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# Promoting Truth in the Courtroom

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# Promoting Truth in the Courtroom*

*The Honorable Edwin Meese III***

It is a distinct privilege to be with you and to join my predecessors as Attorney General—Elliot Richardson, Judge Griffin Bell, and William French Smith—in becoming a Cecil Sims Lecturer.

One of the best features of university life is the freedom it affords to pursue the search for knowledge. In virtually all disciplines an understanding of certain truths, of the way various historical or scientific facts fit together, is an important starting point for further learning and deliberation. The search for truth is also a tremendously important undertaking beyond the campus walls, especially in the realm of criminal justice. That endeavor, the effort to arrive at an accurate assessment of the truth or falsity of charges of criminal misconduct, is the subject of my remarks today.

To most of us the point of a criminal trial is to determine whether the defendant did what he is accused of and to impose a just sentence if he is convicted on the basis of that determination. Getting the correct answer in this context is of the utmost importance. Mistakes in one direction will falsely brand innocent people as criminals and punish them unjustly. Mistakes in the other direction, freeing guilty defendants, also have dire consequences. Dangerous individuals may be set loose upon society, public respect for the legal system may be diminished, and, most importantly, justice will not be done. The objectives of protecting the public from the offender and deterring others from committing

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crimes cannot be achieved if guilt is not accurately established. These objectives are not casual concerns, but the basic reasons that a criminal justice system exists. If the truth cannot be discovered and acted on, the criminal justice system fails in its basic mission. Indeed, the state itself fails in its most fundamental responsibility.

Accordingly, I'm reminded of the words of Oliver Wendell Holmes, Sr., the Justice's father, who said: "Truth is tough. It will not break, like a bubble, at a touch; nay, you may kick it about all day, like a football, and it will be round and full at evening."[1]

If you'll pardon the expression, there are too many ways truth is kept out of play today in the arenas of our courts. We need to look seriously at the various ways in which truthfinding has been frustrated.

My purpose today is to consider whether the vital objective of truth has been subordinated to other interests and whether the hurdles placed between the facts on the one hand and the judge or jury on the other can be justified. There are, of course, many such hurdles. I won't talk about all of them. But let me focus my attention on several of the most significant.

First, this year marked two significant legal anniversaries: the twenty-fifth anniversary of *Mapp v. Ohio*,[2] which applied the fourth amendment exclusionary rule to the states in search and seizure cases, and the twentieth anniversary of *Miranda v. Arizona*,[3] the case establishing the rules that now govern custodial interrogations. Both cases, and their progeny, have had a profound impact on the search for truth. Next, I will address the rules limiting adverse inferences from silence. They also involve significant restrictions on getting reliable evidence before a factfinder. Finally, there is a topic of special relevance for future members of the bar. I am referring to the abuse of the system by some practitioners.

The problems I will be addressing are not inherent in our legal traditions or the nature of an adversary system. Most of them are quite accurately "problem children" of the law, born of the radical innovations of the 1960s. Too many lawyers and judges were then willing to compromise the search for truth in favor of extrinsic policy objectives, as they grew fascinated with complex, formalistic courtroom rules and procedures. In the process, we subordinated

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1. O. W. HOLMES, THE AUTOCRAT OF THE BREAKFAST TABLE 109 (1897).
2. 367 U.S. 643 (1961).
3. 384 U.S. 436 (1966).

the objective of reaching a true and just result in any particular case. When viewed against the broad sweep of American legal history and our even older common-law traditions, it is clearly wrong to see these truth-defeating changes as constituting a deeply rooted part of our legal heritage. Correcting these changes involves a *restoration* of enduring legal principles, not their abolition.

The question is this: Have these truth-defeating doctrines made any practical difference? The answer is clearly yes.

