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## Hocus Pocus: Modern-Day Manifestations of Witch Hunts

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# Hocus Pocus: Modern-Day Manifestations of Witch Hunts

Brie D. Sherwin\*

## ABSTRACT

*Witch hunts have never been about facts or evidence; rather they are about beliefs often fueled by fear. Witch hunts of the past persecuted the powerless – typically women or those who did not fit into “societal norms.” More recently, the term “witch hunt” has reappeared with great fervor in the political arena, used by the powerful to generate fear that serves a distinct political narrative that those in power are the true victims. Tweets, sound bites, and political speeches rife with accusations of a “witch hunt” reflect a modern usage which has served to delegitimize the historical context of the term.*

*This Article argues that this modern use of the term “witch hunt” is a misappropriation of what has long been used to describe illegitimate hunts of marginalized groups of people, implicating roles of gender, race, and power. This misuse is happening all while subversive, carefully veiled witch hunts are occurring in cleverly disguised legislation and litigation, supported by anecdotes and “spectral” evidence, and aimed at affecting the rights of historically oppressed groups of people based on their gender and race. This Article aims to remind the reader of what a “witch hunt” looked like in colonial New England and to propose that witch hunts are still alive today – not in the political arena, but in the legal one. Law cannot stand on conspiracy theories or perversions of truth shaped to fit a narrative, fueling fear, and resulting in the need to find a scapegoat. For as we’ve seen in the Salem witch trials, without a legal system rooted in reliable evidence and based on verifiable facts, a society can crumble.*

**Keywords:** witch hunt, gender, race, scientific evidence

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### INTRODUCTION

*“Hocus Pocus (n.): nonsense or sham used especially to cloak deception.”*

— Merriam-Webster Dictionary<sup>1</sup>

There is no question that the term “witch hunt” has regained its foothold in American discourse.<sup>2</sup> The term is now frequently invoked, often to distort the procedure used to decide the guilt of a person against whom an accusation has been made.<sup>3</sup> Tweets, campaign rally speeches, and signs have transformed the term to something of a metaphor meant to delegitimize an investigation by denouncing alleged ideological and partisan motives behind it.<sup>4</sup> We often see the term “witch hunt” associated with words like “fraudulent,” suggesting that an investigation is somehow logically defective because it is part of an inquiry that is procedurally unfair or improper.<sup>5</sup>

During a true witch hunt, however, the accused is treated unfairly because there is some kind of social framework, tribunal, or method of inquiry in place to determine guilt without proper justification or adequate evidence.<sup>6</sup> As such, calling something a “witch hunt” does not automatically make it so. More importantly, use of the term “witch hunt” may seem to be a relatively innocuous political maneuver, but its actual effect on the legal

<sup>1</sup> *Hocus Pocus*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/hocus-pocus> [https://perma.cc/C3W4-MB2T] (last visited Sep. 5, 2023).

<sup>2</sup> Erin Cassese, *A Political History of the Term “Witch Hunt,”* VOX (Oct. 31, 2018, 10:50 AM), <https://www.vox.com/mischiefs-of-faction/2018/10/31/18047208/trump-witch-hunt> [https://perma.cc/R7RJ-V6WG].

<sup>3</sup> Douglas Walton, *The Witch Hunt as a Structure of Argumentation*, 10 ARGUMENTATION 389, 389 (1996).

<sup>4</sup> Cassese, *supra* note 2.

<sup>5</sup> Walton, *supra* note 3, at 389–90.

<sup>6</sup> *Id.* at 390.

landscape is dangerous.<sup>7</sup> The continued use of the term in the political context pushes a subtle, yet powerful narrative that results in a shift from the traditional notion that a witch hunt targets those who do not fit into perceived societal norms to the notion that a witch hunt targets those in a position of political power and wealth.<sup>8</sup> Today, those who claim to be subjects of witch hunts are often powerful men, which is ironic considering how witch hunts in seventeenth century colonial New England primarily targeted and persecuted strong-willed women or societal outcasts.<sup>9</sup>

This Article argues that modern day witch hunts are not what they appear to be. Specifically, those who are crying “witch hunt” are powerful and use the phrase from a position of strength. Meanwhile, real witch hunts are occurring under the veil of newly enacted laws and lawsuits targeting women, communities of color, and the LGBTQ community. Often, the arguments supporting this legislation and litigation are not based on science or verifiable data; rather, they are based on “spectral evidence,” meant to stir fear and drum up rage. We have seen this danger repeated throughout history, as exemplified in the McCarthy hearings, the internment of Japanese Americans, the Holocaust, and the Jim Crow era in the south, when the persecution of marginalized communities was justified through codified law at the time. All of the instances in history involved a false narrative pushed by those in power; one that targeted specific individuals, claiming that they posed a threat to particular social “norms.”<sup>10</sup> In other words, witch hunts have happened in history when a community is plagued by fear and there is a trigger or event which ultimately leads to the scapegoating and persecution of a group of individuals. By examining the true meaning of a witch hunt and defining the term through a historical lens, we can begin to understand the subversive, yet powerful effect of language in culture and its reverberations in the law. The repeated misuse of this term is one clear example of how deceptive narratives, often meant to drive fear and division, are pervasive in our society and are changing what we now accept as fact.

Our legal system can continue to learn from history. However, when the significance of historical events is lost over time, there is a danger that we will repeat the same pattern of persecution based on fear. Therefore, it is important to call out the misuse of phrases that have historical significance, as well as veiled attempts by lawmakers and judges to target certain groups through legislation and litigation supported by anecdotes and false

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<sup>7</sup> See Cassese, *supra* note 2.

<sup>8</sup> *Id.*; see also Z. Byron Wolf, *These Politicians are Using the “Witch Hunt” Defense*, CNN POL. (Apr. 18, 2018, 6:10 AM), <https://www.cnn.com/2018/04/18/politics/witch-hunt-defense-greitens-trump-moore/index.html> [<https://perma.cc/WEV6-RDPY>]. Other examples of male politicians who have used the term “witch hunt” include Roy Moore, the candidate for U.S. Senate in Alabama when referring allegations that he had sexually abused young women and girls. *Id.* The Washington Post won the Pulitzer Prize-winning reporting uncovering those allegations. *Id.* In 2018, Missouri Governor Eric Greitens also cried “witch hunt” when the GOP-led house commenced a special session to consider impeaching him due to allegations of sexual assault. *Id.*

<sup>9</sup> See Wolf, *supra* note 8; see also CAROL F. KARLSEN, *THE DEVIL IN THE SHAPE OF A WOMAN: WITCHCRAFT IN COLONIAL NEW ENGLAND* 47 (1987). Dr. Karlsen, an American historian specializing in the study of witchcraft and women’s rights in the colonial era, reports that of the 342 persons accused of witchcraft in New England between 1620 and 1725, 78% were female. *Id.* Karlsen makes a powerful argument that the witch trials of the seventeenth century were gendered, specifically targeting women over forty. *Id.* at 64–66. The men who were accused of witchcraft were often associated with accused women, mostly their husbands or brothers. *Id.* at 47.

<sup>10</sup> See KARLSEN, *supra* note 9.

narratives pushing fear. This Article begins with a striking dichotomy of two witch hunts: one which ended in death for the innocent, and the other, wrapped up in politics.

### A. *A Tale of Two Witch Hunts*

In March 2023, Donald J. Trump appeared at his first campaign rally to kick off his 2024 presidential run in Waco, Texas, surrounded by his supporters who held up signs that said: “Witch Hunt.”<sup>11</sup> The term—so familiar and well-used by Trump—had been officially enshrined as part of his campaign.<sup>12</sup> It was not the first nor the last time President Trump would use this term to his benefit.<sup>13</sup> In fact, Trump has utilized the term, “witch hunt” hundreds of times to describe the unfairness in his treatment.<sup>14</sup> In August 2022, he criticized the FBI raid on Mar-a-Lago as a “Witch Hunt” in a fundraising email, raising millions of dollars for his campaign.<sup>15</sup> In response to the thirty-seven count federal indictment over his alleged mishandling of the classified documents found at his resort, he once again called it a “witch hunt.” Many of his supporters believed Trump, as demonstrated by a CBS News Poll that showed that 76% of likely GOP primary voters believed that the indictment was politically motivated.<sup>16</sup>

Trump’s use of the term “witch hunt” began long before his presidency and current legal woes. In 2011, he defended Herman Cain, then a Republican candidate for the White House, from multiple allegations of sexual harassment by calling it a “witch hunt.”<sup>17</sup> In 2013, Trump retweeted a supporter’s allegation that the investigation into the activity of the now defunct Trump University amounted to a “liberal witch hunt.”<sup>18</sup> In 2018, Trump called the potential coordination between his associates and Russia “the greatest witch

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<sup>11</sup> Elaine Godfrey, *Trump Begins the ‘Retribution’ Tour*, ATLANTIC (Mar. 26, 2023), <https://www.theatlantic.com/politics/archive/2023/03/donald-trump-rally-waco-2024-campaign/673526/> [https://perma.cc/26SA-JPBZ].

<sup>12</sup> *Id.*

<sup>13</sup> Alice Markham-Cantor, *What Trump Really Means When He Cries ‘Witch Hunt,’* NATION (Oct. 28, 2019), <https://www.thenation.com/article/archive/trump-witch-hunt/> [https://perma.cc/AMH8-UL49].

<sup>14</sup> *Id.*

<sup>15</sup> Bradford Betz, *Trump Blasts ‘Witch Hunt’ FBI Raid on Mar-a-Lago in Donation Email*, FOX NEWS (Aug. 9, 2022, 4:01 PM), <https://www.foxnews.com/politics/trump-blasts-witch-hunt-fbi-raid-mar-lago-donation-email> [https://perma.cc/3U3R-UFFG]. “The lawlessness, political persecution, and the Witch Hunt, must be exposed and stopped,” Trump said. *Id.* “As long as I have your support, I will continue to fight for the Great American People. I need every single red-blooded American Patriot to step up during this time.” *Id.* “Please rush in a donation IMMEDIATELY to publicly stand with me against this NEVERENDING WITCH HUNT.” *Id.*; see also Brian Bennett & Chris Wilson, *The Trump Campaign Has Raised Millions Off Impeachment—And Facebook Is One of Its Most Powerful Tools*, TIME (Dec. 5, 2019, 6:34 AM), <https://time.com/5744415/trump-campaign-impeachment-facebook-advantage/> [https://perma.cc/5TLR-HBU4].

<sup>16</sup> *Trump Calls Federal Indictment a “Witch Hunt” as Poll Shows Most GOP Voters Agree* (June 12, 2023), CBS NEWS, <https://www.cbsnews.com/video/trump-due-in-court-tuesday-gop-voters-believe-indictment-is-political/#x> [https://perma.cc/5MVE-RK3G].

<sup>17</sup> Markham-Cantor, *supra* note 13. Cain was later forced to end his campaign amid allegations that he had sexually harassed employees and carried on a thirteen-year affair. See also Andrew Kaczynski & Chris Massie, *Trump on Herman Cain’s Sexual Harassment Accusers in 2011: They’re Doing It For Fame*, CNN (Oct. 21, 2016, 5:32 PM), <https://www.cnn.com/2016/10/21/politics/trump-on-herman-cain/index.html> [https://perma.cc/CG2F-MA49]. Cain denied the allegations and was never criminally charged. *Id.*

<sup>18</sup> Markham-Cantor, *supra* note 13.

hunt” in U.S. history.<sup>19</sup> And in June 2022, while speaking at the Faith & Freedom Conference, Trump used the terms “theatrical production” and “witch hunt” to describe the activities of the Select Committee to Investigate the January 6 Attack on the U.S. Capitol.<sup>20</sup>

Arguably, if future generations read President Trump’s Twitter feed and Truth Social messages as an accurate representation of history, they might be convinced that the continuous investigations and allegations of mistreatment suggest that Trump and his inner circle were targeted by a prolonged witch hunt.<sup>21</sup> The political brilliance and the resulting peril of repeating a phrase like “witch hunt” is that, eventually, those subjected to its repetition may adopt its new meaning with a new narrative that is tailored to fit its owner.

In comparison, the phrase “witch hunt” is historically associated with a darker, devious time where innocent individuals were hunted down, tortured, and put to death, often after a hasty proceeding lacking due process that resulted in a conviction based on nothing more than suspicion. A far more consequential and well-known witch hunt began in the middle of an unseasonably cold January.<sup>22</sup> The year 1692 was a dark time in colonial New England and tensions within the colony were rising.<sup>23</sup> The crown had recently annulled the Massachusetts’ charter, which led to an unstable and unreliable legal system. The community in Salem was divided into two economic factions, one an agricultural economy and the other a modern capitalist society, pitted against each other.<sup>24</sup> The largely Puritan community had endured war, famine, disease, and extreme weather, which left them feeling unsettled and vulnerable.<sup>25</sup> Many believed that they were being punished or perhaps tested by something far more sinister. With little stability to cling to, the community entered into its darkest period in history, where fear manifested itself in apparitions of witches and evil, and innocent people were pointlessly persecuted to quell that fear.

The witchcraft panic in Salem began in January 1692, shortly after eleven-year-old Abigail Williams and nine-year-old Betty Parris, members of Reverend Parris’s household, accused Tituba, Reverend Samuel Parris’s slave, of bewitching them, causing them to

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<sup>19</sup> Eli Watkins, *Some of the Times Trump Has Called Russia Probe “Witch Hunt,”* CNN POL. (Jan. 11, 2018, 10:08 AM), <https://www.cnn.com/2018/01/10/politics/donald-trump-witch-hunt-justice-department/index.html> [<https://perma.cc/QE6J-CBGU>].

<sup>20</sup> *Former President Trump Calls Select Committee “A Witch Hunt,”* C-SPAN (June 17, 2022), <https://www.c-span.org/video/?c5020369/president-trump-calls-select-committee-a-witch-hunt> [<https://perma.cc/4Z45-9PE9>].

<sup>21</sup> Jonathon Keats, *This Exhibit About Witch Hunting Is Not About Donald Trump (But It’s Still Politically Spellbinding),* FORBES (Nov. 20, 2020, 7:00 AM), <https://www.forbes.com/sites/jonathonkeats/2020/11/20/this-exhibit-about-witch-hunting-is-not-about-donald-trump-but-its-still-politically-spellbinding/?sh=6f92d3cb1c62> [<https://perma.cc/V3TZ-NGHT>].

<sup>22</sup> Emily Oster, *Witchcraft, Weather and Economic Growth in Renaissance Europe*, 18 J. ECON. PERSPS. 215, 216 (2004). Oster proposed that the witchcraft trials were a large-scale example of scapegoating which was prompted by a deterioration in economic conditions. *Id.* at 216. Her analysis of weather data suggests that these conditions were brought on by food shortages that occurred due to lower-than-average temperatures known to climatologists as “The Little Ice Age.” *Id.*

<sup>23</sup> *See id.*

<sup>24</sup> EMERSON W. BAKER, *A STORM OF WITCHCRAFT: THE SALEM TRIALS AND THE AMERICAN EXPERIENCE* 96 (2014).

<sup>25</sup> *See id.*

behave strangely and have uncontrollable “fits.”<sup>26</sup> Other accusations began occurring around the same time. Ann Putnam Jr., the twelve-year-old daughter of Thomas Putnam, who was among the innermost circle of Reverend Parris’s supporters, accused Sarah Good of afflicting her, claiming that Good appeared as a specter, pinched her, and tried to coerce her into signing the devil’s book—an act considered to establish a formal covenant with Satan.<sup>27</sup> In addition to Ann Putnam Jr., seventeen-year-old Elizabeth Hubbard accused Sarah Good of afflicting her and sending a wolf to stalk her.<sup>28</sup> Hubbard also claimed to be afflicted by Sarah Osborne.<sup>29</sup>

The accusations, which could not be explained away, led to the arrest and public questioning of the accused. In what can only be described as “swift justice,” four men rode into Salem Town, a few miles away, on February 29, 1692, to swear out legal complaints against Tituba, Sarah Good, and Sarah Osborne, accusing them of “suspicion of witchcraft.”<sup>30</sup> Jonathan Corwin and John Hathorne, two wealthy merchants that were the local magistrates, issued warrants and ordered constables to arrest and jail the women.<sup>31</sup> The very next day, Tituba, Sarah Osborne, and Sarah Good were brought to Ingersoll’s Ordinary (or tavern) for public questioning.<sup>32</sup> The tavern became so overwhelmed with crowds of people that the interrogations had to be moved to a larger meetinghouse that day.<sup>33</sup> During the public interrogations of the women, Hathorne asked cross-examining questions that clearly indicated he believed the guilt of the accused women: “Why did you hurt these children?” “What evil spirit have you familiarity with?”<sup>34</sup> Denials to these questions led to outbursts from the young accusers, who began writhing in pain in response to the answers.<sup>35</sup> Sarah Osborne and Sarah Good claimed innocence.<sup>36</sup> Tituba, however, eventually confessed and described images of black dogs, red cats, and a “tall man with white hair who wanted her to sign his book.”<sup>37</sup>

Tituba’s confession set forth a paranoia and stream of new accusations of witchcraft over the next few months.<sup>38</sup> No one—in particular, no woman—was safe. There were accusations against Martha Corey, a loyal member of the church in Salem Village,<sup>39</sup> and

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<sup>26</sup> *Id.* at 93. Although Tituba was once thought to be African American, scholars now believe that she was Native American, although they disagree about from where, exactly, she came. Mary Beth Norton, *An Embarrassment of Witches*, PERSPS. ON HIST. (May 1 2018), <https://www.historians.org/research-and-publications/perspectives-on-history/may-2018/an-embarrassment-of-witches-whats-the-history-behind-trumps-tweets> [https://perma.cc/G8SB-PXGE].

