

### HISTORY REPEATS ITSELF

#### The Hebrews Required Confrontation.

19:15 *One witness shall not rise up against a man for any iniquity, or for any sin, in any sin that he sinneth: at the mouth of two witnesses, or at the mouth of three witnesses, shall the matter be established.*

19:16 *If a false witness rise up against any man to testify against him that which is wrong;*

19:17 *Then both the men, between whom the controversy is, shall stand before the LORD, before the priests and the judges, which shall be in those days;*

19:18 *And the judges shall make diligent inquisition: and, behold, if the witness be a false witness, and hath testified falsely against his brother;*

#### The Romans Required Confrontation.

Acts 25:16. Festus, pronounced: *'It is not the manner of the Romans to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges.'*

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### WHAT DO THESE THINGS HAVE IN COMMON?

- Municipalities
- Municipal Judges
- Crown Pleas
- Common Pleas
- Jacque de Molay
- Sir Walter Raleigh
- The Stamp Act, The Boston Tea Party, The Bill of Rights

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### 1157 BIRTH OF MUNICIPALITIES

Lincolnshire Town Charter:

A free city, able to make many of its own laws, limited taxing authority.  
Residence for a year and a day + no claims being made = free citizenship, not obligated to defend.

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**MUNICIPAL JUDGES**

Originally Justices of the Peace:  
 Heard or Took Testimony Used in Common Law and Civil Trials.  
 •Gentlemen of Means Selected for Status & Probity.  
 •Not Legally Trained.  
 •Understand Local Problems.  
 •Know Personally the Parties and Their Stature.

The Issue: Presiding over the *Ex Parte* Trial. They Tried and Convicted Those They Had Arrested, or

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**MUNICIPAL JUDGES**

•Summarized the testimony for the Shire Court (county) or King's Court (district court).  
 •Defendants were often denied face-to-face cross-examination.

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***EX PARTE TRIALS***

Crown Pleas: Civil Matters

Common Pleas: Criminal Matters

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**1307: JACQUES DE MOLAY**

- Grand Master, Knights Templar.
- Monk-Soldiers.
- Sworn to Protect Pilgrims to the Holy Land.
- Amassed Enormous Wealth Over Two Centuries Existence.




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**1307: JACQUES DE MOLAY**

- Superstition of Middle Ages
- Victim/Scapegoat to Pope Innocent, II and King Philip of France
- Imprisoned in 1306
- Plea Bargain: Publicly Admit Wrongs = Life Sentence.




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**1307: JACQUES DE MOLAY**

- Imprisoned in 1306
- Victim/Scapegoat to Pope Clement, V, and King Philip of France
- Plea Bargain: Humiliation of Publicly Admitting Wrongs = Life Sentence.




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**Before a Crowd Assembled for the Occasion**

In a loud clear voice, retracted his confessions and insisted before God that he had lied only to protect the Order and its members from torture.

*The thought of dying is not so awful that I shall confess four crimes which have never been committed. Life is offered to me, but at the price of infamy. At such a price, life is not worth having*

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Geoffrey de Charney, Templar Preceptor of France Also Renounced.

Both Were Immediately Burned at the Stake in Front of the Crowd.

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De Molay is said to have shouted out a curse against both Philip and Pope Clement V, as the flames engulfed him that both would soon join him before the throne of God; to the consternation of the superstitious Middle Ages, in little more than a month, Clement died in torment of lupus, and in eight months Philippe, at the early age of forty-six, perished by an accident while hunting

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**SUPERSTITION OF MIDDLE AGES**

From time immemorial in both Canon Law and secular law, both on the Continent and in the 1300's, the assumption that a dying person does not lie was critical to both law and religion.

It was felt most strongly that to lie on one's death meant being debarred from heaven and assured entrance into hell. One who lied at death's door automatically lost his soul.

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Sir Walter Raleigh  
and  
Robert Devereux, 2<sup>nd</sup> Earl of Essex




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### SIR WALTER RALEIGH

- In 1603, Alleged to Have Conspired Against the King by Lord Cobham.
- Cobham Implicated Raleigh in a Letter and in Testimony Before the Privy Council.
- Both Used Against Raleigh Despite Request to Confront and Question Cobham.
- Raleigh Executed.

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### ROBERT DEVEREUX

- Half the Age of Queen Elizabeth who enjoyed his flirtations, But Played Only Within Her Age Group.
- Ignored Military Orders in Ireland and Returned to Wrath of the Queen.
- Under House Arrest Conspired to Unseat Q.E. I.

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### COKE AND BACON



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### COKE AND BACON

- "Near Savage Attacks" on Devereux and Raleigh In the Star Chamber.
- Removed as Chief Justice of the King's Bench For Voting Against the Unlimited Powers of the King.
- Became Libertarian Who Believed Common Law Was For The Benefit of the People
- Slick and Manipulative.
- Soft Ball Examination of Raleigh Utilized *Ex parte* Testimony.
- Described as "Unctuous and Double Minded in His Survivalist Mode of Sophistication."

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### WILLIAM SHAKESPEARE

- Coke and Shakespeare were contemporaries.
- Shakespeare was almost caught up in the Essex Affair.
- Shakespeare's father was a town Bailiff.
- Shakespeare probably studied law.
- There are 318 legal words and phrase in 33 plays, sonnets, and poems.




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### The Right To Confrontation Matures

- In 1661 Treason Statutes Required Face-to-Face Confrontation Between Accusers and Accused.
- Statements Admitted Only if Witness Demonstrably Unavailable.
- Suspects Confession Could Be Used Only Against Himself.
- By 1696, A Dead Witness' Examination Excluded Bc. The Statement Was Taken Before A Mayor Without The Defendant Present.