Consider one example: In 1983 a twenty-three year old woman by the name of Denise Hubbard Sanders was murdered after testifying in a drug trafficking case against members of the "Bandidos" motorcycle gang. Police arrested a Bandido named Ronnie Gaspard for the crime. He was informed of his *Miranda* rights and waived them. He then made a full confession of murdering Denise Sanders. Nevertheless, Gaspard walked away a free man. The reason? A court ruled that his confession was inadmissible on the ground that he had been routinely assigned counsel on his entry into jail but had not subsequently initiated conversations with the police.[4]

According to newspaper accounts, a parent of the woman whom Gaspard had shot in the head said that what hurt most was watching the confessed killer walk out of the Fort Worth courtroom with a "big smirky grin" on his face.[5]

Sadly, as your casebooks remind you, this example is not an isolated affront to justice. In 1966 Justice Byron White warned in his *Miranda* dissent that "[i]n some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the . . . environment which produced him, to repeat his crime whenever it pleases him. As a consequence, there will not be a gain, but a loss, in human dignity."[6] That prophecy has proved tragically correct.

In the *Gaspard* case, like many others, there was no question that the confession was voluntary. There was no question about its reliability. There was only a question of tripping on judicially invented rules.

Those who favor the status quo will argue predictably that such judge-made rules are necessary to protect basic individual

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4. *See* Confession of Ronnie Dale Gaspard, Tarrant County, Texas (Jan. 23, 1984) (on file with author).

5. Sennott, *Murder Suspect Goes Free on Technicality*, Fort Worth Star-Telegram, Sept. 19, 1985, at 1, col. 1.

6. *Miranda*, 384 U.S. at 542 (White, J., dissenting).

rights, that without them our Bill of Rights would be undercut. But properly understood, the Constitution itself rebuts these claims.

The provisions of the Bill of Rights have a dual purpose. They provide firm checks against abuses of governmental power, but they also make secure rights and practices—such as the jury trial, the confrontation right, and the right to the assistance of counsel—that promote accurate factfinding. These provisions ensure that a criminal proceeding will be neither arbitrary nor unfair, but a search for truth. I support strong enforcement of the Bill of Rights, but want to see that it is enforced without unduly obstructing the truth.

The rules of the two anniversary cases, *Mapp* and *Miranda*, impede the search for truth. *Mapp* excludes evidence that has been seized illegally—a consideration that has nothing to do with the evidence's probative value or reliability. Similarly, the *Miranda* rules exclude statements obtained from the defendant when certain procedural rules have been violated, no matter how reliable and material such statements may be. The rules arising from these cases not only reflect bad policy; they are in no sense required by the Constitution.

Let me begin with the exclusionary rule. In a number of decisions—such as *United States v. Calandra* and *United States v. Leon*—the Supreme Court has made clear that the exclusionary rule is not required by the fourth amendment or any other provision of the Constitution. It survives today only as a judicially created *prophylactic* rule designed to deter police misconduct.[7]

Benjamin Cardozo stated the basic problem clearly. Why is it, he asked, that the criminal should go free because the constable blunders?[8] Of all possible penalties for government misconduct, throwing away reliable evidence carries the highest cost to the search for truth. It is also a wholly inapt means of protecting individual rights. The windfall chance at acquittal the exclusionary rule offers to the guilty defendant may be completely disproportionate to any wrong done to him. Conversely, it provides no remedy for the innocent suspect who would be acquitted anyway. When the exclusionary rule frees a criminal to claim other victims,

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7. United States v. Leon, 468 U.S. 897, 906 (1984); United States v. Calandra, 414 U.S. 338, 347-48 (1974); *see* United States v. Janis, 428 U.S. 433, 443, 446-47 (1976); Stone v. Powell, 428 U.S. 465, 482-83, 486 (1976).

8. People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587, *cert. denied sub nom.* Defore v. New York, 270 U.S. 657 (1926).

it is the innocent public—not the responsible officer—that is effectively punished.[9] Our continued tolerance of these costs rests on the slender reed that the rule *may* deter police misconduct.