<sup>27</sup> BAKER, *supra* note 24, at 16.

<sup>28</sup> *Id.* at 16.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 93.

<sup>31</sup> *Id.* at 16.

<sup>32</sup> *Id.* at 16–17.

<sup>33</sup> *Id.*

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

<sup>35</sup> *Id.*

<sup>36</sup> Jess Blumberg, *A Brief History of the Salem Witch Trials*, SMITHSONIAN MAG. (Oct. 24, 2022), <https://www.smithsonianmag.com/history/a-brief-history-of-the-salem-witch-trials-175162489/> [https://perma.cc/WCH7-YJAT].

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* Martha Corey’s seventy-one-year-old husband, Giles Corey, was among the first to be accused. *Id.* He eventually met his death under the weight of heavy stones through a failed attempt to force him to submit himself to a trial. *Id.*

even Sarah Good's four-year-old daughter, Dorothy, was questioned by magistrates who determined that her timid answers amounted to a confession.<sup>40</sup>

Women, by far, represented a majority of the accused witches, as well as a majority of people who were supposedly afflicted by witchcraft.<sup>41</sup> Many of the accused, like Sarah Good, did not fit into the societal expectations of Puritan women, which made them prime targets to blame for the misery in the town and the afflictions manifested by the girls.<sup>42</sup> Good, specifically, epitomized a woman that Puritan society disapproved of: she was a woman who became an outcast.<sup>43</sup> She was well-known for having an ill temper, and would often wander from home to home asking for help while her husband, William Good, worked as a day laborer.<sup>44</sup> Their situation was largely a result of having to sell off his farm to pay off her debt from a previous marriage to a former indentured servant who died young.<sup>45</sup> Sarah Osborne also failed to meet Puritan social expectations as a bed-ridden, ill woman and widow, who had created scandal within the Puritan community when she purchased the contract of Alexander Osborne, an indentured slave, and married him.<sup>46</sup>

As the accused awaited their trials, they languished in jail cells described as “a grave of the living,” a cold place that reeked of “the stench of unwashed bodies, chamber pots, rotting food, vomit, and dead vermin.”<sup>47</sup> Prisoners had to reimburse the jailer for their room and board and there were rumors that the prisoners were chained within their cells.<sup>48</sup> Marilynn K. Roach, described the prisons as “Suburbs of Hell” and her research suggests that the grim cells were largely void of light and resembled prison cells in Colchester Castle, Essex England.<sup>49</sup> Though Sarah Osborne was only forty-nine years old when she was arrested for witchcraft, she was bedridden.<sup>50</sup> She died in prison.<sup>51</sup>

To handle the witchcraft cases, Governor William Phips formed the Court of Oyer and Terminer.<sup>52</sup> The first official “trial” was of Bridget Bishop, who was not the first to be accused of witchcraft, but was a “good case” for Crown Attorney Newton; he believed she fit everyone's idea of a “witch” because she was argumentative and distrusted by some in the community.<sup>53</sup> Twice widowed, Bishop had previously been charged with witchcraft years earlier, but was acquitted for lack of evidence.<sup>54</sup> Once Bishop was accused again, she

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

<sup>41</sup> See KARLSEN, *supra* note 9, at 3.

<sup>42</sup> See BAKER, *supra* note 24, at 129.

<sup>43</sup> See *id.* at 15–16.

<sup>44</sup> *Id.* Sarah Good came from a “respectable family” but was left without a dowry at seventeen-years-old when her father committed suicide. *Id.* at 129. Unable to attract a wealthy suitor, she married a former indentured servant whose death at an early age left her in debt. *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 16.

<sup>47</sup> See BAKER *supra* note 24, at 24. Professor Baker notes that the prisoners were often infested with fleas and lice which carried the deadly “jail fever” or typhus. *Id.*

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

<sup>49</sup> See Marilynn Roach, *Suburbs of Hell: Jail Conditions During the 1692 Salem Witch Trials*, Presentation at History Camp Boston 2023 (Aug. 12, 2023), <https://historycamp.org/marilynne-k-roach-suburbs-of-hell-jail-conditions-during-the-1692-salem-witch-trials/> [https://perma.cc/4ARE-W3J4].

<sup>50</sup> BAKER, *supra* note 24, at 24.

<sup>51</sup> *Id.* at 23.

<sup>52</sup> *Id.* at 31.

<sup>53</sup> *Id.* at 28; see also MARILYNN K ROACH, *SIX WOMEN OF SALEM 22–23* (2013). Bridget Bishop was married three times and had long been suspected of petty theft. *Id.*

<sup>54</sup> BAKER, *supra* note 24, at 31.



was subjected to humiliating physical examinations of her body for evidence of “devil’s marks,” whereby panels or groups of examiners inspected her for unusual marks or “teats.”<sup>55</sup> Her trial was filled with testimony of spectral evidence or testimony by the accused that they had been visited by her specter, testimony from witnesses about unusual incidents ranging from the disappearance of money to suspicious deaths, and, importantly, testimony by John Bly and his son that they recovered several poppets or “voodoo dolls” within the walls of her home when they were there to make some repairs.<sup>56</sup> The conviction was an easy one, given the testimony and amount of evidence presented during her trial, and she was sentenced to death.<sup>57</sup> On the morning of June 10, Bridget Bishop was hauled up to Proctor’s Ledge at Gallows Hill on the outskirts of Salem and hanged.<sup>58</sup> Just a few weeks later, on June 28, the Court of Oyer and Terminer reconvened to swiftly try and convict Sarah Good, Susannah Martin—an elderly widow labeled as “one of the most impudent, scurrilous, wicked creatures in the world” by Cotton Mather<sup>59</sup>—and Rebecca Nurse.

As the witch hunt continued, the people who were accused of witchcraft expanded from marginalized, poor members of society to include well-respected women of the community.<sup>60</sup> Seventy-one-year-old Rebecca Nurse, a loyal member of the Salem Town Church, became one of those highly respected women accused of witchcraft.<sup>61</sup> Her family had prepared a vigorous defense with a petition signed by thirty-nine neighbors in support of Nurse’s innocence, which resulted in an initial verdict of not guilty.<sup>62</sup> In response to the resulting cries from afflicted girls in the courtroom, Judge Stoughton asked the jury to reconsider the verdict given a “concerning statement” made by Nurse.<sup>63</sup> When asked to explain her statement, she did not respond.<sup>64</sup> The jurors believed that her silence was a sign of her guilt and convicted Nurse.<sup>65</sup> On July 19, Sarah Good and Rebecca Nurse were among the accused who were carted from Salem Prison to Gallows Hill and hanged.<sup>66</sup>

From July 1692, the executions in Salem continued, as did the rapid spread of the witch hunts throughout the region, until April 1693.<sup>67</sup> During that time, over 160 individuals in the region were accused of witchcraft, most were jailed, and many were deprived of their legal rights.<sup>68</sup> Nearly fifty people confessed to witchcraft to save

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<sup>55</sup> *Id.* at 29.

<sup>56</sup> *Id.* Interestingly, the Blys never produced the poppets that they claimed to have found, but their testimony was certainly considered credible and far more damning than the afflicted girls’ testimony of visits from Bishop’s specter or “spectral evidence,” all of which would be considered inadmissible today, at the very least as hearsay or speculation. *Id.* The spectral evidence included detailed testimony about red articles of clothing worn by her specter. ROACH, *supra* note 53, at 26.

<sup>57</sup> See BAKER, *supra* note 24, at 29.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 31.

<sup>60</sup> *Id.* at 32.

<sup>61</sup> *Id.* at 31.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 32.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* Nurse’s silence can likely be explained by accounts that she was almost completely deaf. *Id.*

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

<sup>67</sup> *Id.* at 33.

<sup>68</sup> Benjamin Ray, *Overview of the Salem Witch Trials*, SALEM WITCH TRIALS DOCUMENTARY ARCHIVE & TRANSCRIPTION PROJECT, <https://salem.lib.virginia.edu/overview.html> [<https://perma.cc/5TNX-NJJW>] (last visited Nov. 7, 2023).

themselves from a swift trial and the almost-guaranteed execution.<sup>69</sup> The Court of Oyer and Terminer sat for two more sessions after July 1692 and conducted numerous trials, despite growing opposition to the swift prosecutions and executions.<sup>70</sup> In October 1692, after his own wife, Lady Mary Phips, was accused of witchcraft and in response to growing outrage by influential voices in the community, Governor William Phips disbanded the Court of Oyer and Terminer, stating that “it must fall,” although the trials continued on through 1693.”<sup>71</sup>

Although the Salem witch trials were unique in many respects, witch hunts had taken place in Europe long before the Salem trials began. In the following subpart, this Article will discuss European witch hunts and the causes of the Salem witch trials in greater detail. By examining history for evidence of witch hunts, this Article notes an emerging pattern of fear and unrest within society, little to no due process afforded to the accused, manufactured evidence, and codified law to justify the persecution of certain individuals.

### B. *The Origins of a Witch Hunt*

The term “witch hunt,” in its very essence, meant the persecution of the marginalized by the powerful.<sup>72</sup> The concept of a “witch” is difficult to pin down and there are a number of complex of words from various languages that were used for it.<sup>73</sup> Historians date witch hunts back to medieval Europe and have pointed to the *Malleus Maleficarum*, or *Hammer of Witches* witch-hunting manual and medieval legal text, as a factor that drove the witch hunting.<sup>74</sup> Written by Heinrick Kramer, a member of the Dominican Order, in 1486, during a time when witch hysteria took hold in Europe, the book elevates sorcery and witchcraft to the equivalent criminal status of heresy.<sup>75</sup> The purpose of the book was to refute arguments that witchcraft did not exist; to prove that women, more often than men, were the witches; and to educate magistrates on the proceedings for identifying and convicting a witch.<sup>76</sup> The handbook, spanning twenty editions, legitimized the existence of witches

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

<sup>70</sup> See BAKER, *supra* note 24, at 35–38.

<sup>71</sup> *Id.* at 40. Increase Mather, Governor Phip’s minister, was one of those influential voices. *Id.*

<sup>72</sup> Annalisa Quinn, *How Did ‘Witch Hunt’ Become the Complaint of the Powerful?*, N.Y. TIMES MAG. (June 6, 2017), <https://www.nytimes.com/2017/06/06/magazine/how-did-witch-hunt-become-the-complaint-of-the-powerful.html> [<https://perma.cc/V7T2-MXU2>].

<sup>73</sup> JULIAN GOODARE, THE EUROPEAN WITCH-HUNT 17–18 (2016). In English, the word ‘witch’ comes from the early medieval Old English words ‘wicca’ (masculine) and ‘wicce’ (feminine). *Id.* at 18. In Latin, the words for ‘witch’ were ‘malefica’ (feminine) and ‘maleficus’ (masculine), and the Latin translation of the Bible used the masculine ‘maleficus’ in Exodus 22:18, which was later translated to “Thou shalt not suffer a witch to live” in contemporary English. *Id.*

<sup>74</sup> DOMINICANS HEINRICUS & JACOBUS SPRENGE, MALLEUS MALEFICARUM (1487). While the *Malleus* contains aggressive language regarding a woman’s vulnerability to the devil, historians in recent years have emphasized that this book is only one of many possible factors that contributed to the European witch hunts. See BRIAN LEVACK, THE WITCH-HUNT IN EARLY MODERN EUROPE 2 (4th ed. 2016). During the past century, the European Witch-hunt has been attributed to a number of possible factors including the Reformation, the development of capitalism, a series of agricultural crises, social and cultural conflicts and even the spread of syphilis. *Id.*

<sup>75</sup> See *id.*

<sup>76</sup> See *id.*; see also *Witch Trials in Early Modern Europe and New England*, BERKELEY L., <https://www.law.berkeley.edu/research/the-robbins-collection/exhibitions/witch-trials-in-early-modern-europe-and-new-england/> [<https://perma.cc/N8YZ-KDAY>] (last visited Oct. 27, 2023).

for those who had not previously believed in them.<sup>77</sup> More importantly, it started a movement.<sup>78</sup> In her 2003 article, Anna Garland commented on the power of the handbook: “it became accepted knowledge among theologians that witches were not isolated individuals dabbling in the occult, but rather members of a demonic, anti-Christian heretical sect.”<sup>79</sup> The text aggrandized the idea that the witch was a threat not only to individuals, but to Christianity as a whole, and created frenzied hunts in Europe that led to upwards of 60,000 individuals, mostly women, being tried for the crime of witchcraft between the years 1550 and 1650.<sup>80</sup>

Witchcraft became firmly enshrined in the law—particularly in England. In 1542, witchcraft was declared a crime, which coincided with the Protestant Reformation, where, under a patriarchal order, everything was delineated into what was good or evil.<sup>81</sup> The Witchcraft Act of 1542, enacted during Henry VIII’s reign, was meant to specifically address fears that “anti-Christian forces” were on the move and to prove that Tudor monarchs had absolute control over deciding who was, in fact, a witch.<sup>82</sup> The Act established witchcraft as a crime, punishable by death, and defined the practice of witchcraft to include acts meant to harm others, acquire money, or defy the Church.<sup>83</sup>

The Act only lasted until Henry VIII’s death five years later, and it was not replaced with a new law until *An Act Against Conjurations, Enchantments and Witchcrafts* was passed during Elizabeth I’s reign in 1563.<sup>84</sup> When Elizabeth I’s successor, James I, an avid witch-hunter and author, took the throne, he elevated the witchcraft crimes to a new level, passing a law in 1604 that made almost every form of perceived witchcraft punishable by death.<sup>85</sup> However, the conviction rate dropped because the law prohibited torture as a means to secure a confession.<sup>86</sup> These laws reminded English citizens that the Tudors were still in charge at a time when many were fearing a Catholic rebellion.<sup>87</sup> James I’s book, *Demonologiae*, was later used as justification for allowing a nine-year-old child to testify against her own mother and grandmother in the 1612 Pendle Witch Trial.<sup>88</sup> This set the precedent for using young girls as witnesses during the Salem witch trials in 1692.<sup>89</sup>

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<sup>77</sup> CARINA CHOCANO, THE CLIMATE OF FEAR: THEN AND NOW, in *The Salem Witch Trials: The True Witch Hunt of 1692 and Its Legacy Today*, TIME LIFE, Oct. 12, 2018, at 4, 7.

<sup>78</sup> *See id.*

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

<sup>80</sup> Catherine Jenkins, *Forgiving European Witches: The Case for Pardons and Memorials*, in *DIVERGENT WOMEN: INTERDISCIPLINARY FEMALE DEVIANCE AND DISSENT* 153 (Lorraine Rumson & Abby Bentham eds., 2022).

<sup>81</sup> Kat Eschner, *England’s Witch Trials Were Lawful*, SMITHSONIAN MAG. (Aug. 18, 2017), <https://www.smithsonianmag.com/smart-news/englands-witch-trials-were-lawful-180964514/> [<https://perma.cc/KGG2-B8XB>].

