

January 2021

Hart, Devlin, and Arthur Miller on the Legal Enforcement of Morality

David R. Samuelson

Follow this and additional works at: <https://digitalcommons.du.edu/dlr>

Recommended Citation

David R. Samuelson, Hart, Devlin, and Arthur Miller on the Legal Enforcement of Morality, 76 Denv. U. L. Rev. 189 (1998).

This Article is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

HART, DEVLIN, AND ARTHUR MILLER ON THE LEGAL ENFORCEMENT OF MORALITY

DAVID R. SAMUELSON*

INTRODUCTION

Arthur Miller took on no formal role in the Hart-Devlin debate,¹ nor does one find even in passing any mention of *The Crucible*² in the voluminous commentaries the debate has spawned. Yet *The Crucible* was as much a product of, and statement about, the popular controversy on law and morals that commenced in the 1950s as was the work first of Patrick Devlin, and then, H.L.A. Hart. Written six years before the debate's commencement, Miller's play reveals an astonishing grasp of what would become Devlin's and Hart's positions on the legal enforcement of morality. Further, as a statement on the issue, *The Crucible* resonates as powerfully today as it did when first produced some six years before the exchanges between the two jurisprudents began. Therefore, as we mark the fortieth anniversary of the Hart-Devlin debate, this article proposes to add to the debate the long ignored voice of Arthur Miller as one deserving our attention.

I will argue that *The Crucible* supplies a prescient airing of the general arguments advanced by Devlin and Hart. Miller crafts a world of past and present, grounded firmly on assumptions Devlin would later set forth in his *Enforcement of Morals*.³ Miller then demonstrates how such assumptions fail under the weight of historical and psychological arguments that Hart, in philosophical form, would develop later in response to Devlin, first in *Immorality and Treason*,⁴ then in *Law, Liberty and Morality*.⁵ In so doing, Miller advances principles identical to ones Hart would come to embrace. First, Miller argues that any theory that assumes the legal enforcement of popular morality is essential to securing a society's existence cannot withstand the test of objective reality. Second, he warns, therefore, that legal coercion and legal punishment are not morally justifiable means for preserving morality. Finally, he persuades the audience to accept the view that a society's morality is best secured through the application of universal norms and virtues that attend to the

* Associate professor of legal writing, Southwestern University School of Law.

1. For a description of the Hart-Devlin debate, see *infra* Part I.

2. ARTHUR MILLER, *THE CRUCIBLE* (1953).

3. PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* (1965).

4. H.L.A. Hart, *Immorality and Treason*, in *MORALITY AND THE LAW* 49 (Richard A. Wasserstrom ed., 1971), reprinting H.L.A. Hart, *Immorality and Treason*, *LISTENER*, July 30, 1959, at 162.

5. H.L.A. HART, *LAW, LIBERTY, AND MORALITY* (1963).

interests of social order and vitality by attending equally to the interests of individual liberty.

I express these principles as Hart might, not Miller. *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. By these means, the play becomes a fascinating vehicle for anyone interested in revisiting the debate afresh.

This article comprises two parts. Part I summarizes the main threads of the Hart-Devlin controversy in order to supply a framework for unearthing thematic correspondences as they appear in the play. My interest in this play is how it addresses the broad issue of whether the law is morally permitted to enforce morality. Hence, the summary pays scant attention to the debate's subject matter in favor of elucidating those principles all three writers found most germane to the inquiry. Part II focuses on the play and on unearthing connections between the play and the Hart-Devlin discourse. Readers in this context will note that the connections appear everywhere—in Act One (*An Overture*), in each of the play's three remaining acts, and in *Echos Down the Corridor*, the play's epilogue. Since *The Crucible* appeared before the onset of the debate, readers might marvel, as I have, over the degree to which Miller anticipates the terms of the arguments. In any event, inasmuch as the arguments issue from different quarters, one cannot ignore their wide reaching currency or their relevance to contemporary application. I offer observations on these matters in this article's conclusion.

I. THE HART-DEVLIN DEBATE REVISITED

In 1957, the Wolfenden Committee adopted and applied a broad principle to conclude that in England private acts of homosexuality ought to be decriminalized and that prostitution, albeit in restricted form, ought to remain legal.⁶ The Committee stated, "there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business."⁷ Patrick Devlin then issued a speech attacking both the principle and its application, commencing the debate that in part bears his name.⁸ But as Hart suggested in his response to Devlin, and as

6. See DEVLIN, *supra* note 3, at 2-3. The Wolfenden Committee was also known as the Committee on Homosexual Offenses and Prostitution, which was established on 24 August 1954 to review the law as it related to prostitution, homosexual crimes, and immoral solicitation in Britain. See Larry Cata Backer, *Tweaking Facts, Speaking Judgment: Judicial Transmogrification of Case Narrative As Jurisprudence in the United States and Britain*, 6 S. CAL. INTERDISC. L.J. 611, 619 n.26 (1998).

7. DEVLIN, *supra* note 3, at 3.

8. See Wasserstrom, *Introduction to MORALITY AND THE LAW*, *supra* note 4, at 4-5. As Wasserstrom explains, the debate was characterized by a series of exchanges between the two

Devlin later acknowledged, the principle under attack was largely derived from the teachings of John Stuart Mill.⁹ Hence, one must look to those teachings to appreciate the debate's proper beginnings.

Mill insisted in *On Liberty*¹⁰ that "the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection."¹¹ He added, "the only purpose for which power can be rightfully exercised over any member of a civili[z]ed community . . . is to prevent harm to others."¹² Mill's interest in restricting the reach of criminal law flowed from an acute understanding that legal enforcement involves the imposition of grave harm upon individuals. As Hart would come to explain, this harm looms apparent when one considers the coercive and punitive faces of legal enforcement.¹³ Legal coercion compels obedience to the law by threatening punishment for disobedience.¹⁴ As a threat, legal coercion necessarily delimits personal liberty, and in so doing, inflicts suffering on those whose desires are frustrated by fear of punishment.¹⁵ Legal punishment inflicts the palpable harm one customarily associates with such penalties as fines, imprisonment, and death.¹⁶ Mill's harm principle, therefore, permits the application of legal coercion and legal punishment only in those instances where such application promotes the good that accompanies preventing persons from harming others.¹⁷ It would not permit such

adversaries. See *id.* at 4. *Immorality and Treason*, Hart's first response to Devlin's argument was initially delivered as a talk over the B.B.C. in 1959. See *id.* It was then later presented in printed form in Hart's *Law, Liberty, and Morality*, which appeared in 1963 and offered an expanded response. See *id.* Devlin, as Wasserstrom says, "had the last word" with Hart when, in 1965, he included the speech under the new title *Morals and the Criminal Law* in the book known now as *The Enforcement of Morals*. *Id.* at 5. In footnotes to the printed speech, he amply responded to Hart's remarks. See DEVLIN, *supra* note 3, at 13. The debate raged in the 1960s, Hart and Devlin passing the baton to their followers. In the 1980s and 1990s the debate has sparked less interest in legal philosophical circles, although writers continue to regard it as the principal reference point for the modern inquiry into the legal enforcement of morality. Cf., e.g., Jeffrie G. Murphy, *Legal Moralism and Liberalism*, 37 ARIZ. L. REV. 73, 75 (1995).

9. See HART, *supra* note 5, at 15-16; see also DEVLIN, *supra* note 3, at vi. Devlin also acknowledges the correspondence, noted by Hart, between his thinking and that of J.F. Stephen, Mill's nineteenth-century opponent. *Id.* at vii. Stephen's thesis that the law is permitted to enforce morality for morality's sake receives almost as much attention in Hart's essay as does Devlin's, and equal disapproval. See HART, *supra* note 5, at 27-28; see also Richard A. Posner, *Foreword to JAMES FITZJAMES STEPHEN, LIBERTY, EQUALITY, FRATERNITY* 10 (1991) (discussing how Hart and Oliver Wendell Holmes, Jr. oppose Stephen's and Devlin's views on the legitimate use of law to enforce morality).

10. JOHN STUART MILL, *ON LIBERTY* (Stefan Collini ed., 1993).

11. *Id.* at 13.

