

# Anonymous Witnesses

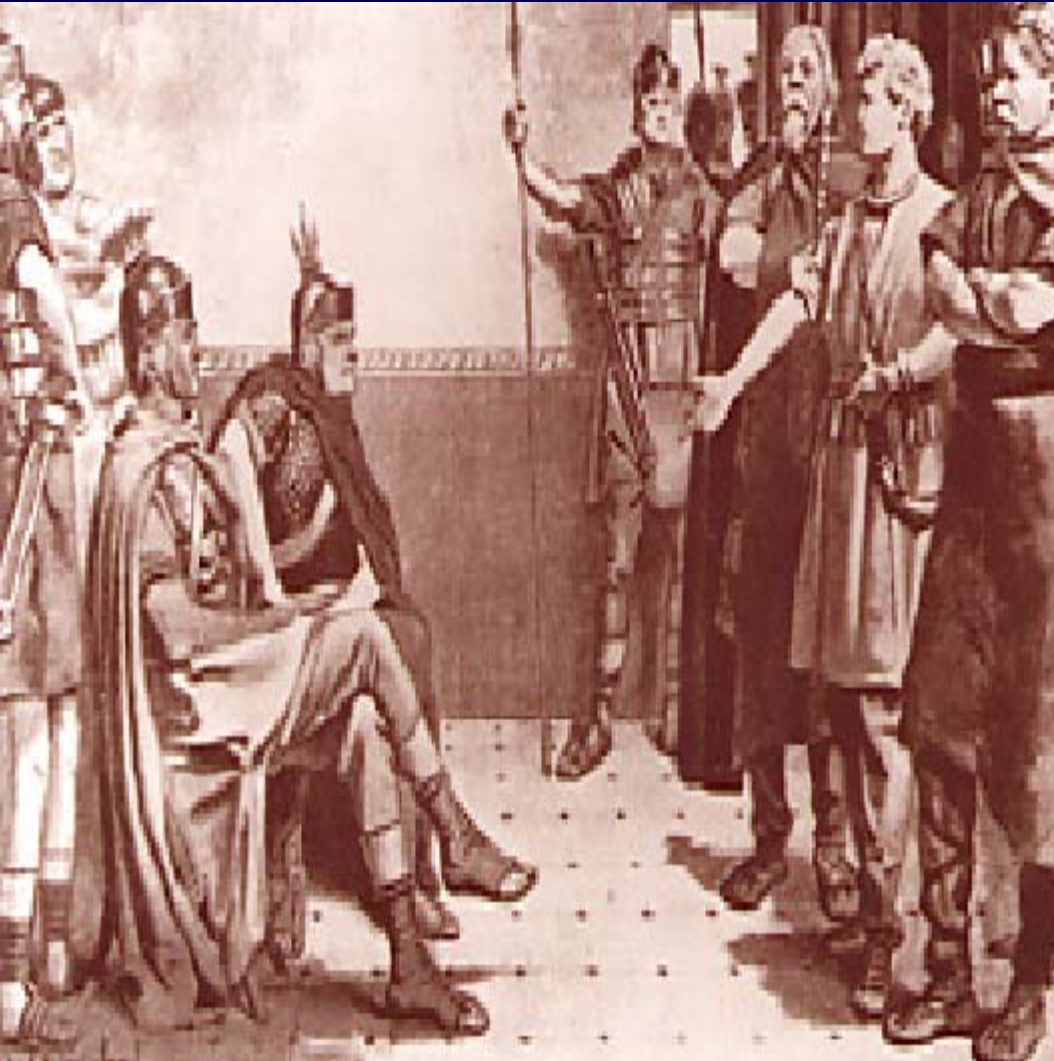
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Human Rights and Criminal Justice  
JUSTICE Student Human Rights Network  
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# The right to confront witnesses

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‘It is not the manner of the Romans to deliver any man to die, before that he which is accused have the accusers face to face, and have licence to answer for himself concerning the crime laid against him’

Acts 25: 16

# The right to confront witnesses

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‘Face to face, and  
frowning brow to  
brow, ourselves  
will hear the  
accuser and the  
accused freely  
speak’

*Richard II, Act I: i*



# The right to confront witnesses

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‘Good my Lords, let my accuser come face to face and be deposed. Were the case but for a small copyhold, you would have witnesses or good proof to lead the jury to a verdict; and I am here for my life!’

