

**ELEVENTH ANNUAL
ALUMNI COLLEGE SEMINAR ON LAW & LITERATURE**

***THE CRUCIBLE* by Arthur Miller**

**October 3 - 4, 2003
Washington & Lee University School of Law**

PROGRAM

Friday, October 3

2:00 - 3:00 PM	Registration, coffee	Moot Courtroom Foyer
3:00 - 3:20 PM	“Arthur Miller: American Tragedian” Professor Marc Conner)	Classroom A, Law School
3:20 - 5:00 PM	CLE Ethics Program: “Prosecutorial Ethics and the Victims’ Rights Movement: Is this a New Witch-hunt?” Professor David S. Caudill)	Classroom A
5:00 - 6:00 PM	Break	
6:00 - 7:00 PM	Cocktails	Evans Dining Hall
7:00 - 8:00 PM	Dinner	Evans Dining Hall
8:00 - 10:00 PM	Film adaptation of the Play	Williams Rm. 327

Saturday, October 4

8:30 - 9:00 AM	Coffee	Moot Courtroom Foyer
9:00 - 10:00 AM	“Miller on Film: <i>The Crucible</i> Crucified?” (Professor Bart Palmer, Clemson University)	Classroom A
10:00 - 10:20 AM	Coffee Break	Moot Courtroom Foyer
10:20 - 11:30 AM	“We Cannot Know God’s Will: Miller’s <i>The Crucible</i> and American Ambiguity” (Professor Marc Conner)	Classroom A
11:30 - 12:45 PM	Lunch	Moot Courtroom Foyer
12:45 - 2:00 PM	“On Hearing the Voiceless: Judicial Ethics in <i>The Crucible</i> ” Professor Penny Pether, American University)	Classroom A

CLE Ethics Program

**DEFENSE CONTACT WITH WITNESSES AND THE
PROFESSIONAL *DE*-REGULATION OF PROSECUTORS**

OR

**SOME WITCH-HUNT CHARACTERISTICS OF THE
VICTIMS' RIGHTS MOVEMENT IN LIGHT OF
ARTHUR MILLER'S *THE CRUCIBLE***



After being accused of witchcraft, John Proctor.

David S. Caudill
Professor of Law and Alumni Faculty Fellow
Washington and Lee University School of Law

FRIDAY, OCTOBER 3, 2003, 3:00-5:00 PM
Classroom A • Washington and Lee University School of Law
Lexington, Virginia

conflict with victims' rights initiatives, when in actuality they do not, that's all the more reason to give our aphorisms some force.

V. *THE CRUCIBLE*

In one sense a play is a species of jurisprudence, and some part of it must take the advocate's role, something else must act in defense, and the entirety must engage the Law.¹⁵¹

Arthur Miller's *The Crucible* is both an historical play about the witchcraft trials in 1690's Salem, and a parable about social and political "witch-hunts" in any place or time—Miller was, of course, thinking about McCarthyism, the 1950's hysteria over communism, and the proceedings of the House Un-American Activities Committee. Notwithstanding the fact that the Salem witchcraft trials were theocratic in character, the trials were legal proceedings (witchcraft was a felony punishable by hanging, not heresy punishable by being burned at the stake as in Europe), and therefore the processes and procedures of criminal law are a major theme in the play. Warrants were issued, complaints filed, trials held, and innocent people hanged. The play is therefore an indictment against potential corruption in criminal courts. In our contemporary constitutional democracy, courts are supposed to guard against majoritarian tyranny, ensure due process and a fair trial, presume innocence until guilt is proven, and thereby protect the rights of an accused. *The Crucible* provides an example of the possibility that an accused might be presumed guilty ("condemned before trial"), that accusers might be deemed "holy," that law can become disconnected from justice, and even that presuming the worst when someone is accused is part of human nature.

The most obvious contemporary analogy, from the perspective of an ACLU activist, for example, might be the Patriot Act passed in the wake of the September 11 "twin-towers" terrorism. That is, for the sake of argument, the apparent sacrifice of individual liberties could only be explained as an hysterical response to fear of Arab (*and Arab-American!*) terrorists.

A less-than-obvious analogy to *The Crucible*, however, is suggested by the victims' rights movement, which was fueled in the last several decades by both a justifiable fear of crime and the sense that crime control is failing—courts are "handcuffing" the police, criminals go free on technicalities, and too much attention is given to protecting the rights of the accused. Instead of presuming that we need to remedy the imbalance of the state's power over the accused, victims' rights advocates presume the opposite and propose that the victim is "a sympathetic figure whose rights and interests could be used to counter-balance the defendants' rights" against a seemingly weak state.¹⁵² Moreover, it is difficult to criticize or oppose the powerful symbols of (i) "victims" as blameless, pure stereotypes, and (ii) "rights" as the American vision of an irreducible trump card.

¹⁵¹ Arthur Miller, "Introduction" to *COLLECTED PLAYS* (1957), at 24-25.

¹⁵² See Henderson, *The Wrongs of Victim's Rights*, *supra* note 2, at 949.

Proposals for law reform associated with the victims' rights movement include keeping suspects in custody, ensuring that procedural delays are minimized, eliminating or letting victims determine plea bargains, minimizing defense contact with victims, abandoning exclusionary rules, and allowing victims to participate in sentencing hearings. It must always be remembered, however, in the effort to streamline criminal procedures to ensure swift and sure punishment, that the victim one day may be an accused the next.

VI. CONCLUSION

The states continue to reset the stage for criminal procedure by granting constitutional and statutory rights of participation, protection, and privacy to participants. The states' reliance on victim harm as a legitimate basis for victim rights has altered an important contextual aspect of the criminal process.¹⁵³

Whether one views the victims' rights movement as an important limitation on the rights of criminal defendants, or the rights of defendants as an important limitation on victims' rights, there is an understandable tendency in judicial opinions and scholarly commentary to focus on constitutional and statutory contours. In striking a balance between conflicting rights, however, a focus on the ethical duties of prosecutors offers an opportunity to reconsider the conventional rights (i) of a defendant to have unobstructed access to witnesses, and (ii) of a victim or witness to refuse defense contact. Those principles seem clear in contrast both to the mere propriety of pre-trial discovery and the abstract "interest of justice" served by pre-trial interviews. By returning to the earlier texts of the *ABA Standards for Criminal Justice*, the script for prosecutors on the "stage" that has been "re-set" by victims' rights legislation could change to include encouragement, and not simply to exclude discouragement, of witness contact with the defense. A minor change, perhaps, but a potential beginning toward a cure for the persistent oscillation between absolute rights in conflict. The constellation of the growing concern for victims' rights, the deregulation of prosecutors in the *ABA Standards*, and the disconnect between *legal* and *professional* misconduct are likely exacerbating the problem of interference with defense contact with witnesses, survivors, and victims.

¹⁵³ Douglas E. Beloof, *Constitutional Implications of Crime Victims as Participants*, 88 CORNELL L. REV. 282, 297 (2003).