12. *Id.*

13. See HART, *supra* note 5, at 21-22.

14. See *id.* at 22.

15. See *id.* at 21-22.

16. See *id.* at 21.

17. See *id.* at 20.

application, and the Wolfenden Committee agreed, where a person's acts cause others no harm.¹⁸

Devlin's objections to the Wolfenden Committee's findings, and therefore to Mill's teachings, rested on his single assumption that a society is kept together by the bonds of a common morality.¹⁹ On the basis of this assumption, Devlin thought it reasonable to conclude first, that a society has a right to pass judgment on all matters of morality, and second, that it has the right to use the law to enforce those judgments.²⁰ He relied on history and on political analogies when tendering these observations:

[A]n established morality is as necessary as good government to the welfare of society. Societies disintegrate from within more frequently than they are broken up by external pressures. There is disintegration when no common morality is observed and history shows that the loosening of moral bonds is often the first stage of disintegration²¹

For these reasons, Devlin maintained that "society is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions."²² Equating "vice" with sedition, he considered it wrong to think that the law should not be concerned with private morality, or acts of immorality.²³ Devlin then moved to a statement of principle, which, if one concedes the value of his assumptions and observations, emanates as a natural and necessary conclusion: "There are no theoretical limits to the power of the State to legislate against treason and sedition, and likewise I think there can be no theoretical limits to legislation against immorality."²⁴ He left the task of ascertaining the moral judgments of society to "the reasonable man," "the man in the Clapham omnibus," or "the man in the jury box."²⁵ Such individuals could be counted upon to embrace moral principles that "every right-minded person would accept as valid."²⁶ Further, according to Devlin, moral alignments among right-minded persons may be permissibly based on shared "feelings" concerning right and wrong.²⁷ When these feelings gather in the form of intolerance, indignation, and disgust, then the act that arouses them becomes properly suitable for moral and legal proscription.²⁸

18. See DEVLIN, *supra* note 3, at 11.

19. See *id.* at 10.

20. See *id.* at 13.

21. *Id.*

22. *Id.*

23. See *id.* at 13-14.

24. *Id.* at 14.

25. *Id.* at 15.

26. *Id.*

27. *Id.*

28. See *id.* at 17.

It would be no exaggeration to suggest that similar feelings, at least in part, prompted Hart to launch his first attack upon Devlin's "legal moralism."²⁹ In *Immorality and Treason*, Hart asserted that it was at best a crude and uncritical expedient on Devlin's part to turn, in Hart's words, "popular morality into criminal law."³⁰ At worst Hart perceived grave danger in Devlin's thesis, for, if left uncriticized, it would appear to accommodate a popular morality based on ignorance, superstition, and misunderstanding.³¹ This finding caused Hart to exclaim at the essay's conclusion: "Morality, what crimes may be committed in thy name!"³²

Hart renewed his warning in *Law, Liberty, and Morality* by emphasizing throughout that essay that Devlin's thesis, so at odds with Mill's liberty principle, was little more than untested utilitarianism. "[I]t is Utilitarianism without benefit of facts,"³³ Hart observed, causing him to inquire early on in the essay whether any good may attach to preserving a society whose morality is based on retrograde principles—racial and religious hatreds, for example.³⁴ He suggested that such a society's disintegration would be preferable to its continued existence.³⁵

Hart's central objection to Devlin's thesis, as untested utilitarianism, rested on Devlin's *a priori* assumption that a universally shared morality was requisite to a society's existence, and that legal enforcement may be used as an essential instrument that works to the good, so to speak, of keeping that morality shared.³⁶ Such an assumption, according to Hart, would warrant the extravagant claim that all of a society's morality "forms a single seamless web, so that those who deviate from any part are likely or perhaps bound to deviate from the whole."³⁷ Any deviation, of course, would have to be perceived as a threat to the society's existence.³⁸ In addition, argued Hart, once this assumption is in place one must squarely concede that at any given moment a society is identical to its morality.³⁹ As a consequence of this concession one could easily maintain, as Devlin appeared to against all plausibility, that a change in a society's morality is tantamount to that society's destruction.⁴⁰

29. HART, *supra* note 5, at 6.

30. Hart, *supra* note 4, at 51; see Ronald Dworkin, *Lord Devlin and the Enforcement of Morals*, in MORALITY AND THE LAW, *supra* note 3, at 69. Dworkin, agreeing with Hart, remarks: "What is shocking and wrong is not [Devlin's] idea that the community's morality counts, but his idea of what counts as the community's morality." *Id.*

31. See Hart, *supra* note 4, at 54.

32. *Id.*

33. HART, *supra* note 5, at 55.

34. See *id.* at 19.

35. See *id.*

36. See DEVLIN, *supra* note 3, at 9.

37. HART, *supra* note 5, at 51.

38. See *id.*

39. See *id.*

40. See *id.*

Most detrimentally, thought Hart, following a seamless web theory to the conclusion that at any given time a society is identical to its morality prompts the additional conclusion that legal enforcement be a requirement for moral preservation.⁴¹ Hart maintained that in order to support this view one would have to argue, unconvincingly, that the best teacher of morality is legal coercion, the fear of punishment.⁴² Secondly, one would have to contend that legal punishment itself has value on retributive grounds only, and that such value is perceptible in those inevitable instances wherein one is punished for acts causing no harm to others.⁴³ Hart considered such a perception unlikely, since it would rest on the implausible claim that two moral wrongs—the wrongful act and the suffering wrought by punishment—taken together produce one moral good.⁴⁴ Hart insisted, rather, that the only plausible justification for using punishment to enforce morality rests not in any interest in preserving society or a useful morality but in maintaining moral conformity.⁴⁵ This is the morality of brute dogma and form which seeks merely to preserve itself from change.⁴⁶ In view of the toll that legal punishment exacts in terms of human suffering, Hart considered its employment for the advancement of conformity worthless:

The use of legal punishment to freeze into immobility the morality dominant at a particular time in a society's existence may possibly succeed, but even where it does it contributes nothing to the survival of the animating spirit and formal values of social morality and may do much to harm them.⁴⁷

Hart's interest in securing social morality was every bit as pronounced as Devlin's. He stated that "some shared morality is essential to the existence of any society."⁴⁸ To explain the substance and practice of the moral vision he had in mind, Hart returned to Mill and to a much different set of assumptions than Devlin's on what constituted social morality.⁴⁹ Devlin expressed no more concern over the principles that informed a society's morality at a particular time other than that they be "derived from the sense of right and wrong which resides in the community as a whole."⁵⁰ Hart maintained to the contrary that all societies of practical value for human beings must make room for universal values, such as individual freedom, safety of life, and protection from intention-

41. *See id.* at 72.

42. *See id.* at 58.

43. *See id.* at 60.

44. *See id.*

45. *See id.* at 69.

46. *See id.*

47. *Id.* at 72.

48. *Id.* at 51.

49. *Id.* at 70-71.

50. *See* DEVLIN, *supra* note 3, at 22.

ally inflicted harm.⁵¹ Hart explained that these values spring not from the feelings of the man in the jury box, although such a person may certainly cherish them, but rather from the most elemental truths of the human condition.⁵² Devlin would say that such values, where they are in place, ought to be preserved because their preservation, in turn, might help secure a society's existence.⁵³ Hart would counter that the preservation of society is worthwhile only to the extent that society secures these values for its constituents.⁵⁴ Once this argument is accepted, Hart implied, then one immediately recognizes the error in Devlin's assumption that a society's morality is a seamless web of shared beliefs.⁵⁵ For when the values of liberty, safety, and protection are once secured, these values not only permit a society to accommodate individual divergences from a dominant morality, but also enable it to profit from such divergences by making suitable adjustments for change.⁵⁶

Hart observed further that from these universal values issued the content of social morality, or a society's moral code.⁵⁷ This code is practiced according to universal formal virtues whose operation Hart described:

In moral relationships with others the individual sees questions of conduct from an impersonal point of view and applies general rules impartially to himself and to others; he is made aware of and takes account of the wants, expectations, and reactions of others; he expects self-discipline and control in adapting his conduct to a system of reciprocal claims. These are universal virtues and indeed constitute the specifically moral attitude to conduct.⁵⁸

Hart emphasized that these formal virtues obviously deserve preservation as much as the universal values they advance,⁵⁹ but such preservation is not to be equated to that contemplated by the identification of a society with its moral code.⁶⁰ Most importantly, legal enforcement is not at all required for the preservation of universal values and virtues.⁶¹ Other methods of preservation—advice, argument, and example—are preferable and more than equal to the task.⁶² With these and other like methods

51. See HART, *supra* note 5, at 70.

52. See *id.* at 71-72.

53. See DEVLIN, *supra* note 3, at 10.

54. See HART, *supra* note 5, at 70.

55. See *id.*

56. See *id.* at 70-71.

57. See *id.* at 71.

58. *Id.*

59. See *id.* at 72.

60. See *id.*

61. See *id.*

62. See *id.* at 75.

in place, the individual, in Mill's words, properly becomes the "final judge" in adopting a moral course of action.⁶³

II. THE CRUCIBLE

To introduce *The Crucible* within the context of the Hart-Devlin debate, one need only to observe⁶⁴ that Miller would not have written his play had not twenty persons been executed in the witch hunt that enveloped Salem in 1692.⁶⁵ In focusing on this occurrence, Miller invites his audience to consider these facts: the executions were legally sanctioned; they were greeted with strict moral approval by most, if only for a time; and they were occasioned by findings that the accused committed "crimes" that could have involved at worst the infliction of imaginary harm upon others.