There is heated debate over whether the rule actually does deter police misconduct.[10] But the real point is that there are ways to secure compliance with the fourth amendment that do not turn criminals loose on society.

I am absolutely convinced that officers and investigators should be trained to understand and follow the rules governing searches and seizures. When those rules are violated, appropriate sanctions should be imposed. But we should discipline and deter misconduct *outside* the forum of the criminal prosecution itself. Make the offending constable, not the public, pay the price.[11]

The *Miranda* custodial interrogation rules raise similar issues. The Supreme Court has made it clear, in such cases as *Michigan v. Tucker*, *New York v. Quarles*, and *Oregon v. Elstad*, that the *Miranda* rules are not constitutional requirements. They are only suggested safeguards meant to reduce the likelihood of fifth amendment violations.[12] The fifth amendment itself only provides that a person cannot be *compelled* to be a witness against himself. It is not violated unless incriminating statements are extracted from a defendant through actual coercion, whether outside the courtroom or inside the courtroom.

The *Miranda* Court sought to justify its creation of a nonconstitutional, prophylactic right to have counsel present at police interrogations as a means of guarding against coercion and of preventing later misrepresentations of a suspect's statements to the police.[13] But these very interests were well served before *Miranda* by a line of decisions protecting criminal suspects against coercive interrogations and the use of unreliable statements. Moreover, such decisions did not come at the great price in lost

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9. *See, e.g.*, Stone v. Powell, 428 U.S. 465, 489-91 (1976); Bivens v. Six Unknown Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 415-20 (1971) (Burger, C.J., dissenting).

10. *See* S. SCHLESINGER, EXCLUSIONARY INJUSTICE: THE PROBLEM OF ILLEGALLY OBTAINED EVIDENCE 50-60 (1977); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 754-56 (1970).

11. *See generally* Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 GEO. L.J. 1361, 1385-1412 (1981); Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 215, 227-32 (1978).

12. *See* Oregon v. Elstad, 470 U.S. 298, 307-11 (1985); New York v. Quarles, 467 U.S. 649, 654-58 (1984); Michigan v. Tucker, 417 U.S. 433, 443-46 (1974); *see also* Moran v. Burbine, 106 S. Ct. 1135, 1143 (1986); Miranda v. Arizona, 384 U.S. 436, 467, 490 (1966).

13. *Miranda*, 384 U.S. at 469-70.

prosecutions and convictions imposed by *Miranda*.[14]

*Miranda*'s right to counsel does not guard against interrogation abuses so much as it forecloses any interrogation at all. As Justice Jackson observed, "Any lawyer worth his salt will tell the suspect in no uncertain terms to make no statements to [the] police under any circumstances."[15] *Miranda* thus transforms the constitutional right not to be subjected to *compelled* self-incrimination into a right not to be subjected to any questioning.[16]

There are clearly other ways to safeguard the genuine rights at issue here. Possible safeguards might include, for example, setting reasonable time limits on interrogations and requiring that interrogations be tape or video recorded whenever practical.[17] These other means would enable courts to satisfy themselves that statements were freely made and might better protect the rights of suspects, with far less cost to the truthfinding interest of the law, than the existing, waivable right to counsel. Since the *Miranda* procedures are not themselves constitutional rights, there is no reason that such alternative rules could not be fashioned and implemented.

A cousin from the *Miranda* family tree, *Massiah v. United States*,[18] provides another example of a law that certainly deserves questioning. *Massiah*, you may recall, is a right to counsel case dating from 1964. Massiah, the defendant, was indicted for cocaine smuggling and released on bail. He then made incriminating statements to an informant whose car had been wired for sound. These statements were used at trial, and he was convicted. Here there was no issue of coercion, no issue of reliability. Yet the Supreme Court reversed the conviction on the ground that eliciting statements from a defendant after indictment without counsel present violates the sixth amendment.[19]

The sixth amendment, however, isn't this elastic. It safeguards only the accused's right "to have the Assistance of Counsel for his

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14. *See id.* at 506-09 (Harlan, J., dissenting); *Controlling Crime Through Effective Law Enforcement: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 200-01, 1120 (1967); Seeburger & Wettick, Miranda *in Pittsburgh—A Statistical Study*, 29 U. PITT. L. REV. 1, 9-13 (1967).