<sup>82</sup> *Id.*

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

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

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

<sup>88</sup> *Id.*

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

As time passed and thousands of witches were executed, it was not uncommon that outspoken women were branded as a ‘witch.’<sup>90</sup> The accusations of witchcraft and systemic witch hunts were primarily carried out by the ruling class, as opposed to the “peasantry” who dealt with each other’s malice on an individual basis.<sup>91</sup> During trials, it was witch-hunters or witnesses that were afraid to be tortured who accused individuals of “night-flying” and pacts with the devil, not the peasant class.<sup>92</sup> Although lore and belief in witches had existed among the peasant class, it was the literature on witchcraft, mixed with politics and religion, that drove the hysteria that resulted in so many deaths.<sup>93</sup> Only toward the end of the seventeenth century did wealthy, educated people begin to divorce themselves from mania which had led to endemic witch hunting throughout Europe and the British Isles.<sup>94</sup>

Witch hunts spread to the colonies in 1692, though colonial witch hunts and trials differed from the “European Witch Craze” in that the trials that followed the accusations somewhat resembled actual legal proceedings.<sup>95</sup> The rise in colonial witch trials coincided with the decline of witch hunting in Europe as many scientists, philosophers, and judges voiced their skepticism of witchcraft.<sup>96</sup> Additionally, the period of Enlightenment, or the great “Age of Reason,” ushered in a period of rigorous political, philosophical, and scientific discourse which required reasonable proofs of causation other than “eyewitness” testimony of midnight flights and spectral visits.<sup>97</sup>

Although the Age of Enlightenment was reshaping beliefs about witchcraft in Europe, the fear of witchcraft continued to plague both the elite and commoners alike in New England.<sup>98</sup> The cause of the witch hunt and subsequent witch trials that took place in New England was more complex than what had happened in Europe, leading many historians to conclude that there were undeniably other factors contributing to this regretful moment in history.<sup>99</sup> There were other perceived threats and hardships plaguing the new colony which exacerbated fear and anxiety with no one to blame for the problems. Professor Emerson Baker described circumstances in Salem as a “perfect storm,” fueled by economic hardship, extreme weather, smallpox, panic, fear of attacks by neighboring Native American tribes, and the lack of a stable governing body in New England.<sup>100</sup> When girls claimed to be afflicted by witchcraft in the midst of this unrest and fear, terror broke out. The witch hunt began and moved quickly to witch trials as a way to appease a

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<sup>90</sup> See CHOCANO, *supra* note 77, at 8. Women (and men) who were often regarded as “healers,” or those who served as mid-wives or tended to the sick, were also in this targeted group responsible for attributing malice throughout Europe. *Id.*

<sup>91</sup> Richard A. Horsley, *Who Were the Witches? The Social Roles of the Accused in the European Witch Trials*, 9 J. INTERDISC. HIST. 689, 708 (1979).

<sup>92</sup> *Id.* at 693.

<sup>93</sup> See PETER CHARLES HOFFER, *THE SALEM WITCH TRIALS: A LEGAL HISTORY* 4 (1997).

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

<sup>95</sup> See Walton, *supra* note 3, at 392.

<sup>96</sup> See HOFFER, *supra* note 93, at 4.

<sup>97</sup> Michael Hunter, *The Decline of Magic: Challenge and Response in Early Enlightenment England*, 55 HIST. J. 399, 400 (2012). The author argues that while there is some link between the onset of Enlightenment and the lack of willingness to accept the plausibility of magical phenomenon, the link between the rise of science and decline of magic is less straightforward than what is generally believed. *Id.* at 400–01.

<sup>98</sup> HOFFER, *supra* note 93, at 5.

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

<sup>100</sup> See BAKER, *supra* note 24, at 6.

community that had no solutions left except to persecute and punish the perceived scapegoats—often those who did not fit neatly into the ideal Puritan society.

## I. WITCH HUNTING IN SALEM, MASSACHUSETTS

### A. *Fear and Instability in Colonial New England*

Like many dark periods in history, the precursor to the Salem witch trials was a period of civil unrest coupled with political and legal instability. More than a decade before the Salem witch trials, trepidation and uneasiness could be found at every corner of the Bay colony. The area was reeling from battles between the British and French, ongoing fears of attacks from the neighboring Native American tribes as a result of King Philip's War,<sup>101</sup> and a rash of smallpox outbreaks.<sup>102</sup> Although most of the fighting occurred outside of Essex County (Salem), many of the townspeople did not feel safe and feared another war with Native Americans.<sup>103</sup> The Puritan ministers attributed those wars and the hardship suffered by the people to "spiritual decline and God's wrath."<sup>104</sup> Furthermore, the Crown in England was tightening its grip on the colony.<sup>105</sup> In 1684, King Charles II revoked Massachusetts Bay's charter, which provided Massachusetts with freedom, autonomy, and an independent legal structure to govern.<sup>106</sup> Although the colony tried to ignore the revocation, many of its citizens were overcome by the fear that a complete upheaval of an already fragile societal, economic, and political order was imminent.<sup>107</sup>

The central government tried to carry on by ignoring the annulment of the charter as the General Court empowered the county courts within the province to act as courts of equity.<sup>108</sup> Meanwhile, a new regime, called the Dominion of New England, met and created a new Court of Chancery or Superior Court, thereby centralizing almost all disputes to one high court and stripping local courts of their powers.<sup>109</sup> Appointed magistrates in Boston

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<sup>101</sup> See *id.* at 50–51. The fighting broke out from 1675 to 1678 between the Native American tribes who were pushed further into their lands by a growing English population. *Id.* The war has been considered one of the bloodiest conflicts in American history. *Id.*

<sup>102</sup> *Seventeenth Century Epidemics*, 1692 SALEM WITCH MUSEUM (July 7, 2020), <https://salemwitchmuseum.com/2020/07/07/seventeenth-century-epidemics/> [<https://perma.cc/8JU3-4K43>]. Smallpox, a highly contagious and deadly disease, regularly swept through colonial New England, maiming many and killing three out of ten people it infected. *Id.* Outbreaks of smallpox only heightened witchcraft accusations during that time, leading neighbors to suspect each other of wrongdoings. *Id.* One clear example of the link between accusations of witchcraft and the disease was the arrival of Martha Carrier and her family to Andover, Massachusetts, which coincided with a smallpox outbreak. *Id.* In 1692, when accusations began in Salem, they spread to Andover where the community blamed Martha and her remaining family members for the outbreak. *Id.* Martha Carrier was the first in Andover to be accused of witchcraft and hanged on August 19, 1692. *Id.* Interestingly, it was Cotton Mather, a well-known Puritan minister who had played a key role in the Salem witch trials, who was a fervent supporter of one of the first trials of inoculation that was conducted during the smallpox outbreak in Boston in 1721. Amalie M. Kass, *Boston's Historic Smallpox Epidemic*, 14 MASS. HIST. REV. 1, 2 (2012).

<sup>103</sup> See BAKER, *supra* note 24, at 50.

<sup>104</sup> *Id.* at 52.

<sup>105</sup> See *id.*

<sup>106</sup> *Id.* at 53.

<sup>107</sup> See DAVID THOMAS KONIG, LAW AND SOCIETY IN PURITAN MASSACHUSETTS: ESSEX COUNTY, 1629-1692, at 158 (1979).

<sup>108</sup> *Id.* at 159.

<sup>109</sup> *Id.* at 161.

with little knowledge of local customs began to resolve local disputes, leading to distrust and anger among local citizens who were largely unfamiliar with how to initiate a legal proceeding in a city miles from their town.<sup>110</sup> All of this amounted to less control and less trust in the court system.<sup>111</sup> In 1689, just three years before the Salem witch trials, the Superior Court was overthrown and anxieties rose to an all-time high about any return to law and order.<sup>112</sup> Simultaneously, the ever-present danger of attacks by the French and Native American resistance loomed in the north.<sup>113</sup> Aid to fight these battles, particularly in Maine, was slow to come and residents felt isolated, unprotected, and anarchistic.<sup>114</sup>

In March 1692, the year of the trials, with no real hope of combatting these ominous external threats, the citizens of Essex county looked to non-governmental entities to control disorder in the communities.<sup>115</sup> The next best entity was the religious order and its application of a fundamental social ideology to perceived internal threats.<sup>116</sup> This powerful ideology found its way into the courtroom that year, in the trial of Joseph Large, who was jailed in Amesbury on charges of heresy, particularly because he proclaimed that the Bible was “not the living word.”<sup>117</sup> Large refused to recant, and, in response, the magistrates in Ipswich handed down an unusually severe punishment for that time: a fine of fifty pounds or thirty lashings.<sup>118</sup> That same month, a court in Salem began to examine those who were accused of witchcraft.<sup>119</sup>

The decision to prosecute witchcraft was a significant departure from previous local customs. Typically, accusations of witchcraft were not handled by a court of law, although in the twelve years leading up to the Salem trials, five cases of witchcraft were heard.<sup>120</sup> In fact, before the accusations of witchcraft began in Salem, neighbors were generally careful about what they said about each other.<sup>121</sup> When one person “maliciously or falsely” accused another of an offense, local magistrates would often order a public confession of error. Between 1672 and 1692, Essex County Courts heard over forty cases of slanderous charges; none of them resulting in a hanging.<sup>122</sup> During that time, women who were

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<sup>110</sup> *Id.* at 162. This time was known as the “Dominion Years,” resulting in far fewer cases being brought by citizens in neighboring counties in this one centralized court. *Id.*

<sup>111</sup> *Id.* at 164.

<sup>112</sup> *Id.* at 165. On May 25, 1689, a new charter was reestablished in all but name, led by Governor Simon Bradstreet. *Id.*

<sup>113</sup> *Id.* at 166. Fear continued to manifest itself into “spectral antagonists” in 1692 as sixty men were sent into the woods bordering Gloucester to intercept a “spectral force” of French and Native Americans. *Id.*

<sup>114</sup> *Id.* at 166–67.

<sup>115</sup> *Id.* at 167.

<sup>116</sup> *Id.* at 168.

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

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 169.

<sup>120</sup> *Id.* at 169, 172. Typical customs employed to address witchcraft included prayer and fasting to “exorcise the evil spirit from the afflicted.” *Id.* at 169. This practice was actually attempted by Reverend Samuel Parris when the two young girls in his household, the first in Salem, became afflicted. *Id.* When those methods did not “work,” the Reverend’s household tried methods of “white magic” to combat the evil spirits by feeding the dog, a suspected familiar of the witch, a “witch cake” made of rye and urine from one of the afflicted girls. *Id.* During the few times that a case did go to trial, it was fairly difficult to obtain a conviction because of a strict standard of evidence to prove the guilt of the accused. *Id.* at 172.

<sup>121</sup> See HOFFER, *supra* note 93, at 59.

<sup>122</sup> See *id.* at 59–60.

accused of witchcraft could have responded with a countersuit for defamation or slander.<sup>123</sup> One example was a lawsuit brought by the Widow Marshfield against Mary Parsons for saying that after the widow had arrived in Springfield, mysterious lights appeared in a meadow and, even worse, the widow had “witched away” the wool that Parsons was supposed to bring to a neighbor’s house.<sup>124</sup>

Husbands also filed suits on behalf of their wives for slanderous statements made against them.<sup>125</sup> In 1650, Erasmus James brought suit against Peter Pitford for his statement that he had seen Goodwife James turn herself into a cat.<sup>126</sup> James won fifty shillings from Pitford, along with a likely confession of his error in making the false accusations.<sup>127</sup> However, none of these customary deflections worked in Salem in 1692 as the town was so disordered by the recent war and political turmoil that many residents turned inward to religion for stability, believing that the “Devil was close at hand.”<sup>128</sup>

### B. *The Perfect Storm of Factors That Led To The Trials*

Given the “perfect storm”<sup>129</sup> of events that took place prior to the Salem witch trials, modern scholars have acknowledged that there were a number of factors that led to accusations of witchcraft and the resulting trials.<sup>130</sup> Scholars are particularly interested in what caused the mass fear and hysteria that led to the trials.<sup>131</sup> The plausible causes have ranged from deep-seated fears of attacks from neighboring Native American tribes to possible outbreaks of diseases like smallpox and encephalitis.<sup>132</sup>

One of the first modern scholarly works on the cause of the witchcraft episode was historian, Marian Starkey’s book *The Devil in Massachusetts*.<sup>133</sup> Starkey postulates that the accusations by the afflicted were fueled by a psychoneurosis among the girls that followed a series of stressful events felt among colonists in New England.<sup>134</sup> She argues that the accuser’s behaviors fell in line with the psychological conditioning of a woman in Puritan society.<sup>135</sup> However, it was the community’s reaction to their fits that was

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<sup>123</sup> *Id.* at 60.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

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

<sup>127</sup> *See id.*

<sup>128</sup> *See id.* at 61.

<sup>129</sup> *See generally* BAKER, *supra* note 24, at 6 (referencing economic hardship, extreme weather, smallpox, panic, fear of attacks by neighboring Native American tribes, and the lack of a stable governing body in New England).

<sup>130</sup> *See* K. DAVID GOSS, *THE SALEM WITCH TRIALS: A REFERENCE GUIDE* 51 (2007).

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

<sup>132</sup> *Id.* One other interesting and highly disputed theory, which gained traction in the 1970s when Linnda Caporeale published this theory in the highly respected journal, *Science*, was the “ergot theory,” or the notion that contaminated grain caused the hallucinations and afflictions in the accused. *See* BERNARD ROSENTHAL, *RECORDS OF THE SALEM WITCH-HUNT* 27 (2009). The theory was later refuted by Nicholas P. Spanos and Jack Gottlieb that same year, yet the ergot discussion has stayed alive in popular culture. *Id.*

<sup>133</sup> MARION L. STARKEY, *THE DEVIL IN MASSACHUSETTS: A MODERN ENQUIRY INTO THE SALEM WITCH TRIALS* (1949). Although Starkey’s book is influential and provides some parallels between Salem and modern day, several ideas presented in the book are now considered inaccurate including the idea that a group of young girls were meeting in the home of Samuel Parris and practicing magic. *See* Norton, *supra* note 26.

<sup>134</sup> STARKEY, *supra* note 133, at 52.

<sup>135</sup> *Id.*

unexpected and arguably one of the key factors leading to the swift trials.<sup>136</sup> While the Puritan community that settled in Salem believed in witchcraft, Starkey argues that the belief was not enough to overturn what should have been a rational understanding of the cause of the girls' behavior.<sup>137</sup> Rather, she argues that the community's reaction was heavily influenced by the villager's sense of imminent danger and their resulting fear that had persistently grown over the past twenty-five years.<sup>138</sup> Everything from King Philip's War in 1675 to the ongoing frontier war with the French and Native Americans and the revocation of the Massachusetts Bay Charter contributed to the "community's sense of 'anxiety and terror...longer than could be borne' that demanded a catharsis."<sup>139</sup> In Starkey's view, the trials were fueled by fear and the victims of the trials were scapegoats whose executions were meant to assuage the irreconcilable tension and anxiety felt by the town.<sup>140</sup>

Though Starkey's book predated Arthur Miller's *The Crucible* and its commentary on McCarthyism by four years, Starkey describes what Miller and other artists, historians, and scholars later believed: that "witch hunts" could become commonplace in modern times.<sup>141</sup> She writes that for Salem Village in 1692,

its flareup of irrationality was to some extent a product of the ideological intensities which rent its age no less than they do ours; its swing to sanity through the stubborn refusal of the few to give way to the hysteria and mad logic of the many marked the turn of a moral season . . . .<sup>142</sup>

She goes on to comment that witch hunts have "been revived on a colossal scale by replacing the medieval idea of malefic witchcraft by pseudo-scientific concepts like 'race,' 'nationality,' and by substituting for theological dissension of a whole complex of warring ideologies."<sup>143</sup> She believed that the trials were an "allegory for our times."<sup>144</sup>

In their 1974 book, *Salem Possessed*, Paul Boyer and Stephen Nissenbaum identified economic motivations based on land disputes that divided Salem Village into socioeconomic classes that contributed to the accusations in 1692.<sup>145</sup> The demographic data that Boyer and Nissenbaum relied on largely supported their theory that those in town who led the witch hunts were seeing their fortunes decline and also happened to be supporters of Reverend Samuel Parris.<sup>146</sup> In the authors' opinion, the witch hunt was a result of a "conscious and premeditated attempt" by supporters of Reverend Parris to regain control

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

<sup>137</sup> *Id.* at 46.

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

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 46–47.

<sup>141</sup> *Id.* at 15, 52–53.

<sup>142</sup> *Id.*

<sup>143</sup> *See id.* at 15.

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

<sup>145</sup> *See* GOSS, *supra* note 130, at 55; *see also* PAUL BOYER & STEPHEN NISSENBAUM, *SALEM POSSESSED: THE SOCIAL ORIGINS OF WITCHCRAFT* vi–vii (1974).