With these facts established, Miller causes the matter of particularized justification to emerge. But he does so, as later would Hart and Devlin in the particular context of prostitution and private acts of homosexuality, by raising the broader issue: Is a society permitted to take any legal measures it finds necessary to secure its popular morality on a theory that such measures are required for social preservation? Miller poses the question in all earnestness and urgency, having taken measures to demonstrate that his Salem, like its historical counterpart, is best understood as a community struggling for moral and social survival.⁶⁶ It is a place, in other words, especially ripe for asking such a question. So, too, are a number of other places and contexts, Miller might argue, if only in the perceptions of those persons feeling entangled in the struggle. Hence, the question acquires trans-historical importance for Miller and his audience, just as it would for Hart and Devlin and for those of their followers who have taken up the cudgels on both sides of the debate.

Miller sides, as I have indicated, with Hart by embracing identical philosophical principles.⁶⁷ Miller demonstrates forcefully that Devlin's essential assumptions are illusory, even delusionary. According to Miller, social preservation does not depend upon legally securing a society's seamless web of moral bonds because the seamless web, where one believes it to exist, exists merely as artifice, and always at odds with humankind's instinct for individual freedom.⁶⁸ Rents will occur, and the

63. MILL, *supra* note 11, at 77; see Hart, *supra* note 5, at 77.

64. Readers unfamiliar with *The Crucible* may benefit from the précis provided in the appendix to this article. See *app. infra* p. 213.

65. According to a *New York Times* article, the Penguin edition of the play sells 180,000 copies annually. See Sarah Lyall, *Quiet Heroes: Books Not on the Best Seller Lists*, N.Y. TIMES, Aug. 1, 1994, at A1. Additionally, the play has undergone scores of theatrical productions, two television productions, and two movie treatments, the most recent in 1996. See, e.g., THE CRUCIBLE (Twentieth Century Fox 1996).

66. See MILLER, *supra* note 2, at 5-6.

67. See HART, *supra* note 5, at 1-4.

68. See MILLER, *supra* note 2, at 7.

assumption that such rents portend social collapse can only lead first to concealment and then to self-fulfilling prophesy.⁶⁹ Legal coercion and legal punishment when used in service of the seamless web, therefore, possess no value as moral instruments.⁷⁰ Instead, they must be perceived merely as moral negatives. Finally, Miller agrees with Hart and Mill that humankind's moral instinct is as entrenched as the liberty instinct, and that the cultivation of individual morality and its sharing are essential to social existence.⁷¹ Morality's cultivation and sharing, moreover, can be achieved in a manner consonant with the cultivation of individual liberty. By properly securing the latter, the law need have no business with the former.⁷²

A. *The Seamless Web: "[T]he people of Salem developed a theocracy"*⁷³

"That were pretense, sir,"⁷⁴ says Mary Warren to Judge Danforth in Act Three, referring to the girls' frenzied courtroom displays of demonic possession. Such displays have already led to accusations of witchcraft against Rebecca Nurse, Martha Corey, Elizabeth Proctor, and others.⁷⁵ Mary, if her courage holds, would expose the fraud, but she retracts her statement moments after making it to rejoin ranks with the pretenders.⁷⁶ Mary's reversal issues from her disposition to place her community's survival secondary to her own.⁷⁷ By now the audience has seen enough of this disposition in others to recognize that it is emblematic of Salem's reversal. We are resigned to the expectation that other examples will follow Mary's.

That the Devil could have found any foothold in the Massachusetts Colony was a thought unspeakable to the Colony's founders.⁷⁸ Miller tells us in the play's *Overture* that the colonists originally grouped for good, even "high" purposes—to shine "the candle that would light the world."⁷⁹ Their theocracy, or as Miller calls it, "an autocracy by consent,"⁸⁰ succeeded early on in this purpose by requiring that individual self-interest subordinate itself to the Puritans' larger concerns of moral and social preservation. They cultivated these concerns by requiring from all within their camp a rigorous observance of the unique stamp they placed on the Bible's various prescriptions and proscriptions.⁸¹ In their

69. *See id.*

70. *See id.* at 7–8.

71. *See id.* at 8.

72. *See id.* at 7–8.

73. *Id.* at 7.

74. *Id.* at 106.

75. *See id.* at 56.

76. *See id.* at 118.

77. *See id.* at 118–19.

78. *See id.* at 5.

79. *Id.*

80. *Id.* at 6.

81. *See id.* at 7.

interpretation of the Bible, one could find the seamless web of beliefs or the core of moral bonds whose function it was to keep the community together.⁸²

The society that Miller sketches, in a word, was Devlinesque. No Puritan of serious mind would doubt that social survival was inexorably dependent upon the preservation of God's law, nor would one deny the law its prerogative to administer "hard handed justice" in the interests of such preservation.⁸³ It is thus clear from Miller's description of the early colony that it was not a place where one could somehow separate the society from its morality.⁸⁴ But Miller leads us to believe that the Puritans' early success depended less upon these assumptions themselves than upon their willingness to validate them through the application of well entrenched and beneficent traits that guided them in their daily lives. "Probably more than the creed," he says, "hard work kept the morals of the place from spoiling."⁸⁵ Hard work, coupled with "their self-denial, their purposefulness, their suspicion of all vain pursuits," also rewarded the Puritans with physical survival in the early years.⁸⁶ These traits supplied them the means for withstanding frequent attacks by natives, bouts of disease, and harsh winters.⁸⁷ In a couple of generations the Puritans had taken root and prospered.⁸⁸ It had come time for them to feel the nascent stirring of personal freedom.⁸⁹

Miller observes that panic sprang from such stirring and that the witch hunts in turn sprang from this panic.⁹⁰ This assessment is difficult for modern audiences to understand unless we perceive, as would Hart, that freedom is inimical to the seamless web. A society cannot have both; rather, it must honestly accommodate the former and abrogate the latter.

82. See MARION L. STARKEY, *THE DEVIL IN MASSACHUSETTS: A MODERN INQUIRY INTO THE SALEM WITCH TRIALS* 51-52 (Doubleday 1969) (1949). Starkey remarks:

[T]his chosen people, this community which submitted itself to the direct rule of God, looked less to England for its precepts than to God's ancient and holy word. So far as was practicable the Puritans were living by a legal system that antedated Magna Carta by at least two millennia, the Decalogue and the tribal laws codified in the Pentateuch.

Id.; see Edmund S. Morgan, *Arthur Miller's The Crucible and the Salem Witch Trials: An Historian's Perspective*, in *THE GOLDEN AND THE BRAZEN WORLD: PAPERS IN LITERATURE AND HISTORY, 1650-1800*, at 183 (John M. Wallace, ed., 1985); see also David R. Samuelson, "I Quit This Court.": *Is Justice Denied in Arthur Miller's The Crucible?* 2 U. CHI. L. SCH. ROUNDTABLE 619, 634 (1995) (describing the law in historical Salem as "rough hewn and hard-handed" and at best, primitive). In commenting on Miller's treatment of history in the play, Morgan observes: "Puritans believed that the state existed to enforce the will of God among men." Morgan, *supra*, at 183.

83. MILLER, *supra* note 2, at 6.

84. *See id.* at 6-7.

85. *Id.* at 4.

86. *See id.* at 6.

87. *See id.* at 5-7.