15. Watts v. Indiana, 338 U.S. 49, 59 (1949) (Jackson, J., concurring in part, dissenting in part).

16. *See Miranda*, 384 U.S. at 444-45, 473-74; *see also id.* at 516-17 & n.12 (Harlan, J., dissenting).

17. *See generally* AMERICAN LAW INSTITUTE, A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 130.4 & commentary at 341-42 (1975) (recording); 114 CONG. REC. 14,184-86 (1968) (relating to six-hour time rule of 18 U.S.C. § 3501(c) (1982)).

18. 377 U.S. 201 (1964).

19. *Id.* at 206-07.

defense."[20] This provision embodies the historical right to counsel's assistance in preparing and presenting a defense *at trial.* As a matter of policy, a right to counsel is also properly recognized in other courtroom proceedings involving a need for legal advocacy and expertise to ensure fair treatment of the defendant.[21]

The *Massiah* rule, however, is unrelated to any conventional function of counsel. The techniques employed by the police in *Massiah* did not interfere with the preparation of a defense or eavesdrop on any privileged communication with counsel. Undercover measures of this sort have been approved repeatedly for *pre*indictment investigations.[22] It is hard to understand why a different standard should apply after formal accusation.

The *Massiah* doctrine has been applied in later cases with shocking consequences. In *United States v. Henry* a bank robbery conviction was overturned simply because an informant testified that the defendant had confessed during the course of some prison conversations with him.[23] In the recent case of *Maine v. Moulton,* the Court described *Massiah* as meaning that counsel must be present to serve as a "medium" between the accused and the state.[24] But as one Justice aptly has pointed out, there is no support in the Constitution itself for the notion that counsel "is a sort of guru who must be present whenever an accused has an inclination to reveal incriminating information" to a government agent,[25] or for that matter, any other person. The sixth amendment, of course, does not say that a defendant has any right for counsel to serve as an impenetrable wall between government and the accused after formal charges, that the state's attempts to investigate the truth are foreclosed. It provides only for counsel's assistance in preparing and presenting a defense *at trial.*

These cases, and others like them, reflect a dangerous turn of thinking in the criminal law. Instead of addressing authentic con-

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20. U.S. CONST. amend VI.

21. *See* United States v. Ash, 413 U.S. 300, 306-13 (1973). The extension of ostensibly constitutional civil rights beyond the context of adversarial judicial proceedings was an innovation of the 1960s. *See id.* at 310-11; Crooker v. California, 357 U.S. 433 (1958); United States v. Wilson, 162 U.S. 613, 623-24 (1896); Cox v. Coleridge, 1 B.&C. 37, 107 Eng. Rep. 15 (1822); Enker & Elsen, *Counsel for the Suspect:* Massiah v. United States *and* Escobedo v. Illinois, 49 MINN. L. REV. 47 (1964).

22. *See, e.g.,* United States v. Russell, 411 U.S. 423, 432 (1973); Lewis v. United States, 385 U.S. 206, 208-09 (1966); *see also* Weatherford v. Bursey, 429 U.S. 545 (1977).

23. United States v. Henry, 447 U.S. 264 (1980); *cf.* Brewer v. Williams, 430 U.S. 387 (1977) (reversing conviction of murderer of ten year old girl under *Massiah* doctrine).

24. Maine v. Moulton, 106 S. Ct. 477, 487 (1985).

25. *Henry,* 447 U.S. at 295-96 (Rehnquist, J., dissenting).

stitutional rights, these decisions attempt to remake the law into something resembling a sporting event. Unfortunately, what seems to matter isn't whether someone is genuinely guilty, or even if he or she is actually the victim of a constitutional violation. The law represented in these cases appears instead to be most concerned with giving criminal defendants a chance to "beat the odds" and go free for reasons unrelated to guilt or innocence. The most effective investigatory techniques are increasingly met with new obstacles to their use.