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### THE COLONIAL PERIOD

- In 1765 Offenses Under The Stamp Act Were Tried In Admiralty Courts Using Civil-Law Procedures of Depositions or Private Judicial Examination as Proof.
- Defense Lawyer John Adams.




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*Examinations of Witnesses upon Interrogatories, Are Only By The Civil Law [and] Englishmen and Common Lawyers Have An Aversion To Them If Not An Abhorrence Of Them.*

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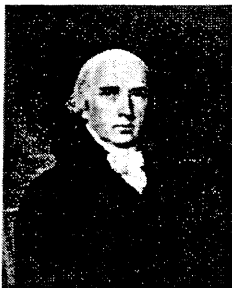
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### JAMES MADISON

- Among Drafters of Sixth Amendment.
- Confrontation,
- Unrestricted Right To Counsel at any proceeding,
- Right To Copy of Indictment.




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**The Boston Tea Party** was planned at the Green Dragon Tavern, also known as the "Freemasons' Arms," and "the Headquarters of the Revolution."

John Adams Was Free Mason.

James Madison also was thought to be Free Mason.

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A survey of 363 prosecutions between 1720 and 1740 [in North Carolina], shows that 207 (57.0 percent) resulted in no judgment at all because of lack of persons to give evidence.

In colonial New York, 37% of the prosecutions were never resolved with that rate being over 50% in some parts of the colony.

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**The Sixth Amendment, in granting a full right to counsel in all cases, was not constitutionalizing English law.**

**It was rejecting, or at least going beyond, the existing common law.**

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**A MATURING NATION**

*[N]otwithstanding the death of the witness, and whatever the respectability of the court taking the depositions, the solemnity of the occasion and the weight of the testimony, such depositions are ex parte, and therefore, utterly incompetent.*

*State v. Campbell, 30 S.C.L. 124 (1844)*

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*Crawford v. Washington*

**CONFRONTATION:  
THE THIRD TIME AROUND.  
2004 TO THE PRESENT**

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Michael Crawford, upset by a report that Kenneth Lee had made advances on his wife Sylvia, went with Sylvia to Lee's apartment.

During the course of the ensuing fight Crawford was cut badly on the hand and Lee was stabbed in the stomach.

That night, Sylvia and Michael Crawford both made tape-recorded statements to the police at the station-house.

The statements were similar in many respects, but Sylvia's tended to damage Michael's contention of self defense.

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•Michael eventually was tried on charges stemming from the incident.

Sylvia was unwilling to testify at trial against her husband, and was deemed by all parties to be unavailable as a witness.

Accordingly, the prosecution offered Sylvia's statement; as a witness to an alleged crime, made knowingly and privately to investigating officers,

with the clear anticipation on the part of all that the statement may be used as prosecution evidence at trial.

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The Court Reversed, Holding That Introduction of Sylvia's Statement Violated The Sixth Amendment's Confrontation Clause:

-similar to civil law depositions;

-similar to the *ex parte* examination presented in lieu of witness thus preventing cross-examination

3 Types of Statements Were Subject To Exclusion.

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*ex parte* in-court testimony or its functional equivalent, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially";

extrajudicial statements ...contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"; and

statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."

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The Court Rejected the concepts of admissibility  
 -based on firmly rooted hearsay exceptions; and  
 -thought to bear particularized guarantees of  
 trustworthiness.

It said these principles held true for Cobham's statements  
 used at Raleigh's trial: inculpatory, not made in heat of  
 passion, or extracted by hope of pardon.

But the issue was that those judges refused to let Raleigh  
 cross-examine Cobham.

To reach the clause's ultimate goal of *reliability*, it requires  
 that *reliability be tested by cross-examination*

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(a) "ex parte in-court testimony or its functional  
 equivalent that is, material such as affidavits,  
 custodial examinations, prior testimony that the  
 defendant was unable to cross examine, or similar  
 pretrial statements that declarants would reasonably  
 expect to be used prosecutorially";

(b) "extrajudicial statements ...contained in  
 formalized testimonial materials, such as affidavits,  
 depositions, prior testimony, or confessions"; and

(c) "statements that were made under circumstances  
 which would lead an objective witness reasonably to  
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 at a later trial."

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**Davis and Hammond 2006**

Whether the Confrontation Clause applies only to testimonial hearsay, and  
 if so, whether the 911 tape of the victim reporting a family violence assault  
 as it was occurring was admissible.

Held: Statements are nontestimonial when made in the course of police  
 interrogation under circumstances objectively indicating that the primary  
 purpose of interrogation is to enable police assistance to meet an ongoing  
 emergency.

They are testimonial when the circumstances objectively indicate that there  
 is no such ongoing emergency, and that the primary purpose of the  
 interrogation is to establish or prove past events potentially relevant to  
 later criminal prosecution.

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**Melendez-Diaz v. Massachusetts, 2009**

Whether the Confrontation Clause applies to certificates by analysts that drug tested was cocaine.

Held: The certificates are affidavits, which fall within the "core class of testimonial statements"

They asserted the substance tested cocaine, the very testimony to be subject to cross.

The certificates were made for the sole purpose of replacing live testimony.

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**Art. 38.41 Tex. Code Crim. Proc.**

Sec. 1. A certificate of analysis that complies with this article is admissible in evidence on behalf of the state or the defendant to establish the results of a laboratory analysis of physical evidence conducted by or for a law enforcement agency without the necessity of the analyst personally appearing in court.

Sec. 2. This article does not limit the right of a party to summon a witness or to introduce admissible evidence relevant to the results of the analysis.

Sec.4 Requires the prosecution to provide notice to the defendant of its intent to use an analyst's report as evidence at trial, after which the defendant is given a period of time in which he may object to the admission of the evidence absent the analyst's appearance live at trial.

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**Soupy Sales**

- Dressed as George Washington
- Both were Masons




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