<sup>146</sup> GOSS, *supra* note 130, at 55. The first two accusers in Salem, Betty Parris and Abigail Williams both resided in the household of Reverend Parris. *See* STARKEY, *supra* note 133, at 26.



by “attacking those who supplanted them as the economic leadership.”<sup>147</sup> In addition to political strife, scholars have noted the fear of attacks and war that created an underlying current of terror among the colonists. Professor James Kences theorized that the continued threat of Indian attacks conditioned the colonists to fear an impending disaster.<sup>148</sup> Kences labeled this terror as *invasion neurosis* which was “the extreme tension of anticipating an attack which does not materialize.”<sup>149</sup> Kences also discovered that a number of the afflicted children who accused others of witchcraft were refugees from attacks by local Native American tribes that had experienced terror and witnessed violent deaths.<sup>150</sup> Professor Mary Beth Norton also explored this theory in her scholarly work, *The Devil’s Snare: The Salem Witchcraft Crisis of 1692*, where she shared that a commonly held Puritan belief was that Native American people were “minions of Satan and served powers of darkness.”<sup>151</sup> Her theory shines a light on the race-based fears that plagued the community and led to the eventual manifestation of witch hunting and witch trials.<sup>152</sup>

Colonial New Englanders needed a scapegoat for their fear and hysteria. But what did the scapegoat look like? In his 1984 award-winning book, *Entertaining Satan: Witchcraft and the Culture of Early New England*, John Putnam Demos, a Professor of History at Yale University, examined both demographic data and court documents to curate a typical profile and pattern associated with the accusations of witchcraft and the trials that followed.<sup>153</sup> Like other scholars, Demos found that belief in witchcraft was not unusual for that time, but the data supported a specific profile of the typical witch: a female,<sup>154</sup> middle-aged,<sup>155</sup> married but with few or no children, often considered contentious by the community, possibly with a medical vocation like a healer, and who had been charged with other crimes or “occupied a low social standing in the community.”<sup>156</sup> Demos was not the only scholar to recognize that witch hunts were almost exclusively associated with women. In her groundbreaking book, *The Devil in the Shape of a Woman*, Professor Carol K.

<sup>147</sup> See generally JOHN PUTNAM DEMOS, ENTERTAINING SATAN: WITCHCRAFT AND THE CULTURE OF EARLY NEW ENGLAND 60–62 (1983). Professor Demos’s work won the prestigious Bancroft Prize in History and Diplomacy in 1983. *The Bancroft Prizes: Previous Awards*, COLUM. UNIV. LIBRS., [https://library.columbia.edu/about/awards/bancroft/previous\\_awards.html](https://library.columbia.edu/about/awards/bancroft/previous_awards.html) [<https://perma.cc/M6QX-K7J9>] (last visited Oct. 27, 2023); see also GOSS, *supra* note 130, at 55.

<sup>148</sup> See GOSS, *supra* note 130, at 62; see also JAMES E. KENCES, SOME UNEXPLORED RELATIONSHIPS OF ESSEX COUNTY WITCHCRAFT TO THE INDIAN WARS OF 1675 AND 1689, at 270–86 (2000). The American Indian tribes who inhabited the state later known as Massachusetts were the Wampanoag, Mohegan, and Mohican tribes. *New England Indian Wars*, HERITAGE HIST., [https://www.heritage-history.com/index.php?c=resources&s=war-dir&f=wars\\_amerindne](https://www.heritage-history.com/index.php?c=resources&s=war-dir&f=wars_amerindne) [<https://perma.cc/R6VF-Y286>] (last visited Mar. 6, 2023). To the north of Salem, in Maine, New Hampshire, and Vermont, resided the Abenaki and Penobscot tribes. *Id.*

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

<sup>150</sup> See GOSS, *supra* note 130, at 62; see also KENCES, *supra* note 148.

<sup>151</sup> GOSS, *supra* note 130, at 62.

<sup>152</sup> See *id.*

<sup>153</sup> See DEMOS, *supra* note 147, at 13–14.

<sup>154</sup> *Id.* at 60–62. According to Professor Demos, females accused of witchcraft in colonial New England outnumbered males by 4:1. *Id.* at 60. He also notes that in most cases where a man was accused of witchcraft, it was in association with a woman who was the primary suspect. *Id.*

<sup>155</sup> *Id.* at 66. Demos notes that most of the accused witches were in their forties and fifties; that in fact, they were not old by their standards during the time or ours. *Id.* at 66–67.

<sup>156</sup> See *id.* at 93–94. Demos concludes that those accused of witchcraft in seventeenth century colonial New England were, to a disproportionate extent, among “the most humble, least powerful citizens of New England.” *Id.* at 84–85.

Karlsen presents overwhelming statistical evidence that a preponderance of individuals convicted and executed for witchcraft both in Europe and New England, were female.<sup>157</sup> Karlsen theorized that there was an inherent fear among Puritan leadership of a woman's power and independence and the way to control women was through marriage and prescribed social order.<sup>158</sup> The control was passed from father to husband as soon as the virtuous Puritan woman married.<sup>159</sup> Any rebellion or challenge to this framework by a woman meant that they were challenging male authority as well as God's prescribed system of order, and inviting suspicion that could manifest itself into accusations of witchcraft.<sup>160</sup> Like Karlsen, Professor Elizabeth Reis also believed that the threat of a witchcraft accusation would keep a woman in conformity with expected behavior driven by a male-dominated hierarchy.<sup>161</sup>

Beyond the underlying political and attack-driven fears, another scholar has suggested that the Salem witch trials would not have occurred had it not been for a conspiracy between the major players—high-ranked men who were the town leaders.<sup>162</sup> Professor Enders Robinson argues that there were a number of ringleaders who fanned the flames that led to the swift trials and executions that took place.<sup>163</sup> The list of co-conspirators included Reverend Samuel Parris and Dr. William Griggs, who were assisted by an outer circle of men who were “helpful” when testimony was needed against the accused.<sup>164</sup> These men were tied together through friendship or kinship and shared a goal of reasserting power over Salem Village with the assistance of their female children, which comprised a majority of the “afflicted girls.”<sup>165</sup> What guaranteed the success of the conspiracy was the Court of Oyer and Terminer, where many of these “conspirators” appeared countless times as judges, witnesses, and prosecutors in the case.<sup>166</sup> The predetermined guilt of the accused, the introduction of “spectral evidence,” and the carefully crafted cross examinations doomed the accused from the outset.<sup>167</sup> The accused quickly realized that without a guilty confession, they had little chance to survive.<sup>168</sup>

### C. “Evidence” in the Trials

The trials of Salem began as a somewhat informal process with two magistrates questioning the accused.<sup>169</sup> The establishment of the Court of Oyer and Terminer by

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<sup>157</sup> See GOSS, *supra* note 130, at 60; *see also* KARLSEN, *supra* note 9, at xii.

<sup>158</sup> GOSS, *supra* note 130, at 60.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> See KARLSEN, *supra* note 9 at 61; ELIZABETH REIS, DAMNED WOMEN: SINNERS AND WITCHES IN PURITAN NEW ENGLAND *passim* (1999).

<sup>162</sup> GOSS, *supra* note 130, at 63.

<sup>163</sup> *Id.*; *see also* ENDERS A. ROBINSON, THE DEVIL DISCOVERED: SALEM WITCHCRAFT, 1692, at 289–90 (2000).

<sup>164</sup> GOSS, *supra* note 130, at 63.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 64.

<sup>167</sup> See Walton, *supra* note 3, at 393.

<sup>168</sup> *See id.*

<sup>169</sup> Allen Pusey, *Oct. 29, 1962: Special Witch Trials Dissolved*, ABA J. (Oct. 1, 2015, 6:30 AM), [https://www.abajournal.com/magazine/article/special\\_witch\\_trials\\_dissolved](https://www.abajournal.com/magazine/article/special_witch_trials_dissolved) [<https://perma.cc/9TFX-XAEJ>].

Governor Phips enabled the death penalty to be considered for the crime of witchcraft.<sup>170</sup> The court continued the practice of the first trials by allowing the admission of “spectral evidence” or testimony about paranormal phenomenon that occurred—often a visit from a specter of the accused in the middle of the night.<sup>171</sup> What followed was a rapid succession of hangings, many based on spectral evidence.<sup>172</sup> Bridget Bishop was the first to be hanged on June 10 and, by the end of August, twenty defendants were tried by the court and executed for witchcraft.<sup>173</sup> It was not until early October that year when Increase Mather, a prominent Puritan Minister and President of Harvard University, attempted to quell the hysteria by questioning the use of spectral evidence in his writings, although he had long supported the court in its prosecution of witches.<sup>174</sup>

Among the judges who were appointed to the court were Chief Judge William Stoughton, Judge John Richards, and Judge Wait Winthrop, were described as “a mixed lot at best,” and were friends of clergyman Cotton Mather, son of Increase Mather and a supporter of witch hunts.<sup>175</sup> As Professor Len Niehoff has commented, the law that the judges used to govern the trials was “hardly a masterpiece of clarity and due process.”<sup>176</sup> The Massachusetts law governing the prosecution of witches, echoing the book of Exodus, stated that “if any man or women be a witch (that is hath or consulted with a familiar spirit) they shall be put to death.”<sup>177</sup> The judges were directed to apply this law according “to the laws and customs of England.”<sup>178</sup> Overall, the court sat on four occasions during 1692, blowing through the “trials” that typically lasted no more than an hour.<sup>179</sup>

The accused were given a chance at the beginning of the proceeding to offer a plea, with the expectation that if the defendant claimed innocence, they would also acknowledge the court’s authority to adjudicate.<sup>180</sup> The evidence that the judges primarily relied on during the preliminary stages of the case typically took the form of a written statement from a purported witness taken during a hearing that was later admitted during trial.<sup>181</sup> These statements, which would now be rejected as hearsay, often contained “secondhand rumors” and “fits of fancy.”<sup>182</sup> The court also accepted evidence about the character of the defendant, who was often marginalized in the community.<sup>183</sup> Witnesses recounted unpleasant interactions with the accused and gave opinions as to the accused’s reputation, falling in line with early English law which treated the act of being a witch as “criminal.”<sup>184</sup>

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<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *See id.*

<sup>173</sup> MARILYNNE K. ROACH, *THE SALEM WITCH TRIALS: A DAY-BY-DAY CHRONICLE OF A COMMUNITY UNDER SIEGE 167* (2002). Of these, nineteen of the accused were hanged and one, Giles Corey, was pressed to death for refusing to confess. *See* Pusey, *supra* note 169.

<sup>174</sup> Pusey, *supra* note 169.

<sup>175</sup> Len Niehoff, *Proof at the Salem Witch Trials*, 47 *LITIG.* 21, 22 (2020).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

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

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* Once the plea was offered and the accused stood trial, the person had no legal counsel, other than from the Court. *See* ROSENTHAL *supra* note 132, at 21.

<sup>181</sup> Niehoff, *supra* note 175, at 22.

<sup>182</sup> *Id.* at 23.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

Although Massachusetts law did not require actual proof that the accused had used witchcraft to harm another or damage their possessions, a mere accusation of some harm was enough to initiate the primary focus, which was on the accused's character.<sup>185</sup> All of this occurred under the long-held Puritan belief that witches were real.<sup>186</sup> These beliefs led to the strong focus on "evidence" of witchcraft, including anything from unremarkable marks on the body of the accused to dolls, pets, or unusual behaviors.<sup>187</sup>

Of particular concern was the belief that a witch could appear in spirit or a spectral shape to the afflicted.<sup>188</sup> The accusers were allowed to testify about the presence of these specters, providing a powerful narrative that supported "what everyone already knew," which was that witches were real.<sup>189</sup> One of the primary problems with this use of "spectral evidence" was that it could not be verified since the specter was only visible to the person for whom it was intended.<sup>190</sup> However, even judges at the time were skeptical about spectral evidence, as they often took pains to support the spectral evidence with other forms of evidence when possible.<sup>191</sup>

Any legal expert would agree that the use of spectral evidence that led to controversy during that time should never be allowed in a courtroom today. Spectral evidence is intangible, metaphysical, and unverifiable.<sup>192</sup> The accused party could never mount a defense because the evidence to refute or falsify the claim did not exist.<sup>193</sup> In other words, admissible evidence, at that time, was entirely supported by one's beliefs—not by facts.

Today, the Federal Rules of Evidence guard the courtroom against impermissible testimony based on hearsay, irrelevance, and the requirement of reliable scientific evidence.<sup>194</sup> However, outside the courtroom, advocacy organizations such as the American Civil Liberties Union (ACLU) are tracking new legislation targeting specific demographics. One can argue that this type of attack is more akin to a historical witch hunt than what the phrase is used for in political discourse today.<sup>195</sup> The phrase, "witch hunt," has morphed into a label, slogan, or tagline for politicians, despite the fact that the United States has had its share of real witch hunts that occurred long after the trials in Salem.

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<sup>185</sup> *Id.*

<sup>186</sup> *See id.*

<sup>187</sup> *See id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 24. A large amount of spectral evidence detailing how the accused were harmed by the specters, while unusual and doubted by many within the community, was allowed as evidence during the Salem witch trials. *See* ROSENTHAL, *supra* note 132, at 26.

<sup>190</sup> Mohammed A. Diwan, *Conflict Between State Legal Norms and Norms Underlying Popular Beliefs: Witchcraft in Africa as a Case Study*, 14 DUKE J. COMPAR. & INT'L L. 351, 360 (2004).

<sup>191</sup> *Id.* at 360; *see also* BOYER & NISSENBAUM, *supra* note 145, at 18.

<sup>192</sup> Diwan, *supra* note 190, at 360.

<sup>193</sup> *See* WALTON, *supra* note 3, at 393.

<sup>194</sup> *See* FED. R. EVID. 702. As of Dec. 1, 2023, Rule 702 will be amended to clarify the admissibility requirements for an expert witness and emphasize the court's gatekeeping function in admitting expert opinions, allowing it to more closely scrutinize an expert's opinion before it is presented to the jury. David S. Manusch, *Upcoming Changes to F.R.E. 702*, IR. STAPLETON (Apr. 24, 2023), <https://irelandstapleton.com/insights/upcoming-changes-to-f-r-e-702/> [<https://perma.cc/VV42-XDTS>].

<sup>195</sup> *See, e.g., Mapping Attacks on LGBTQ Rights in U.S. State Legislatures*, ACLU (Nov. 3, 2023), <https://www.aclu.org/legislative-attacks-on-lgbtq-rights> [<https://perma.cc/5X5Y-HD8G>]. The ACLU reports that it is currently tracking 506 anti-LGBTQ Bills in the United States during the 2023 Legislative Session. *Id.*

## II. THE EVOLUTION OF A WITCH HUNT

### A. *Metaphors and Mischaracterizations*

Over the years, various legal scholars have characterized witch hunts and the witch trials that took place in New England in ways that diverge from what many historians now believe to be more accurate. No other historical event has arguably provided fiction writers, scholars, playwrights, and poets with a story that has continued to evade a final resolution.<sup>196</sup> The witch hunts and subsequent trials in Salem occurred in the short span of just under one year: a year full of witch hunting that culminated in accusations, denials and confessions, “trials,” and executions.<sup>197</sup> And for 300 years, that one year has sparked a vast amount of literature to fix blame or find a reason for the short and illogical period of brutality in American history.<sup>198</sup> Professor Gretchen Adams captures this fascination with brilliant clarity:

We preserve, guard, and celebrate that in which we find reason to take pride or that which reinforces our sense of ourselves as we imagine we are—or would like to be. We may find utility in a historical event or individual as a symbol at one time but not at another. Other figures and events are deliberately, or mercifully, ‘forgotten’ when they remind us of the ‘shame’. . . . But Salem witchcraft fits uncomfortably into all of these standard scenarios.<sup>199</sup>

She goes on to identify two curiosities at play: the first is why things happened the way they did in Salem in 1692, and the other is why the memory is preserved and excavated in the first place.<sup>200</sup> We want to keep examining the mystery, yet we also want to distance ourselves from the crimes that occurred during that time.<sup>201</sup> Historical interpretations of what fueled the witch hunts in Salem range from “hysterical girls” to religious fanaticism.<sup>202</sup> The fantastical narrative has even been perpetuated in nineteenth century schoolbooks that purposely told stories of earthquakes, storms, and witchcraft to hold students’ attention and teach a moral lesson.<sup>203</sup>

Over time, the term “witch hunt” has been evoked throughout history, recalling witch hunting or execution when advancing a point.<sup>204</sup> Three years after the Boston Massacre, John Adams, who famously defended the British soldiers, commented that had the soldiers been executed, it would “have been as foul a stain upon this country as the executions of

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<sup>196</sup> Gretchen A. Adams, *Mysteries, Memories, and Metaphors: The Salem Witchcraft Trials in the American Imagination*, 110 PROC. AM. ANTIQUARIAN SOC’Y 255, 255 (2003), <https://www.americanantiquarian.org/proceedings/44539515.pdf> [https://perma.cc/3JWT-C3RY].