The courts do have a vital role to perform. Violations of the fourth, fifth, and sixth amendments need to be identified and dealt with appropriately. But it does not follow that concealing important evidence from the factfinder is the proper remedy for such violations. Instead, to the extent that wise policy can be rendered in rules, it is for our legislators and administrators to craft regulations and policies that will both prevent violations of suspects' rights *and* respect the important public interest in effective law enforcement.

As I mentioned earlier, the exclusionary rule and misapplications of the right to counsel are not the only obstacles on the road to truth. There are also the rules barring rational inferences from a defendant's failure to respond to pretrial questioning or to take the stand at trial.

The current rules are contrary to common sense. A credible exculpatory story maintained from arrest through trial is, naturally, helpful to the credibility of a defense. On the other hand, if a defendant refuses to explain away an accusation early on, but suddenly offers a new story at trial, his delay in providing an account may naturally raise doubts concerning his credibility in the mind of a reasonable trier of fact.

However, despite the fact that the Constitution does *not* mandate them, judicially invented rules now generally require that pretrial silence be concealed from the jury. The question is: Why? Merely permitting rational inferences from a defendant's failure to respond to accusations or to adverse evidence does not "compel" him to be a witness against himself in the sense of the fifth amendment. In fact, at the time of the Bill of Rights' adoption, any refusal by a defendant to answer questions in pretrial interrogations conducted by justices of the peace *could* be disclosed at trial and could provide the basis for adverse inferences by the jury.[26]

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26. *See* L. MAYERS, SHALL WE AMEND THE FIFTH AMENDMENT? 16, 175, 180, 188 (1959);

The Supreme Court also has affirmed in recent decisions that there is no general constitutional bar to admitting pretrial silence to impeach a defendant's trial testimony.[27]

Yet in *Doyle v. Ohio* the Supreme Court held that a defendant's silence following the receipt of *Miranda* warnings cannot be disclosed to the factfinder.[28] The Court reasoned that suspects might misunderstand the warnings—"you have the right to remain silent," and so on—as an assurance by the government that silence will not work against them in any way. Since suspects normally get *Miranda* warnings at or near the time of arrest, the *Doyle* rule, in practical effect, generally requires the concealment of pretrial silence from the jury.

Happily, there seems to be a simple means of correcting the problem. *Miranda* warnings could be modified or supplemented so that they could not be misunderstood in the way that the *Doyle* Court feared. For example, a suspect could be advised explicitly that his failure to make a statement or answer questions may be disclosed in court and may reduce the likelihood that any story or explanation he offers later will be believed. With "fair notice" along these lines, there would be no reason to deny the jury the whole truth about the defendant's pretrial behavior.

A defendant's failure to take the stand at trial can be just as telling as his silence before trial. Until 1965 the Supreme Court held constitutional the adverse comment by a judge or prosecutor on a defendant's failure to testify in a state trial—a practice widely endorsed on policy grounds by leading writers and model rules of evidence.[29]

Unfortunately, in *Griffin v. California*, reversing a conviction for a brutal murder, the Court departed from precedent and adopted a contrary rule.[30] Once again, common sense and the ability of the factfinder to draw reasonable inferences suffered a defeat. I believe the Supreme Court stated the better rule in its 1947 decision *Adamson v. California*, wherein it said: "[W]e see no

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Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1, 18 (1949).

27. *See* Fletcher v. Weir, 455 U.S. 603 (1982) (per curiam); Jenkins v. Anderson, 447 U.S. 231 (1980).

28. Doyle v. Ohio, 426 U.S. 610 (1976).

29. *See* Adamson v. California, 332 U.S. 46 (1947); Twining v. New Jersey, 211 U.S. 78 (1908); *see also* Griffin v. California, 380 U.S. 609, 622 & nn.6-8 (1965) (Stewart, J., dissenting); Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 938-40 (1965).

