior statement to Proctor was made when they were alone together, not under penalty of perjury, and so this exclusion/exception would not apply. As of yet,

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<sup>267</sup> See FED. R. EVID. 613(b).

<sup>268</sup> See MILLER, *supra* note 19, at 102; FED. R. EVID. 613(b) ("Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement . . .").

<sup>269</sup> FED. R. EVID. 801(d)(1)(A).

<sup>270</sup> See *id.* at 801(d).

<sup>271</sup> See *id.* at 803–804.

the statement can still only be used for impeachment, not as substantive evidence. Thus, the defense attorney would look for other exceptions or exclusions that would make it admissible for the truth.

c. Party-Opponent Admission

Although colloquially known as the hearsay exception for party opponent “admissions,” by the plain language of the Rule, *any* statement made by an opposing party is admissible when offered against that party, whether they are “admitting” to something or not.<sup>272</sup> The difficulty with relying on this rule, however, is that Abigail is *not* the “party opponent.” Elizabeth is the defendant, and Abigail is a witness against her. Indeed, even Abigail’s status as the alleged “victim” of Elizabeth’s witchcraft does not make her the party opponent for purposes of hearsay. In a criminal proceeding, the government, not the victim, is the party.<sup>273</sup>

d. Statement Against Interest

Assuming Abigail is *not* a party opponent, the defense attorney may try to rely on the closely related hearsay exception for “statements against interest” under Rule 804(b)(3). This exception applies to a statement that

a reasonable person in the declarant’s position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant’s proprietary or

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<sup>272</sup> See *id.* at 801(d)(2)(A) (excluding from the definition of hearsay, “*An Opposing Party’s Statement*. [A] statement [that] is offered against an opposing party and was made by the party in an individual or representative capacity”). As with prior statements of witnesses under Rule 801(d)(1), party-opponent admissions under Rule 801(d)(2) are treated as exclusions from the definition of hearsay, rather than exceptions to the hearsay rule. However, as noted above, the effect is still the same: they may be offered for the truth of the matter asserted.

<sup>273</sup> See, e.g., *United States v. Vasilakos*, 508 F.3d 401, 410 (6th Cir. 2007) (finding that statements by employees or officers of an organization allegedly defrauded by the defendant were not admissible as party-opponent admissions in prosecution of the defendant for fraud because the organization was not a party thereto). If Abigail were the party-opponent, it would raise interesting additional issues regarding admissions. For example, when Proctor publicly accuses Abigail of having committed adultery with him, Danforth asks Abigail to respond:

DANFORTH, blanched, in horror, turning to Abigail: You deny every scrap and title of this?

ABIGAIL: If I must answer that, sir, I will leave and I will not come back again.

MILLER, *supra* note 19, at 111. Abigail does not actually deny the allegations, which at least arguably indicate that they are true. This would seem to fit within the hearsay exclusion for “adoptive admissions,” perhaps as an admission by silence. See FED. R. EVID. 801(d)(2)(B) (stating that party opponent admissions include a statement that “the party manifested that it adopted or believed to be true”).

pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability.<sup>274</sup>

The rationale for this exception is that people would not say things that are against their financial or legal interests unless they are true.<sup>275</sup> Here, Abigail's revelation to Proctor arguably exposes her to liability for perjury now that she has testified that the girls were victims of witchcraft.

However, there are several reasons why this exception would not apply. First, such statements are only admissible if the declarant is "unavailable" to testify pursuant to Rule 804(a).<sup>276</sup> Abigail is not only available to testify—she *has* testified.

Second, unlike a party-opponent "admission," the declarant of a statement against interest really must have been "admitting" to something harmful at the time the statement was made.<sup>277</sup> Here, Abigail confided to Proctor that the girls' illness was not the result of witchcraft *before* the formal accusations and legal proceedings had begun. Thus, it cannot be established that the statement was "so contrary to [her] proprietary or pecuniary interest," or would "expose [her] to civil or criminal liability," that she would not have said it unless it was true.<sup>278</sup> Granted, her statement could undermine the credibility of the accusations she would later make against Elizabeth, and so arguably could have a "tendency to invalidate [her] claim against someone else." But here, too, the "claim" did not exist at the time, and there is no evidence that she knew or had reason to know that she would become a star witness in court proceedings. Indeed, it is plausible that at the time she made

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<sup>274</sup> FED. R. EVID. 804(b)(3)(A).