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

<sup>198</sup> *See id.*

<sup>199</sup> *Id.* at 256.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 258.

<sup>203</sup> *Id.* at 259.

<sup>204</sup> *See id.* at 258.

the...witches anciently.”<sup>205</sup> The witch-hunting in Salem was also a frequently used rhetorical strategy by Southern politicians as a metaphor when describing the Northern political ascendancy and resulting abolitionist movement.<sup>206</sup> In 1849, during the height of tensions over slavery, Representative Henry Bedinger delivered a speech, taunting Massachusetts representatives by stating that “perhaps they should not comment on the ‘degraded’ culture of the Southern states when, in Massachusetts, ‘witches...were, in the brave days of old, burned literally by the cord!’”<sup>207</sup> The use of the Salem witch trials and the term “witch hunt” has persisted throughout our history. With it, the translation of what was one of the most tragic years in American history has been reduced to a metaphoric label to suit political ambitions or been dismissed as a game or ploy by manipulative girls. The memory persists without a satisfying resolution. While scholars may never settle on an answer, we should continue to focus on the accounts of the Salem witch trials and the true meaning of a “witch hunt.” Even scholars with the best intentions misrepresent the Salem witch trials.

In 1989, a comment written in *Tulane Law Review* attributed the beginning of the hysteria in Salem to a “childhood sport gone awry.”<sup>208</sup> Others have minimized the legal void that the community was faced with during the time of the Salem witch trials. For example, in his 2006 piece for the American Bar Association, Kevin O’Kelly states that the phrase “Salem Witch Trials” conjures images of society overtaken by insanity, sacrificing innocent persons to superstition.<sup>209</sup> He then goes on to say that “what happened in Salem at the end of the seventeenth century was first and foremost a series of *trials*, events taking place in a society that acknowledged the rule of law, that followed prescribed legal procedures.”<sup>210</sup> Another legal scholar has recently classified “witch hunts” as “targeting individuals based on their beliefs....”<sup>211</sup>

While that may be true, history has shown us that what triggers a “witch hunt” is not solely based on an ideological belief. There is more at play that deserves attention, including a pervasive fear among members of society with power and the targeting of specific groups of people based on their association and identity. John Felipe Acevedo has argued that witch hunts contain an element of fantasy to them, which is unquestionably true—a belief in imagined or illusory truths or speculations.<sup>212</sup> However, Acevedo argues that the Salem witch trials were more akin to a crime panic, where there is a disproportionate fixation on a type of criminal activity as opposed to a “witch hunt” which, “although more odious, given their intentional targeting of a specific group is easier to

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<sup>205</sup> See *id.* at 261–62; see also John Adams, Diary Entry for March 5, in 2 *DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS* 79, 79 (Lyman H. Butterfield, Leonard C. Faber, & Wendell D. Garrett eds., Harvard Univ. Press ed. 1961).

<sup>206</sup> See Adams, *supra* note 196, at 263–64.

<sup>207</sup> *Id.* at 264 (quoting CONG. GLOBE, 30th Cong., 2d Sess. 111–12 (1850)).

<sup>208</sup> Martha M. Young, *The Salem Witch Trials 300 Years Later: How Far Has the American Legal System Come? How Much Further Does it Need to Go?*, 64 *TUL. L. REV.* 235, 236 (1989).

<sup>209</sup> KEVIN O’KELLY, *The Evidence of Things Unseen: The Legal World of the Salem Witch Trials*, 16 *EXPERIENCE* 16, 16–19 (2006).

<sup>210</sup> *Id.* at 16.

<sup>211</sup> John F. Acevedo, *Crime Fantasies*, 46 *AM. J. CRIM. L.* 193, 194 (2019).

<sup>212</sup> *Id.* at 197. “Oyer and Terminer” literally means to “hear and determine.” *Oyer and Terminer*, *MERRIAM-WEBSTER*, <https://www.merriam-webster.com/dictionary/oyer%20and%20terminer> [<https://perma.cc/525G-Q2E8>] (last visited Mar. 6, 2023).

identify and cure.”<sup>213</sup> Additionally, he argues that “true witch-hunts are increasingly unlikely to occur in American society” as opposed to other events that the author mentions such as the Red Scares.<sup>214</sup> While Acevedo alludes to a more categorized approach of a “witch hunt” as opposed to a crime panic, the approach seems to run into difficulties when classifying past events such as the internment of Japanese Americans during World War II.<sup>215</sup> Granted, Acevedo’s article is written in the context of criminal law and likens the persecution of Quakers in Colonial Massachusetts to witch hunting as opposed to what occurred during the Salem witch trials.<sup>216</sup> However, contemporary interpretations by well-known historians suggest that there is far more at play than crime panic; there are other factors that actually led to the trials.<sup>217</sup> In a sense, these factors are akin to what lawyers believe is causation. In other words, what caused the hysteria that led to the trials? A majority of scholars in the area tell us that the answer is not so simple. Identifying these factors and the points in history where we see this pattern repeated is critical to our current understanding of the difference between false accusations of witch hunts and real, subversive witch hunts that are occurring today.

*B. A Formula to Explain Witch Hunts: Fear + Trigger = Scapegoat*

It is undeniable that witchcraft was a crime that was imposed on innocent people.<sup>218</sup> While many historians have proposed theories of causation, the Salem Witch Museum in Salem, Massachusetts, has been attempting to answer this question by studying visitors’ perceptions of what constitutes a witch hunt over the past six years.<sup>219</sup> One of its missions, in addition to educating the public about the history of the Salem witch trials, is to “be the voice of the innocent victims of the witch-hunt of 1692, while also bringing awareness to the root cause of witch hunts and how they continue to impact our society today.”<sup>220</sup> In its exhibit titled, *Witches: Evolving Perceptions*, the museum offers its visitors a unique formula that it believes can be used to adequately describe the factors that led to witch hunts throughout history.<sup>221</sup> Its formula for a “witch hunt,” which is “fear + a trigger = a scapegoat,” includes three critical components to a witch hunt: human behavior, a triggering event or series of events, and most importantly, that someone is “unfairly or irrationally” blamed for the problem.<sup>222</sup> As such, if there is a prevailing fear or anxiety within a community and then a particular event takes place to make the fear grow, people

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<sup>213</sup> Acevedo, *supra* note 211, at 196. The author argues that religious minorities are “now largely (if not satisfactorily) protected under the First Amendment.” *Id.* However, targeted groups extend far beyond religious minorities. *Id.*

<sup>214</sup> *Id.* at 196–97.

<sup>215</sup> *Id.* at 197.

<sup>216</sup> *Id.* at 199.

<sup>217</sup> *Id.*; see also GOSS, *supra* note 130, at 51–65.

<sup>218</sup> See generally Acevedo, *supra* note 211.

<sup>219</sup> *Witch Hunts, 1692 SALEM WITCH MUSEUM*, <https://salemwitchmuseum.com/witch-hunt/> [https://perma.cc/9WUP-24UW] (last visited July 15, 2023).

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

will look for someone to blame for the trouble, or a “scapegoat.”<sup>223</sup> The Salem witch trials are the classic example of a “witch hunt,” and provides a lens through which to view modern pronouncements of “witch hunts.”<sup>224</sup> This Article argues that the formula also allows us to question whether some current legislative endeavors are approaching what could be considered a “witch hunt” under the formula. The framing and historical context is incredibly relevant given that we see echoes of similar themes in subsequent “trials” or persecutions of groups of people perpetuated by fear and fueled by conspiracy theories.

### C. *Twentieth Century Witch Hunts*

Although the post-mortem in Salem concluded with eventual apologies, exonerations,<sup>225</sup> and a memorial to honor the accused, witch hunts continued into the twentieth century at the hands of politicians, ruthless dictators, and even American presidents. Amidst two world wars, fear motivated the impassioned hunt for a new kind of scapegoat: arguably one that was to blame and who could be cast as a threat to societal norms established by the majority.<sup>226</sup> Although persecuting someone for their ideological beliefs may have been a factor in some of the better-known twentieth century witch hunts, ideological beliefs alone cannot account for the other critical factors necessary for a witch hunt to exist.<sup>227</sup>

There are many examples of possible witch hunts that fit the formula, “fear + trigger = scapegoat.” This Article discusses a few notable examples of witch hunts in the twentieth century, specifically with hunts that occurred during times where prevailing fears led to legislation being passed that targeted a group of individuals due to their race, gender identity, or some other characteristic that made the group a witch hunt target. Much like the witch hunts in Salem, once these hunts were initiated, they were not easily stopped—particularly because the hate manifested itself into actual laws and pseudo-legal proceedings.

The hunt for “witches” in Nazi Germany provides a classic example of how hatred was enshrined in law as well as an example of the witch hunt formula.<sup>228</sup> The identification of Jewish people as the “scapegoat” was rooted in fear. Power-seeking Nazis created laws, such as the Nuremberg Laws, that sought to promote and capitalize on a fear that Germany was under attack from both internal and external enemies like the Jewish people,

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<sup>223</sup> *What is a Witch Hunt?*, 1692 SALEM WITCH MUSEUM, <https://salemwitchmuseum.com/videos/what-is-a-witch-hunt/> [<https://perma.cc/4VEN-WL96>] (last visited Feb. 27, 2023). Other specific examples of a witch hunt provided by the museum include Japan (fear) + Pearl Harbor (trigger) = Japanese Americans (scapegoat), and The Spread of Communism (fear) + House Un-American Activities Committee (HUAC)/Joe McCarthy = Citizens Accused of Having Ties to Communism (Scapegoat). *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> Interestingly, in 2022, Massachusetts lawmakers finally exonerated Elizabeth Johnson Jr., clearing her name 329 years after she was convicted of witchcraft in 1693 and sentenced to death at the height of the Salem witch trials. ASSOCIATED PRESS, *After 329 Years, a Woman Accused of Being a Witch in Salem Has Been Exonerated*, NPR (May 26, 2022, 4:18 PM), <https://www.npr.org/2022/05/26/1101562323/salem-witch-trials-woman-exonerated-329-years-later> [<https://perma.cc/KNA9-6JAZ>].

<sup>226</sup> Donna Patricia Ward, *American Hysteria: 5 Witch Hunts That Rocked the U.S. in the 20th Century*, HIST. COLLECTION (Apr. 30, 2017), <https://historycollection.com/american-hysteria-5-witch-hunts-rocked-us-20th-century/> [<https://perma.cc/5XJJ-JNW3>].

<sup>227</sup> *But see* Acevedo, *supra* note 211, at 195.

<sup>228</sup> LaSheyna T. Alexander, *The Hunt for Witches and Jews: Hatred Infused Within the Law*, 20 RUTGERS J.L. & RELIGION 84, 87 (2019).



homosexuals, and other perceived racial and political enemies.<sup>229</sup> The targeting of these “enemies” escalated after the First World War concluded.<sup>230</sup> German forces were overextended and resources were exhausted, resulting in a “humiliating” peace settlement imposed on the Germans by the 1919 Treaty of Versailles.<sup>231</sup> The loss of the war provided the trigger to accompany the underlying fear and unrest at home in Germany. And before the peace agreement was in place, high-ranking German officers began to spread the lie that their armies had been defeated or “stabbed in the back” by cowards and enemies at home, essentially targeting the Jewish community.<sup>232</sup> After Germany invaded Poland in 1939, thousands of Jewish and non-Jewish refugees fled to eastern Poland with the hope that the Polish army would assist them, only to be stopped by the Soviets who annexed eastern Poland.<sup>233</sup> In addition to the Nuremberg Laws, other laws such as the Reich Citizenship Law and the Law for the Protection of German Blood and German Honor stripped the Jewish people of their full citizenship and forbade interracial marriages or sexual relationships between a Jewish person and “people of German or related blood.”<sup>234</sup> However, the test of whether someone was Jewish by examining their religion or heritage proved difficult and led to “identification” based on physical characteristics, name, or social interactions, which was not far off from the identification of a witch by looking for identifying marks.<sup>235</sup>

The fear, the trigger, and the scapegoat of the witch hunt formula were present in the Holocaust, a systematic persecution and murder of over six million people.<sup>236</sup> The witch hunt could not have taken place without the active and passive participation of others who benefitted by acquiring property or homes once owned by Jewish people, or who acquired political favor or power by assisting the Nazi regime.<sup>237</sup> During that time, there was also an inordinate amount of societal pressure to conform and accept the propaganda pushed throughout the schools and towns in Germany.<sup>238</sup> Similarly, those in the Puritan community in colonial New England also lived in a world of conformity and fear from recent wars. Additionally, the speed and haste of the executions associated with the witch trials in Salem and the surrounding towns would not have happened but for willing and passive participation of others in the community—including town leaders, elected judges, clergymen, and their households. Others were, perhaps, too afraid to speak up for fear that

<sup>229</sup> *The Nuremberg Race Laws*, HOLOCAUST ENCYCLOPEDIA, <https://encyclopedia.ushmm.org/content/en/article/the-nuremberg-race-laws> [<https://perma.cc/WU8P-LXP4>] (last visited July 31, 2023).

<sup>230</sup> Doris Bergen, *Factors in Hitler’s Rise to Power, 1918-1933*, PBS, <https://www.pbs.org/auschwitz/40-45/background/> [<https://perma.cc/J6Q8-QPGF>] (last visited Nov. 13, 2023).

<sup>231</sup> *Id.*

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

<sup>233</sup> *German Invasion of Poland: Jewish Refugees, 1939*, HOLOCAUST ENCYCLOPEDIA, <https://encyclopedia.ushmm.org/content/en/article/german-invasion-of-poland-jewish-refugees-1939?series=8> [<https://perma.cc/5H6D-CGUK>] (last visited Nov. 13, 2023).

<sup>234</sup> See *The Nuremberg Race Laws*, *supra* note 229.

<sup>235</sup> See Alexander, *supra* note 228, at 8. The customary practice of checking an accused was to search the body for marks, although the absence of marks did not exonerate the accused of witchcraft as the Devil could have “hidden the marks from mortal eyes.” *Id.* at 5.

<sup>236</sup> *Documenting Numbers of Victims of the Holocaust and Nazi Persecution*, HOLOCAUST ENCYCLOPEDIA, <https://encyclopedia.ushmm.org/content/en/article/documenting-numbers-of-victims-of-the-holocaust-and-nazi-persecution> [<https://perma.cc/YM2G-4SMU>] (last visited Nov. 13, 2023).

<sup>237</sup> See *Bystanders*, HOLOCAUST ENCYCLOPEDIA, <https://encyclopedia.ushmm.org/content/en/article/bystanders> [<https://perma.cc/3VSW-M8AS>] (last visited Oct. 14, 2023).

<sup>238</sup> *Id.*

they would be accused of witchcraft themselves, which is a familiar theme to any witch hunt, whether it be in Salem or Nazi Germany.

The beginnings of the Cold War led to another well-known witch hunt in American history—the McCarthy hearings.<sup>239</sup> During that time, a paranoia emerged in the United States where many believed that the “radical left” was conspiring with or had become communists.<sup>240</sup> Known as the “Red Scare,”<sup>241</sup> the late 1940s and 1950s were characterized as an era in American history when both government officials and businesses found the communist influence so fearful that many American citizens were interrogated and harassed in an effort to root out communists or their sympathizers.<sup>242</sup> To be sure, there was some truth or legitimacy to the fear that Russian agents had stolen classified information about the atomic bomb.<sup>243</sup> However, the method used by certain members of the United States Congress to root out the communists certainly fit the formula of a witch hunt, and, once again, the powerful relied on codified law to pursue the accused. Even prior to the McCarthy hearings, Congress enacted a number of laws that were meant to protect the United States from the perceived threat of communism.<sup>244</sup>

The fear of communism also pervaded the Executive Branch. In 1947, President Truman issued Executive Order 9835, initiating a program of “loyalty reviews” for federal employees that would call for dismissal if there were “reasonable grounds . . . for belief that the person involved is disloyal to the Government of the United States.”<sup>245</sup> Soon after, the House Un-American Activities Committee (HUAC), headed by Senator Joseph McCarthy, launched hearings focused on outing individuals with suspected communist ties that it believed were dangerous.<sup>246</sup> The witch hunt commenced as the Committee quickly issued subpoenas to witnesses, compelling them to testify before the Committee about suspected ties to communism.<sup>247</sup> The initial hearings, led by McCarthy, focused on questioning targeted individuals including then-current members of the Communist Party, but quickly spread to others—notably members of the Hollywood film industry, many of whom were immigrants or ethnic or religious minorities.<sup>248</sup> The film industry drew a special heightened suspicion from the government because of a belief that communists

<sup>239</sup> See *From Salem to McCarthy*, CHI. PUB. LIBR. (Oct. 31, 2007), <https://www.chipublib.org/from-salem-to-mccarthy/> [https://perma.cc/6PS2-RH5U].