30. *Griffin*, 380 U.S. at 615 (holding prosecutor's comment to jury on defendant's failure to testify unconstitutional).

reason why comment should not be made upon [the defendant's] silence" as a means of bolstering the prosecution's case in light of the defense's "failure to explain or deny" it.[31] The *Adamson* approach allowed juries to give greater weight to the government's evidence in the absence of a rebuttal or explanation from the defendant.

In a real sense, much of what I am saying today about the search for truth comes down to trusting juries. Trusting them to weigh the reliability of evidence, trusting them to assess the veracity of confessions, and trusting them to make reasonable inferences is really what the test ought to be in evaluating the rules.

Almost seventy years ago, in *Rosen v. United States* the Supreme Court succinctly stated much of what I have said at length today: "[T]he truth is more likely to be arrived at by hearing the testimony of all persons . . . hav[ing] knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury . . . ."[32]

If our citizens are to retain their trust in our system of justice, we must make sure that when we ask them to find the truth, we allow them, consistently with our Constitution, to see the whole truth.

In closing, I'll contrast this reasonable basis for trusting in juries with the reasonable fear that the practices of some lawyers are twisting the criminal justice system in a perverse manner. The search for truth should constrain members of our profession at least as well as it does the system in which they work.

We do have an adversary system. And we proceed from the belief that in allowing both the prosecution and the defense to advocate their cases fully, we will uncover the truth. But zealous advocacy should not mean unbounded advocacy. Counsel's role must to some extent be defined to reflect the basic purpose of the adversary system as a means of promoting the discovery of truth.

On the one hand, the prosecutor is not *only* an advocate. He has obligations to justice. He must, for instance, disclose exculpatory evidence to the defense. My Department's guidelines go further and limit the initiation of prosecution to cases in which the prosecutor believes that the defendant is in fact guilty *and* that prosecution can probably establish that fact to the satisfaction of a

31. *Adamson*, 332 U.S. at 56.

32. Rosen v. United States, 245 U.S. 467, 471 (1918).

fair-minded trier.[33]

On the other hand, there are certain constraints on defense counsel as well. As the Supreme Court said in *Nix v. Whiteside*: "[C]ounsel's duty of loyalty and his 'overarching duty to advocate the defendant's cause' . . . is limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth."[34] Such common practices as moving for repeated continuances in the hope that witnesses will be worn down, forget, or disappear;[35] baiting the judge or prosecutor in the hope of provoking reversible error;[36] and similar tactics are not consistent with this ideal. These practices directly impede the search for truth without furthering any legitimate function of adversarial testing. Courts, of course, have an obligation to act against these abuses, but the women and men who comprise the bar must remember their obligations as officers of the court.

Finally, let me say that I do not expect all the problems I've mentioned to vanish tomorrow. But I do hope that I have encouraged you to think seriously about the premises of our criminal justice system and how it may be improved.

As aspiring members of the profession, you will someday have obligations to real clients. But both now and in the future you and I have a common commitment to preserving and enhancing our system of justice. In a 1935 decision the Supreme Court concisely identified the goals of criminal justice: "that guilt shall not escape or innocence suffer."[37] By pursuing the search for truth we will be faithful to these twin ideals and live out the proposition, as Joubert once put it, that "justice is truth in action."[38]

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33. *See* U.S. DEP'T OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION, pt. B, § 2 and comment (1980).

34. Nix v. Whiteside, 106 S. Ct. 988, 994 (1986).

35. *See* REPORT OF THE PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, 67-68, 75-76, 99 (1982).

36. *See* M. FRANKEL, PARTISAN JUSTICE 46-48 (1980).

37. Berger v. United States, 295 U.S. 78, 88 (1935).

38. J. JOUBERT, PENSEES 203 (H. Atwell ed. and trans. 1877).