88. *See id.* at 5-6.

89. *See id.* at 7.

90. *See id.*

This the Puritans could not do, nor did they know how. Instead, they outwardly clung to the web while flirting with individual liberty.⁹¹ Consternation and then panic erupted because the people were at a loss to interpret the displays of liberty they began to see all about them. A society that had so long and so closely identified itself with its shared morality, the Puritans now had to face an immense problem in the realization that some individuals were, on their own, setting the margins separating freedom's blessings from its curses. Their shift toward personal freedom thus signified a shift toward subjective morality,⁹² which in most instances meant a morality of convenience. They turned to the web for meaning and redress, failing to understand that all that remained of it was artifice and repression. They also failed to understand that the answer and remedy the web would supply—namely witchcraft and the necessary persecution of witches—would push them from mere moral subjectivity to moral inversion. The Father of Lies, once identified as the cause of their problem, would make witches out of innocents and saints out of villains. The seamless web of public morality would unravel and turn inside out and become a tangle of pretense, false accusation, and false denial.

The question the play might pose to Devlin, accordingly, is this: Can a society secure itself by securing a popular morality that in no respect should account as such? Miller develops a negative answer to this question by taking pains throughout the play to illustrate the question's premise. Most of the major characters, sooner or later, reveal themselves as moral pretenders. Act One, for example, develops around various contests of transparent moral one-upmanship. Parris is the first to perceive a serious rent in Salem's moral fabric, having witnessed the girls' dancing and conjuring.⁹³ His moral reflex is to conceal, but he sees some wisdom in Thomas Putnam's advice to be the first to charge witchcraft rather than wait for an enemy to lay the charge at his own door. Putnam obviously shares our understanding of Parris as a man to whom expedient moral accusations might come easily. We just earlier saw Parris charge his niece Abigail with "abominations" over the conjuring.⁹⁴ The charge emanated not at all from any concern for Abigail's soul, but from a concern for his reputation. A similar concern will soon spur him to accuse Proctor of Quakerism, a grave accusation since the Puritans regarded all sects but their own as abominations.⁹⁵ Putnam's advice is also

91. *See id.* at 7.

92. *See* ARTHUR MILLER, *ARTHUR MILLER'S COLLECTED PLAYS* 39 (1957).

93. *See* MILLER, *supra* note 2, at 10.

94. *Id.* at 11.

95. *See* THOMAS JEFFERSON WERTENBAKER, *THE PURITAN OLIGARCHY* 208, 211 (1947). Miller no doubt wants us to appreciate the keen dislike that would accompany such a charge. Wertenbaker explains that the Puritans could not countenance other sects and persecuted them at every turn. *See id.* at 209–10. The penalty for Quakerism was banishment:

But when the heretic refused to accept banishment . . . the ministers and magistrates showed him no mercy. "If any Quaker or Quakers shall presume, after they have once

in keeping with his own character, for when Proctor dares question Putnam's and Parris's authority in the community, Putnam is quick to point out Proctor's many absences from Sabbath services.⁹⁶ Upon answering this charge, Proctor discloses no less an interest in taking the moral high ground: Parris's preaching, in his opinion, is not sufficiently elevating to warrant the five mile trek to the village.⁹⁷ Interestingly, this exchange comes straight on the heels of Proctor's private encounter with Abigail, whom Proctor had seduced.⁹⁸ In that scene he dismisses her entreaties to renew the affair as he would a child's, and he calls her such.⁹⁹ They should both, he suggests, opt for pretense:

Proctor: We never touched, Abby.

Abigail: Aye, but we did.

Proctor: Aye, but we did not.¹⁰⁰

All of this moral posturing is an apt prelude to Act One's finale. Abigail, having long understood Salem's pretense, and having just been stung by Proctor's callous reminder of it, finds it only natural, when pushed, to seek the artificial high ground. Reverend Hale comes on the scene, ignorant as yet of the web's inversion. Having just uncovered witchcraft, Hale offers Abigail and her mates the choice of which moral role to play.¹⁰¹ They could play the witch or the victim-saint-judge who would ferret out Salem's witches. Abigail the conjurer would prefer to wear a saint's mantle.

The pattern thus cast, morality for show becomes a dominant motif in the play.¹⁰² We revisit Proctor in Act Two and observe him initially occupy the role of aggrieved penitent and moral judge. Proctor's adultery has caused his wife, Elizabeth, to nurse some hurt, resentment, and suspicion. Proctor asks her to find some goodness in him, but she declines to be his judge.¹⁰³ She will remain steadfast in her resentment and suspicion as long as her husband's behavior earns them. Proctor, then, would be his wife's judge. He confessed his sin to Elizabeth like a good Christian and

suffered what the law requireth, to come into this jurisdiction," stated the Massachusetts law of 1656, "every such male Quaker shall for the first offence have one of his ears cut off . . . and for the second offence . . . his other ear cut off . . . and every woman Quaker shall be severely whipt . . . and for every Quaker, he or she, that shall a third time herein again offend, they shall have their tongues bored through with a hot iron." At last, if all other measures failed . . . they were to be put to death.

Id. at 213 (quoting STATE OF MASSACHUSETTS, RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY 308 (AMS Press 1968) (1853)).

96. See MILLER, *supra* note 2, at 28.

97. See *id.* at 28-29.

98. See *id.* at 21-24.

99. See *id.* at 23.

100. *Id.*

101. See *id.* at 44-46.

102. See *id.* at 7.

103. See *id.* at 55.

perceives something un-Christian in his wife's continued aloofness.¹⁰⁴ He seems content in this role until Mary Warren, the house servant, alerts him to the raw consequences. She too has become the moral judge, having been appointed an officer of the court. By Elizabeth's account, Mary Warren left the Proctors' house earlier "like the daughter of a prince" to attend the witchcraft proceedings.¹⁰⁵ She returns sickened, worried over those who have been accused.¹⁰⁶ From this point onward moral inversion in the play becomes an essential element of individual survival. As we see in Act Three, Mary's distaste for pretense cannot overcome her reluctance to lose her own skin. Therefore, she calls out Proctor, again as victim-saint-judge, instead of maintaining the truth.¹⁰⁷ By this time as well, the truth of Proctor's adultery has lost its self-serving value for Elizabeth. Just before Mary's recanting, she issues the false denial that damns him.¹⁰⁸ In Act Four Hale completes the circle. He entreats Elizabeth to ask her husband to confess to witchcraft, knowing it to be a lie, so that Proctor may save his life.¹⁰⁹ Hale shares our understanding that the lie is all that is left of Salem's seamless web.

B. *The Matter of Legal Enforcement: "[C]onfess . . . or hang!"—
"Hang them high!"*¹¹⁰

As noted earlier, Devlin's premise that a society's existence depended upon securing its universally shared morality permitted him to conclude that society thus was warranted in adopting theoretically limitless legal measures to accomplish such an end.¹¹¹ Hart rejected the premise and decried the consequences of acting upon a false conclusion.¹¹² The best one could hope from applying the moral negatives of coercion and punishment to secure a society's morality, Hart maintained, are the negatives themselves, that is, fear and suffering.¹¹³ Miller adopts a similar position in *The Crucible*. We have observed that morality in Salem had disintegrated into a practice of form motivated largely by self-serving values. It is not surprising, then, to find such values informing most of the play's scenes involving coercion and punishment, or that the effect of legal enforcement, as depicted, is merely fear, futility, and suffering. Legal coercion and punishment, thereby, become fitting instruments of Salem's collapse.

104. *See id.*

105. *See id.* at 52.

106. *See id.* at 55.

107. *See id.* at 118.

108. *See id.* at 119.

109. *See id.* at 132.

110. *Id.* at 117, 144.

111. *See supra* text accompanying note 24.

112. *See HART, supra* note 5, at 57–60.

113. *See id.* at 59–60.