<sup>240</sup> See Acevedo, *supra* note 211, at 209.

<sup>241</sup> The “Red Scare” has been defined as the time periods (between 1918 and 1924 and again during the late 1940s and 1950s) in the United States when both private and public officials harassed citizens suspected of affiliations with the Communist Party. See generally KENNETH D. ACKERMAN, YOUNG J. EDGAR: HOOVER AND THE RED SCARE, 1919-1920 (2011).

<sup>242</sup> Martha Minow, *Storytelling and Political Resistance: Remembering Derrick Bell (With a Story About Dalton Trumbo)*, 28 HARV. J. RACIAL & ETHNIC JUST. 1, 3 (2012).

<sup>243</sup> See Acevedo, *supra* note 211, at 209.

<sup>244</sup> See, e.g., The Hatch Act, 5 U.S.C. §§ 7321–7326 (1939) (restricting federal employees’ involvement in partisan political activity; specifically subversive organization); The Alien Registration Act, 18 U.S.C. § 2835 (1940) (creating criminal penalties for advocating the overthrow of the U.S. government by either force or violence and requiring all non-citizens to register with the federal government); Subversive Activities Control Act of 1950, 50 U.S.C. §§ 781–798. (1950) (requiring Communist organizations to register with the federal government and establishing the Subversive Activities Control Board tasked with investigating possible communist actions and communist-front organizations) (repealed 1993).

<sup>245</sup> Exec. Order. No. 9,835, 12 Fed. Reg. 1935 (Mar. 21, 1947).

<sup>246</sup> See Minow, *supra* note 242, at 3.

<sup>247</sup> *Id.*; see also Acevedo, *supra* note 211, at 210.

<sup>248</sup> See Minow, *supra* note 242, at 4.

therein could place subversive messages into movies.<sup>249</sup> The efforts to root out communists soon expanded beyond the entertainment industry as the hearings began to target those in organized labor, higher education, and the media.<sup>250</sup> In addition to targeting individuals who often fell into a particular race or ethnicity, McCarthy's witch hunts also tended to target women, who were overrepresented among defendants and who were often singled out for careful scrutiny, echoing the historical attacks on women as the scapegoat during a witch hunt.<sup>251</sup> In his article, *Attacking the Washington Femmocracy*, historian Landon Storrs argued that McCarthyism largely hurt the careers of women in government and undercut the policies that many of them shared.<sup>252</sup> This, he argues, was evident in the gendered tone during the hearing which focused on "keeping one's maiden name," needlessly holding a job while married, or exhibiting a dominant personality—all of which heightened suspicions that the women were communist sympathizers.<sup>253</sup>

The punishment for individuals who were targeted during the hearings was very real. Those who ignored the subpoena were cited for contempt of Congress, which carried with it a possible prison term.<sup>254</sup> When a witness did testify, members of the Committee often made sweeping accusations that assumed the witness's guilt, and the accused often had to endure dehumanizing labels during the hearings such as "poisonous germs," "snakes," "rats," and "slime."<sup>255</sup> As the hearings intensified, ten members of the film industry refused to testify before the Committee and were subsequently fired by the Motion Picture Association of America.<sup>256</sup> The heads of the major studios sided with the Committee, declaring that they would not employ communists or their sympathizers, creating the "Blacklist."<sup>257</sup> The "Blacklist" ruined hundreds of careers of individuals who were accused of being communists.<sup>258</sup> Many people who were identified as Communists or sympathizers lost their jobs in the name of national security.<sup>259</sup> Those individuals and others who were accused were easy scapegoats. Their individual rights—the right to privacy, freedom of speech, and the freedom of association—were effectively ignored in the pursuit of a witch hunt that was rooted in legislation passed years earlier by Congress in an effort to curb the rise of labor unions.<sup>260</sup> The Warren Court eventually undid the McCarthy era with a number of rulings by the Supreme Court to curb this brief, unfettered power exhibited by

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

<sup>250</sup> Cassese, *supra* note 2.

<sup>251</sup> *Id.* Of note, there was also a disproportionate attack on gay and lesbian individuals during the McCarthy trials known as the "Lavender Scare." See generally, DAVID K. JOHNSON, *THE LAVENDER SCARE: THE COLD WAR PERSECUTION OF GAYS AND LESBIANS IN THE FEDERAL GOVERNMENT* 2 (2003).

<sup>252</sup> Landon R. Y. Storrs, *Attacking the Washington "Femmocracy": Antifeminism in the Cold War Campaign Against "Communists in Government,"* 33 *FEMINIST STUD.* 118, 120 (2007).

<sup>253</sup> *Id.* at 140.

<sup>254</sup> Minow, *supra* note 242, at 4.

<sup>255</sup> Mari J. Matsuda, *McCarthyism, The Internment and the Contradictions of Power*, 19 *B.C. THIRD WORLD L.J.* 9, 19 (1998).

<sup>256</sup> See Minow, *supra* note 242, at 4. Known as the "Hollywood Ten," the witnesses cited their First Amendment right to free speech and free assembly to no avail. *Id.* at 5.

<sup>257</sup> *Id.* at 4.

<sup>258</sup> *Id.*

<sup>259</sup> Ellen Schrecker, *McCarthyism: Political Repression and the Fear of Communism*, 71 *SOC. RSCH.* 1041, 1047 (2004).

<sup>260</sup> The beginnings of the Red Scare took root after the Russian Revolution of 1917, which created the possibility of the rise of communism and the labor union in the United States—in particular, the Industrial Workers of the World (IWW) and fears of anarchy and violence. See Acevedo, *supra* note 211, at 204–05.

individuals in positions of power.<sup>261</sup> The legacy of McCarthyism, much like the Salem witch trials, is regarded as a dark period in American history. Fear, a false narrative, and a compelling narrator fueled McCarthy's witch hunt.<sup>262</sup> The incident led playwright Arthur Miller to write *The Crucible* in 1952, using the Salem witch trials as a metaphor for McCarthyism.<sup>263</sup>

In addition to the notorious McCarthy hearings, there are other shadows of witch hunts that linger in the American past. After the attack on Pearl Harbor on the morning of December 7, 1941, the federal government and United States court system deprived Japanese Americans of their constitutional rights based on a fear that further Japanese threats resided within the United States at that time.<sup>264</sup> The witch hunt began with the United States Justice Department arresting and detaining populations of Japanese Americans, but it did little to quell the anger or underlying fear triggered by Pearl Harbor.<sup>265</sup> The result was the scapegoating and internment of Japanese Americans based solely on race and not necessarily an ideology.<sup>266</sup> Only individuals of Japanese descent were interned<sup>267</sup> at camps, including Japanese American citizens whose ideals were not aligned with Japan or its culture.<sup>268</sup> The incident has been characterized as "World War II's civil liberties calamity of mass, race-based, nonselective forced removal and incarceration of over 110,000 Japanese American civilians, most of them American citizens."<sup>269</sup>

The targeting of individuals based on race is persistent throughout American history and the targeting of individuals based on their race continues today, according to various

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<sup>261</sup> See, e.g., *Slochower v. Bd. of Higher Educ.*, 350 U.S. 551 (1956). Harry Slochower was a professor at Brooklyn College who was fired for invoking the Fifth Amendment when questioned by the Internal Security Subcommittee of the Committee of the Judiciary about his membership in the Communist Party. *Id.* at 553. The Court condemned "the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment" and stated that "the privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt of a conclusive presumption of perjury." *Id.* at 557; see also *Kent v. Dulles*, 357 U.S. 116 (1958) (halting the State Department from refusing or revoking passports of those with suspected communist beliefs). See generally *Yates v. United States*, 354 U.S. 298 (1957) (reversing the convictions of fourteen communists); *Watkins v. United States*, 354 U.S. 178 (1957) (curtailing HUAC's power to punish uncooperative witnesses by finding them in contempt of court).

<sup>262</sup> Ron Elving, *Decades Before Trump's Election Lies, McCarthy's Anti-Communist Fever Gripped the GOP*, NPR (Oct. 18, 2021, 2:28 PM), <https://www.npr.org/2021/10/18/1046648461/decades-before-trumps-election-lies-mccarthys-anti-communist-fever-gripped-the-g> [<https://perma.cc/TS6T-48MM>].

<sup>263</sup> Arthur Miller, *Why I Wrote "The Crucible,"* NEW YORKER (Oct. 13, 1996), <https://www.newyorker.com/magazine/1996/10/21/why-i-wrote-the-crucible> [<https://perma.cc/VQQ3-M52E>]. Miller was greatly concerned with the parallels between the witch panic and the hearings. *Id.* His work intimated that a McCarthy-style witch hunt could occur at any time because once an individual was accused (or identified as the scapegoat), they could not overcome the irrational, fear-based reasoning of the public. *Id.*

<sup>264</sup> Harvey Gee, *Journey Towards Justice: The Historical and Legal Legacy of Fred Korematsu and the Japanese American Internment in a Post-9/11 World*, 50 SUFFOLK UNIV. L. REV. 237, 241 (2017).

<sup>265</sup> *Id.*

<sup>266</sup> See *id.* at 243.

<sup>267</sup> Since this article is focused on the meaning of the term "witch hunt," it is important to note that there is disagreement about the use of the term "interned" or "internment" and that the more fitting term should be "imprisoned" or "imprisonment." Yoshinori H.T. Himel, *Americans' Misuse of "Internment,"* 14 SEATTLE J. SOC. JUST. 797, 797 (2016).

<sup>268</sup> See Gee, *supra* note 264, at 243.

<sup>269</sup> Himel, *supra* note 267, at 797.

scholars. Historians Karen and Barbara Fields have opined that lingering hostilities in the United States toward race are still evident and even termed it as “racecraft” or a “ready-made propaganda weapon for use against the aspirations of the great majority of working Americans.”<sup>270</sup> Their theory refers back to the expansion of the African slave trade at the end of the seventeenth century, where plantation owners feared “plots and conspiracies” against them, all while viewing their slaves as chattel.<sup>271</sup> Jim Crow laws followed the abolishment of slavery after the Civil War, and social controls were created to further discriminate against and punish African Americans.<sup>272</sup> The discrimination and building fear and anger culminated into profane and violent lynching by vigilantes who were seldom charged with a crime.<sup>273</sup>

The witch hunt formula extends beyond race and fits the fear narrative and propaganda pushed by those in the ‘80s and ‘90s, who persecuted the gay community during the height of the AIDS epidemic.<sup>274</sup> Fear of the infection, based on a lack of scientific knowledge about transmission of AIDS at that time, triggered the scapegoating and persecution of the gay community.<sup>275</sup> The “Center for Disease Control (CDC)” states that the HIV stigma that was manufactured during that time and what now continues to persist is largely based on a “prejudice that comes with labeling an individual as part of a group that is believed to be socially unacceptable.”<sup>276</sup> The cause of the stigma is the “lack of information and awareness combined with outdated beliefs [which] lead people to fear . . . .”<sup>277</sup>

Much like the Salem witch trials, the accused scapegoats are not the powerful, but often those who are singled out due to gender, race, or another aspect of their personality that makes them “socially unacceptable” to a dominant group. The fear of the unknown is at the heart of a witch hunt. To remain in power, the powerful use false narratives to capitalize on fear: through the spectral evidence and emotionally charged testimonies presented by the afflicted girls during the Salem witch trials to legislation that we see targeting a less-powerful group of people today.

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<sup>270</sup> KAREN E. FIELDS & BARBARA J. FIELDS, *RACECRAFT: THE SOUL OF INEQUALITY IN AMERICAN LIFE* 283 (2012).

<sup>271</sup> Peter Temin, *The Oppressive, Enduring Legacy of ‘Racecraft,’* MIT PRESS READER (June 4, 2020), <https://thereader.mitpress.mit.edu/oppressive-enduring-legacy-racecraft/> [<https://perma.cc/9C4K-5WGP>].

<sup>272</sup> *Id.*

<sup>273</sup> Tulani Salah-Din, *The Evidence of Things Unsaid: The Lynching of Matthew Williams, 1931*, NAT’L MUSEUM OF AFR. AM. HIST. & CULTURE (July 6, 2017), <https://nmaahc.si.edu/explore/stories/evidence-things-unsaid> [<https://perma.cc/8Z9L-XRW8>].

<sup>274</sup> See Donald G. McNeil Jr., *The Ethics of Hunting Down ‘Patient Zero,’* N.Y. TIMES (Oct. 29, 2016), <https://www.nytimes.com/2016/10/30/sunday-review/the-ethics-of-hunting-down-patient-zero.html> [<https://perma.cc/G2N9-F4FZ>].

<sup>275</sup> See *HIV Stigma and Discrimination*, CDC (June 1, 2021), <https://www.cdc.gov/hiv/basics/hiv-stigma/index.html#:~:text=The%20lack%20of%20information%20and,who%20are%20living%20with%20HIV> [<https://perma.cc/P67X-PL79>].

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

### III. THE MODERN-DAY WITCH HUNT

#### A. *The Perpetuation of Fear and the Move Toward Cultural Tightness*

Modern-day witch hunts are still happening, albeit not in name, when less-powerful groups of Americans are targeted by recent laws and court opinions. In the courtroom, fear seems to drive the courts to make decisions resembling historical witch trials. Outside the courtroom, politicians capitalize on the use of fear to win elections.<sup>278</sup> Both rely on a narrative that is strategically tailored to influence the listener's beliefs and actions to be successful.<sup>279</sup> While fear is not inherently bad, it becomes dangerous when it is used deceptively.<sup>280</sup> Rooting out the deceptiveness can be challenging, particularly when politicians spread conspiracy theories, which are not always easy to falsify.<sup>281</sup> Politicians cleverly pitch conspiracy theories as questions and their associated statements lack few concrete details that can be put to the test.<sup>282</sup> Cable news and social media play an important role in this process by repeating the disinformation, creating "an echo chamber" while capitalizing on the highly emotional content.<sup>283</sup>

Playing upon people's fears is effective and results in changing the behavior and attitudes of the recipients of the message—it has even been shown to influence voting behavior.<sup>284</sup> Dr. Christopher Federico, a professor of political science and psychology at the University of Minnesota, explains the process by which a target listener processes the message: when an individual experiences fear, they will stop to reassess by "seek[ing] out information that reinforces the idea that a threat exists—which is not necessarily the most accurate or objective information."<sup>285</sup> Psychologists have also noted that this repetitive use of a phrase or theory has a powerful effect on its listeners that results in an adopted "illusory truth."<sup>286</sup> This phenomenon was first observed by scientists in 1977 when their subjects concluded that statements that they had repeatedly heard were "more probably true" than new statements that they had heard for the first time.<sup>287</sup> At some point, an individual's belief, which is not supported by the evidence, diverges from truth based purely on the individual's familiarity with the phrase in the new context in which it is presented.<sup>288</sup> Further, Dr. Federico says that a large part of politics is getting people to think and fear as a group.<sup>289</sup> Once a politician has shown that their party is best suited to address the fear,

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<sup>278</sup> See Kirk Waldroff, *Fear: A Powerful Motivator in Elections*, AM. PSYCH. ASS'N NEWS (Oct. 13, 2020), <https://www.apa.org/news/apa/2020/fear-motivator-elections#:~:text=Campaigns%20also%20use%20fear%20to,will%20lead%20to%20outright%20disaster> [<https://perma.cc/4Q5J-3EVU>].

<sup>279</sup> See *id.*

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> Ian Maynard Begg, Ann Anas, & Suzanne Farinacci, *Dissociation of Processes in Belief: Source Recollection, Statement Familiarity, and the Illusion of Truth*, 121 J. OF EXPERIMENTAL PSYCH. 446, 446 (1992), <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.220.6486&rep=rep1&type=pdf> [<https://perma.cc/EX26-3W7C>].

<sup>287</sup> *Id.*

<sup>288</sup> *Id.* at 456.

<sup>289</sup> Waldroff, *supra* note 278.

making people scared about that issue can cause them to seek comfort by joining that community.<sup>290</sup>

History also shows us that an individual's belief is influenced by impressions that have nothing to do with the truth.<sup>291</sup> Cognitive scientists have found that a speaker's confidence and demeanor correlated with whether an audience believed the witness was telling the truth.<sup>292</sup> During the Watergate hearings in 1973, the confidence exhibited by John Dean, White House Counsel for U.S. President Richard Nixon, throughout his testimony made him a "credible witness" to many, even though later comparisons between his testimony and the Nixon tapes revealed numerous instances when his testimony was incorrect.<sup>293</sup> Over the years, multiple studies have concluded that an individual's gender shapes which emotions they are expected to express to an audience,<sup>294</sup> which ultimately could be linked to the credibility of the witness.