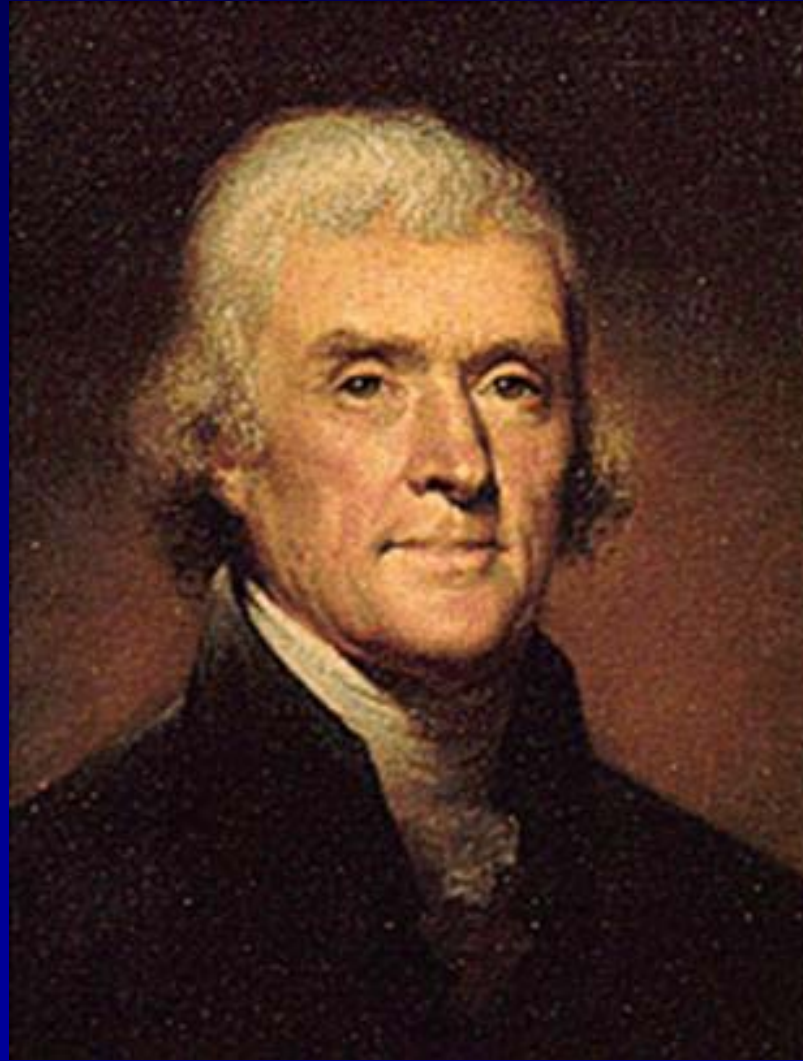
The trial of Sir Walter Raleigh  
(1 Criminal Trials 389-520 at 427)

# The right to confront witnesses

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‘In all capital and criminal prosecutions, a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and the witnesses’

Article 8, Virginia Constitution 1776



# The right to confront witnesses

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‘A Defendant shall have the right through himself or through his Counsel to present evidence at the Trial in support of his defense, and to cross-examine any witness called by the Prosecution’

Article 16(e) of the Charter of the International Military Tribunal at Nuremberg, 1945

# The right to confront witnesses

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Arts 6(3)(d) ECHR and 14(3)(d) ICCPR guarantee everyone charged with a criminal offence the right:

to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

# The right to confront witnesses

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*R v Hughes* [1986] 2 NZLR 129:

The right to confront an adverse witnesses is basic to any civilised notion of a fair trial.



# The rise of anonymous witnesses

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- *R v Murphy and another* [1990] NI 306
- *R v Brindle and Brindle* (March 1992)
- *R v Watford Magistrates Court ex p Lenman* [1993] Crim LR 388
- *R v Taylor and Crabb* (July 1994)
- By the mid-90s, witness anonymity a regular practice
- c.f. evidence by video link under Youth and Criminal Evidence Act

# The rise of anonymous witnesses

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*R v Davis* [2008] UKHL 36:

It is a long-established principle of the English common law that, subject to certain exceptions and statutory qualifications, the defendant in a criminal trial should be confronted by his accusers in order that he may cross-examine them and challenge their evidence.

Lord Bingham at para 5.

# The rise of anonymous witnesses

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*R v Davis* [2008] UKHL 36:

By a series of small steps, largely unobjectionable on their own facts, the courts have arrived at a position which is irreconcilable with long-standing principle.

Lord Bingham at para 29.

# The rise of anonymous witnesses

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*R v Davis* [2008] UKHL 36:

no conviction should be based *solely or to a decisive extent* upon the statements or testimony of anonymous witnesses. The reason is that such a conviction results from a trial which cannot be regarded as fair. This is the view traditionally taken by the common law of England.

Lord Bingham at para 25.

# The rise of anonymous witnesses

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Criminal Evidence (Witness Anonymity) Act 2008 enacted within 5 weeks of *Davis*:

1. anonymity order must be 'necessary' to protect witness or property;
2. 'consistent with the defendant receiving a fair trial'
3. 'necessary to make the order in the interests of justice'

# The rise of anonymous witnesses

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Number of considerations, including:

- ‘general right’ to know identity of witness
- whether credibility likely to be at issue
- whether testimony would be ‘sole or decisive’
- whether ‘reasonably practicable’ to protect witness’s identity by other means

# The rise of anonymous witnesses

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*R v Mayers, Glasgow and others* [2008] EWCA Civ 2989:

- nothing in Act diminishes ‘the overriding responsibility of the trial judge’ to ensure proceedings are fair
- must be necessary to make order because otherwise witness will not testify
- ‘sole or decisive’ may have cumulative effect
- generally not necessary to disclose identity of undercover officer

# The rise of anonymous witnesses

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‘the witnesses would be cut off from all their roots, and have to start completely new lives: so would their spouses or partners and their children. The interference with the life of any such witness would be tumultuous, and would effectively penalise him for doing his duty as a citizen’.

*Mayers and Glasgow, para 9.*



# Protecting witnesses

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- *Permanent* relocation very uncommon
- Most witness relocation involves temporary relocation between 1 day and 6 months
- Other forms of witness protection include installation of a dedicated phone line, security system, various degrees of police protection
- C.f. cost of jury protection measures: *R v T and others* [2009] EWCA Crim 1035