<sup>275</sup> See *id.* at 804 advisory committee's note to the Rule formerly numbered as 804(b)(4) (renumbered as 807) [hereinafter FED. R. EVID. 807 A.C.N.] ("The circumstantial guaranty of reliability for declarations against interest is the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true."). Proctor himself later invokes this rationale when he defends the credibility of his admission that he committed adultery with Abigail: "A man will not cast away his good name. You surely know that. . . . I have made a bell of my honor! I have rung the doom of my good name—you will believe me, Mr. Danforth!" MILLER, *supra* note 19, at 110–11; see also CAL. EVID. CODE § 1230 (West 2012) (hearsay exception for statements against interest includes those statements that "created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true.").

<sup>276</sup> See FED. R. EVID. 804(b) ("The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness . . . ."); *id.* at 804(a) (defining "unavailability").

<sup>277</sup> See FED. R. EVID. 807 A.C.N., *supra* note 275 ("If the statement is that of a party, offered by his opponent, it comes in as an admission[], and there is no occasion to inquire whether it is against his interest, this not being a condition precedent to admissibility of admissions by opponents.").

<sup>278</sup> FED. R. EVID. 804(b)(3)(A).

the statement, she was just trying to downplay the rumors in order to mollify or entice Proctor.<sup>279</sup>

Third, in criminal cases, there is an additional foundational requirement of corroboration of statements against interest. The Rule provides that a statement against interest is admissible if it “is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.”<sup>280</sup> A primary rationale for this requirement is the concern that a defendant will fabricate a third-party “confession,” or that a defense-friendly third party would himself “confess” to the crime with which the defendant has been charged, in order to generate reasonable doubt and secure an acquittal.<sup>281</sup> Here, Proctor is not claiming that Abigail “confessed” to the crime with which Elizabeth has been charged, so this rationale does not seem to apply. But it does fit within the plain language of the Rule: his testimony, if believed, is tantamount to a confession by Abigail that her accusation against Elizabeth was perjured, and so arguably it “tends to expose the declarant to criminal liability.” As such, in order to admit her statement, the student-lawyer would have to point to “corroborating circumstances that clearly indicate its trustworthiness.” The only such “corroborating circumstance[s]” Proctor could offer are his adulterous “knowledge” of Abigail, which, if believed, would go to undermine her character, as well as to explain why she would be willing to reveal the information to him in the first place. But of course, Proctor’s attempt to “corroborate” his account by revealing the affair takes a tragic turn when Elizabeth unwittingly denies knowledge of it in an attempt to protect Proctor’s reputation.

Thus, the statement against interest exception likely cannot be relied upon.

#### e. Residual or “Catchall” Exception

In a last-ditch effort, the student-lawyer may seek to rely on the “residual exception” under Rule 807, which may permit admission of a hearsay statement that does *not* fit within any of the other exceptions under Rules 803 or 804. Such a statement may be admitted if:

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<sup>279</sup> Immediately after Abigail’s revelation regarding having danced in the woods, Proctor’s “smile widen[s],” and he says, “[a]h, you’re wicked yet, aren’t y’!” The stage notes then provide that “[a] trill of expectant laughter escapes her, and she dares come closer, feverishly looking into his eyes.” MILLER, *supra* note 19, at 22.

<sup>280</sup> FED. R. EVID. 804(b)(3)(B).

<sup>281</sup> FED. R. EVID. 807 A.C.N., *supra* note 275 (“The requirement of corroboration . . . [w]hen the statement is offered by the accused by way of exculpation . . . should be construed in such a manner as to effectuate its purpose of circumventing fabrication.”).

(1) the statement has equivalent circumstantial guarantees of trustworthiness; (2) it is offered as evidence of a material fact; (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and (4) admitting it will best serve the purposes of these rules and the interests of justice.<sup>282</sup>

However, a parsing of that Rule should reveal why this tactic is not likely to work.

As a preliminary matter, there is a threshold procedural foundation requirement that sufficient advance notice of intent to invoke the Rule must be given to the other side.<sup>283</sup> Here, Proctor essentially “springs” his testimony on Abigail.