The perpetuation of fear has also dominated political discourse and remains a driver of cultural tightness, which is exponentially enhanced by social media platforms.<sup>295</sup> The University of Maryland recently studied the perpetuation of fear and threats and why politicians continue to capitalize on it.<sup>296</sup> The researchers theorized that when communities are threatened by warfare, famine, and natural disasters, they are more likely to survive these threats when they set clear rules for behavior and install "strong" leaders who can regulate according to those rules and punish anyone who deviates from the norm.<sup>297</sup> When studying thirty-three nations, the researchers found that the countries with cultural tightness, or who force citizens to conform with the harshest laws and strictest punishments, were those who had a history of war, famine, and natural disasters.<sup>298</sup> Similarly, American states with the strictest laws have histories that correlate with high rates of natural disasters or disease.<sup>299</sup> They also noted that tighter states were also more likely to prefer autonomous leaders with extreme confidence in their own abilities to make

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<sup>290</sup> *Id.*

<sup>291</sup> Begg., Anas, & Farinacci, *supra* note 286, at 456.

<sup>292</sup> *Id.*

<sup>293</sup> *Id.* Importantly, the authors of the study also opined that "witness demeanor may be correlated with whether witnesses believe what they are saying, but it is absurd to assume that confident witnesses are expressing true statements, whereas witnesses who are less assured are telling untruths." *Id.* Interestingly, the retrospective study of Dean's testimony, which was conducted in 1981, did not account for gender bias when rating confidence of an individual in the credibility of a witness. See Ulric Neisser, *John Dean's Memory: A Case Study*, 9 COGNITION 1 (1981), <https://www.sciencedirect.com/science/article/pii/0010027781900111> [<https://perma.cc/5F6G-MYQC>].

<sup>294</sup> See Constantine Boussalis, Travis G. Coan, Mirya R. Holman, & Stefan Müller, *Gender, Candidate Emotional Expression, and Voter Reactions During Televised Debates*, 115 AM. POL. SCI. REV. 1242, 1244 (2021), <https://www.cambridge.org/core/journals/american-political-science-review/article/gender-candidate-emotional-expression-and-voter-reactions-during-televised-debates/B259E3277178F68F52CCEADF5AE0CD40> [<https://perma.cc/5C6G-7RBT>].

<sup>295</sup> See Michele Gelfand, Joshua Conrad Jackson, & Jesse R. Harrington, *Trump Culture: Threat, Fear and the Tightening of the American Mind*, SCI. AM (Apr. 27, 2016), <https://www.scientificamerican.com/article/trump-culture-threat-fear-and-the-tightening-of-the-american-mind/> [<https://perma.cc/NE3Q-29QU>].

<sup>296</sup> *Id.*

<sup>297</sup> *Id.*

<sup>298</sup> *Id.* Specifically, they found that Germany, the center of two world wars and India, who spent over \$10 billion on natural disasters displayed the highest cultural tightness. *Id.*

<sup>299</sup> *Id.*

independent decisions in high-threat environments.<sup>300</sup> We see echoes of this theory during the Salem witch trials. The Salem community had a propensity for cultural tightness during a time of great fear and anxiety due to wars, famine, and weather events which greatly affected their economy and survival. The citizenship therefore turned to its patriarchal leadership, their own politicians, magistrates, and religious leaders for solutions to the perceived threats.

The threats that were present in the seventeenth century have evolved over time to include new threats with familiar themes. Politicians and lawmakers are now capitalizing on fear with “threatening rhetoric, fervent nationalism and hostility toward those [who are] consider[ed] different.”<sup>301</sup> Those who are labeled as “deviants” have changed from the traditional notion of a witch into other groups such as Mexican immigrants, Syrian refugees, Muslims, and women who receive abortions.<sup>302</sup> If society is convinced to believe there is a threat, these groups then become the scapegoats and the true modern witch hunts begin.<sup>303</sup> The higher the level of the perceived threat, the more likely the listener will support policies that promote cultural tightness. For example, in the University of Maryland study, those who reported perceiving high levels of threat also supported radical policies like “ending affirmative action” and “changing the Constitution to make Christianity the national religion.”<sup>304</sup>

We see echoes of a cultural tightness movement in state-driven legislation seeking to curtail education that is more inclusive of narratives and points of view from others—specifically that which addresses black history and LGBTQ issues. The legislation tends to be buttressed by the claim that the proposed restrictions “are necessary to avoid ‘indoctrination’ of students.”<sup>305</sup> But others argue that the legislation seeks to suppress the free flow of ideas, imposing government restrictions of the freedom to read, the freedom to learn, and the freedom to teach.<sup>306</sup>

As of August 2022, thirty-six states had introduced over 137 bills restricting the ability of teachers to cover topics that deal with gender, race, LGBTQ issues, and American history in K-12 education.<sup>307</sup> The proposed legislation targeting speech in the classroom has increased 250% as compared to 2021.<sup>308</sup> Pen America, a non-profit literary and human rights organization, has tracked what it calls “educational gag order” legislation across the country, noting that while the number of actual laws passed have declined, legislative attacks on education in America are escalating.<sup>309</sup> Similarly, the American Libraries Association has reported that attempted book bans and restrictions at schools and public libraries surged in 2022 with objections to more than 2500 books, nearly doubling the

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<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> *See id.*

<sup>304</sup> *Id.*

<sup>305</sup> Jeremy C. Young & Jonathan Friedman, *America’s Censored Classrooms*, PEN AM. (Aug. 17, 2022), <https://pen.org/report/Americas-censored-classrooms/> [<https://perma.cc/YM7Z-AC65>].

<sup>306</sup> *Id.*

<sup>307</sup> *Id.*

<sup>308</sup> *Id.*

<sup>309</sup> *Id.*



record total in 2021, a majority of which were targeted at LGBTQ+ or racial themes.<sup>310</sup> Restrictions on books are now finding their way into proposed legislation. Bills restricting the availability of certain books have been proposed or passed in Arizona, Iowa, Missouri, Oklahoma, and Texas.<sup>311</sup> In Florida, newly passed laws now allow for the review of classroom materials and limitations on discussions of gender identity or race in the classroom.<sup>312</sup>

Educators across the country are concerned over the move by state and local elected officials to swiftly rid schools of any hint of what they believe may be Critical Race Theory (CRT), criticizing it as “anti-white, radical leftist agenda [that] is being used by public schools to indoctrinate students.”<sup>313</sup> CRT, more commonly found in undergraduate or law school courses, is a thought framework developed by legal scholars in the 1970s, hinging on the notion that racism is systemic—not simply perpetuated by individuals—and is historically intertwined in laws.<sup>314</sup> In 2021, reminiscent of many school board meetings around the United States, parents of students at Guilford schools in Connecticut clashed in a heated debate about what CRT was and whether it was being taught to their children.<sup>315</sup> During the meeting, the critics of the theory argued that it rejects “rational science,” is based on Marxism, and “seeks to enforce legal discrimination against white citizens.”<sup>316</sup> The disinformation campaign against the academic concept has resulted in more than two dozen states who have proposed bills to stymie conversations about race, racism, and systemic oppression.<sup>317</sup> While many of the bills did not specifically name CRT, which in and of itself was not being taught in many K-12 schools, most of the language in the bills is aimed at halting the teaching and training on “divisive concepts.”<sup>318</sup> In many cases,

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<sup>310</sup> Hillel Italie, *Book Ban Attempts Reach Record High in 2022, American Library Association Report Says*, PBS NEWSHOUR (Mar. 23, 2023, 10:58 AM), <https://www.pbs.org/newshour/arts/book-ban-attempts-reach-record-high-in-2022-american-library-association-report-says> [<https://perma.cc/R9J9-AGBL>]. The ALA notes that some books were targeted by liberals because of racist language, but a vast majority of complaints were directed at books with LGBTQIA+ or racial themes. *Id.*

<sup>311</sup> *Id.*

<sup>312</sup> *Id.*; see FLA. STAT. § 1000.05(4)(a) (2022).

<sup>313</sup> Amanda Blanco, *Parents Clash Over “Critical Race Theory” at Forum in Guilford. National Conflict Over Teaching About Systemic Racism Surfaces in Connecticut*, HARTFORD COURANT (June 25, 2021, 1:25 PM), <https://www.courant.com/2021/06/25/parents-clash-over-critical-race-theory-at-forum-in-guilford-national-conflict-over-teaching-about-systemic-racism-surfaces-in-connecticut/> [<https://perma.cc/4D2Y-NNRG>]. “As of December 31, 2022, lawmakers in 28 states have adopted at least one anti-‘CRT’ measure at the state level including attorney general letters, executive directives, [and] legislation . . . .” TAI FHA ALEXANDER, LATOYA BALDWIN CLARK, KYLE REINHARD, & NOAH ZATZ, *CRT FORWARD: TRACKING THE ATTACK ON CRITICAL RACE THEORY 5* (2023), [https://crtforward.law.ucla.edu/wp-content/uploads/2023/04/UCLA-Law-CRT-Report\\_Final.pdf](https://crtforward.law.ucla.edu/wp-content/uploads/2023/04/UCLA-Law-CRT-Report_Final.pdf) [<https://perma.cc/CEU3-XBFZ>].

<sup>314</sup> See Blanco, *supra* note 313.

<sup>315</sup> *Id.*

<sup>316</sup> *Id.*

<sup>317</sup> Fabiola Cineas, *What the Hysteria Over Critical Race Theory is Really All About*, VOX (June 24, 2021, 10:50 AM), <https://www.vox.com/22443822/critical-race-theory-controversy> [<https://perma.cc/H5WL-TS8F>]. The article references a Fox News story that aired as racial justice protests heightened in the summer of 2020, which arguably acted as a trigger to this debate. *Id.*

<sup>318</sup> *Id.*; As of June 16, 2021, 29 states had proposed legislative bans on anti-racist teachings and trainings, either through schools, state government programs or both. *Id.* For example, Idaho passed HB 377 in 2021, which bans teaching specific concepts about race and gender in public schools, public charter schools, and public institutions of higher education. IDAHO CODE §33-138 (2023). Oklahoma passed HB 1775, prohibiting

teachers have argued that critics have offered no tangible evidence that CRT was actually being taught in grade school; only ambiguous anecdotes and innuendo, amounting to nothing more than spectral evidence used by those in power who accuse teachers of “fabricated indiscretions,” leading to a mob mentality.<sup>319</sup>

Therein lies the problem: How do we combat anecdotal stories that are used to drive fear and garner support of legislation that promotes cultural tightness and oppression of minority groups? In order to combat anecdotal, unverifiable claims that often emerge during discussions at the state or local level, we should be encouraging legislative bodies to utilize reliable, evidence-based legislation (EBL).<sup>320</sup> EBL essentially requires that legislation rely on a solid foundation of evidence-based truths that are both verifiable and subject to scrutiny. During the process of drafting the bill’s subject matter, rigorous research must be conducted in a concurrent manner to support the assertions in the bill.<sup>321</sup> If the bill contains solid, evidentiary footing, legislators can build on political support by offering an objective measure for winning those who are opposed.<sup>322</sup>

Of course, there are difficulties in this approach. Legislators are still prone to confirmation bias and even naïve beliefs, which may cause them to simply search for the best evidence that supports their position and call it EBL.<sup>323</sup> Additionally, naïve beliefs can present significant challenges to EBL because they may be based on previously heard anecdotes and grounded in unreasoned ideals that masquerade as evidence.<sup>324</sup> These invidious anecdotes are not unlike those presented by the accusers during the Salem witch trials—unverifiable narratives that carry a powerful emotional effect, yet are impossible to invalidate.<sup>325</sup> For example, one of the unfounded beliefs perpetuated to drive fear was that gay marriage will increase the divorce rate when, there was an overwhelming amount of social science evidence to the contrary.<sup>326</sup>

Despite the challenges to EBL, the enactment of the Evidence-Based Policymaking Act of 2016 demonstrates that there is growing support for the use of evidence-based legislation at the federal level.<sup>327</sup> Applying a *Daubert*-like structure to determine the reliability of the evidence used to support legislation could also help to curb the use of anecdotal, unsupported narratives that often sway the public.<sup>328</sup> In a trial, the judge is considered the “gatekeeper” of expert testimony, charged with ensuring the reliability of the evidence presented by both parties.<sup>329</sup> Similarly, legislators should be charged with the

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public colleges from requiring students to participate in mandatory gender/sexuality diversity training, and bans teaching specific concepts about race and sex in public schools. OKLA. STAT. tit. 70, §24-157 (2023).

<sup>319</sup> Barth Keck, *Critical Race Theory is our Modern-Day “Crucible,”* CT NEWS JUNKIE (Nov. 15, 2021, 4:50 AM), <https://ctnewsjunkie.com/2021/11/15/op-ed-critical-race-theory-crucible/> [<https://perma.cc/7JW6-N6NG>].

<sup>320</sup> Sean J. Kealy & Alex Fomey, *The Reliability of Evidence in Evidence-Based Legislation*, 20 EUR. J.L. REFORM 40 (2018).

<sup>321</sup> *Id.* at 42.

<sup>322</sup> *Id.*

<sup>323</sup> *Id.* at 47–48.

<sup>324</sup> *Id.*

<sup>325</sup> *See id.*

<sup>326</sup> Jeffrey J. Rachlinski, *Evidence-Based Law*, 96 CORNELL L. REV. 901, 921 (2011).

<sup>327</sup> *See* Kealy & Fomey, *supra* note 320, at 51.

<sup>328</sup> *Id.* at 65.

<sup>329</sup> *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993).

same responsibility in sorting the evidence and not merely accept anecdotes and narratives as worthy evidence when considering the legislation.<sup>330</sup>

Of course, the mention of *Daubert* implies that our court system has evolved over time to disallow anecdotes, misinformation and “spectral evidence;” however, we see that this gatekeeping function is still incredibly challenging for judges to employ—particularly when the legal issue involves moral uncertainty, coupled with emotionally charged issues. Witch hunts were often used to test the morality of individuals, as well as a strict adherence to particular cultural ideals. This very narrative criminalized the outcasts—particularly women—and eroded any chance that they had at a fair trial. The hallmark of a fair proceeding often depends on the nature of the evidence that a factfinder is allowed to consider. Despite the guardrails in place, select evidence that is far from reliable is now finding its way into decisions that involve women.

### B. *Women’s Rights and the New “Spectral Evidence” in The Courtroom*

There is an undeniable and obvious connection between the issue of reproductive rights and witch hunts. Historians have noted that during the witch trials in Europe, in particular, women who were knowledgeable about reproductive health care were targeted for witchcraft.<sup>331</sup> According to Emeritus Professor and feminist scholar Silvia Federici, people who, allegedly, interfered with procreation were often charged with witchcraft.<sup>332</sup> In particular, women who were the healers and midwives were easy targets.<sup>333</sup> And while Salem did not have the same obsession with prosecuting those who prevented procreation, the society was still extremely gendered, and a woman’s role, which included having children, was very defined.<sup>334</sup>

A key characteristic of the Salem witch trials was the nature of the evidence that was relied upon during the legal proceedings.<sup>335</sup> The evidence may look or feel “scientific,” and it may be reported by witnesses who consider themselves “experts,” but upon careful examination, the evidence is only a deception.<sup>336</sup> The key characteristic of sham evidence is that it is neither verifiable nor falsifiable when compared to generally accepted scientific findings.<sup>337</sup> For example, during the Salem witch trials, the “spectral evidence” used during trial was visible only to certain people.<sup>338</sup> Marion Starkey writes that “[t]hanks to this arrangement, hallucinations, dreams and mere fancies would be accepted in court as factual proof not of the psychological condition of the accuser but of the behavior of the accused.”<sup>339</sup> During the times of the trials, even some “enlightened minds” were concerned that the unusual reliance on spectral evidence in 1692 was “the sort of ‘proof’ against which

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<sup>330</sup> See Kealy & Fomey, *supra* note 320, at 65.

<sup>331</sup> Tulika Bose, *The Surprising Backstory Behind Witch Hunts and Reproductive Labor*, SCI. AM. (Apr. 18, 2023), <https://www.scientificamerican.com/podcast/episode/the-surprising-backstory-behind-witch-hunts-and-reproductive-labor/> [https://perma.cc/Y6KK-LS24].

<sup>332</sup> *Id.* Federici says that many times “when they burned women, they also burned gay people as well.” *Id.*

<sup>333</sup> *Id.*

<sup>334</sup> See *id.*

<sup>335</sup> See Walton, *supra* note 3, at 399.