Antecedent to the punishment that awaits Salem's accused is a coercive option best summed up in the phrase "confess or hang." The option is implicated in every act.¹¹⁴ At the end of Act One, following Tituba's example, the girls confess to trafficking with the Devil in order to escape hanging.¹¹⁵ We learn in Act Two that others have confessed to the crime to avoid the same fate.¹¹⁶ Confess or hang becomes Proctor's option at Act Three's conclusion and throughout Act Four.¹¹⁷

Thus, Miller would have us test Devlin's thesis concerning the use of legal extremes to preserve a society's morality by inviting us to pass judgment first on the worth of forced confessions. The test would appear to be an easy one were it not for Miller's insistence here and there to offer concessions to the option's plausibility. While he does not argue his story's historicity, he would have us observe, accurately enough, that the witch hunts arose in Salem from a genuine perception of dire emergency.¹¹⁸ Anyone interested in pursuing the matter could find ample historical occurrences buttressing Miller's finding, that to the people of Salem, the times must have been out of joint.¹¹⁹ Further, he cautions the audience that the cosmology of the day required a belief in witches. Indeed, to deny their existence was to deny Satan's, which was tantamount to denying God's.¹²⁰ Killing the witch—one exposed acceptably enough through "spectral evidence"¹²¹—flowed necessarily from the biblical injunction, "Thou shalt not suffer a witch to live."¹²² Moreover, the play is replete with authentic practitioners and participants in the black arts.¹²³

114. MILLER, *supra* note 2, at 47, 56, 119, 137.

115. *See id.* at 48.

116. *See id.* at 56.

117. *See, e.g., id.* at 119, 137.

118. *See id.* at 6-7.

119. *See* WERTENBAKER, *supra* note 95, at 326-38. Special consternation greeted the 1684 revocation of the 1630 charter that granted the people virtual autonomy from England. *See id.* at 328. Massachusetts would now be a crown colony. *See id.* at 329. A fatal blow came from the subsequent issuance of a new charter permitting, among other things, religious freedom. *See id.* at 338. Other problems haunted the Bay Colony and caused people to fear for the worst:

One calamity after another had been heaped on the Bay Colony—small pox, Indian raids . . . and the growing certainty that New England had lost for ever the near-independence it had enjoyed under the charter. God had manifestly turned His countenance from a people unworthy to be chosen as He had once chosen them. The devout were searching their hearts—and the conduct of their neighbours—for cause of this withdrawal. There were many who seriously believed that Doomsday was imminent. . . . Repent, they cried, for the Kingdom of God is at hand.

STARKEY, *supra* note 82, at 32-33.

120. *See* Arthur Miller, *Why I Wrote The Crucible*, THE NEW YORKER, Oct. 21 & 28, 1996, at 162; *see also* STARKEY, *supra* note 82, at 53.

121. Samuelson, *supra* note 82, at 637. "Spectral evidence" includes any evidence—marks on the body, hallucinations, the vexing of neighbors, etc.—indicating that the accused is in league with the devil. *See* STARKEY, *supra* note 82, at 53-54.

122. *Exodus* 22:18.

123. *See* MILLER, *supra* note 2, at 20, 42-48.

All of this tempts the impression that the options available to Salem's authorities were plausibly as limited as the ones they offered their accused. Plausibility emerges as well from Miller's early characterization of Hale and Danforth as individuals entertaining principled belief in the moral efficacy of baring one's soul. Hale, for example, in Act One perceives in Tituba's confession a "wish to come to Heaven's side."¹²⁴ He gratefully announces that the community will bless her for it.¹²⁵ And Danforth, it should be recalled, is so moved by Proctor's confession of adultery in Act Three that he would permit Elizabeth's corroboration of it to direct the future course of the proceedings.¹²⁶

It becomes obvious, however, that by lending some measure of plausibility to the "confess or hang" option, Miller is but offering a reminder, as a warning, concerning the use of legal coercive tactics in modern prosecutorial arenas. Here, I am not only referring to the flagrant abuses one associates with the Stalin era or with McCarthyism; I am referring, as does Miller, to commonplace legally sanctioned and socially accepted tactics such as the plea bargain, grants of immunity, and the like. For surely it is not difficult to see glimpses in the girls of our everyday modern accused turned state's witness. And surely Mary Warren's remark to Proctor—"I'll not hang with you!"¹²⁷—resonates with an understanding shared with the audience that the state eagerly accommodates those whose tales it wants to hear. Such tactics, just as those on display in *The Crucible*, relegate the truth secondary to governmental and personal expediency. Further, cloaked as these tactics are in perceived necessity and good motive, they too look to plausibility to acquire moral acceptance.

For Miller, the option, while conceivably plausible, can never gather moral acceptance. He advances this thesis in nearly all the scenes alluded to and in his parting characterization of Hale and Danforth.¹²⁸ Notwithstanding Hale's good purpose, the audience knows fully that the confessions he elicits from Tituba's and the girls' fear are dishonest and socially disunifying. If Hale would want to learn the identity of the oppressors, as his coaxing and suggestions imply, then Tituba and the girls will gladly furnish any number of likely names from around the community. It is simply easier to confess and name others than it is to hang for the truth. Of course, Proctor gets it right when he learns from Hale in Act Two that several others have also succumbed to the option:

Hale: Mister, I have myself examined . . . others that have confessed to dealing with the Devil. They have *confessed* it.

124. *Id.* at 46.

125. *See id.*

126. *See id.* at 113–14.

127. *Id.* at 118.

128. *See id.* at 141–44.

Proctor: And why not, 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?¹²⁹

Ironically, after Danforth points the option in Proctor's direction towards the end of Act Three, it is Hale in Act Four who would have Proctor lie to save his life.¹³⁰ Hale thus comes to personify that capacity in all of us to pave a road to Hell with good intentions. He realizes that the option speaks to sheer legal expediency, yet his knowledge of the moral trickery involved does not discourage him from urging its use upon Proctor. Hale's mission has ceased to be soul-saving. Neither Proctor's nor the community's nor his own moral life has any meaning. The same can be said of Danforth toward the play's end. He retains full allegiance in the option, not for any potential it might have for producing a moral or social good, but for its capacity to shore up his own "moral" authority. For him the option cannot accommodate an evident lie, for it would then necessarily speak to some lie about that authority. However, as Danforth indicates in his last exchange with Proctor, he will readily accept a lie if the lie can be mistaken for the truth.¹³¹ The coercive option rings morally hollow in Salem.

As a consequence, legal punishment in *The Crucible* becomes little more than an expression of futility. Miller establishes the point in a series of brief scenes in Act Four. The jail sequence involving Tituba and Sarah Good offers droll mockery of Salem justice. Witches both, they deserve some punishment, but awash in Herrick's cider and comic hopes of Satanic rescue they seem oblivious to imprisonment's sting.¹³² The audience perceives them throughout the scene as marginally harmless creatures whose presence in jail accentuates the absence of Salem's genuine miscreants. Later in the Act, Miller focuses on the consequences of imprisoning Salem's innocents. Here, punishment's futility is evoked through references to vagrant cattle, wandering children, rotting crops, and rumors of rebellion.¹³³ Salem is on the verge of social suicide.

We then learn of Giles Corey's demise as told by Elizabeth.¹³⁴ The futility of killing Giles is apparent on two fronts. Giles is pressed to death for his refusal to enter a plea, but by refusing to plea Giles legally prevents the theocracy from confiscating his lands and possessions.¹³⁵ Nor

129. *Id.* at 68-69.

130. *See id.* at 141.

131. *See id.* at 134-44.

132. *See id.* at 122.

133. *See id.* at 130.

134. *See id.* at 135.

135. *See Samuelson, supra note 82, at 642 n.42.* If a person refused to answer a charge, then the matter could not proceed to trial. *See id.* The state could resort to *peine forte et dure* to induce a plea, as it did in Giles's case. *See id.* However, as Elizabeth tells Proctor, if the person still refused to answer, as did Giles, then the state could not seize that person's property. *See MILLER, supra note 2, at 135; see also CHADWICK HANSEN, WITCHCRAFT AT SALEM 153 (1969).*

can the theocracy derive the slightest, even pretended, moral satisfaction from executing Giles, since his refusal to deny the charge of witchcraft erases the usual proof of the charge's legitimacy. Lastly, futility emerges as an indelible fixture of Proctor's imprisonment and execution. Although imprisonment succeeds in transforming Proctor into "another man" physically, it has not broken his resolve.¹³⁶ He goes to his death at the end as defiant as Giles, causing Danforth's parting words, "Hang them high,"¹³⁷ to sound out in abject frustration.