Setting this aside, the bigger problem is that the substantive foundational requirements probably cannot be met. Granted, Proctor’s testimony about Abigail’s private revelation to him is “offered as evidence of a material fact,” as is required<sup>284</sup>—if the girls invented the initial episode of “witchcraft,” then every accusation that followed would be called into doubt. And given Abigail’s refusal to come clean, Proctor’s testimony relating her admission is “more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.”<sup>285</sup> However, the proponent must also establish that the statement has “equivalent circumstantial guarantees of trustworthiness” as statements admissible under the other enumerated hearsay exceptions, such that “admitting it will best serve the purposes of these rules and the interests of justice.”<sup>286</sup> But it is simply Proctor’s word against Abigail, and without the benefit of the knowledge that the reader possesses, there is no reason why the court should credit his version of events. Thus, for the same reason that the student-lawyer would likely be unable to meet the “statement against interest” exception above—failure to establish “corroborating circumstances that clearly indicate its trustworthiness”—she would likely be unable to meet the similar requirement under the residual exception.

#### f. Strategic Considerations Regarding Limited Admissibility

Given that it is unlikely that there is a hearsay exception that would apply, Proctor’s testimony is admissible, if at all, only to impeach Abigail’s

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<sup>282</sup> FED. R. EVID. 807(a)(1)–(4).

<sup>283</sup> See *id.* at 807(b).

<sup>284</sup> *Id.* at 807(a)(2).

<sup>285</sup> *Id.* at 807(a)(3).

<sup>286</sup> *Id.* at 807(a)(1), (4).

credibility, not for the truth of the matter asserted. As such, we see once again the critical importance of the judicial credibility contest to the fate of the Salem villagers who stand accused in the play—much like in a modern-day trial.

The student-lawyer should also be aware that, if this were a jury trial, then pursuant to Rule 105, the prosecutor would be entitled to a limiting instruction admonishing the fact finder to consider Proctor's testimony only for a limited purpose.<sup>287</sup>

At the same time, the student-lawyer can also appreciate the limited strategic benefit of such an instruction. A jury is unlikely to truly understand, let alone abide by, the fine distinction between considering the statement for its truth and considering it for impeachment only. Indeed, the limiting instruction may well backfire: like telling someone not to think about a pink elephant, pointing out the impermissible inference may highlight the issue for the jury, and make it *more* likely that they will indulge in that very inference.<sup>288</sup> The student-lawyer must always consider the overall strategic context of evidentiary issues, and be cautious not to win an evidentiary battle only to lose the war.

#### V. CONCLUSION

I have attempted to present vignettes from *The Crucible* that illustrate some of the more common and significant evidentiary issues that trial lawyers tend to face in practice. One could identify a variety of other evidentiary issues that have not been discussed herein—so many, in fact, that an exhaustive analysis of them would be far longer than the play itself.

Does the play raise issues that implicate every single Federal Rule of Evidence? Of course not. Neither does any trial, no matter how long or complex it is. But the play does provide a valuable opportunity to explore the policies and doctrinal nuances of the Rules as applied in a rich and holistic factual context.

I recognize that a possible critique of this Article is that, in applying the Federal Rules of Evidence to the disputed factual scenario in *The Crucible*, it “takes law’s boundaries for granted,” and assumes the “law” to be “a domain consisting almost entirely of rules.”<sup>289</sup> As such, I arguably have sidestepped the issue of what law “is”, or what it does or should aspire to be.<sup>290</sup>

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<sup>287</sup> Rule 105 provides: “If the court admits evidence that is admissible against a party or for a purpose—but not against another party or for another purpose—the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.” *Id.* at 105.

<sup>288</sup> See, e.g., J.J. Prescott & Sonja Starr, *Improving Criminal Jury Decision Making After the Blakely Revolution*, 2006 U. ILL. L. REV. 301, 323 (“[L]imiting instructions are notoriously ineffective. In fact, they may be counterproductive because they draw jurors’ attention to the evidence that is supposed to be ignored.”).

<sup>289</sup> Baron, *supra* note 9, at 1085.

<sup>290</sup> See *id.*

But I view this as a strength, not a weakness. Say what one will about the Federal Rules of Evidence, they are, at the end of the day, rules. And they operate in a context of adversarial litigation. In order for legal pedagogy to be considered successful, it must do many things; but above all, it must empower students to understand legal rules and apply them in the context in which they will have to utilize them in practice. If a work of fiction can help students better grasp the brass tacks of evidence law, and ultimately become more effective lawyers, then it is a “reality” which we should take very seriously indeed. It may not be “experiential learning” in the conventional sense, but it is an experience worth having.