<sup>336</sup> *Id.*

<sup>337</sup> *Id.*

<sup>338</sup> *Id.*

<sup>339</sup> STARKEY, *supra* note 133, at 54.

there is no disproof.”<sup>340</sup> The concern was that the evidence, based on the conjectures of victims which were only limited by their fears and imaginations, was not based on whether objectively proven facts existed to justify them.<sup>341</sup>

In the eighteenth century, recognizing the inherent flaws and danger associated with the use of “spectral evidence” during the witch trials, courts in England and the United States began to focus on reliability of the testimony.<sup>342</sup> Courts recognized how essential reliable evidence was to trial after they realized that unreliable testimony was more detrimental than no testimony.<sup>343</sup> In 1993, the United States Supreme Court emphasized the importance of reliability, identifying the trial court as the single arbiter and gatekeeper, thus providing a set of criteria for judges to assess the reliability of scientific evidence.<sup>344</sup> The judge could do this by carefully considering factors which assess both the relevance and reliability of what is presented as scientific data that forms the foundation for an argument.<sup>345</sup> Scientific evidence that is admitted in a courtroom should be considered by a judge or presented to a jury only when it meets this standard.<sup>346</sup> While *Daubert*<sup>347</sup> typically employs a more rigorous standard intended for use by judges when they consider whether to allow an expert to testify on a scientific issue, the standard should be an important consideration when the judge acts as a factfinder in pretrial hearings involving administrative agency decisions. Additionally, when reviewing scientific evidence relied upon by a federal agency in its decision-making process, “courts owe significant deference to the politically accountable entities with the ‘background, competence, and expertise to assess public health.’”<sup>348</sup> By recognizing the importance of “good science” in the regulatory context in its *Daubert* opinion, the Supreme Court acknowledged the benefits of applying a *Daubert*-type review to cases involving administrative decisions based on science.<sup>349</sup> This type of review sets up a process where a judge should only consider weigh good science, while recognizing the importance of being “most deferential” to the agency

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<sup>340</sup> *Id.* Even the “hard-liners” and fervent believers of witchcraft such as Reverend Cotton Mather at some point began to caution when such evidence was used as proof of guilt during the trials. *Id.*

<sup>341</sup> *State v. Dustin*, 446 A.2d 1186, 1188 (N.H. 1982). In his dissent, Justice Douglas references the “spectral evidence” used during the Salem witch trials to illustrate the prejudicial effect of a prosecutor’s references of what went through the victim’s mind as a possible “rape” to be so prejudicial and egregious as to have denied the defendant, who was on trial for criminal restraint, a fair trial. *Id.* at 1190.

<sup>342</sup> Elizabeth L. DeCoux, *The Admission of Unreliable Expert Testimony Offered by the Prosecution: What's Wrong with Daubert and How to Make It Right*, 2007 UTAH L. REV. 131, 138 (2007).

<sup>343</sup> *Id.* at 140.

<sup>344</sup> *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993).

<sup>345</sup> *Id.* The checklist of factors that a trial judge can use include the following; (1) whether the basis of the testimony has been tested, (2) whether it has undergone peer review, (3) the potential rates of error for the methodology used, (4) and whether the method enjoys general scientific acceptance. *Id.* at 593–95.

<sup>346</sup> *See* Walton, *supra* note 3, at 400.

<sup>347</sup> *See Daubert*, 509 U.S. at 597.

<sup>348</sup> *Food & Drug Admin. v. Am. Coll. of Obstetricians & Gynecologists*, 141 S. Ct. 578, 579 (2021) (quoting *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1614 (2020)).

<sup>349</sup> Alan Charles Raul & Julie Zampa Dwyer, “Regulatory Daubert”: *A Proposal to Enhance Judicial Review of Agency Science by Incorporating Daubert Principles Into Administrative Law*, 66 LAW & CONTEMP. PROBS. 7, 24 (2003). The Supreme Court, in its *Daubert* opinion, specifically cites to Sheila Jasanoff’s book on regulatory science, which addresses the relationship between good science and the regulatory decision-making process. *Id.*; *see also Daubert*, 509 U.S. at 593 (*citing* SHEILA JASANOFF, *THE FIFTH BRANCH: SCIENCE ADVISORS AS POLICYMAKERS* 61–76 (1990)).

where “its decision is based upon its evaluations of complex scientific data within its technical expertise.”<sup>350</sup>

Given the precedent on how a judge should assess scientific evidence for its reliability, it was a shock to many, including the American Medical Association (AMA), when a federal district court in Texas stayed the FDA’s longstanding approval of mifepristone, which was approved as a safe and effective drug typically used to end an early-term pregnancy.<sup>351</sup>

The AMA issued a statement, with a strongly worded disapproval of the judge’s decision: “The court’s disregard for well-established scientific facts in favor of speculative allegations and ideological assertions will cause harm to our patients and undermines the health of the nation.” The AMA also noted the harm that could occur should the pattern of disregard for science continue: “substituting the opinions of individual judges and courts in place of extensive, evidence-based scientific review of efficacy and safety through well-established FDA processes is reckless and dangerous.”<sup>352</sup>

Other mainstream medical groups also raised alarms about the cherry-picking and misuse of the science in the case.<sup>353</sup> One of the scientists, whose research was cited by the judge, said that both the plaintiffs—and now the judge—were purposely misunderstanding his work and “overemphasizing ‘adverse events’ despite overwhelming scientific evidence of the drug’s safety.”<sup>354</sup> The judge also relied on data provided by researchers associated with the Charlotte Lozier Institute, an anti-abortion group.<sup>355</sup> One study in particular found

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<sup>350</sup> See *Sierra Club v. U.S. Env’t Prot. Agency*, 939 F.3d 649, 680 (5th Cir. 2019) (quoting *BCCA Appeal Grp. v. United States Env’t Prot. Agency*, 355 F.3d 817, 824 (5th Cir. 2003)).

<sup>351</sup> *All. for Hippocratic Med. v. U.S. Food & Drug Admin.*, 2:22-CV-223-Z, 2023 U.S. Dist. LEXIS 61474 (N.D. Tex. Apr. 7, 2023), *stay granted in part, denied in part*, *All. for Hippocratic Med. v. United States Food & Drug Admin.*, No. 23-10362, 2023 U.S. App. LEXIS 8898 (5th Cir. Apr. 12, 2023). Specifically, the FDA reports that between September 2000 and December 2022, it received reports linking mifepristone to thirty-two unconfirmed deaths out of the 5.9 million who have used the drug. *Mifepristone U.S. Post-Marketing Adverse Events Summary through 12/31/2022*, U.S. FOOD & DRUG ADMIN. (Dec. 31, 2022), <https://www.fda.gov/media/164331/download?attachment> [<https://perma.cc/X4RH-PKJC>]. Further, the American College of Obstetricians and Gynecologists, after reviewing hundreds of published, peer reviewed studies, found that the risk of death is almost non-existent that “[s]erious side effects occur in less than 1% of patients, and major adverse events ... occur in less 0.3% of patients.” Brief for Medical & Public Health Societies as Amici Curiae Supporting Defendants in Opposition to Plaintiff’s Motion for a Preliminary Injunction at 3, *All. for Hippocratic Med. v. United States Food & Drug Admin.*, , 2:22-CV-223-Z, 2023 U.S. Dist. LEXIS 61474 (N.D. Tex. Apr. 7, 2023).

<sup>352</sup> Jack Resnick, *AMA: Texas Mifepristone Ruling Flies in the Face of Science*, AM. MED. ASS’N (Apr. 7, 2023), <https://www.ama-assn.org/press-center/press-releases/ama-texas-mifepristone-ruling-flies-face-science> [<https://perma.cc/SBF2-JRZQ>].

<sup>353</sup> See Lauren Weber, Laurie McGinley, David Ovalle, & Frances Stead Sellers, *Unpacking the Flawed Science Cited in the Texas Abortion Pill Ruling*, WASH. POST (Apr. 13, 2023, 6:00 AM), <https://www.washingtonpost.com/health/2023/04/13/abortion-pill-safety/> [<https://perma.cc/3KN3-D38C>]. Dr. Heikinheimo, professor of obstetrics and gynecology at the University of Helsinki and co-author of a study cited by J. Kacsmaryk, disputes the judge’s (and plaintiff’s) characterization of his study of 40,000 women in Finland who had surgical or medical abortions in the early 2000s. *Id.* The study identified a higher risk of adverse events among patients undergoing medication abortions, however the judge’s analysis neglected a crucial point: significant complications were extremely low in both groups. *Id.*; see also Maarit Niinimäki, Anneli Pouta, Aini Bloigu, Mika Gissler, Elina Hemminki, Satu Suhonen, & Oskari Heikinheimo, *Immediate Complications After Medical Compared with Surgical Termination of Pregnancy*, 114 OBSTETRICS & GYNECOLOGY 795, 803 (2009).

<sup>354</sup> See Weber, McGinley, Ovalle, & Sellers, *supra* note 353.

<sup>355</sup> *Id.*

that more than a quarter of women on Medicaid who used abortion pills visited the emergency room within thirty days, but the study failed to specify which services the women received while at the ER.<sup>356</sup> Medicaid patients are often more likely to visit the ER for routine medical care because they lack primary care.<sup>357</sup> This evidence, presented by the plaintiffs, was compared with, and trumped, the evidence relied upon by the FDA in its decision-making process, which drew upon two decades of clinical research studies of mifepristone and more than 400 randomized controlled studies, which were considered the “gold standard” in research design.<sup>358</sup> Whether the intent was to create a shroud of uncertainty or imply political influence, the absence of acknowledgement of the principles associated with reliability and the use of the best scientific evidence by the agency was striking.

Following the preliminary injunction, which stayed the approval of the drug in 2000 and its post 2016 regulations, a Fifth Circuit panel granted a limited stay on April 12, 2023 after a contentious two-hour oral argument in front of the panel.<sup>359</sup> Some of the comments by the Fifth Circuit panel signaled skepticism of the ability of the FDA to evaluate and make decisions based on the science.<sup>360</sup> Circuit Judge James Ho pondered why the panel could not just “focus on the facts of the case rather than have this sort of ‘FDA can do no wrong’ theme.”<sup>361</sup> The questions by the panel suggest that the case will return to the Supreme Court, who had already issued an emergency stay of the Fifth Circuit ruling.<sup>362</sup> Access to the drug will not change while the litigation continues; however, what the Fifth Circuit and later, the Supreme Court, decide to do with the case will largely depend on how much deference the judges are willing to give to an agency of scientific experts and how scientific evidence should be treated by a court. Amid other complicated procedural issues in the case, the judicial system will ultimately have to decide whether anecdotal evidence or cherry-picked information should be given equal weight, thus creating a scientific uncertainty that does not really exist.

There is a striking difference between what evidence modern courts faces and the evidence that magistrates during the Salem witch trials considered. In colonial New England, the best evidence in the trials turned on stories, eyewitness accounts, and spectral evidence. Over the years, the law has evolved to prevent the use of this kind of evidence, particularly when scientific expertise exists. Courts are meant to defer to scientific experts and agency decision-making to insulate our society from decisions wrought with political influence, which could happen if courts continue to substitute their judgement for that of scientific experts.

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<sup>356</sup> *Id.*

<sup>357</sup> *Id.*

<sup>358</sup> *Id.* In opposition, Christina Francis, chief executive of the American Association of Pro-life Obstetrics and Gynecologists, argues the data used by the FDA is flawed because it relies on reports by abortion providers, which does not capture the full picture of abortion complications. *Id.*

<sup>359</sup> *All. for Hippocratic Med. v. U.S. Food & Drug Admin.*, No. 23-10362, 2023 U.S. App. LEXIS 8898 (5th Cir. Apr. 12, 2023).

<sup>360</sup> See Tierney Sneed, *Takeaways From the 5th Circuit Argument on Abortion Drug Access*, CNN POLS. (May 17, 2023, 8:26 PM), <https://www.cnn.com/2023/05/17/politics/abortion-drug-mifepristone-5th-circuit-hearing-takeaways/index.html> [<https://perma.cc/VT8P-3PYQ>].

<sup>361</sup> *Id.*

<sup>362</sup> *U.S. Food & Drug Admin. v. All. for Hippocratic Med.*, No. 22A902, 2023 U.S. LEXIS 1669 (Apr. 19, 2023).

## IV. THE IMPORTANCE OF REDEFINING A WITCH HUNT

The current fascination and co-optation of the term “witch hunt” is not new; politicians and former presidents have misused the term countless times before.<sup>363</sup> Witch hunts have and will likely continue to occur in American society. However, unlike past witch hunts, the modern witch hunt tends to be invoked by men in powerful positions.<sup>364</sup> We are now seeing those with economic and political power rely on the term “witch hunt” to work for them and not against them, benefitting from characterizing themselves as victims.<sup>365</sup> Meanwhile, actual witch hunts have taken the form of new laws, utilizing institutional authority to enforce notions of gender and racial norms as well as targeting particular groups. This is not unlike what happened during the Salem witch trials.

There is a time-worn tale that we have heard before: rumor has it that if you put a frog in a pot of boiling water, it will instantly leap out.<sup>366</sup> However, if you place the frog in a pot filled with pleasantly tepid water, it will remain there until it boils to death.<sup>367</sup> This allegory illustrates a notable aspect of human psychology—we tend to accept the things that creep up on us slowly but steadily, even when those things have a demonstrable effect on our lives. If our society fails to recognize and label true modern witch hunts, we cannot intervene and combat mistruths preemptively by pre-bunking and post-bunking misinformation meant to perpetuate fear, generate a scapegoat, and pass laws to curb the behavior of the scapegoat so that scapegoat will adhere to “societal norms.”<sup>368</sup> The key to recognizing a willingness to believe mistruths resides in the psychology underlying logical fallacies.<sup>369</sup> A recognition of those logical fallacies will help scientists and lawyers learn how to deliver evidence-based truths through interventions that can help combat misinformation. Only our courts have a system in place through the Federal Rules of Evidence that allow for credible witness testimony and expert testimony to reach a jury. However, an appointed judge has tremendous power in determining what evidence is credible or not, and they may be influenced by their own political beliefs.<sup>370</sup>

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<sup>363</sup> See William Cummings, *Trump Thinks He Is the Target of a ‘Witch Hunt.’ Nixon Thought So Too*, USA TODAY (May 18, 2017 6:07 PM), <https://www.usatoday.com/story/news/politics/onpolitics/2017/05/18/trump-nixon-witch-hunt/101846962/> [https://perma.cc/5PYC-TYZE]. President Trump is not the first former president to believe that he was a victim of a witch hunt. *Id.* Former President Nixon also used the phrase ‘witch hunt’ when referring to the Senate Watergate hearings that eventually led to his resignation. *Id.*

<sup>364</sup> Cassese, *supra* note 2.

<sup>365</sup> See *id.*

<sup>366</sup> Canadian Med. Ass’n, *The Tale of the Boiling Frog*, 171 CANADIAN MED. ASS’N J. 1425, 1425 (2004), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC534568/pdf/20041207s00001p1425.pdf> [https://perma.cc/T84H-RR9K].

<sup>367</sup> *Id.*

<sup>368</sup> See Ullrich K.H. Ecker, Stephan Lewandowsky, John Cook, Philipp Schmid, Lisa K. Fazio, Nadia Brashier, Panayiota Kendeou, Emily K. Vraga, & Michelle A. Amazeen, *The Psychological Drivers of Misinformation Belief and Its Resistance to Correction*, 1 NATURE REV. PSYCH. 13, 18–19 (Jan. 12, 2022), <https://www.nature.com/articles/s44159-021-00006-y> [https://perma.cc/XUA4-BUUM].

<sup>369</sup> A subsequent, upcoming article will analyze the importance of examining of logical fallacies rooted in an individual’s perception of a witch hunt (fear + trigger = scapegoat) based on empirical data collected by the Salem Witch Museum.

<sup>370</sup> Grace Benninghoff, *A Federal Judge in Amarillo Could Effectively Ban the Abortion Pill. Why Does He Get to Make That Call?*, TEX. MONTHLY (Feb. 28, 2023), <https://www.texasmonthly.com/news-politics/amarillo-federal-judge-could-effectively-ban-abortion-pill/> [https://perma.cc/H7AE-JQD3].

During the Salem witch trials, magistrates had to rely on spectral evidence and hearsay, primarily because there was no set of rules for the trials. Further, little was known about the affliction at the time, from a medical perspective. Perplexed doctors and the citizens of Salem turned inward to their faith and belief in witches and the devil as evidence enough of the crime. We now know that there were a number of evidence-based possibilities that arguably led to the condition experienced by the girls. The difference between the witch hunting that occurred then and what is happening now is that we know better, and we do have access to facts based on evidence.