We thus see in Miller's thematic treatment of legal punishment a thorough repudiation of Devlin's thesis. Legal punishment cannot preserve Salem's society or morality any more than legal coercion can. Accordingly, because it is lacking in moral instrumental value, punishment ultimately emerges in the play as the mere brute expression of human suffering and sacrifice—a thing of evil. Furthermore, since Miller selects for our attention the deaths of virtuous persons at play's end, we must conclude that it is an evil that temporarily triumphs. Miller thereby gives shape to what would become Hart's direst warning: "Morality, what crimes may be committed in thy name!"¹³⁸

C. *The Final Judge: "There be no higher judge under Heaven than Proctor is!"*¹³⁹

Miller notes with approval in the play's epilogue, *Echoes Down the Corridor*, that twenty years after the last hanging the theocracy no longer controlled Massachusetts.¹⁴⁰ This observation recalls another of Hart's: There are some societies whose disintegration is morally better than their continued existence. Miller's comment also points out in concluding fashion the supreme folly of assuming, as did Devlin, that social and moral existence depend upon the legal enforcement of morality. This assumption, as we have seen, may produce an unwelcome opposite effect.

But outweighing such reflections on social collapse is Miller's reminder in the epilogue that moral conditions seemed to have improved with the theocracy's disappearance.¹⁴¹ In 1712, the government offered compensation to surviving victims and ordered the congregation to rescind excommunications.¹⁴² In addition, and far more importantly, several church members on their own issued a statement urging forgiveness from all who suffered during the witch hunt.¹⁴³ This last fact, a testament to the

136. MILLER, *supra* note 2, at 133.

137. *Id.* at 144.

138. Hart, *supra* note 4, at 54.

139. MILLER, *supra* note 2, at 137.

140. *Id.* at 146.

141. *See id.*

142. *See id.*

143. *See id.*

worth of voluntary morality, encourages an examination of how elsewhere in the play worthy individual morality is depicted as a thing to be achieved and sustained.

In this context we return to Proctor and to the development in his character of a moral vision that permits him at the play's conclusion to lay a claim to a "shred of goodness."¹⁴⁴ In presenting this vision, Miller once again reveals an unmistakable kinship to Hart and John Stuart Mill. All three would agree that a good life is premised upon a social allegiance to individual liberty bounded by universal virtues of moral conduct. To reiterate Hart's articulation of them, these virtues comprise a willingness to apply general social rules impartially to oneself and others in moral relationships; a recognition in one's conduct of the wants, expectations, and reactions of others; and, a regard for self-discipline and control as adaptive requirements for participating in a system of reciprocal claims. Miller not only displays a similar appreciation for such virtues, he posits them as essential criteria for charting Proctor's moral education. Further, he insists, quite in keeping with Hart and Mill's sentiments, that one regard these virtues as qualities to be learned and cultivated voluntarily by means of advice, example, and argument. In so doing, he ultimately gathers attention to the central informing principle of this play and the work of both Hart and Mill: morality, once secured voluntarily by means of such virtues, will ensure that evil's triumphs remain, at worst, momentary.

According to Hart's three principles, Proctor must be counted a moral failure throughout most of the play. First, he exhibits no feel for the impartial application of social rules. Rather, always preferring to play according to his own rules, he is arrogant and socially disconnected. For example, he will not attend church services regularly and refuses to have his third son baptized, both on account of his hatred of Parris.¹⁴⁵ Moreover, he says he would join a faction, if he could find one, in order to oppose Parris, Putnam, and anyone, we may suppose, whose "authority" offends his sense of "smell."¹⁴⁶ Proctor, of course, favors his own authority, and he does not hesitate to impose it on others when, in his opinion, the occasion so warrants. In this regard, we see Proctor violating the second of Hart's principles. For Proctor would much rather control others than fashion his own conduct according to what others need and expect from him. We again note his curt dismissal of Abigail in Act One, and further, how he answers her criticisms of Elizabeth with threats of whipping.¹⁴⁷ He uses the same threat against Mary Warren in Act Two when he scolds her for leaving the Proctor house against his orders.¹⁴⁸ At the

144. *Id.* at 144.

145. *See id.* at 28-29.

146. *See id.* at 31.

147. *See id.* at 24.

148. *See id.* at 55.

act's end he orders Mary to accompany him to court.¹⁴⁹ When she resists the command, he uses force to bend her will.¹⁵⁰ We recall the earlier scene in Act Two when, alone with Elizabeth, he orders that she desist in doubting him.¹⁵¹ He regrets his prior demonstrations of meekness: "I should have roared you down."¹⁵² But we know, along with Proctor, that for all of his attempts to control others, he has failed miserably in controlling himself. Evidence of this violation of Hart's third principle appears throughout the play's first three acts. Speaking against him in this respect is his adulterous conduct with Abigail preceding the action, and indications offered by his own admission in Act One and by Elizabeth's suspicions in Act Two that he has had difficulty in ridding Abigail from his thoughts.¹⁵³ In Act Two we also become aware that Proctor's undisciplined self has tragically prevented him from calling out Abigail sooner than he does.¹⁵⁴

Proctor thereby has permitted his conduct, by turns reckless and unresponsive, to be a source of his own and of others' undoing. Significantly, at the end of Act Three, events cause him to blaspheme and to denounce both himself and Danforth.¹⁵⁵ At this point Proctor has come to understand the fruits of his hypocrisy and so has the audience. We are tempted to recall his admonition to Elizabeth in Act Two to see some good in him, and to wonder in retrospect what goodness ought to have attached to this man who always insisted upon playing according to his own rules and who, oblivious of the consequences, would control others without giving a thought to controlling himself.¹⁵⁶

Yet, if Proctor exaggerated his goodness in the earlier interlude with his wife, he surely exaggerates his wickedness by condemning himself at the conclusion of the trial scene. His attempt to save Elizabeth and his friends, his public confession of adultery, as well as his guilt all belie genuine evil in his make up.¹⁵⁷ Nor would either Hart or Mill perceive evil in Proctor. Mill's thinking on this topic is especially apposite. Mill would regard Proctor merely as someone who has reaped the woes of self-regarding faults. Proctor's "rashness, obstinacy, self-conceit,"¹⁵⁸ his pursuit of "animal pleasures at the expense of those of feeling and intellect"¹⁵⁹ are traits rightfully likely to arouse social reproof, and they rightfully deserve correction through "self-development."¹⁶⁰ However, they do

149. *See id.* at 80.

150. *See id.* at 80-81.

151. *See id.* at 54-55.

152. *Id.* at 55.

153. *See id.* at 54.

154. *See id.* at 77.

155. *See id.* at 119-20.

156. *See id.* at 55.

157. *See id.* at 113-14, 141-43.

158. MILL, *supra* note 11, at 78.

159. *Id.*

160. *Id.* at 79.

not make Proctor evil. According to Mill, genuine evil resides in cruelty, envy, covetousness, and total preoccupation with self above others.¹⁶¹ These traits constitute what Mill terms "an odious moral character,"¹⁶² and with these traits in mind, Mill would join the audience in identifying Abigail, Parris, Putnam, and possibly Danforth as figuring among the play's evil characters, not Proctor.¹⁶³

Proctor, then, is very much in need of moral self-development. He achieves this goal throughout Act Four. Miller invites us to view Proctor's moral education, and hence everyone's, as an achievement that necessarily must issue from the exercise of free will.¹⁶⁴ It is up to the individual to chart a moral course and to the individual to assess the efficacy of such a course. The play furnishes ample proof that the law, although it certainly may channel conduct through fear, has properly nothing to do with shaping one's moral development. Nor is it the responsibility of those possessing true moral authority to direct or judge the moral course of another. However, others may assist through advice, example, and argument. The point echoes directly from Mill, finding appropriate re-statement in Hart. Mill says this:

Considerations to aid [the individual's] judgment, exhortations to strengthen his will, may be offered to him, even obtruded on him, by others; but he himself is the final judge. All errors which he is likely to commit against advice or warning, are far outweighed by the evil of allowing others to constrain him to what they deem his good.¹⁶⁵

Proctor learns through Elizabeth's advice that he must become his own judge.¹⁶⁶ Through the moral influence of Elizabeth and others, he also learns that his proper moral course is to die rather than sacrifice his own and his fellows' good name. As her husband's principal moral advisor, Elizabeth strikes one as a proper student of Mill. She will advise Proctor, but she will not offer him her moral judgments on specific conduct. We see her exhibit this attitude from first to last. In Act Two she reminds Proctor of her advice to go to Salem to put an end to the fraud.¹⁶⁷ Proctor has declined to heed her, yet she will not judge his tarrying. Neither will

161. See *id.* at 78.

162. *Id.* at 79.

163. In his *Introduction to the Collected Plays*, Miller expresses disappointment that he did not render Danforth more obviously a man of evil, referring specifically to Danforth's willingness to allow Elizabeth's testimony to decide his course of action. See MILLER, *supra* note 92, at 43. However, Danforth at the end is unwilling to hear further arguments concerning the accused's guilt, lest postponement speak of "floundering" on his part. MILLER, *supra* note 2, at 129. His resistance to postponement, given its consequences, might fit within Mill's definition of cruelty enough to warrant regarding Danforth as an evil person. *But see* Samuelson, *supra* note 82, at 640-41 (providing possible justifications for Danforth's actions).

164. See MILLER, *supra* note 2, at 135-36.

165. MILL, *supra* note 11, at 77.

166. See MILLER, *supra* note 2, at 137.

167. See *id.* at 53.

she judge his conduct favorably, despite his entreaties to see some good in him. "I cannot judge you,"¹⁶⁸ she says. Instead, she tells Proctor to look to the magistrate who sits in his heart for proper judgment.¹⁶⁹ She reveals having acted upon her own advice when, in Act Four, she admits to Proctor that a reading of her own heart has revealed serious imperfections.¹⁷⁰ Therefore, insisting that one follow one's own conscience, she refuses to judge his early decision to confess for living's sake.¹⁷¹ She refuses even though she told Hale just beforehand that opting for this choice would amount to accepting "the Devil's argument."¹⁷²

Both Elizabeth and Proctor realize that goodness, horribly, lies in opting for death, but she would not make that choice for him either. Rather, she acknowledges a wonderful goodness she has at last discovered in him and his own capacity to make this decision for himself. She tells him: "There be no higher judge under Heaven than Proctor is! . . . I never knew such goodness in the world!"¹⁷³ Proctor at first does not understand her, his self-loathing having permitted him at this point only the personal judgment that he is "no good man," and not one to be confused with the saints who go to their rest.¹⁷⁴ As "no good man" he would have his life.

Elizabeth's advice and counseling thus prove insufficient in themselves to position her husband to consider the choice that would allow him to claim some goodness. But her advice is only a beginning. Moreover, other means exist to assist Proctor in completing his moral education, namely, example and argument. Elizabeth's example of judging herself but not others has had a serious impact on Proctor. "I speak my own sins. I cannot judge another," he tells Danforth when questioned about Rebecca Nurse.¹⁷⁵ He cannot bring himself to blacken a worthy person's name. In his refusal to call out Rebecca, one readily perceives the influence of Proctor's friend, Giles Corey. Corey's demise initially staggers Proctor. He is "numbed"¹⁷⁶ when Elizabeth informs him of the pressing. He can merely repeat Giles's last words.¹⁷⁷ When Elizabeth labels Giles a "fearsome man,"¹⁷⁸ Proctor is silent. He would rather broach the topic of his own survival than contemplate Giles's character. Giles cannot be too far from his thoughts, however, because he quickly inquires about Giles's wife, Martha.¹⁷⁹ Then, to rationalize a decision to

168. *Id.* at 135.

169. *See id.* at 55.

170. *See id.* at 136-37.

171. *See id.* at 135.

172. *Id.* at 132.

173. *Id.* at 137.

174. *Id.* at 136.

175. *Id.* at 141.

176. *Id.* at 135.

177. *See id.*

178. *Id.*

179. *See id.* at 136.

keep his life, Proctor interjects a premise he knows to be a straw man: "I cannot mount the gibbet like a saint," he protests, "I am not that man,"¹⁸⁰ meaning Giles.

Clearly, Giles never had any claim to sainthood. Only too often has he revealed himself as fractious, meddlesome, hard-headed, irascible, and loose-mouthed.¹⁸¹ Giles's loose mouth, in fact, is partially accountable for his wife's imprisonment.¹⁸² His faults notwithstanding, Giles is brave and knows right from wrong. Further, the audience understands that he shares these qualities with Proctor—that he and Giles, in certain respects, are the same man. Giles goes to court to save his wife and others. Proctor does the same. Giles calls out Thomas Putnam.¹⁸³ Proctor follows suit by calling out Abigail.¹⁸⁴ Giles would rather die than call out his friends and betray his own name. Proctor knows that the proper course is to follow Giles's good example.

Still Proctor wavers, preferring "the Devil's argument."¹⁸⁵ Against this argument is pitted another, one voiced simply and resolutely by Rebecca Nurse who is shocked and saddened to discover Proctor's buckling.¹⁸⁶ "[I]t is a lie, it is a lie," she answers Danforth when asked to confess.¹⁸⁷ "[H]ow may I damn myself? I cannot, I cannot."¹⁸⁸ Having heard Rebecca's declaration, Proctor must choose. On the one side is the argument of expediency, one with whose terms and consequences Proctor has long been familiar. On the other side is the argument of plain truth, one he has long sought to ignore. He opts for the truth upon discovering that to do otherwise requires the sacrifice of his name.¹⁸⁹ His good name, he learns, one he can pass on to his family and to the community, is worth the price of this life.

Proctor can now, in a manner that would fully meet with Hart's and Mill's approval, reap the benefits of his moral development. As his own judge, he can forgive his prior social aloofness, his disregard for others, and his immoderation. He can claim a shred of goodness by heeding Rebecca's argument and following Giles's example. "He have his goodness now,"¹⁹⁰ observes Elizabeth, as Proctor goes to the scaffold. According to Miller, it was a goodness that was to survive in Salem.

180. *Id.*

181. *See id.* at 40–41.

182. *See id.* at 71–72.

183. *See id.* at 96.

184. *See id.* at 105.

185. *Id.* at 132.

186. *See id.* at 139–40.

187. *Id.* at 140.

188. *Id.*

189. *See id.* at 143.

190. *Id.* at 145.

CONCLUSION

Readers attracted to *The Crucible* and to the work of Devlin and Hart may find it serendipitous that Miller's thinking on law and morals was so intimately connected to that of these legal writers that he was able to simulate their argument in dramatic form six years before its entry into philosophical circles. Of course, by coincidence strong political crosscurrents were blowing on both sides of the Atlantic at the time, prompting strong responses. Miller, by his acknowledgment, had the proceedings of Senator McCarthy's House on Un-American Activities Commission (H.U.A.C.) in mind when he wrote the play,¹⁹¹ just as Devlin was spurred to write by the recommendations of the Wolfenden Committee. But coincidence would not explain Miller's reaction to events in America any more than it could explain Devlin's reaction to similar events taking place in Great Britain, nor Hart's reaction to Devlin's. To explain these, one would have to look to the tension that since Mill's day has accompanied conservative and classical liberal efforts to define the contours of liberty, morality, and social order, and to the circumstances that encouraged these writers, by different means, to take one side or the other.

On the business of taking sides, I think it would miss the mark to conclude that Lord Devlin would have sided either with the McCarthyites or the likes of Deputy Governor Danforth. Neither Hart nor Miller would readily have it so. Rather, they might argue that Devlin's assumptions, if pressed to their theoretical limits, could have found favor for the best of motives in very unpleasant quarters. But it should not be forgotten, as one commentator has recently observed, that Mill's own thinking on freedom can be viewed largely as based on hunches concerning its long-range benefits.¹⁹² Miller is wedded to these hunches inasmuch as they found validation in society's repudiation of the Salem witch trials, the H.U.A.C. proceedings, Stalinism, Maoism, and other obvious tyrannies. Whether the play, Hart's, or Mill's work speaks persuasively to issues of penumbral harm might be another matter. Is the law really overreaching, for example, where it sees fit to regulate the use of tobacco products or alcohol, or where it proscribes gambling, euthanasia, dueling, begging, and the like?¹⁹³ The debate seems far from over.

My final thoughts concern the consequences that have attended the different means by which these writers have presented their arguments. Formally, Miller's world of discourse exists far apart from Devlin's and Hart's, this difference apparently having prevented any consideration of how their works may speak to one another. As I indicated at the outset of this article, one will not find any reference to *The Crucible* in the debate commentaries. I will add here that no reference to my knowledge exists

191. See MILLER, *supra* note 92, at 41.

192. See Murphy, *supra* note 8, at 77.

193. See Wasserstrom, *supra* note 8, at 7.

of the Hart-Devlin debate in the canon that has developed around the play. These facts should come as a surprise on the basis of the works' contemporaneous writing, their enduring influence, and their uncanny similarity in thought. I have joined them here momentarily, therefore, to build a much needed bridge. To those among my audience possessing interests in legal philosophy, I reiterate my belief that Miller's unique voice should be added to the debate. Any among them having occasion to teach courses in Jurisprudence or Law and Literature will find *The Crucible* a worthy course addition. To readers who enjoy teaching *The Crucible*, I recommend the Hart-Devlin debate as an instructive companion piece.

APPENDIX

Act One (An Overture): Spring, 1692—The house of the Rev. Samuel Parris, a minion among Salem's theocracy.

The act begins with Parris having discovered his house-slave Tituba, his daughter Betty, his niece Abigail, and other girls participating in nighttime dancing and perhaps conjuring. The discovery prompts Betty to collapse into a trance, leaving Parris to worry over the possibility of witchcraft. Abigail denies any Devil trafficking. The act ends with the house-slave, niece, and daughter hysterically denouncing several townspeople of low repute as witches.

Miller introduces all but two of the play's memorable characters in the beginning act. After the four just mentioned, we encounter by turns Thomas Putnam, a prosperous landowner; Ann Putnam, Thomas's wife; John Proctor, a local farmer; Giles Corey, another farmer and Proctor's aged friend; Mary Warren, Proctor's servant; and Rebecca Nurse, a pious and saintly woman of the community. Directly or indirectly, the cause of these characters' arrival on the scene is Betty's unusual behavior, news of it, and associated rumors of witchcraft by now running through the town. Putnam sees in it the work of the Devil. Parris, new to Salem and generally disliked by his congregation, initially recoils at the suggestion, fearing added damage to his reputation. Nevertheless, he has called upon the Rev. John Hale from a nearby village to investigate, Hale being an expert in such matters. Proctor, a practical man, is skeptical, as is Rebecca, who senses Betty's confusion and fear. Hale arrives. He learns that Tituba conducted an authentic conjuring on the night of the dancing. His resolute, leading, and threatening questioning of Abigail and Tituba causes these two to begin the accusations of others. These others, it seems, have sent out their spirits to afflict Tituba and the girls. This turn of events frees Betty from her trance so that she may add her voice to the denunciations.

One cannot appreciate the remainder of the story without attending to some additional information supplied in Act One. From external quarters, the colony was experiencing vexing political change, some among the theocracy seeing ample evidence of the Devil's stamp in the current political condition. And, of course, wherever Lucifer lurked, churchmen and government leaders alike required that he must be rooted out. Internally, Salem's politics had deteriorated into a factionalism that pitted the camp of Thomas Putnam, a thoroughly disagreeable soul, against that of Francis Nurse, Rebecca's husband. Putnam, with Parris squarely behind him, will eventually win out as a ringleader in the witchhunt purge. Act One gives us a taste of things to come in a couple of scenes. In the first, Putnam squabbles with Proctor over Nurse's right to sell Proctor the land from which Proctor gathers wood, Putnam claiming the land as his own. This follows an earlier heated exchange

wherein Proctor challenged and ridiculed Putnam's authority. Giles Corey sides with Nurse and Proctor in this matter of the wood, thereby incurring Putnam's threat of a writ. Later, Giles will accuse Putnam of denouncing others in order to grab up their land, this charge ultimately leading to Giles's demise. In the other, and more startling scene, Ann Putnam reveals to the group that she sent her daughter to the conjuring to find the cause of her seven still-borns. She refuses to countenance the rebuke that immediately issues from Rebecca. Later, Rebecca will be charged with the supernatural murders of Ann's babies.

For dramatic purposes, the most important relationship unearthed in Act One is that between Proctor and Abigail. Seven months before the events of Act One take place, Proctor's wife, Elizabeth, dismissed Abigail from her household employ upon learning that Abigail and Proctor had committed adultery with one another. Abigail despises Elizabeth, and, during the conjuring, drank a potion to bring about Elizabeth's death. She would have Proctor for her own. She attempts to rekindle the flame when the two of them are alone together early in the act, but Proctor will have none of it. Interestingly, she tells him that the dancing, being mere silliness, had nothing to do with witchcraft and that Betty's condition was brought on simply by her father's discovery of events. In Act Two, her charges of witchcraft against Elizabeth will result in Elizabeth's arrest.

Act Two: Eight days later—Proctor's home.

Elizabeth Proctor makes her first appearance. Outside, the air is heated by witchcraft proceedings underway in the village. Abigail, assisted by other girls, including Mary Warren, is calling out names of witches at court. Several persons have been arrested. Inside, Proctor's home is chilled by Elizabeth's lingering disappointment over her husband's infidelity, and lately over her husband's reluctance to report to the authorities Abigail's prior minimization of the dancing and Betty's condition. Mary Warren enters, interrupting an argument between the Proctors. She brings sad tidings: the number of those arrested has increased substantially, and one is condemned to hang. She tells the Proctors that Elizabeth's name is "somewhat mentioned" in court. Enter now Hale, repeating much of Mary's news, and adding that Rebecca Nurse's name is mentioned along with Elizabeth's. Incredulous, Proctor tells Hale about Abigail's denial of any witchcraft. This news only partially registers with Hale, for now enter Giles and Francis Nurse with word that their wives have been arrested. Giles regrets earlier having told the authorities that his wife, Martha, had lately taken up reading books at night. The act ends with Elizabeth herself being carted off to jail. Proctor forces Mary Warren to admit the fraud. They are both poised now to expose it in court.

Act Three: A few days later—The court of Judge Danforth, the Deputy Governor.

Miller describes Judge Danforth, the chief jurist in the proceedings, as a grave but not humorless man. By now his court has arrested hundreds of individuals, sentencing seventy-two to hang, including Rebecca Nurse. Danforth greets Mary's words with high skepticism when Mary finally gathers the courage to tell the court that there never were any afflicting spirits—it was all pretence. Proctor also charges the girls with fraud, echoing charges brought earlier by Giles and Francis Nurse. Giles, irascible and pugnacious, will find himself jailed at the act's end for contempt of court. He declares that Thomas Putnam is fabricating accusations of witchcraft against local farmers in order to buy up their land. In addition, he threatens Putnam's life. Later, he will be charged with witchcraft, and, refusing to plead, will be pressed to death. Focusing now on Mary, we witness a gradual waning of courage once Abigail and the other girls make an appearance—pretending that Mary's spirit afflicts them. Attention shifts to Proctor, who desperately pulls Abigail to her feet and calls her out as a whore. He then publicly owns up to his lechery with her. Danforth declares that Abigail will pay dearly if Elizabeth can corroborate the charge. Elizabeth cannot do this, preferring instead to save Proctor's name. Proctor tries then to stiffen Mary Warren's resolve, but Mary buckles after the girls once again turn on her, this time howling their pretended afflictions. She rejoins the girls and accuses Proctor of witchcraft. Wholesale pandemonium results. Proctor damns himself and Danforth, and is hauled away. Hale quits the court, convinced finally of the fraud.

Act Four: The autumn of 1692—A cell in the Salem jail.

Proctor awaits his execution. So many people are jailed now that wandering orphans and untended cattle are common features in Salem's gloomy landscape. Word of rebellion emerges. The action moves quickly from a comic jailhouse interlude involving Tituba, fellow witch, Sarah Good, and the drunken Gaoler, Herrick, to a touching scene in which Proctor, in Elizabeth's and Danforth's presence, considers arguments for saving his life. All he need do is confess to witchcraft. Moments before, the transformed Hale entreated Elizabeth to urge Proctor to confess for life's sake. She refuses. Danforth would like a confession for purposes of vindicating the court. Elizabeth informs Proctor of Giles's death, leaving him awed over the man's courage. He tells Elizabeth that his own weakness renders him a creature apart, that he doesn't belong in this company of saints. He asks his wife for guidance, but Elizabeth, who would clearly have Proctor live, insists that he decide on his own. He tells her within the hearing of Rebecca, who is ashamed for him, that he would speak the lie to have his life. He then quickly signs the confession, but just as quickly tears it up. Danforth insists that the confession be publicly posted. Proctor retracts the confession and is hanged.

